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Jurisdictional Developments in the Eighth Circuit - Two Cases to Note

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JURISDICTIONAL DEVELOPMENTS IN THE EIGHTH CIRCUIT — TWO CASES TO NOTE

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I. INTRODUCTION

Prior to 1960 there were no uniform rules of practice for the United States Courts of Appeals. Chief Justice Earl Warren's appointment in 1960 of a Standing Committee on Practice and Procedure and an Advisory Committee on Appellate Rules was the beginning of a process that led first to the March 1964 Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure and ultimately to the current Federal Rules of Appellate Procedure, which were adopted by Congress December 4, 1967, and made effective July 1, 1968.[1]

Uniform rules, however, have not produced complete uniformity of practice and consistency of decision either among the thirteen United States Courts of Appeals or even within the United States Court of Appeals for the Eighth Circuit. The two unrelated

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1. 9 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE, § 2.1-.3 (2d ed. 1983) (hereinafter cited as MOORE's). Chief Justice Warren appointed Judge E. Barrett Prettyman as the first chairman of the Advisory Committee on Appellate Rules. Currently the chairman of the Committee on Rules of Practice and Procedure for the United States Judicial Conference is Judge Edward T. Gignoux, director of the Administrative Office for the United States Courts. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65 (1984).

Eighth Circuit cases discussed in this Article suggest that inconsistency, lack of uniformity, and uncertainty persist. But the focus of the Article is not to criticize those decisions; rather it is to call attention to the rulings because they have important jurisdictional implications for federal practitioners in the Eighth Circuit.

II. CAMPBELL V. WHITE

The first case, *Campbell v. White*,[2] was significant because it reversed a standing practice of the Eighth Circuit to construe late notices of appeal as motions for extensions, particulary in *pro se* cases, where the result of that construction was to save appeals from automatic dismissal as untimely.

Darron Campbell appealed the dismissal of his civil rights action brought pursuant to 42 U.S.C. § 1983 on the thirty-second day after entry of judgment.[3] The notice was not within the thirty day period prescribed by the federal rules but was within the period in which the appellant could seek an extension. The Eighth Circuit had to decide whether to dismiss the appeal as untimely, or construe the notice of appeal as a motion for extension. If construed as a motion for extension, the Eighth Circuit could remand to the district court because the district court has jurisdiction over motions for extension.[4] The precedent for remanding on the extension issue was established in a 1976 decision in which the Eighth Circuit remanded the case to the district court to consider a *nunc pro tunc* motion for extension which, if granted, would have rendered timely the notice of appeal, which was filed on the thirty-eighth day after judgment.[5] The Eighth Circuit, in several

2. 721 F.2d 644 (8th Cir. 1983).

3. Campbell v. White, 721 F.2d 644, 645 (8th Cir. 1983).

4. *Id. See* FED. R. APP. P. 4(a)(1). Rule 4(a)(1) provides, in pertinent part: "In a civil case . . the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment. . . ." FED. R. APP. P. 4(a)(1). But Rule 4(a)(5) provides:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Id.

In *Campbell*, as in all the cases discussed in this section, no motion for extension was filed in the district court within the time prescribed by Rule 4.

5. Seshachalam v. Creighton University School of Medicine, 545 F.2d 1147 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). In a case prior to *Seshachalam*, the Eighth Circuit assumed *arguendo* that it had the power to remand for a determination of excusable neglect but suggested that when no motion

unpublished orders, had followed this practice of remanding cases when the notice of appeal was not timely filed but was filed within the thirty-day extension period that may be granted by the district court. The Eighth Circuit had followed this practice despite the 1979 amendment of Rule 4 of the Federal Rules of Appellate Procedure.[6]

Prior to the 1979 amendment of the appellate rules, appellate courts often allowed appellants to seek an extension either before or after the extension period had expired, so long as a notice of appeal was filed during the extension period.[7] But the 1979 amendment of Rule 4 appeared to mandate that a motion to extend the time be filed no later than thirty days after the expiration of the original appeal time.[8] Rule 4(a)(5) as amended in 1979 thus "rejects such cases as *Evans* [and the others cited above in footnote 7] that permit a showing of excusable neglect long after the fact when the appellant has neglected to make his Rule 4(a)(5) motion on time."[9] This also eliminated the distinction between remand and dismissal without prejudice to apply to the district court for a *nunc pro tunc* extension after the extension period has run.

