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Oral History of Distinguished American Judges

# HON. FRANK H. EASTERBROOK
# U.S. Court of Appeals for the Seventh Circuit
# An Interview

with

Nicholas Quinn Rosenkranz,
Professor of Law, Georgetown Law

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**Transcribed by Ubiqus**

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PROF. NICHOLAS ROSENKRANZ: Good

00:00:24 morning. My name is Nicholas Quinn Rosenkranz and I'm a law professor at Georgetown. We are here in the chambers of Judge Frank H. Easterbrook of the US Court of Appeals for the Seventh Circuit. It was my great honor to clerk for Judge Easterbrook in 1999-2000, and it is my great honor to interview him today on behalf of the Institute of Judicial

00:00:53 Administration of NYU School of Law. I'll just say: I've had the privilege to work with many brilliant lawyers and judges in my career, and Judge Easterbrook's mind is the finest legal mind I have ever known. Judge, it's an honor and a pleasure to be with you.

JUDGE FRANK H. EASTERBROOK: And a pleasure to be with you, Nick.

00:01:17 PROF. ROSENKRANZ: I still remember

the two of us walking down the street here in Chicago 20 years ago -- me, bundled up in my warmest winter coat, and you, wearing just a sports

00:01:28 jacket. And I said: ”What are you doing? It’s freezing!” And you said: “This is nothing; I’m from Buffalo.” Could you tell us a bit about what it was like growing up in Buffalo?

JUDGE EASTERBROOK: Well, Buffalo did tend to be a little chilly and a little windy, but I had the great benefit of growing up in a family where both parents were intellectuals. They loved thoughts, and they made sure I went to a good public school (public in the US

00:02:04 sense) in the nearest northern suburb of Buffalo. A place called Kenmore. The Kenmore schools were staffed by very intelligent people, a lot of whom had PhDs, and it offered a wonderful education. It was a place where, for example, my last six years there I

00:02:24 took Latin for six years running and managed to learn a whole lot of English in the process. That's one reason, I think, why I care more about words, having worked through how we

00:02:37 got to where we are in words. It was a lot of fun, so it was a wonderful place to grow up provided you liked snow. Buffalo, by the way, is of the view that it doesn't get very much snow. There's a place to the south of Buffalo that gets twice as much. The people who live in Buffalo call

00:02:57 that the Snow Belt. [Laughter]

PROF. ROSENKRANZ: You talked a bit about your love of, and facility with, language. All three Easterbrook brothers are extremely accomplished and extremely facile with language.

JUDGE EASTERBROOK: Mm-hm.

PROF. ROSENKRANZ: How did that come to be?

JUDGE EASTERBROOK: Well, I think it

was our upbringing. Again, our parents really cared about words. I

00:03:20 think our mother cared about words more than our father. My mother says that by the time I was two, she had read all of Shakespeare to me. I must say, I don't remember it.

00:03:31 [Laughter] In fact, I'm not sure I remember the Shakespeare plays I read 10 years ago. But words were very important in our family and all of us got drawn into this. My next younger brother Gregg became a journalist, wrote some things on spec for publications, and wrote books, and is, of course, still doing that.[1] And then he took the sideline of writing the "Tuesday Morning Quarterback" column.[2] Neil, the youngest brother,

00:04:03 we refer to as the black sheep of the family, because he went into, and is

[1] https://www.greggeasterbrook.com/books.html
[2] "Tuesday Morning Quarterback" or "TMQ" was a football column written by Gregg Easterbrook.

a professor of, English literature. [Laughter] Well, at the time he did that, the only association you would belong to was the Modern Language Association, which mostly scoffed at everything they were teaching and was

00:04:25 interested in Shakespeare only to the extent it would reflect on modern sexual trends. There has been another association of language teachers formed, but Neil quickly

00:04:38 learned that he wasn't going to be able to get tenure just teaching his real love, which was 20th century American existential thought. There weren't that many people who wanted to sign up for PhD programs in that, so he took a sidelight: He teaches science fiction. His science fiction

00:04:57 classes are oversubscribed, and every year he wins best teacher awards. [Laughter]

PROF. ROSENKRANZ: I had a look at his list of courses which is simply astonishing. So, why did you choose

Swarthmore and how did that come to pass?

