



Frank Easterbrook:
A Portrait of the Next Chief

By Stephen M. Shapiro, Andrew L. Frey, and Kenneth S. Geller¹

We would like to offer an anticipatory salute to our former Justice Department colleague, Frank Easterbrook, who will be assuming the position of Chief Judge for the Seventh Circuit in November 2006. Lawyers can expect a continuation of the outstanding leadership of Chief Judge Joel Flaum with, undoubtedly, an addition of some new administrative perspectives.

The Chief Judge serves as the presiding panel member in a full array of cases reaching the Court, but also is responsible for the administration of the Court of Appeals and the District Courts and Bankruptcy Courts in the seven districts of the Circuit. He is a member of the U.S. Judicial Conference and head of the Judicial Council for the Circuit. Fortunately for the Court and members of the bar, Judge Easterbrook is the most organized and efficient administrator we have encountered. His mental Lexis is quick, his wizardry with computers is legendary, and his knowledge of substantive law and procedure is comprehensive.

Most members of the Association know something of the background of Judge Easterbrook, a man of extraordinary credentials. He was a law review officer at the University of Chicago Law School, a clerk for Judge Levin Campbell of the First Circuit, and then Assistant to the Solicitor General and Deputy Solicitor General in the 1970s. He joined that office along with Danny Boggs and Bob Reich (Chief Judge of the Sixth Circuit and former Secretary of Labor, respectively) immediately after his clerkship. In this position he argued 17 cases before the Supreme Court and briefed hundreds more.

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¹Messrs. Shapiro, Frey and Geller are all partners in the Appellate and Supreme Court Practice Group at Mayer, Brown Rowe & Maw. Each served previously as Deputy Solicitor General of the United States, and all worked extensively with Judge Easterbrook during his tenure in the Office of the Solicitor General. Mr. Shapiro and Mr. Geller are coauthors of Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (8th ed 2002).

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Following his service in the Solicitor General's Office, Judge Easterbrook became a tenured faculty member at the University of Chicago Law School and a principal in Lexecon, the economic and financial consulting firm. He continued his Supreme Court practice in the private sector, presenting three more cases to the high Court before President Reagan nominated him to the Seventh Circuit in 1985. In our view, Frank Easterbrook was one of the very top advocates appearing before the Supreme Court in his days at the bar.

For the last two decades, Judge Easterbrook has served with distinction on the Seventh Circuit while teaching two or three courses at the law school every year. In the words of Dean Saul Levmore: "Frank Easterbrook continues to have a reputation here, at the University of Chicago Law School, as a must-have teacher. He is also a brilliant and constructive participant in workshops. Some presenters (especially from other schools) may dread the verbal missiles, usually hurled from his front-row center seat, but most learn that it is a treat to rethink one's paper in light of a thoughtful comment from Easterbrook. I dare say that a

good part of what I have learned in my years at the law school can be traced to Frank Easterbrook's comments at these faculty workshops. Finally, Easterbrook is an important influence on legal education through his judicial opinions. Course after law school course has changed for the better as Judge Easterbrook's opinions have made their way into the curriculum. So long as he decides cases, and decides them in a way that cuts to the heart of an issue with such skill and pressure, no area of law can be dull."

The recent law school graduates who served as his clerks have found the experience to be, according to David Lisitza, a most rewarding one. Easterbrook is, he states, an "excellent boss," who provides a "well-rounded cultural experience for his clerks." "His fondness for Alaska and opera humanize him. As far as outdoors in Alaska, I was shocked to learn that he

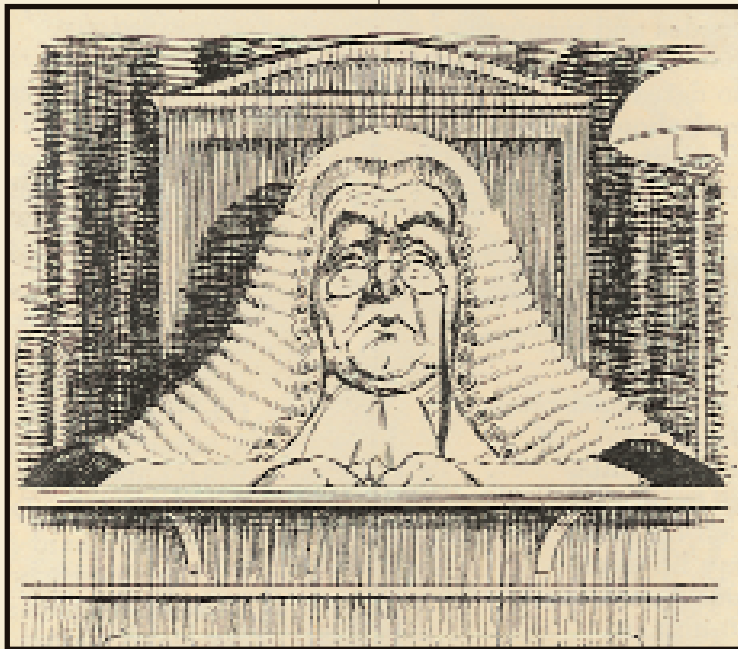
doesn't hunt or fish—he likes to look at the animals, not kill them."

Does this soft touch extend to counsel presenting oral arguments? And will serving as Chief Judge do anything to mute Judge Easterbrook's style of questioning? Arguing counsel who have graded the judges, while praising Easterbrook's knowledge, intellect, and opinion-writing skills, have sometimes stated that he can be hard-nosed and demanding in argument. Is the Judge guilty as charged?

