
News

Experts: Easterbrook misstatements shows need for greater judicial scrutiny

By **Emily Hoerner** and **Rick Tulsky** | April 10, 2017

Legal experts say that the work of federal judges receives too little scrutiny, despite their far-reaching power to interpret federal law.

More attention needs to be paid to the “integrity and validity” of opinions issued by the U.S. Court of Appeals, said Vikram David Amar, dean of the University of Illinois School of Law. Though the appeals courts are the final word in many cases in the federal courts, too little attention is spent reviewing those cases.

Cornell Law School Professor Jeffrey J. Rachlinski also highlighted the need to provide feedback to judges, and said “Judges should in fact know that they are fallible and the ways in which they are fallible.”

Their comments came after an *Injustice Watch* investigation (<https://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions/>) identified 17 cases since 2010 in which opinions authored by Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit included misrepresentations of the record, including misstatements of facts, omissions of facts in the record, or assumptions that were contrary to the trial record.

Easterbrook declined to discuss his opinions, saying through a spokeswoman “the court’s products speak for themselves.”

The U.S. Courts of Appeals reviews appeals from all U.S. District Courts in their jurisdiction; the Seventh Circuit oversees the federal trial courts in Illinois, Indiana and Wisconsin. The appellate courts consider cases in three-judge panels, so at least one other appellate judge signs onto every majority opinion that the court issues.

The *Injustice Watch* analysis of Seventh Circuit opinions since 2010 found that attorneys for the losing party filed post-opinion petitions contending the panel either got the law or the facts wrong in a greater percentage of opinions authored by Easterbrook than those authored by his colleagues.

The U.S. Supreme Court takes about one percent of the cases that are appealed from the circuit courts each year, leaving the circuit court decisions almost always as the final say.

Despite the court’s far-reaching impact, the opinions of appellate court judges get scrutinized far less often than U.S. Supreme Court or U.S. District Court opinions, Amar said. He wrote an [online article](https://verdict.justia.com/2016/08/25/oversees-overseers-explosive-law-review-article-points-difficulty-keeping-appellate-courts-honest) (<https://verdict.justia.com/2016/08/25/oversees-overseers-explosive-law-review-article-points-difficulty-keeping-appellate-courts-honest>), suggesting one reason: “Court of appeals jurisprudence simply isn’t sexy or glamorous enough” for law professors.

Court of appeals judges are appointed by the President and confirmed by the Senate for lifetime appointments; Easterbrook was appointed to his seat in 1985 by then-President Ronald Reagan, one of the youngest appellate judges in history.

How court of appeals judges arrive at their opinions, and the role other panel members play in the crafting of the decision, is what New York University School of Law professor Arthur Miller called a “black box.”

Amar wrote that having three separate judges, and their clerks, examine each case provides less of a safeguard than outsiders would expect. “The judge assigned primary responsibility is often given a fair degree of deference by the other judges on the panel. That deference increases once a judge is assigned the task of writing an opinion,” given that judges must decide hundreds of cases a year, and their main focus is on the cases for which they author the opinion, he wrote.

Charles Gardner Geyh, a University of Indiana Maurer School of Law professor who studies judicial accountability, also noted the factor of time. While judges always can do better at factual accuracy, he said in an interview, “There’s an inevitable tradeoff in getting it right and offering justice in a timely way. Justice delayed is justice denied.”

Cornell professor Rachlinski, who studies the psychology of judicial decision making, noted that judges have less accountability in part by design. “If you want judges to be independent of the political process, then those judges really will be sort of invulnerable or impervious to any manner of the kind of accountability that any employee in America is used to,” he said.