JUDGE EASTERBROOK: Swarthmore had, deservedly, a wonderful reputation as an intellectually intense school. It has a beautiful campus. At the time I

00:05:26 went there, there were about 250 people in each class. You would go to this place southwest of Philadelphia and just spend time thinking and interacting with your

00:05:39 teachers and with fellow students. I mean I thought that was a wonderful model, and, after I went there for a while, I was sure it was a wonderful model. You spent your time, when you weren't in class, reading, talking to other students about what you were reading, about what you were thinking. You know, there were the odd occasions

00:06:01 where you went out on the lawn and threw a Frisbee as hard as you possibly could or took a knife to see how close you could get it to your

foot without going through your toe. [Laughter] Those were the other attractions at Swarthmore, but it was the intellectual attractions that were important. And when I left Swarthmore and came to law school, everybody around me was saying: “Oh,
00:06:28 it’s so hard; there’s so much reading.” And I was saying: “Hard? Reading? This is the life of Riley compared to Swarthmore.” It was just a wonderful experience. The last two years in
00:06:40 Swarthmore, I was in, what they call, the Honor’s Program, which is just seminars. In those seminars, you do a paper every other week, and the subject of the seminar is the discussion of those papers. So, the students are discussing each other’s work. There are no exams. There are
00:06:59 no grades. But, then, at the end of your senior year, they bring in outside examiners, something along the English model. The outside

examiner is told the title of the seminar and told that they can ask you anything about that subject matter. [Laughter] Well, that induces people to prepare, which we did. It was a lot of fun.

PROF. ROSENKRANZ: What were some of your favorite classes and professors from that time?

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JUDGE EASTERBROOK: Well, one of my favorites was the seminar called Public Law and Jurisprudence, given by Professor J. Roland Pennock[3], a wonderful political scientist and

00:07:37

quite a great thinker. Then, there was a seminar called Economic Stability and Growth, taught by Frank Pearson. And I specialized in both political science and economics and learned, I thought, a reasonable amount about them.

PROF. ROSENKRANZ: Did you ever

[3] James Roland Pennock (1906-1995) taught at Swarthmore College from 1929-1976, serving as chair of the Department of Political Science. https://www.nytimes.com/1995/03/15/obituaries/j-r-pennock-89-political-professor-theorist-and-author.html

00:07:57 consider pursuing a different field?

JUDGE EASTERBROOK: Well, when I went to college, I thought I was going to pursue physics. I took physics and math. I placed into third-year college math -- linear algebra and intermediate calculus, they called it. I had already known that there is one problem with physics: if you haven't made your contribution by age 25, you're probably not going to. But I

00:08:26 also learned that the math was really, really hard. It wasn't clear to me I would ever be good enough to make original contributions. Moving to economics and political science,

00:08:39 the math is a lot simpler. And then, ultimately moving to law, you discover you've got so much math you don't know what to do with it! But I did, when I became a teacher of law. I would put calculus up on the board occasionally, and the students would stare at me as if I had put up Greek.

00:09:01 (Well, there were some Greek letters in it.) And I would stare back at them and say: “The Dean of Students tells me that the average student in this class has two years of college calculus. Let’s get on with it.”

[Laughter]

PROF. ROSENKRANZ: So, you determined, while you were at Swarthmore, that you would like to go to law school. Why-

JUDGE EASTERBROOK: I was moving away from physics and into the social

00:09:30 sciences, and one of the things that was becoming clear is, I liked almost everything. I love the hard sciences, but I love the social sciences, where you’re learning about

00:09:42 how the world works, how people relate to one another, how people relate to the world. And what field involves how the world works better than law? So that’s what attracted me to law, much more than the fact that the math was simpler.

PROF. ROSENKRANZ: And you landed at the University of Chicago Law School.

00:10:06 How did you make that choice?

