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In 1972 the Eighth Circuit Court of Appeals heard an admiralty case argued in St. Louis, Missouri. Sitting on the panel with me was then-retired Associate Justice Tom C. Clark. After the appellee's counsel had made his oral argument, Justice Clark leaned over the bench and asked counsel, "Didn't you used to clerk for Bill Brennan?" The lawyer said, "Yes." Justice Clark said, "I thought so. I remember you." The lawyer was Richard S. Arnold. The case was *Spiller v. Lowe*.[1] In it, the appellee obtained a $455,000 wrongful death award, which the court upheld on appeal. This was my first meeting with Richard Arnold.

I next met Judge Arnold in 1978 at the Eighth Circuit Judicial Conference. President Carter had recently appointed him to serve as a federal district judge in the Eastern District of Arkansas. From that time forward, our associations grew from occasional meetings to our now frequent contacts on and off the court. I am privileged to say he is a good friend, and our relationship has always been warm and gracious. Those who know him will not be surprised to hear me say that Richard is one of the most gracious individuals one can know. He is a true gentleman. It is only fitting that the *Minnesota Law Review* provides this tribute to Chief Judge Arnold, who is now in his fifteenth year in the federal judiciary.

President Carter appointed Judge Arnold to the Eighth Circuit Court of Appeals in 1980. I well remember our breakfast meeting at a hotel in Little Rock shortly after his appointment. During this meeting we discussed in detail the administrative procedures for processing the Court of Appeals's rising caseload. I also vividly remember that, shortly after his appointment, a newspaper ran an editorial attacking Judge Arnold's nomination as "cronyism" because he had been a member of Senator Bumpers's staff. One discovers early in public life that it is not

* Judge Lay was Chief Judge of the Eighth Circuit Court of Appeals from 1980 to January 1992 and is currently a senior judge on the circuit.

1. 466 F.2d 903 (8th Cir. 1972).

the best policy to argue with a newspaper's editorial staff. They always have the last word. In this instance, however, I was enraged because I believed that the editorial had cast undeserved ignominy upon not only a fine judge, but also upon our court and the entire federal judiciary. I wrote to the paper and received a public acknowledgement that Richard Arnold had been number one in his undergraduate class at Yale and number one in his law school class at Harvard. I also knew he was an outstanding district judge and a fine human being. I believed the entire judicial community and the nation could take great pride in his appointment. This tribute to Chief Judge Arnold confirms that my initial impression was more than accurate.

Judge Arnold's contribution to the federal judiciary is immeasurable. His many contributions to the law are well recognized, but few members of the public understand the role he has assumed as chairman of the Budget Committee of the Judicial Conference. Chief Justice Rehnquist appointed him to the position in 1987. Since then his duties have increased in geometric proportion. Notwithstanding these duties, he has continued to serve and take regular assignments in the cases before the Eighth Circuit Court of Appeals.

Richard Arnold has been active in judicial administration since 1981, when Chief Justice Burger appointed him to serve on the Ad Hoc Committee on Judicial Review Provisions in Regulatory Reform Legislation. In 1984, the Chief Justice appointed him to serve on the Subcommittee on Judicial Improvements of the Judicial Conference Committee on Court Administration. As a member of this committee until 1987, Judge Arnold helped shape the federal judiciary's entry into the computer age. His most important role, however, has been on the Budget Committee. In his capacity as chairman of the committee, he has, since 1987, presented the judiciary's budget request to Congress. As Ralph Mecham, the Director of the Administrative Office of the United States Courts, has stated, Judge Arnold's "integrity, expertise, and responsiveness [have] earned him the deep respect not only of the other committee chairs but also of the members of Congress."[2] It is important to recognize that, during Judge Arnold's chairmanship, appropriations for the judiciary have risen from $1.260 billion in 1987 to $2.472 billion this year. Judge Arnold's knowledge of the appropriation process and his tireless

