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Richard S. Arnold

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ESSAYS

UNPUBLISHED OPINIONS: A COMMENT

Richard S. Arnold*

These days, more and more opinions handed down by the federal courts of appeals are marked "Not To Be Published," or words to that effect. The purpose of this brief comment is to examine the purpose of this new device, discuss some of the effects it is having on the appellate process and the practice of law, and venture a few personal comments from one who has produced probably hundreds of unpublished opinions, but has always felt uneasy about it.

The whole thing appears to have started, so far as the federal appellate courts are concerned, in 1964. In that year, the Judicial Conference of the United States, the governing body of the lower federal courts for administrative purposes, issued a general recommendation that judges publish only those opinions "which are of general precedential value."

Let's be clear, at the outset, about the meaning of the word "unpublished." The word does not mean "secret." As far as I know, there are no secret judicial opinions in the federal system, with the possible exception of opinions rendered by the

* United States Circuit Judge for the Eighth Circuit.

1. Administrative Office of the United States Courts, Judicial Conference Reports 1962-64, at 11 (1964).

Intelligence Surveillance Court, an institution before which lawyers in private practice would have no occasion to appear. All opinions are public; in the sense that they are available to the public. Anyone may walk in off the street, pay the appropriate fee, and get a copy of any opinion or order of a court of appeals. Or, to describe the situation in more modern terms, anyone may gain computer access to any opinion or order of a court of appeals, usually without paying a fee. For example, all of the opinions of my court, the United States Court of Appeals for the Eighth Circuit, are available without charge to anybody through our web site, <http://ls.wustl.edu/8th.cir>. So we are not attempting to hide our product. It is open to the public in general, and not just to the parties to a given case, whether or not the opinion is marked "Not To Be Published." What the phrase means is something quite different; it means only that the opinion is not to be published in a book, a printed medium. It means that the opinion is not mailed (or otherwise transmitted) to West Publishing Company or any other legal publisher with the intention that it be printed in a book commercially available.

Why should anyone care if we send our opinions to a book publisher, especially in this day and age, when computer accessibility is so common? The answer lies in the use that courts allow to be made of their unpublished opinions. To make the point, I now set out in full the text of Eighth Circuit Rule 28A(i):

(i) Citation of Unpublished Opinion. Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an unpublished

opinion, a party must indicate the opinion's unpublished status.²

The most important provision of the rule occurs in the first sentence, which I repeat for emphasis: "Unpublished opinions are not precedent and parties generally should not cite them." As one who came to the bar almost forty years ago, I find this a startling statement. "Unpublished opinions are not precedent . . ." The court is saying that it is not bound by its unpublished opinions. In general, of course, the court on which I sit, like all courts in common-law countries, recognizes the doctrine of precedent. A court should not, without very good reasons publicly acknowledged, depart from past holdings. Our rule 28A(i) says, quite plainly, that this principle applies only when the court wants it to apply. If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice. (On my court, the decision whether to publish is, as a practical matter, always made by the writing judge.)

Why would the federal courts take such a step, seemingly so much at odds with traditional ways of adjudication? The answer lies in one word, the same word that describes the most serious problem facing all our courts today: volume. I will not burden the reader with a flood of statistics, but a few will make the point. In 1970, the courts of appeals disposed of 10,669 cases. Within ten years, this number had almost doubled, to 20,877. After another ten years, the number had almost doubled again, to 38,520. In 1993, 47,790 appeals were disposed of, and in 1997 the number was 51,194.³ During this period of time,

2. 8TH CIR. R. 28A(i) (adopted as of December 8, 1994). The predecessor rule was much shorter and read as follows:

(k) Citation of Unpublished Opinion. No party may cite a federal or state court opinion not intended for publication, except when the cases are related by identity between the parties or the causes of action.

3. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 758 n.48 (1995); Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Report of the Director,

have the numbers of appellate judges kept up with the numbers of cases? Hardly. In 1970 there were 97 circuit judgeships. There are now 167, and little prospect of any new ones being created in the near future. So something had to be done, and sometimes one gets the feeling that those in charge thought they should do something, even if it was wrong. The federal system has adopted a number of strategies to deal with this volume, including more staff, with centrally located staff attorneys; a smaller proportion of cases argued orally; less time allotted to those cases that are argued; decisions by one-line order or brief memorandum; and, of course, unpublished opinions. Judges have been persuaded that a great deal of what they do lacks any significance except to the parties, that some cases have no "precedential significance," and that, therefore, nothing will be lost by refusing to recognize them as precedent.

This practice disturbs me so much that it is hard to know where to begin in discussing it. For one thing, I question the proposition that any opinion lacks precedential value. There is perhaps one group of cases of which this statement could accurately be made. Under our practice, a practice that I believe obtains in all of the federal courts of appeals, once a three-judge panel decides an issue in a published opinion, other three-judge panels are bound. They cannot overrule a prior panel opinion. Only the court en banc can take this step. If, therefore, a case arises in which the parties concede that a prior panel opinion governs the issue, a second panel opinion doing nothing more than following the previous opinion can truly be said to lack precedential significance, and there would be no reason to allow parties to cite it, when the earlier, governing opinion will serve just as well.