JUDGE EASTERBROOK: I landed there for entirely economic reasons. I was bribed-- excuse me, side payments were made. [Laughter] The University of Chicago had a full tuition scholarship available linked to Swarthmore, so at the time, one Swarthmore student a year who decided to go to Chicago was eligible for a free ride. They offered me that

00:10:33 scholarship, and that was a better offer than any other law school had made. I knew Chicago was getting an increasing reputation for economic analysis of law, and that was

00:10:45 obviously very interesting. And it was practicing economics by paying its students! When I got to Chicago, I then signed on as the undergraduate debate coach, and that covered my room and board. So I was fully covered for tuition, room, and board,

managed to graduate from the law school with no

00:11:06 debt burden, which, compared to how some people are graduating today, was a terrific position to be in. It enabled me to do what I wanted afterward.

PROF. ROSENKRANZ: So, as you say, those were very heady days at University of Chicago Law School with an incredible list of faculty, and this burgeoning law and economics movement. Can you just talk a bit about that?

JUDGE EASTERBROOK: It was certainly

00:11:33 growing at the time. But Chicago, when it was founded-- when the Law School was founded, in 1903, I believe -- it started with an idea that law was a social science. It wanted

00:11:48 people who were good at social science to be on the law faculty, and it hired some right from the get go.

Frank Knight[4], the first person who did real economic analysis of law, was hired there in the 1930s. And, of course, Ronald Coase[5], who went on to win a Nobel Prize in economics, was hired by the Law School in about

00:12:10 1960. So, the Law School was interested in the social sciences and not just in economics, but it had people who were interested in political science, in philosophy, in sociology. There were a lot of people who taught…. At Chicago, the Midway Plaisance divides the campus. The Law School is on the south, the economics department is on the north. People would say that these

00:12:39 disciplines “cross the Midway”, and a lot of people were involved. The law school, by the time I arrived, had

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[4] Frank Knight (1885-1972) was an economist who spent most of his career at the University of Chicago, and is a major figure in classical liberal economic theory. https://www.econlib.org/library/Enc/bios/Knight.html

[5] Ronald Coase (1910-2013) was a British economist at the University of Chicago from 1964 until his death. He was awarded the Nobel Prize in Economics in 1991. https://www.nytimes.com/2013/09/04/business/economy/ronald-h-coase-nobel-winning-economist-dies-at-102.html

Ken Dam[6], in addition to Ronald Coase. It had Ken Dam. It had Walter

00:12:54 Blum[7], who was a teacher of tax and very interested in economics. It had Ed Kitch[8]. And it had a recent hire by the name of Richard Posner[9]. He had just come a year before.

PROF. ROSENKRANZ: And you took Torts with Judge Posner. Is that right?

JUDGE EASTERBROOK: I took Torts with

00:13:12 Judge Posner. My very first day in law school, I arrive in Torts with this very traditional torts book, and Richard Posner walks in, and in his kind of high and mild voice, says to these brand-new law students, “torts is not my field”. [Laughter] This

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[6] Kenneth W. Dam, Max Pam Professor Emeritus of American and Foreign Law at University of Chicago Law School, also served as Deputy Secretary of State (1982-85) and Deputy Secretary of the Treasury (2001-03).

[7] https://www.chicagotribune.com/news/ct-xpm-1994-12-20-9412200252-story.html

[8] Edmund W. Kitch, Mary and Daniel Loughran Professor of Law, UVA School of Law. https://www.law.virginia.edu/faculty/profile/ewk/1180712

[9] Richard Posner (born 1939), Senior Lecturer in Law at the University of Chicago, was a Judge on the United States Court of Appeals for the Seventh Circuit from 1981-2017, and is a major figure in the field of law and economics. He has written dozens of books and hundreds of articles, and he is the most cited legal scholar of all time. https://www.law.uchicago.edu/faculty/posner-r

is not an assurance to the students. It soon became clear that he was very interested in torts and had a lot to say about it, and immediately assured that we had read Coase's famous

00:13:51 article, The Problem of Social Cost[10], and would talk about torts from that perspective. But it also became clear, over the course of the year, what he had meant when he said, "torts is not my field". He meant it was not his special field. His field was … everything, right? It wasn't just law and economics; it was everything and economics. On that, he agreed with Gary Becker[11] and George Stigler[12], people from the other side of the Midway who were often seen at the Law School at

