

[About the Blog](#) | [Become a Blogger](#) | [Yale Journal on Regulation](#)

NOTICE & COMMENT



A Blog from the Yale Journal on Regulation and the ABA Section of Administrative Law & Regulatory Practice

An Affiliate of the Law Professor Blogs Network

D.C. Circuit Review – Reviewed: The Frank Easterbrook Edition

by [Aaron Nielson](#) – Saturday, Oct. 10, 2015 – [@Aaron_L_Nielson](#)



Share via E-m

Judge [Frank Easterbrook](#) is an extraordinary jurist. He's [prolific](#); [influential*](#); and [scholarly](#). He also wields a sharp pen (e.g., “This case pits the twenty-first amendment, which appears in the Constitution, against the ‘dormant commerce clause,’ which does not.”). Even if you disagree with him, he always has interesting things to say. And that includes his thoughts on the D.C. Circuit versus “regional” courts. This week the D.C. Circuit issued [no opinions](#). With more time for reflection, this is as good a week as any to consider a classic quote from the vault.

A bit over a decade ago, [Howard Bashman interviewed Judge Easterbrook](#). Discussing becoming a judge so early in his career, Easterbrook included this rabble-rousing aside: “Gerhard Casper, my Dean at the time, was nonplussed; he said that he could understand jumping to the D.C. Circuit but not to a regional circuit. My view was and is exactly the reverse. Administrative law is enjoyable, but a varied diet is better. Robert Bork and Antonin Scalia, who joined the D.C. Circuit in the early 1980s both spent more than half of their time there reviewing decisions of the Federal Energy Regulatory Commission. I get to decide antitrust, securities, tax, discrimination, and intellectual-property cases, and some administrative matters too, along with the inevitable cocaine prosecutions. And I don’t have to suffer through D.C.’s miserable six-month summers.”

There is wisdom in Judge Easterbrook’s observation—to a point. In many ways, the D.C. Circuit is not that different from any other circuit. It also decides [antitrust](#), [securities](#), [tax](#), and [intellectual-property](#) cases—though, to be sure, often (though not always) through the filter of administrative law. The D.C. Circuit also decides a fair number of discrimination cases; there are a lot of federal employees. True, there aren’t as many cocaine prosecutions, but there are some, plus the D.C. Circuit reviews the Drug Enforcement Agency. In short, the D.C. Circuit’s cases [cover](#) a lot more ground than just FERC.

The D.C. Circuit is different from other courts, moreover, in ways that go beyond docket. D.C. Circuit judges [come from all across the country](#). Senators, quite rightly, are territorial; [they don't like seeing judge slots go to nominees from different states](#). But the District of Columbia has no senators. For clerkship applicants, moreover, the D.C. Circuit is a national court because it is one of the nation's largest legal markets yet not a single [law school that feeds a lot of clerks](#) is located within the circuit's boundaries. There is something to be said for the resulting geographic diversity.

So Judge Easterbrook's observation is mostly right, but with important caveats. He is 100% right, however, that D.C. summers are miserable.

(As a personal aside, my [home institution](#) will host an all D.C. Circuit moot court panel later this month: Judges Griffith, Millett, and Sentelle are all coming. With Justice [Clarence Thomas](#) and Commissioner [Maureen Ohlhausen](#) coming in October as well, Provo is getting more than its fair share of administrative law.)

* Although this is not the most scientific way of measuring influence, it is worth noting that Westlaw lists 375 "(Easterbrook, J.)" cites in its U.S. Supreme Court briefs database. By way of comparison, it also lists 346 "(Friendly, J.)"; 324 "(L. Hand, J.)"; 235 "(Kozinski, J.)"; 68 "(Wood, J.)"; 62 "(Reinhardt, J.)"; 54 "(Wald, J.)"; 49 "(McConnell, J.)"; and 35 "(Boudin, J.)" Plus there 23 "(Easterbrook, C.J.)" cites.

D.C. Circuit Review – Reviewed is designed to help you keep track of the nation's "second most important court" in just five minutes a week.

Cite As: Author Name, *Title*, 36 YALE J. ON REG.: NOTICE & COMMENT (date), URL.

This entry was categorized in D.C. Circuit Review and tagged D.C. Circuit, Frank Easterbrook, Judge Easterbrook.

About Aaron Nielson

Professor Nielson is an associate professor at Brigham Young University Law School. Before joining the academy, Professor Nielson was a partner in the Washington, D.C. office of Kirkland & Ellis LLP (where he remains of counsel). He also has served as a law clerk to Justice Samuel A. Alito, Jr. of the U.S. Supreme Court, Judge Janice Rogers Brown of the U.S. Court of Appeals for the D.C. Circuit, and Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit. All views expressed are the author's alone. Follow him on Twitter

[@Aaron_L_Nielson](#).

[View all posts by Aaron Nielson](#) →