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

by Aaron Nielson — Saturday, July 30, 2016 — @Aaron_L_Nielson

Last October, I dedicated one of these posts to Judge Frank Easterbrook. I praised him for being "an extraordinary jurist" who is "prolific; influential; and scholarly."* Of course, Easterbrook is not a judge on the D.C. Circuit, nor would he like to be. But he is an important judge and his views matter—indeed, Westlaw lists 74 cases in which the D.C. Circuit has mentioned "Easterbrook," and a quick glance confirms that almost all of them are in reference to Frank Easterbrook. (His Limits on Antitrust seems to have done quite well.) This week, everyone is talking about a law review article—how often does *that* happen?—all about Judge Easterbrook: Albert W. Alschuler's How Frank Easterbrook Kept George Ryan in Prison I'll let people judge for themselves whether Alschuler's arrows hit their mark. I'm still working through the materials. The purpose of this post, however, is to address whether Easterbrook manipulated the case assignment process.

First, the backstory: Alschuler represented former Illinois Governor George Ryan during federal habeas proceedings. That representation resulted in two opinions written by Judge Easterbrook: Ryan v. United States (7th Cir. 2012) ("*Ryan II*") and Ryan v. United States (7th Cir. 2011) ("*Ryan I*"). (The Supreme Court GVR'd *Ryan I* in

light of Wood v. Milyard.) Alschuler argues that Easterbrook was sloppy—or worse—regarding this matter. Indeed, he asks: "Would a journalist who made similar misstatements keep his job? Would an academic who showed no greater regard for the truth get tenure? Would a corporate executive who misstated crucial facts in a business report be given a second chance?"

There is a lot in this article to try to digest. One claim, however, jumped out at me as too hasty. (Perhaps his other claims are too hasty as well, or perhaps not; I've not worked through all the materials.) He says "that Judge Easterbrook's appearance on the panel that heard Ryan's appeal was not the result of random assignment." More than that, he suggests that it was Easterbrook who pulled the strings:

> Might Chief Judge Easterbrook have discouraged the judges initially assigned to the case from continuing with it? Might he have indicated that he was available as a replacement? Judge Easterbrook has written a surprisingly high proportion of the Seventh Circuit's opinions in both mail fraud cases and cases presenting issues of post-conviction procedure. Perhaps our case interested him, and perhaps he saw it as a vehicle for making a point.

That is a serious accusation—and the fact that Alschuler frames it as questions changes little. (An analogy: "Mr. Boddy did not die by random chance. Might Colonel Mustard have done it in the conservatory with the candlestick? Perhaps the two had an argument. Perhaps the Colonel wanted to make a point.")

What's the evidence? First, Alschuler says that the same panel that heard the direct appeal should have heard the habeas appeals too. But a habeas appeal is not the same case as a direct appeal. To get around this, he says: "Nevertheless, Collins T. Fitzpatrick, the Circuit Executive of the Seventh Circuit, confirmed that a panel that has heard a defendant's direct appeal ordinarily hears any subsequent appeal from a ruling in a § 2255 proceeding brought by the same defendant. Telephone Interview with Collins T. Fitzpatrick (Mar. 24, 2015)." The word "ordinarily" is doing a lot of work. (An aside: I do not envy the law review editor asked to cite check a telephone interview.) Does "ordinarily" mean it happens in every case? Or that it happens most of the time? Or just that it is common? I have no idea, but even a quick look at Seventh Circuit post-conviction decisions confirms that the post-conviction panel need not be the same as the direct review panel. (That example was literally the first § 2255 opinion with corresponding direct-review opinion that I looked at.)

Second, Alschuler says that the habeas appeal "was assigned initially to" the direct-review panel. After all, that direct-review "panel denied an emergency motion requesting Ryan's release on bond or, in the alternative, an order transferring him to a facility near his home where he could be released during the day." The article does not include a citation to the denial decision, but I'm happy to take Alschuler's word for it. This fact, however, is not dispositive. Is it the ordinary practice in such a situation for the panel that denied an emergency motion to later hear the case? Again, I have no idea, but it does not seem farfetched that emergency motions might sometimes receive unusual, expedited treatment. To be sure, Alschuler reports that "Fitzpatrick also confirmed that Ryan's bail motion would have been considered by the panel assigned to his case rather than by the court's motions panel." Maybe he did confirm that, or maybe there was just a miscommunication between the two of them. There is a reason why there is a game called "telephone."