2. Letter from L. Ralph Mecham, Director of the Administrative Office of the United States Courts, to Donald P. Lay, Senior Judge of the Eighth Circuit Court of Appeals (June 17, 1993) (on file with the *Minnesota Law Review*).

efforts to seek the resources required by the judiciary have been invaluable assets to the Third Branch. In the past year, because of anticipated budget cuts for fiscal year 1994, Judge Arnold has spent seemingly endless hours on the telephone communicating with members of the judiciary, members of Congress, and leaders in the Executive Branch, outlining the financial difficulties that will befall the judiciary if these anticipated budget cuts become reality.

When Judge Arnold became Chief Judge in January 1992, the Chief Justice immediately appointed him to the Executive Committee of the United States Judicial Conference. Judge Arnold's knowledge of the budget process as well as a wide range of other issues has, in the words of Ralph Mecham, "made him an indispensable member of the Committee, and his wry wit helps keep the Committee on its toes."[3] Mr. Mecham has written to me that "Richard Arnold is one of the most important players in federal judicial administration today. He serves as the judiciary's point man in securing the funds the judiciary needs to carry out duties, and he does so superbly."[4]

When I recently mentioned to Chief Justice Rehnquist that the *Minnesota Law Review* planned a tribute to Richard Arnold, he wrote to me as follows:

> Judge Arnold was named chairman of the Judicial Conference Committee on the Budget in late 1987 and has distinguished himself by his unstinting efforts on behalf of the federal judiciary. He was chosen partly because of his familiarity with the legislative appropriations process, gained by his years as a Congressional aide, and it didn't hurt that he also had more than a passing familiarity with Senator Bumpers, an important member of the Senate Appropriations Committee. Judge Arnold has been an able advocate for getting the Judiciary the resources it needs, a task that has become more and more challenging in recent years. Now, as the Third Branch faces an uncertain fiscal future, Judge Arnold has also been called upon to explain the efforts the judiciary has made to cut out any unnecessary expenditures and spend its resources wisely. He has also done this difficult job well.
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> Upon his elevation to Chief Judge in early 1992, Judge Arnold became a member of the Judicial Conference. I appointed him to the Executive Committee of the Judicial Conference shortly thereafter, where he has played a major policy-making and administrative role. Administrative leadership of the kind ably performed over the years by Judge Arnold does not show up on judicial statistics and rarely gives much to the individual performer other than extra work, a few more headaches, and frequent but rather unglamorous travel. It is, nonetheless, crucial to the work of the Third Branch and deserves recogni-

3. *Id.*
4. *Id.*

tion alongside Judge Arnold's jurisprudential contributions.[5]

Judge Arnold has now assumed the duties of Chief Judge of the Eighth Circuit. I have long believed that the Chief Justice should not place chief judges on Judicial Conference Committees. The chief judge's role as the key judicial administrator of a circuit is too important to be diluted by assignment to other administrative tasks. The administrative function of a chief judge grows every year, and his or her duties are not confined to the Court of Appeals. Space allows mention of only a very few of those duties: overseeing the circuit's overall case flow, budget and automation; coordinating the functions of the different court units; administering the Judicial Discipline and Conduct Act within the circuit; chairing Court of Appeals meetings and those of the Judicial Council; and serving as a member of the Judicial Conference of the United States. Of course, a chief judge's primary judicial obligation is to sit as a panel member on cases heard within the circuit. After all, he or she is the most senior and experienced judge on the court, and his or her voice should be heard.

Some of the chief judge's duties can be delegated, but only a chief judge can provide a coordinated voice to the administration of the court. To be successful, a chief judge needs the utmost loyalty and cooperation from the staff and from the other circuit judges. I have stated that the role of the chief judge of the Circuit is in itself such an overwhelming responsibility that the chief judge should not bifurcate his or her efforts by serving on other judicial conference committees. Of course, there should always be exceptions to the norm—and Richard Arnold is one of those rare exceptions. I say this because his unique and adroit skills as chair of the Budget Committee of the Judicial Conference are sorely needed.