[10] R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960)
[11] Gary Becker (1930-2014), University Professor of Economics and of Sociology at the University of Chicago, was awarded the Nobel Prize in Economics in 1992. https://news.uchicago.edu/story/gary-s-becker-nobel-winning-scholar-economics-and-sociology-1930-2014
[12] George Stigler (1911-91), Charles R. Walgreen Distinguished Service Professor Emeritus at the University of Chicago, was awarded the Nobel Prize in economics in 1982. https://www.chicagotribune.com/news/ct-xpm-1991-12-03-9104180940-story.html

workshops, and disagreed

00:14:26 totally with Ronald Coase, which lead them to have many disagreements over the years. Stigler, Becker, and Posner were economic imperialists. They thought economics could analyze everything. Coase thought economics can analyze markets, and if you didn't have a market transaction, you shouldn't be using economics. The difference between these two perspectives led, for example, to the

00:14:58 fact that there were two law-and-economics seminars at the University of Chicago Law School. And I took both. One, given by Coase, taught law and economics from his

00:15:11 perspective and was limited to analysis of markets. The other, taught by Posner, was using mimeographed copies of what was to become Economic Analysis of Law[13], and taught everything from an economic

[13] Richard A. Posner, Economic Analysis of Law (9th ed. 2014).

perspective: Criminal Procedure; Law and the Family; you name it, it's in

00:15:28 Economic Analysis of Law[14]. I thought it was wonderful that the Law School agreed that students could get both distinctive perspectives on law and economics. I ended up more in the economic imperialist camp, I will admit; but I thought Coase was a wonderful scholar and a wonderful teacher.

PROF. ROSENKRANZ: That's extraordinary to have studied with both of them. Who else do you particularly remember

00:15:56 studying with?

JUDGE EASTERBROOK: Well, I've already mentioned Walter Blum who taught tax law and also, by the way, gave me the lowest grade I ever got

00:16:07 in law school. I'm not sure exactly what I had missed that he thought was important. I thought that Blum was a

[14] Id.

wonderful teacher. On the other hand, there were some teachers who didn't really want to interact with students. They were teachers, of a generation gone by, that no longer exists at Chicago, or, I suspect, at

00:16:32 many other law schools. One of the teachers was Kenneth Culp Davis,[15] who had written "The Treatise", as he always called it, on administrative law[16], and you get a sense of Davis's perspective on the world. He assigned his own administrative law case book, and one of the cases has the heading, normal in a law school case book: X v. Y; so-and-so, DC Circuit; Leventhal, Circuit Judge,

00:17:04 period. Three asterisks -- "as Professor Davis says in The Treatise …", long quotation from the Administrative Law Treatise-- 3 asterisks; rule line; notes and

[15] Kenneth Culp Davis (1908-2003), helped draft the Administrative Procedure Act and was a pioneer in the field of administrative law.
[16] Kenneth Culp Davis, Administrative Law Treatise (2d. ed. 1983).

questions; "1) Judge
00:17:19 Leventhal is one of our better Circuit Judges," period. "2) …" Well, you can tell he was a good Circuit Judge: he quoted from Kenneth Culp Davis's treatise! [Laughter]. One of my classmates, Ron Cass[17], who went on to a long career as a law teacher, ending as a Dean at BU, became an
00:17:42 accomplished mimic of Kenneth Culp Davis. He can still do it to this day. I can hear Davis in my mind whenever I see Ron. So, yes, there were some really good people there, but-- well, the old school just wanted to tell you what they thought and that was that. And then, there were the people in the middle who were always very difficult to figure out. One of them was Soia Mentschikoff[18]. Soia had been around

[17] Ronald A. Cass, Dean Emeritus, Boston University School of Law.
[18] Soia Mentschikoff (1915–1984) was a professor best known for her work in the development of the Uniform Commercial Code.

for a long time,

00:18:15 and she taught Elements of Law and the Uniform Commercial Code. She really wanted to teach law as it was developing, but she was so well grounded in the differences between

00:18:31 the UCC and the law of New York as it had been developed by Judge Cardozo[19] when he was on the court, that that's where everything focused. It sometimes enlightened the students and sometimes made them very frustrated.