Third, Alschuler says that "[i]n a later telephone interview, Collins T. Fitzpatrick, the Circuit Executive of the Seventh Circuit, confirmed that when a vacancy occurs in a previously selected panel, he selects a replacement without using a randomized process." At the outset, was there really a "previously selected panel" here? The direct-review panel was Judges Wood, Manion, and Kanne. The post-conviction panel was Judges Wood, Easterbrook, and Tinder. The only overlap is Judge Wood. Yet Judges Manion and Kanne are still Seventh Circuit judges. So there was not one unexplained "vacancy"—there were two. Yet if Judge Easterbrook were behind this, why would he persuade two judges to drop out instead of just one? Or was Judge Tinder part of the scheme too? Rather than assume that anyone dropped out of a "previously selected panel," isn't it possible that there was no "previously selected panel" in this case—i.e., that the "emergency" motions panel didn't count? Once more, I don't pretend to know the answers to these questions, but they seem worth asking.

In any event, I don't know if it is fair to say that Fitzpatrick did not use a randomized process. Granted, Alschuler (with citations) notes that "[l]awyers and scholars have questioned whether the assignment of judges to cases in the courts of appeals is as random as the courts say it is." But "questioned" does not mean "answered." Alschuler also says this:

> Apart from cases in which earlier arguments have occurred, the Seventh Circuit claims to assign judges to panels randomly. Judges, however, seem able to game the system. Fitzpatrick, the Circuit Executive, reported that he examines the briefs in every case, determines how much time to allow for argument, and prepares the argument calendar. After he circulates the calendar to the judges, the judges advise him of disqualifying conflicts of interest and of times they are unavailable to hear argument. After that, a computer randomly assigns the judges to panels. A judge who wishes to avoid a particular case apparently can do so by reporting

> his unavailability on the day argument is scheduled, and a judge who wishes to hear a particular case apparently can increase the chance of hearing it by reporting, "The only day I'm available that week is Friday."
>
> I do not claim that Seventh Circuit judges steer cases to or from themselves by inventing scheduling conflicts; I merely note that they have the ability to do it. Fitzpatrick observes that judges are advised long in advance of the weeks when arguments will occur, that they are discouraged from scheduling other activities during these weeks, and that scheduling conflicts are in fact infrequent. When conflicts arise sufficiently in advance, moreover, judges typically advise Fitzpatrick of these conflicts before he prepares the argument calendar.

As I read this account, the process still seems pretty randomized. All a judge can do is "increase the chance of hearing" a particular case—which I understand to mean there are no guarantees. So unless Fitzpatrick was in on Judge Easterbrook's "game" (which I don't think anyone alleges), we are to believe that Easterbrook persuaded Judges Kanne and Manion to leave the panel, all for the *chance*—not *certainty*—that he would end up being chosen as the replacement. Without knowing a lot more about the particular calendar dates at issue, that theory seems undercooked.

Thus, unless I'm missing something, I don't think the case has been made. No doubt, it is *possible* that Easterbrook encouraged other judges to drop out and that he suggested himself as a replacement, but it all seems pretty speculative.

Anyway, you didn't come here for my slapdash thoughts on Seventh Circuit panel assignments—you want to know what the D.C Circuit did this week.

First, consider Hancock v. Urban Outfitters, Inc.—an important case about Article III standing after Spokeo. In 2013, plaintiffs made purchases using credit cards. The respective clerks asked for their zip codes as part of the purchase. *Arguably* how they did so violates D.C. law. Judge Millet, joined by Judges Edwards and Sentelle, concluded that the district court erred "when it bypassed the jurisdictional question of [the plaintiffs' Article III] standing." The claimed injury was a violation of a statutory right. The panel concluded that under *Spokeo*, that was not enough. Though it may be a statutory violation, without an allegation of some actual injury, neither plaintiff

had standing.

Next is Florida Health Sciences Center, Inc. v. HHS. Here, Judge Griffith, joined by Judges Kavanaugh and Sentelle, ruled that the Affordable Care Act's (ACA) bar on judicial review of HHS's decisions regarding types of care provided by hospitals also bars review of the underlying data. Although acknowledging a presumption of reviewability, the panel concluded that the presumption was "overcome by 'specific language' in the statute that is a 'reliable indicator' of Congress's intent to bar review." (There is more going on, but for our purposes here that will suffice.)