With that exception, I would take the position that all decisions have precedential significance. To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished; and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding is itself a conclusion of law with precedential

at Table B-1 (1997). I commend Professor Dragich's excellent article to all those interested in this subject. Her research is complete and her observations perceptive, in my opinion.

significance. The following crude example comes to mind. One party cites a previous opinion as binding precedent. The other party says it is distinguishable, and, upon being asked why, says that the previous case was argued on a Tuesday, whereas this case is being argued on a Wednesday. This circumstance, admittedly a factual difference, is obviously irrelevant. Why? Because the factual difference—the day on which the case is being argued—has nothing to do with the governing legal principles. The example is extreme, and deliberately so, but I believe it illustrates the point. Every case has *some* precedential value, maybe not much, but some.

That being said, I would agree that many cases do not need full opinions, that the distinctions offered between these cases and previous decisions may be frivolous, and that, given the shortness of human life, judges' time would be better spent on hard cases than on tedious explanations of the easy ones. In this sense, a case in which no arguably substantial distinction is suggested from previous authority may well not have enough precedential significance to justify spending much time on it. As to such cases, not a great deal is lost by deciding them in unpublished opinions.

Let me explain, though, some of the effects that this practice can have on the psychology of judging. If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser. (I don't say that judges are actually doing this—only that the temptation exists.) Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug. Again, I'm not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.

There is more: many cases with obvious legal importance are being decided by unpublished opinions. Some unpublished opinions—and, I must say, I believe this occurs more in other circuits than in the Eighth—are fairly elaborate. They go for as long as twenty pages. They contain citations and legal reasoning. Occasionally they decide questions that anyone would describe as important. Let me give an example from the Eighth Circuit. In *United States v. Kocourek*,⁴ the question presented was the constitutionality of a federal statute, 18 U.S.C. § 922(j), which makes it unlawful for any person to “receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm . . . which has been shipped or transported in, interstate or foreign commerce.” This provision contains no requirement that interstate commerce be substantially affected, and it was challenged as beyond the power of Congress under the Commerce Clause, citing *United States v. Lopez*.⁵ Our court’s opinion holds that the statute is valid. It does so in a paragraph. The opinion, however, was marked not to be published, and one can gain access to the full text only by way of the computer citation, 1997 WL 307160, or by ordering a copy from our Clerk’s office.

I do not suggest that the judges on the *Kocourek* panel were up to anything underhanded. Mr. Kocourek’s appointed counsel had filed what is known as an *Anders* brief.⁶ An *Anders* brief is a way of saying that appointed counsel, in his or her best professional judgment, sees nothing of substance in the appeal. Once such a brief is filed, our normal practice is to allow counsel to withdraw, invite the appellant to file his own brief pro se, and then review the record on our own to see if there could be any contention of merit.⁷ Such cases are normally referred to our Staff Attorneys’ office, which prepares a memorandum, possibly including a draft per curiam opinion, and sends it to a panel of three judges, which we refer to as a “screening panel.” Screening-panel opinions are routinely unpublished. I suspect that this is what happened in *Kocourek*, and that it simply did

4. 116 F.3d 481 (8th Cir. 1997) (per curiam) (table).

5. 514 U.S. 549 (1995).

6. See *Anders v. California*, 386 U.S. 738 (1967).

7. See *Penson v. Ohio*, 488 U.S. 75 (1988).

not occur to the panel to vary the customary practice and publish the opinion.

The result, though, is that, at least if you believe what our rule says, the question of the constitutionality of Section 922(j) is still open in this Circuit. If the question does arise before another panel, moreover, it would be a violation of our rule for the *Kocourek* case to be cited as precedent. The irony is enhanced when you look at *United States v. Luna*.⁸ In that case, the Fifth Circuit had before it the same question, a question of first impression for that court. The Fifth Circuit found *Kocourek* on the computer, and cited the opinion as persuasive authority on the way to its own holding that the statute is valid. (In the Fifth Circuit, it should be noted, unpublished opinions do have precedential value, and there is no prohibition against citing them.)

I have no comprehensive statistics to prove my next point, but I have the strong feeling that the number of unpublished opinions in the Eighth Circuit is on the rise. Every day we receive a printout from the Clerk's office listing the names and docket numbers of opinions to be filed within the next few days, and stating, also, whether the opinions are to be published or not. The list for February 16-18, 1999, recently came across my desk and caught my eye. The list appears on one page, and contains twenty-two opinions. Of these, only four were to be published.

This unpublished-opinion practice is creating a vast underground body of law, fully accessible to the public at a reasonable cost by way of computers, but disavowed by the very judges who are producing it. If the reader will pardon a personal reference, I have many times voted to change our rule on this subject, not to require that every opinion be printed in a book, but simply to allow lawyers to cite any opinion that they believe would be helpful, and to acknowledge that judges must respect what they have done in the past, whether or not it is printed in a book. In the beginning, my motions to repeal this rule died for want of a second.⁹ Recently, some other members of this court

8. 165 F.3d 316 (5th Cir. 1999).

9. Curiously, our Court has not always followed the rule. In *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1983) (en banc), an unpublished opinion was cited as authority on an important jurisdictional point. I deliberately included this citation in the

have begun to join me. Other judges have expressed strong reservations.¹⁰

I close with a question. Article III of the Constitution of the United States vests “judicial power” in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. We can exercise no power that is not “judicial.” That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called “judicial”? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions? In other words, is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?

draft opinion when I circulated it, and all the members of the en banc Court concurred without a murmur.

10. *See, e.g., In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, J., dissenting); *National Classification Comm'n v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., concurring); *In re Amendment of Section (Rule) 809.23(3)*, 456 N.W.2d 783, 788 (Wis. 1990) (Abrahamson, J., dissenting).