In *Campbell*, the Eight Circuit was faced with a dilemma. The panel could follow the holding announced in *Sechachalam,* decided before the 1979 amendment of Rule 4, or the court could reverse the holding in *Sechachalam* based on the apparent clear language of

for extension or showing of excusable neglect was made within the thirty-day extension period, normally the court of appeals should not remand. *See* Merrill Lynch, Pierce, Fenner & Smith v. Kurtenbach, 525 F.2d 1179, 1183 (8th Cir. 1975).

6. *See, e.g.*, Brown v. Wyrick, No. 82-2229 (8th Cir. unpublished order of Nov. 29, 1982) (civil); Herzog v. Morrisons, No. 82-1466 (8th Cir. unpublished order of July 14, 1982) (civil); McClain v. Meier, No. 81-1437 (8th Cir. unpublished order of June 15, 1981) (civil); Smith v. Mercy Hospital, No. 80-1703 (8th Cir. unpublished order of Oct. 1, 1980) (civil). *See also* United States v. Yancy, No. 82-1285 (8th Cir. order of Aug. 31, 1982) (criminal).

7. 9 MOORE'S, *supra* note 1, ¶ 204.13[2] at 4-100 to 4-101. Paragraph 204.13[2] provides as follows: "If the notice of appeal was filed within the 30th day [of the extension period], but the motion to establish excusable neglect [was] filed after the 30th day, most of the decisions held the extension could be granted." *Id.* (citing Craig v. Garrison, 549 F.2d 306 (4th Cir. 1977); Seshachalam v. Creighton University School of Medicine, 545 F.2d 1147 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976), *cert. denied*, 441 U.S. 911 (1979); Salazar v. San Francisco Bay Area Rapid Transit District, 538 F.2d 269 (9th Cir.), *cert. denied*, 429 U.S. 951 (1976); *In re* Buckingham Super Markets, Inc., 534 F.2d 976 (D.C. Cir. 1976); Stirling v. Chemical Bank, 511 F.2d 1030 (2d Cir. 1975); Lashley v. Ford Motor Co., 518 F.2d 749 (5th Cir. 1975); Chinese Maritime Trust, Ltd. v. Carolina Shipping Co., 456 F.2d 192 (4th Cir. 1972); Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084 (3d Cir. 1972); Pasquale v. Finch, 418 F.2d 627 (1st Cir. 1969); Reed v. State of Michigan, 398 F.2d 800 (6th Cir. 1968); C-Thru Prods., Inc. v. Uniflex, Inc., 397 F.2d 952 (2d Cir. 1968); Evans v. Jones, 366 F.2d 772 (4th Cir. 1966)).

8. *See* FED. R. APP. P. 4. Rule 4(b) pertaining to criminal appeals contains no requirement that the motion for extension be made before the extension period runs, thus "the liberality generally extended to [the] 'notice of appeal' in criminal cases has permitted the court of appeals to treat a request for extension of time as a notice of appeal, or a late filed notice of appeal as a request for an extension." 9 MOORE'S, *supra* note 1, ¶ 204.19 at 4-132 (*citing* United States v. Gibson, 568 F.2d 111 (8th Cir. 1978); United States v. Williams, 508 F.2d 410 (8th Cir. 1974); United States v. Mills, 430 F.2d 526 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971)). *See also* United States v. Lucas, 597 F.2d 243 (10th Cir. 1979).