Those who do not appear regularly before the Seventh Circuit would do well to read Judge Easterbrook's comments on oral argument in the August 2, 2004 interview by Howard Bashman, <http://howappealing.law.com/20q>. He makes the point there, which the other Judges of the Court undoubtedly

endorse as well, that counsel cannot expect to give a speech, but must rather be prepared to participate in a conversation, guided firmly by the judges.

Those planning to give an uninterrupted presentation should check their argument outline at the door. Lawyers can serve their clients best by boning up on the case in every respect to prepare for the questions that are sure to come. And they should not be surprised if the interrogation is unceasing, exhausting all of their allotted time, as often occurs in the Supreme Court.



Judge Easterbrook no doubt has strong opinions. After all, he has now been on the Court of Appeals for more than twenty years, and as Justice Frankfurter once observed, "weak characters ought not to be judges." No judge who studies the briefs and the record comes to oral argument without impressions about the case. But as Judge Easterbrook states in his interview, a well prepared lawyer can show him what is wrong with those first impressions and help his or her client in the process. This same interview contains valuable advice on preparation of a brief for the Seventh Circuit to comply with its numerous rules—among the most important suggestions is that counsel send a draft of the brief to the clerk for inspection before the filing date to assure compliance with all governing protocols.



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Is there anything the Seventh Circuit can do to address concerns of arguing counsel that the flood of tough questions and the limited time for argument preclude an adequate presentation of their clients' position? Here are three suggestions for the next Chief:

Judge Easterbrook has indicated that on some occasions a post-argument letter or memorandum addressing a difficult question raised during argument may be of assistance to the Court. Arguing counsel do not know when such a submission would be of assistance to the Court and when it would be an undue burden. We realize that nothing is more vexatious than a lawyer who keeps filing paper outside the governing rules. We suggest a general rule allowing submission of a 500 word letter, within 48 hours of argument, and a response within the next 48 hours, similarly limited. If these materials are of no use to the panel, they can be placed in the circular file.

An old tradition of the Supreme Court, largely abandoned during the years of Chief Justice Rehnquist but now revived under Chief Justice Roberts, allows arguing counsel to address the Court for a minute or two before the deluge of questions begins. The advantage of such a short interlude of silence is that arguing counsel, after extensive preparations, may have additional useful insights that cut through the detail of the briefs and which would be of value to the Court if time permitted their expression. Of course, this indulgence always depended on the Court's needs and in some cases was not observed, even in the leisurely days of 60 minute oral arguments. When another Justice jumped in immediately with a host of questions, Justice Holmes was overheard to say: "Damn it, I want to hear the argument."

Last but not least, we hope the Seventh Circuit will harmonize views within the Court on amicus practice. At the moment, the Seventh Circuit has led practitioners to believe that amicus briefs are a waste of money and a waste of time, with several well known opinions of motions judges striking these briefs. Judge Easterbrook has stated that while he disapproves repetitive amicus briefs, those expressing an important and independent perspective with new and helpful analysis should be permitted. In this respect, Judge Easterbrook is in tune with the views of the Supreme Court and most other circuits. We believe that amicus briefs can perform an important and valuable function for the development of the law, as well as allowing persons whose interests may be affected by the rule of law under consideration to have their views heard by the

decision makers, and would hope to see the Court relax its current negative views on this point. John Paul Stevens, our Circuit Justice, has asked us to pass along to Judge Easterbrook his congratulations in anticipation of his succeeding Chief Judge Flaum later this year:

"My respect and admiration for my friend Frank Easterbrook dates back to my early years on the Court when he was in the Solicitor General's office arguing cases on behalf of the United States. Potter Stewart could and did ask difficult and penetrating questions. Frank never hesitated in giving a straightforward and honest answer even when he was fully conscious of the fact that the answer might not be the one that Potter hoped to hear. Frank has maintained his characteristic brilliance and intellectual honesty throughout his years as a Circuit Judge and will, I am confident, make an excellent Chief Judge when he succeeds Joel Flaum in that important office."

Justice Antonin Scalia, a former member of the faculty at the University of Chicago School of Law, adds the following:

"I am pleased to congratulate Judge Easterbrook (or, if he prefers, to commiserate with Judge Easterbrook) on his forthcoming elevation to Chief Judge of the United States Court of Appeals for the Seventh Circuit. He has been a good friend and a confidant for many years, since we were colleagues together on the faculty of the University of Chicago Law School. I learned much from him then, and have learned much from his clear and trenchant opinions since then. My pleasure at his elevation might be mingled with regret if I thought there were the slightest chance that his new administrative responsibilities would cause him to cut back on his case production or abridge his scholarship. Knowing Frank, I am not worried."

Finally, Judge Levin Campbell offers his congratulations and recollections of the law clerk who served with him three decades ago:

"I am delighted to congratulate my former law clerk, Judge Frank Easterbrook, upon his forthcoming elevation to the post of Chief Judge of the Seventh Circuit. Back in 1973-1974, when he clerked for me, Frank was a formidable law clerk who not only followed the Supreme Court's every move, but could cite from memory to the relevant new opinions from every circuit court in the nation. While entirely respectful, he did not hesitate to let me know what he thought on most topics, and his thoughts were always cogent and stimulating. He is one of today's outstanding judges and legal minds. This November he will become the able chief of a most distinguished circuit."