PROF. ROSENKRANZ: If I recall correctly, one of your most memorable

00:18:51 dinners during that period was during a take-home exam. Am I remembering that correctly?

JUDGE EASTERBROOK: Well that was true. Professor Posner gave a take-home exam in one of his classes. (I

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She was also the first woman to teach at Harvard Law School. https://law.jrank.org/pages/8536/Mentschikoff-Soia.html

[19] Benjamin Cardozo (1870–1938) served as a Judge on the New York Court of Appeals, 1914-26; as Chief Judge of the New York Court of Appeals, 1926-32; and as an Associate Justice of the Supreme Court of the United States, 1932-38. https://www.oyez.org/justices/benjamin_n_cardozo

can’t remember which it was.) It was my third year, and he invited me and a couple of other law students to dinner at his home during the time when the exam time was running! So,

00:19:19 I started on it, took the papers with me, had dinner at his home -- and he included wine; he offered after-dinner drinks. I said, well you know, I probably should go finish

00:19:30 this exam. So, at about midnight, I walked from his home to the apartment where I was living and tried to finish the exam and hand it in. I hoped he might give me some credit for the fact that there had been a distraction in the interim!

PROF. ROSENKRANZ: And, at that dinner

00:19:46 party, weren’t there all sorts of luminaries? Am I remembering that correctly?

JUDGE EASTERBROOK: Well, it depends on how you define luminaries. George Stigler was there. But Richard

Posner's two sons were there, and of course, one of them is now a luminary in his own right, on the faculty of the University of Chicago Law School. So, you couldn't tell at the time that they were luminaries,

00:20:11 but Eric is now a distinguished professor all by himself[20].

PROF. ROSENKRANZ: Impossible to say no to an invitation like that, I imagine.

00:20:20 JUDGE EASTERBROOK: Yes.

PROF. ROSENKRANZ: Next was your clerkship. Can you tell us a bit about that?

JUDGE EASTERBROOK: I clerked for Judge Levin Campbell[21] of the First Circuit. I was an experiment on his part, and I'm not sure that he thought I had paid off. He had been a state

[20] Eric A. Posner, Kirkland & Ellis Distinguished Service Professor of Law, University of Chicago Law School. https://www.law.uchicago.edu/faculty/posner-e

[21] Levin Campbell (born 1927) was appointed to the United States Court of Appeals for the First Circuit in 1972; served as Chief Judge, 1983-90; and took senior status in 1992.. https://www.fjc.gov/history/judges/campbell-levin-hicks

00:20:44 judge. He had graduated from Harvard. He had been a state judge. He was now in his second year as an appellate judge. He had never hired, or even thought of hiring, anybody who was not a graduate of the Harvard Law School. And afterward, he did go back to hiring mostly from the Harvard Law School. But it was a wonderful time with him, because he made it clear to his clerks that the
00:21:13 job of a judge was not to analyze everything. As he said more than once: a judge's job is to think through everything that matters; it is not to say everything that
00:21:26 matters. You want things boiled down. So his clerks would occasionally -- he would write some opinions himself; he would ask for drafts on some opinions -- whatever the clerks did, he would revise from top to bottom and find a way of saying more with less. And that's a
00:21:46 lesson that's stuck. When he

retired, there was a ceremony in his honor, which I couldn't go to, but I recorded a message, and that was central to the message: that he practiced that and he conveyed that lesson to his clerks. And I got a phone call from the person who was then the Chief Judge of the Circuit saying: "I hope all of my other colleagues were listening when you said that. I just wish they followed that." [Laughter]

00:22:18 PROF. ROSENKRANZ: Did you stay in good touch with the Judge after your clerkship?

JUDGE EASTERBROOK: Mm-hmm. I stayed in touch with him. I went to all of

00:22:28 his clerks reunions until very recently when he held fewer and fewer, and I spent more and more time in Alaska. That complicated going to reunions, but we certainly stayed in touch. And when I was sworn in as a judge of this Court, he came out to Chicago and administered the oath.

PROF. ROSENKRANZ: So you were a quote

00:22:53 "failed experiment" from University of Chicago, just as I was a "failed experiment" from Yale? [Laughter] Is that right?