Despite all of these onerous duties, Judge Arnold continues in his role as a regular sitting circuit judge. I hope he never curtails his input as a sitting judge. His voice is singularly strong in providing individualized input into such diverse areas of the law as equal rights in race, gender, and age; first amendment speech and religion; antitrust; prisoner rights; civil rights; and all constitutional issues, to mention a few. He writes unusually gifted and prescient opinions, and he refrains from using vocabulary that sends readers to the dictionary. Trained in the

5. Letter from William H. Rehnquist, Chief Justice of the United States Supreme Court, to Donald P. Lay, Senior Judge of the Eighth Circuit Court of Appeals (June 28, 1993) (on file with the *Minnesota Law Review*).

Classics, he does now and then use latin phrases to emphasize a point. All lawyers and judges have been trained in the lexicology of the law, however, and it is often helpful to be reminded of the derivation of the source of legal principles.

One of the attributes that sets Richard's opinions apart from many other excellent decisions is his unique writing ability. One can always tell a Judge Arnold opinion by his talent for employing an individualized style of writing to clarify legal principles. It is obvious that law clerks do not write his opinions. Several examples come to mind.

On a defendant's rights to fair process at sentencing:

> The government has an interest in preventing defendants from unfairly escaping appropriate punishment, but this interest is not at all likely to be harmed by allowing defendants a right of confrontation. The government's major interest is parallel to the defendant's, if not identical: the interest in seeing that the sentence imposed is based on facts accurately found.
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> . . . I have never known the Department of Justice to misrepresent facts in court. But if the mere fact that information comes from the government gives it "an aura of authenticity that renders it sufficiently reliable as the basis of a finding of fact," why bother to have any sentencing hearings? Let's just hear the government's statement of facts and dispense with formalities like testimony and burden of proof.[6]

On the excesses of the "War on Drugs":

> Airports are on the verge of becoming war zones, where anyone is liable to be stopped, questioned, and even searched merely on the basis of the on-the-spot exercise of discretion by police officers. The liberty of

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6. United States v. Wise, 976 F.2d 393, 411-13 (8th Cir. 1992) (en banc) (Arnold, C.J., concurring in part and dissenting in part) (citation omitted), *cert. denied*, 113 S. Ct. 1592 (1993).

In another sentencing case, Judge Arnold explained:

> The District Court based the upward departure on three separately listed factors: previous convictions not counted in [the defendant's] criminal-history score, pending charges, and the failure of previous sentences to deter [him]. I have no quarrel with two of these factors—the previous convictions not counted and the failure of previous sentences to deter. The use of pending charges, though, seems to me a mistake. I do not see how the fact that someone is charged with a crime—a charge which has not yet been tried and may never be—can be used against him. A charge is merely an accusation. A person charged is still entitled to the presumption of innocence until his guilt has been properly established. It is quite true that "uncharged conduct" can be used against a defendant for sentencing purposes. But here there is no "conduct," but only accusations that criminal conduct has occurred.

United States v. Morse, 983 F.2d 851, 855 (8th Cir. 1993) (citation omitted) (Arnold, C.J., concurring in part and dissenting in part).

the citizen, in my view, is seriously threatened by this practice. The sanctity of private property, a precious human right, is endangered. It's hard to work up much sympathy for [the defendant]. He's getting what he deserves, in a sense. What is missing here, though, is an awareness that law enforcement is a broad concept. It includes enforcement of the Bill of Rights, as well as enforcement of criminal statutes. Cases in which innocent travelers are stopped and impeded in their lawful activities don't come to court. They go on their way, too busy to bring a lawsuit against the officious agents who have detained them. If the Fourth Amendment is to be enforced, therefore, it must be by way of motions to suppress in cases like this.[7]

On the treasured right of freedom of speech:

Until today, I had thought that one of the undisputed rights of every American, including the much-discussed "media," was to question the motives of public servants. Such personal criticism may be abusive, and perhaps we would have a better country if there were a lot less of it, but it is, in my opinion, no part of the business of government, including the Judicial Branch, to tell the people that they cannot criticize the motives of their own employees.