9. 9 MOORE'S, *supra* note 1, ¶ 204.13[2] at 4-103.

the amended rule and the weight of case authority since the amendment. In four[10] of the five[11] United States Courts of Appeals that had considered the issue prior to *Campbell*, the courts followed the literal language of the rule and held "the result of [a] failure to file a timely notice of appeal, followed by failure to make a timely motion to be permitted to file one out of time extinguishes the right to appeal beyond revival by either the district court or the court of appeals."[12]

The majority in *Campbell* rejected *Sechachalam* and held that the notice could not be construed as a motion for an extension.[13] The court thus dismissed the appeal for lack of a timely notice of appeal.[14] Judge John R. Gibson, writing for the majority, discussed *Shah v. Hutto*,[15] the one circuit opinion going the other way, and concluded the dissenting opinion in *Shah*[16] was more persuasive as it followed the opinion of the other circuits, the clear language of the amendment, and the committee comments concerning the amendment.[17] The panel majority declined to rule prospectively, as the United States Court of Appeals for the Fifth Circuit had done in *Sanchez v. Board of Regents of Texas Southern University*.[18] The Eighth Circuit found that, unlike *Sanchez*, the instant case involved a notice filed more than three years after the rule change and after development of a considerable body of case law from other circuits had made clear the import of the rule.[19]

Recognizing the harsh results that enforcement of the holding

10. *See* Briggs v. Lucas, 678 F.2d 612 (5th Cir. 1982); Brooks v. Britton, 669 F.2d 665 (11th Cir. 1982); Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981); Wyzik v. Employee Ben. Plan of Crane Co., 663 F.2d 348 (1st Cir. 1981); Oda v. Transcon Lines Corp., 650 F.2d 231 (10th Cir. 1981); Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980) (court held motion for extension must be within thirty days, but remanded holding the ruling was prospective only because the effect of the ruling was to depart from the prior law of the circuit).

11. *See* Shah v. Hutton, 704 F.2d 717, *rev'd*, 722 F.2d 1167 (en banc) (4th Cir. 1983).

12. 9 MOORE'S, *supra* note 1, ¶ 204.13[2] at 4-104 (footnote omitted).

13. Campbell v. White, 721 F.2d 644, 646-47 (8th Cir. 1983).

14. *Id.* A timely notice of appeal is mandatory, jurisdictional, and requisite for perfecting an appeal. Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264, *reh. denied*, 434 U.S. 1089 (1978); USM Corp. v. GKN Fasteners, Ltd., 578 F.2d 21, 22 (1st Cir. 1978); Edwards v. Joyner, 566 F.2d 960, 961 (5th Cir. 1978); Boggs v. Dravo Corp., 532 F.2d 897, 899 (3d Cir. 1976); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach, 525 F.2d 1179, 1181 (8th Cir. 1975). The courts of appeals are without power to extend the period within which a notice of appeal may be filed. *See* Moorer v. Griffin, 575 F.2d 87, 89 (6th Cir. 1978); Martinez v. Trainor, 556 F.2d 818, 819 (7th Cir. 1977); Morin v. United States, 522 F.2d 8, 9 (4th Cir. 1975); Stirling v. Chemical Bank, 511 F.2d 1030, 1032 (2d Cir. 1975).

15. 704 F.2d 717, *rev'd*, 722 F.2d 1167 (en banc) (4th Cir. 1983).

16. Shah v. Hutto, 704 F.2d 717, 721 (Hall, J., dissenting), *rev'd*, 722 F.2d 1167 (en banc) (4th Cir. 1983).

17. Campbell v. White, 721 F.2d at 646. Subsequent to *Campbell*, the United States Court of Appeals for the Fourth Circuit granted rehearing en banc in *Shah*. Shah v. Hutto, 722 F.2d 1167 (4th Cir. 1983). The en banc majority followed the literal language of the 1979 amendment of Rule 4 and held that a bare notice of appeal should not be construed as a motion for extension of time, where no request for additional time is manifest. *Id.* at 1168-69.

18. 625 F.2d 521 (5th Cir. 1980).