JUDGE EASTERBROOK: In perhaps the same sense. Like Judge Campbell -- he's never been exclusively from Harvard -- I have not been exclusively from Chicago. You remember that your co-clerk graduated from Queensland.[22] [Laughter]

00:23:15 PROF. ROSENKRANZ: So, if my math is correct, you were clerking at the time of the Saturday Night Massacre.[23] Is that correct?

JUDGE EASTERBROOK: It is correct.

00:23:26 PROF. ROSENKRANZ: Were you very

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[22] Laurence P. Claus, Professor of Law, University of San Diego Law School. https://www.sandiego.edu/law/faculty/biography.php?profile_id=2735

[23] Saturday, October 20, 1973. President Nixon ordered Attorney General Elliott Richardson to fire Special Prosecutor Archibald Cox. Richardson refused and resigned. President Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox, and Ruckelshaus also refused and resigned. President Nixon then ordered Solicitor General Robert Bork to fire Cox, and Bork did so. Impeachment proceedings against President Nixon began shortly thereafter.

aware of that at the time?

JUDGE EASTERBROOK: Oh yes. You could hardly not be. It was a little worse than that, too, because after I graduated from law school, instead of taking the bar exam that summer, I went and took a tour of Japan for

00:23:46 about six weeks before then moving to Cambridge and taking up my clerkship. That meant I had to study for and take the bar exam the next summer. And that summer, the House of Representatives was holding impeachment hearings into President Nixon. So while I was supposed to be studying for the bar exam, what I was in fact doing, was sitting rapt in front of the TV, watching. I knew that the questions and answers at

00:24:21 these hearings were not going to feature prominently on the bar exam. I was just hoping that what had happened in law school would stand me in good stead. It did, mercifully,

00:24:30 but this whole sequence had a curious

consequence. I was going to the Solicitor General's Office and going to have practice in the Supreme Court. You can't be a member of the Supreme Court's bar for three years after you have been a member of the bar of the highest court of some state. I didn't become a member of
00:24:55 any state bar until December of 1975 which meant, technically, I couldn't be a member of the Supreme Court's bar until late 1978. There I was, briefing and arguing cases in the Supreme Court -- anyway. The Solicitor General had to keep filing applications for me to argue pro hac vice, which he persisted in doing until one day the clerk of the court, Mike Rodak[24], called the Solicitor
00:25:22 General and said: "I've been instructed by the Chief Justice to tell you to stop filing those applications. We'll just let Mr.

[24] Michael Rodak, Jr., Clerk of the Supreme Court of the United States, 1972-81.

Easterbrook argue." [Laughter]

00:25:36 PROF. ROSENKRANZ: Was Bob Bork[25] aware that you had only taken the bar recently when he hired you?

JUDGE EASTERBROOK: Oh yes. Oh yes, he knew that. [Laughter]

PROF. ROSENKRANZ: When you were following the impeachment hearings and the news at the time, were you

00:25:53 already considering a career in government? I imagine many people were disgusted by government during that moment in time. You were getting ready to jump in, is that right?

JUDGE EASTERBROOK: Absolutely. I thought when I went to law school that I wanted to practice law. I wanted to do some litigation. I thought I wanted to be in government. And I thought I would-- since what

[25] Robert Bork (1927-2012) served as Solicitor General of the United States (1973-77). Before that, he had been a renowned professor and scholar at Yale Law School. He would later serve as Circuit Judge of the U.S Court of Appeals for the D.C. Circuit (1982-88). In 1987, President Reagan nominated Bork to the Supreme Court of the United States, but the Senate declined to confirm him.

00:26:21 law school does is teach people to analyze judicial opinions, mostly to explain where the judges went wrong -- I thought it'd be good to try and see if I could do it right. I've gotten-

00:26:33 - I'm very thankful for the opportunity to have been able to do all of those things. But you take your chances, you take your opportunities, when you can, and, of course, the place where I had the opportunity at the time was to go to work for the man who carried out the Saturday Night Massacre, Robert Bork.

00:26:52 PROF. ROSENKRANZ: Were you concerned that he would be gone, and the position would be gone? Was there any danger of that?