. . . .

I am not blind to the fact that this kind of public discussion has its costs. Good people may shrink from public office because of them. Federal judges are no strangers to this sort of attack, and we may often wish to be free of it. But the only restraint that should be imposed on this sort of discussion is self-restraint, either of the individual citizen or of the press itself. The Framers of our Constitution long ago struck the balance in favor of speech, and judges ought not to re-weigh it, however much we might desire to elevate the level of public discourse.[8]

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7. United States v. Weaver, 966 F.2d 391, 397 (8th Cir.) (Arnold, C.J., dissenting), *cert. denied*, 113 S. Ct. 829 (1992).

Similarly, Judge Arnold dissented from the majority's opinion that exigent circumstances existed to permit a warrantless search of a home. He wrote, "There is a war on drugs, and we want to win it. But this war should be fought in accordance with rules. Otherwise, we may achieve victory, but it will be Pyrrhic." United States v. Johnson, 904 F.2d 443, 450 (8th Cir. 1990) (Arnold, J., dissenting).

Long before the "War on Drugs," Judge Arnold wrote in a similar vein:

> It is hard to develop much sympathy for the defendant, of course. The incriminating evidence was found on his person, as is often the case in motion-to-suppress situations. It seems clear that he has violated a federal statute. What we cannot know for sure is how many innocent people will be restrained or searched without probable cause, if the officers' conduct in this case is approved. For an innocent person whose rights are so violated is usually not prosecuted. He does not have to make a motion to suppress. He simply goes on his way, and the unconstitutional conduct of the government never comes to the attention of any court. It is the innocent that the Fourth Amendment is intended to protect, and it is the innocent who suffer when it is not enforced.

United States v. Clark, 743 F.2d 1255, 1261 (8th Cir. 1984) (Arnold, J., dissenting).

8. Janklow v. Newsweek, Inc., 759 F.2d 644, 656-57 (8th Cir. 1985) (Ar-

Characteristically, Judge Arnold has treated hateful speech no differently:

> I take it as a given . . . that the act of cross burning, as it occurred in this case, was expressive conduct. It was intended to convey a message, an idea: "We do not like black people, and we want them to move out," or something of that sort. This kind of communication, no matter how hateful, is "speech" within the meaning of the First Amendment. It is entitled to protection from governmental sanction just as much as speech of which we might approve.
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> If, instead of burning a cross, an act especially odious because of its historical antecedents, the defendant had distributed leaflets in the Tamarack Apartments, stating that the Ku Klux Klan was in the neighborhood, disliked black people, and wanted them to move out, the black residents of the apartments could well have been threatened or intimidated in the sense allowed by the District Court's instructions to the jury in this case.[9]

A common theme of Judge Arnold's opinions is his dedication to judicial restraint. This is well illustrated by Judge Arnold's opinion in a labor case:

> An injustice may have been done in this individual case, and there is a natural judicial itch to correct it. But we are bound by the strict standards set out by this Court and the Supreme Court in judging this sort of claim, standards based on the assumption, which we are bound to accept, that industrial peace and fairness to the broad run of employees will be better served if the number of cases in which courts intervene to correct apparent malfunctions of grievance procedures is kept to a minimum.[10]

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nold, J., concurring in part and dissenting in part), *modified and aff'd en banc*, 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986).

9. United States v. Lee, 935 F.2d 952, 958-60 (8th Cir. 1991) (Arnold, J., dissenting) (urging retrial to determine if the cross burning constituted a threat of imminent force).