19. Campbell v. White, 721 F.2d at 647.

might have, the court directed the district court clerks to screen notices of appeal and advise *pro se* litigants of the need for extension motions where appropriate.[20] The court further directed that district court clerks should prepare a notice to be given to all litigants informing them of the time limitations of Rule 4 and the necessity of filing a motion for extension within the thirty-day extension period when a timely notice of appeal was not filed.[21]

Judge Myron Bright dissented in *Campbell*, stating he would follow the previous rulings of the Eighth Circuit and "would remand to permit Campbell to amend his implied motion for extension of time by filing a written motion, to be deemed filed *nunc pro tunc* as of the date of the late notice of appeal, and to permit the district court to rule on the request."[22] Judge Bright relied on the majority panel opinion in *Shah* to support that conclusion. He cited that portion of *Shah* that decried such a literal reading as making the rule into a trap for the unwary.[23]

The opinion is noteworthy because it represented a reversal of court policy, although the majority was careful to base its holding on the new language in Rule 4 following the 1979 amendment. While there are points in both the majority and minority decisions that commend themselves, the decision is praiseworthy because the court was willing to change the rule, publish the opinion, and direct the district courts to prepare notices designed to eliminate the situation in the future. While the holding may be characterized as a break with certain Eighth Circuit precedents, it reestablished the jurisdictional mandate of a timely notice of appeal and cleared up any uncertainty created by the 1979 amendment of Rule 4.

III. *In re* LEIMER

The second case, *In re Leimer*,[24] was important because it expanded the kinds of orders that can be appealed in bankruptcy

20. *Id.*
21. *Id.*
22. *Id.* (Bright, J., dissenting).
23. *Id.* (quoting Shah v. Hutto, 704 F.2d 717, 720, *rev'd*, 722 F.2d 1167 (en banc) (4th Cir. 1983)). The court in *Shah* stated as follows:

> There is no doubt, however, that the notice was a clear indication of their intention to appeal, and implicit in that is a wish to do and have done whatever was necessary to preserve and protect their rights. If someone in the clerk's office had informed them of the delay and of the appropriateness of a motion for an extension of time, there is little doubt but that they would have embraced the suggestion. Unless the notice of appeal is given such a construction, the rule becomes a trap for the unwary.

Shah v. Hutto, 704 F.2d at 720.
24. 724 F.2d 744 (8th Cir. 1984).

matters prior to a determination of all issues and parties under 28 U.S.C. § 1291. The case is also important because it reversed an unpublished prior decision without an en banc hearing.

Aetna Life Insurance had initiated adversary proceedings against Reuben F. Leimer, as debtor, to release certain land from an automatic bankruptcy stay.[25] The bankruptcy court refused to release the land from the automatic stay. That prevented Aetna from selling the land through a state proceeding it had initiated.[26] Aetna sought leave to appeal to the district court. The district court denied leave to appeal based on *Ewald v. The Cornelius Co.*[27] In *Ewald* the Eighth Circuit held that the grant of relief in adversary proceedings to lift a stay was an interlocutory order.

Aetna then appealed to the United States Court of Appeals for the Eighth Circuit, presenting that court with a jurisdictional dilemma. The Eighth Circuit had to decide whether it should dismiss the appeal, following *Ewald*, or entertain the appeal, overruling *Ewald,* based on *In re Bestmann.*[28] Reasons to follow *Ewald* were that it would avoid piecemeal appeals and uphold the finality requirement of 28 U.S.C. § 1291,[29] and it would be consistent with Eighth Circuit precedent holding that remands to government agencies and lower courts are not appealable.[30] In contrast, the Eighth Circuit in *In re Bestmann*[31] held that it had jurisdiction to review a district court order refusing to entertain an appeal from a final order of the bankruptcy court.[32]

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25. *In re* Leimer, 724 F.2d 744, 744 (8th Cir. 1984).

26. *Id.* The land was under the automatic stay because Leimer claimed he was the beneficiary of a trust that included the land among its assets. Aetna argued that it owned the land by virtue of a deed of trust that it obtained as security for a loan it made to the Leimer trust. *Id.*

27. *Id.* Specifically, the district court held the case did not present the important questions of law or extraordinary circumstances that would cause it to grant an interlocutory appeal. *Id.*

28. *Id.* at 745. *See In re* Bestmann, 720 F.2d 484, 486-87 (8th Cir. 1983) (circuit court of appeals has jurisdiction to review a district court's final order).