JUDGE EASTERBROOK: That the Solicitor General's Office would be gone? No. By the time I interviewed, Bork was no longer the Acting Attorney General. After

Elliot Richardson[26] resigned and Donald Ruckelshaus[27] was fired, Bork was

00:27:13 Acting Attorney General until William Bart Saxbe[28] was confirmed. By the time I interviewed, Bork was back in his job as just the Solicitor General. As Bob said, at the time,

00:27:29 and said later when he was nominated to the Supreme Court, his plan had been to fire Cox[29] and resign. And Elliot Richardson talked him out of it. He'd said: If that happens the Department of Justice gets decapitated; somebody has to stay around here and run a professional

00:27:50 Department. So Bob stayed. And nobody wanted him to leave. He was a fabulous Solicitor General.

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[26] Elliott Richardson (1920-1999) served as Attorney General of the United States, May 25 - October 20, 1973.
[27] Sic. William Doyle Ruckelshaus (1932-2019) served as Deputy Attorney General of the United States, July 9 – October 20, 1973.
[28] William Bart Saxbe (1916-2010) served as Attorney General of the United States, 1974-75.
[29] Archibald Cox (1912-2004), former Solicitor General of the United States (1961-65), served as Special Prosecutor for the Watergate investigation, May 18 – October 20, 1973.

PROF. ROSENKRANZ: Was the Justice Department itself in a bit of turmoil or had everything settled down by the time you arrived?

JUDGE EASTERBROOK: The phrase "settle down" just doesn't ever mix with Washington, D.C. It's, as you well know, a political world where there are always clashing political

00:28:26 forces. Saxbe was not a good fit as Attorney General and people understood that, and he was pretty soon replaced by Edward Levi[30]. Edward Levi made some changes across the

00:28:43 Department, including, of course, the FBI, where he set up guidelines for FBI investigations. Every different Attorney General, indeed, every different Assistant Attorney General, has his own ideas for how to run the Department. And so there is

[30] Edward Levi (1911-2000), had been President of the University of Chicago, 1968-75, and then served as Attorney General of the United States, 1975-77.

institutional turmoil. I don't have a sense that there was any more during, say, the

00:29:05 Levi years than there was during the Griffin Bell years when Jimmy Carter was president. I ended up being in the office for five years, the first two and a half during the Ford Administration with Bork, and the next two and a half during the Carter Administration with Solicitor General Wade McCree. There was always infighting. There were always difficult issues, difficult

00:29:32 substantive issues. There were always difficult personnel issues at different places in the Department. That's just the way government works, and if it worked the way Max Weber[31]

00:29:44 thought a bureaucracy worked as some kind of clockwork mechanism, it really wouldn't be any fun to be

[31] Max Weber (1864–1920) was a German sociologist, philosopher, jurist, and political economist. https://plato.stanford.edu/entries/weber/

there.

PROF. ROSENKRANZ: As I recall, *The Washington Post* was concerned that the office was going downhill [Laughter] when they brought you on board.

00:30:03 JUDGE EASTERBROOK: Oh yes. *The Washington Post* thought they had good evidence that the Solicitor General's Office had gone to the dogs. They wrote a piece saying: For years, the best appellate advocates have been hired in the Solicitor General's Office; people who are experienced at handling appellate work needed to go to the Supreme Court; but it's obvious that Solicitor General Bork is wounded because he can't attract

00:30:31 that kind of person anymore. They gave as an example, the three most recent hires, who *The Post* was convinced were, if not ne'er-do-wells, at least people of no account. The

00:30:45 three most recent hires were Danny

Boggs, Robert Reich, and me! Well Danny went on to be Deputy Secretary of Energy and a Judge of the Sixth Circuit. Robert Reich went on to be the Head of the Bureau of Consumer Protection at the FTC[32], a professor at the Kennedy School, Secretary of Labor in the Clinton Administration,

00:31:07 and a professor again. And then there is me: I may still be the ne'er-do-well of that group. But the thought that, by identifying Boggs, Reich, and Easterbrook as these people had -- obviously showing the Solicitor General's Office had come upon really hard times. [Laughter]

PROF. ROSENKRANZ: It was in fact an extremely strong office, actually.