Judge Arnold also expressed his strong views on the First Amendment in his separate opinion in *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1084-85 (8th Cir. 1988), *rev'd*, 492 U.S. 490 (1989). Judge Arnold agreed with my conclusion that the State of Missouri could not constitutionally forbid public employees from counseling on abortions. Taking a different approach than I did, he wrote as follows:

> These statutes sharply discriminate between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it. That kind of distinction is flatly inconsistent with the First Amendment, as incorporated against the states by the Due Process Clause of the Fourteenth Amendment.

Id. at 1085 (Arnold, J., concurring in part and dissenting in part).

10. Stevens v. Highway Drivers Local 600, 794 F.2d 376, 378-79 (8th Cir. 1986); *see also* United Elec. Workers of Am. v. Litton Microwave Cooking Prods., 704 F.2d 393, 400-03 (8th Cir. 1983) (Arnold, J., concurring in part and dissenting in part) ("I am not sure I should have awarded this particular kind of relief, or indeed that the arbitrator was correct in interpreting the contract.

Similarly, Judge Arnold has scrupulously refused to find federal jurisdiction where none is warranted. He wrote in dissent in a Nebraska bail case:

> Both sides urge us to overcome these doubts and reach the merits. But jurisdiction cannot be conferred by consent, least of all in constitutional matters. The federal courts have an institutional interest of their own in scrupulously confining their power to strike down legislation to those cases where exercise of the power is safely within the traditional judicial function to decide cases affecting substantial rights of real people. If this were such a case, I should be as quick as any to meet the issue. But here the likelihood that our holding will mean anything to the named party challenging the state constitutional provision is so attenuated, and the question presented so abstract, that I would refrain from adjudicating the merits, not out of timidity, but out of discretion.[11]

In a case deciding a mother's right to select a surname of her choosing for her child, Judge Arnold espoused his view of the right of privacy:

> The real question is, not whether there is a right of privacy (see also the Fourth Amendment for a modicum of textual support), but how do you tell what it includes? The limits of the right remain controversial, and no doubt they will continue to be tested by litigation. Precedent tells us at least this much, though: family matters, including decisions relating to child rearing and marriage, are on almost everyone's list of fundamental rights. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383, 98 S.Ct. 673, 679, 54 L.Ed.2d 618 (1978), and the other cases cited by the Court, *ante*, at 1214. The right to name one's child seems to me, if anything, more personal and intimate, less likely to affect people outside the family, than the right to send the child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), or to have the child learn German, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). We know, moreover, from *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), that these women had a fundamental right to prevent their children from being born in the first place. It is a bizarre rule of law indeed that says they cannot name the children once they are born. If there was ever a

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But those questions are, in all but the clearest cases, the arbitrator's business not ours."), *rev'd en banc*, 728 F.2d 970 (8th Cir. 1984).

11. Hunt v. Roth, 648 F.2d 1148, 1167 (8th Cir. 1981) (Arnold, J., dissenting), *vacated*, Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam). I wrote the majority opinion in *Hunt*, in which the Eighth Circuit overturned a provision of the Nebraska Constitution that denied bail to defendants charged with certain sex crimes. Although Hunt had already been convicted, we held that his challenge to the bail statute was not moot because it fell within the class of cases "capable of repetition, yet evading review." *Id.* at 1152. Judge Arnold disagreed. The Supreme Court cited Judge Arnold's dissent in reversing our court's decision. Murphy v. Hunt, 455 U.S. 478, 482-83 nn.6-7 (1982) (per curiam).

> case of the greater including the less, this ought to be it.[12]

The nation is indeed privileged to have Chief Judge Richard Arnold as a member of the federal judiciary. If his appointment resulted from "cronyism," we need to promote more of the same.

12. Henne v. Wright, 904 F.2d 1208, 1217 (8th Cir. 1990) (Arnold, J., dissenting), *cert. denied*, 498 U.S. 1032 (1991).