29. *See, e.g.,* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Abney v. United States, 431 U.S. 651, 656-57 (1977); United States v. Sisk, 629 F.2d 1174, 1181 (6th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981); Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968); Howell v. Terminal Rr. Ass'n of St. Louis, 155 F.2d 807, 808 (8th Cir. 1946).

30. *See, e.g.,* Home Federal Savings & Loan Assoc. v. Joslin, Nos. 80-1556, 1558 (8th Cir. Oct. 6, 1980). *See also In re* Hansen, 702 F.2d 728 (8th Cir.), *cert. denied,* 103 S. Ct. 3539 (1983).

In another case this court dismissed an appeal from an order remanding to the Board of Immigration Appeals. Udoh v. Nolan, No. 80-1506 (8th Cir. Oct. 29, 1980). Although the dismissal order does not say so, dismissal was on grounds that the remand was not a final order. *Id.*

District court remands to government administrative agencies or departments (*see* Giordano v. Roudebush, 565 F.2d 1015, 1017 (8th Cir. 1977); Silver v. Secretary of Army, 554 F.2d 664, 665 (5th Cir. 1977); Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968)), retirement committees (*see* Darr v. Atchinson, Topeka, and Santa Fe Ry., No. 80-1624 (8th Cir. October 6, 1980); Weeks v. Coca-Cola Bottling Co., No. 80-1630 (8th Cir., dismissal order of August 29, 1980)), or other similar decision-making entities are ordinarily not appealable.

For a recent reported decision discussing nonappealable remands, see Freeman United Coal Mining v. Director, Office of W.C.P., 721 F.2d 629 (7th Cir. 1983).

31. 720 F.2d 484 (8th Cir. 1983).

32. *In re* Bestmann, 720 F.2d 484, 486-87 (8th Cir. 1983).

Faced with these contrasting principles, the Eighth Circuit postured the jurisdictional question and ruled as follows:

> The question presented here comes down to whether the Bankruptcy Court's order denying relief from the stay is a final order. We hold that it is final. . . . The Bankruptcy Court conclusively determined that Aetna is not the exclusive owner of the land. As far as Aetna is concerned, nothing remains for the Bankruptcy Court to do. The order terminates Aetna's adversary proceeding. If the order were not viewed as final, and no appeal allowed until the main bankruptcy proceeding terminated, the entire bankruptcy proceeding would have to be recommenced if this Court ultimately found that the estate had no interest in the property. Further, if the order is not treated as final, what may be Aetna's property will be tied up in lengthy bankruptcy proceedings, even though this Court may ultimately find that the property is not part of the debtor's estate.[33]

The above passage could be criticized for ignoring the reality that the bankruptcy order was not final as to all parties and issues and that similar reasoning could be employed to permit an interlocutory appeal any time a single party plaintiff or defendant was dismissed from a multi-party lawsuit. But Judge Arnold, writing for the majority, thwarted such criticism by explaining that the litigation at issue should not be viewed as the entire bankruptcy proceeding in deciding whether the order is appealable.[34] Rather, he explained, the litigation should be viewed as just the adversary proceeding brought by Aetna.[35] Judge Arnold concluded that as contrasted with other proceedings,[36] in bankruptcy the federal courts have taken a more liberal view of a separate appealable order.[37] An alternative basis given for the holding and overruling of *Ewald* was that orders concerning stays are similar to permanent injunctions, which are appealable under 28 U.S.C. § 1292(a)(1).[38]

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33. *In re* Leimer, 724 F.2d 744, 745 (8th Cir. 1984).

34. *Id.* Judge Arnold stated the test of appealability as follows: "[A]n order is appealable only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " 724 F.2d at 745 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978),; Catlin v. United States, 324 U.S. 229, 233 (1945).

35. *In re* Leimer, 724 F.2d at 745.

36. *Id.* (citing 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 54.19 (2d ed. 1983); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431-32 & n.3 (1956)).

37. 724 F.2d at 745 (citing *In re* Yermakov, 718 F.2d 1465, 1468-69 (9th Cir. 1983); *In re* Saco Local Development Corp., 711 F.2d 441, 443-46 (1st Cir. 1983)).