Jones v. Dufek is an interesting case. It seems that Jones owed money to a bank, and the bank sold the debt. The new owner of the debt then engaged Dufek's law firm to collect, and Dufek sent a letter to Jones on his law office's letterhead. The letterhead identified Dufek as an attorney. The letter included a disclaimer advising that the firm was acting as a debt collector in an attempt to collect a debt. Jones brought suit alleging the letter misled her about an attorney's involvement. Judge Randolph, joined by Judges Kavanaugh and Henderson, didn't buy it. According to the panel, the letter did not misrepresent Dufek as an attorney because it included a disclaimer, prominently displayed, saying he was acting as a debt collector and made no mention of the possibility of a lawsuit.

Then we have Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review. The American Immigration Lawyers Association requested, and was given, thousands of pages of information related to complaints about the conduct of immigration judges. Some of the information, however, was redacted. Judge Srinivasan, joined by Judges Henderson and Millett, reversed the holding of the district court, finding that the Freedom of Information Act could not sustain the redaction of all the judges' names or the redaction of information deemed "non-responsive" contained within a response document. They did, however, agree with the district court that complaint resolutions fell outside the statute's affirmative disclosure mandate.

Blue Water Navy Viet. Veterans Ass'n, Inc. v. McDonald is next. To provide some background, the Agent Orange Act of 1991 instructs the Department of Veterans Affairs (VA) to presume veterans who served in Vietnam during a specific time period were exposed to an herbicide known as Agent Orange. Blue Water brought the case to challenge the VA's current interpretation of the Act, which excludes application to veterans who served on ships offshore. The district court dismissed the case for lack of subject matter jurisdiction, and Judge Griffith, joined by judges Henderson and Pillard, affirmed, citing 38 U.S.C. § 511(a) as a clear bar to reviewing the VA's interpretation.

After that, we have Confederate Tribes of the Grande Ronde Community v. Jewell. The case was consolidated from two separate challenges to the Interior Secretary's decision to take a parcel of land into trust for the Cowlitz Indian Tribe and allow casino-style gaming. The two challengers were a group of residents who lived around the parcel and the owner of a competing casino. Judge Wilkins, joined by Judges Pillard and Edwards, affirmed the district court's ruling in favor of the Secretary and the Cowlitz. The court found that, despite the plaintiff's claims, the Secretary had reasonably interpreted the Indian Reorganization Act in recognizing the Cowlitz as Indian and appropriately applied the "initial-reservation" exception to the Indian Gaming Regulatory Act.

In Quicken Loans, Inc. v. NLRB, Judge Millett, joined by Judges Srinivasan and Wilkins, considered, then denied, Quicken's petition for review of a decision by the National Labor Relations Board. The Board found some of Quicken's policies restricting employees' ability to publicly criticize the company to be a violation of the National Labor Relations Act. The petition was denied because there was nothing arbitrary or capricious about the decision, nor was there any abuse of discretion in the hearing process.

Finally, we come to U.S. Sugar Corp. v. EPA, a short little consolidated case about the EPA's emission standards for things like boilers and incinerators – it's only 162 pages long and involves more than two dozen petitions for review. (Very) long story (very) short, the per curiam panel of Judges Henderson, Brown, and Griffith universally dismissed the challenges brought by industry groups, but upheld some of the environmental petitioners' challenges. The EPA was given the homework of better explaining or fixing some of its regulations.

So there you go: another week at the D.C. Circuit. (For what it is worth, I bet all of these panels were randomly assigned.)

* Everyone really ought to read (or reread) Statutes' Domains. Whether you agree with it or not, you'll be smarter for having done so.

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About Aaron Nielson

Professor Nielson is an associate professor at Brigham Young University Law School, where he teaches and writes in the areas of administrative law, civil procedure, federal courts, and antitrust. He currently co-chairs the Rulemaking Committee of the American Bar Association's Section of Administrative Law & Regulatory Practice. Previously he chaired the Section's Antitrust & Trade Regulation Committee. 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. Follow him on Twitter @Aaron_L_Nielson.

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