38. 724 F.2d at 746 (citing Mayor & Aldermen of Vicksburg v. Henson, 231 U.S. 259, 266-67

The Eighth Circuit ruling, while inconsistent with its prior unpublished decision in *Ewald*, was consistent with decisions of the Second and Eleventh Circuits.[39] Perhaps as significant as the holding on the merits was the announcement that "unpublished opinions of this Court are not intended to create binding precedent."[40] *Leimer* presented a difficult issue, and if the decision is subject to criticism it is only because it departs from the requirement of a final judgment and leaves doubt about the kinds of orders, other than final judgments, that can be appealed.

IV. STARE DECISIS

Campbell and *Leimer* are important to Eighth Circuit practitioners because they herald a change in the law. But they are also important because they demonstrate a willingness by the Eighth Circuit to reject precedents when the error of past decisions becomes apparent. Only those who maintain that stare decisis is a fundamental principle of American jurisprudence should be upset by these rulings. In England they have a rule of principled adjudication, perhaps it should be *called* the rule of principled adjudication, of stare decisis, meaning the decision stands. But in America sometimes the decision stands and sometimes it does not. Whether openly confessed or not, the case history of school desegregation, rights of the accused and convicted, and voting rights establishes beyond cavil that the Supreme Court has not blindly followed stare decisis. And why should the United States Courts of Appeals, when faced with less weighty matters, be unwilling to change their minds and decisions?

Otherwise stated, the question is should American jurisprudence have abandoned stare decisis? Consistency of decisions is certainly more than just the hobgoblin of small minds Emerson described. And clarity and consistency are desirable in and of themselves, especially in areas of jurisdiction such as *Campbell* and *Leimer* where it may be less important what the rule is than that there be a rule that the bench and bar can follow. But

(1913); H. R. REP. NO. 595, 95th Cong., 2d Sess. 344, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5963, 6300). *See also* 28 U.S.C. § 1292(a)(1) (1982).

39. *See* Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1309 (11th Cir. 1982) (order of bankruptcy court not interlocutory, but appealable final order); *In re* Taddeo, 685 F.2d 24, 26 n.4 (2d Cir. 1982) (denial of relief from automatic stay held equivalent to permanent injunction, thus appealable).

40. *In re* Leimer, 724 F.2d 744, 745 (8th Cir. 1984). Judge Arnold elaborated as follows: "The decision of a panel not to publish an opinion usually represents the judges' view that the case is without substantial value as a precedent." *Id.* at 745-46 (citing Plan for Publication of Opinions § 1, *reprinted in* 28 U.S.C.A., UNITED STATES COURTS OF APPEALS RULES 833 (West 1980); 8TH CIR. R. 8(i)).

consistency and accuracy are often mutually exclusive terms, and when previous holdings are proved to be in error, accuracy should prevail at the expense of consistency.

As additional cases present to the court slightly different perspectives on an issue, the court may view the effect of its initial holding differently. The complexity and unpredictability of any case that follows the announcement of a hard and fast rule can demand a different response requiring modification or at least clarification of the rule. When judges see the nuances of their decisions and decline the logical extensions or applications of their holding, should the judges not be commended for their willingness to rethink instead of condemned for their further insight and understanding? Again this may be less true in cases involving jurisdictional rules, where it is most important that there simply be a pronouncement or an agreement on some particular rule. But jurisdictional rules such as those announced in *Campbell* and *Leimer* determine court access and thus may be as important as more readily recognized substantive constitutional rights.

When confronted with inconsistent prior statements or positions, John Kennedy would simply reply, "I don't think that way any more." To live is to change, and judges both individually and collectively as a court should be allowed, even encouraged, to change their minds within the constraints of constitutional adjudication. The point here is not to champion abolishment or wholesale abandonment of case precedents. Rather, the point is that both the Supreme Court and the lower federal courts should be bound by stare decisis only to the extent that upon considered reflection the court decides the case precedents should be followed.

V. CONCLUSION

The two cases discussed above present a potential trap for the uninformed. Practitioners in the Eighth Circuit should be aware of those decisions and also of the court's new willingness to overrule prior unpublished decisions.