00:31:27 JUDGE EASTERBROOK: It was an extraordinary office and not that the three of us were any particular standouts. There were people there who had indeed, as *The Post* said, had

[32] Federal Trade Commission.

a lot

00:31:47 of appellate experience. There were people who had less appellate experience but were very smart. It was an office where everybody worked together and perfected the job of being a good legal generalist by handing work around, and talking to one another all the time -- in the

00:32:09 corridors, at the Office's institutional 5:00pm game of darts in Ken Geller's office. But when you worked on a brief, you would hand it around to other people who knew nothing about the case, and get comments about -- what does this look like for another really smart, well-read generalist, because that's the audience you're dealing with at the Supreme Court. The group at the time had included Danny Friedman. He was

00:32:43 the Chief Deputy, and he would go on to be the Chief Judge of what became the Federal Circuit. It included

Larry Wallace[33]. It included Andy Frey[34], called the "Criminal

00:32:58 Deputy", although I would have much preferred to call him the Deputy with the criminal portfolio. We never thought of Andy as a-- well, you get the picture. [Laughter] It included Keith Jones. It included Ray Randolph[35]. The number of people in the office there who have gone on to outstanding careers was quite high.

00:33:20 PROF. ROSENKRANZ: Bork, of course, had been an academic before going to the Department.

JUDGE EASTERBROOK: Mm-hm.

PROF. ROSENKRANZ: It sounds like he ran the office a bit like a seminar with sharing of work. Is that-?

JUDGE EASTERBROOK: Yes. He did,

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[33] Lawrence Gerald Wallace (1931-2020) served as Assistant to the Solicitor General, 1968-70, and then as Deputy Solicitor General, 1970-2003. He argued 157 cases before the U.S. Supreme Court, more than any other civil servant in history, and more than anyone else in the twentieth century.

[34] Andrew L. Frey, served as Assistant to the Solicitor General, 1972-73, and Deputy Solicitor General, 1973-86. https://www.mayerbrown.com/en/people/f/frey-andrew-l?tab=overview

[35] A. Raymond Randolph, Senior Judge, U.S. Court of Appeals for the D.C. Circuit.

indeed. He wanted people to talk things through. The talking took -- not just conversations among the
00:33:42 assistants and the deputies-- the talking was institutional, in the sense that it's been and still is the policy of the Solicitor General to listen to anybody about cases pending
00:33:58 in the Supreme Court where the SG might file something. That "anybody" includes people at the Departments, at cabinet Departments whose interests are at stake. In one case, John Hart Ely[36], who was then the General Counsel of the Department of Transportation, came
00:34:17 and complained loudly that the SG's Office was a bunch of know-nothings and wasn't carrying out transportation policy. But we would also listen to anybody from outside the office -- the attorneys involved

[36] John Hart Ely (1938-2003) later served as Professor of Law and then Dean of Stanford Law School, and he is one of the most widely cited legal scholars of all time.

in the case, potential amici -- so these would be running discussions, with a fairly broad base.

PROF. ROSENKRANZ: You argued some 20 cases at the Court in that period and then in private practice.

00:34:45 JUDGE EASTERBROOK: Yes, I argued 16 cases when I was in the Solicitor General's Office. After I left to go to the Law School, the SG's Office brought me back for a

00:34:56 17th case where I had worked on the brief. So I came back as a consultant from the academy to argue the 17th case. Then I was hired as a private counsel to argue three cases in the Supreme Court. So I was getting my opportunity to have a good appellate practice.

PROF. ROSENKRANZ: Do you think that

00:35:15 experience has informed your work as a judge?

JUDGE EASTERBROOK: Oh, informed my work as a judge very powerfully. The job of an advocate is to be able to

understand the case from every perspective. If you can't understand it from every perspective, you can't possibly be a good advocate. You can't see the right line to take if you can't go back, open the case up,

00:35:46 and just take it apart and put it back together again. Then, you make the best argument you can. And sometimes, in the Solicitor General's Office, we were worried that we were

00:35:58 trying to sell the Justices a bill of goods, because we could see the weaknesses in our argument, but our job was to overcome them to take the position that the Executive branch of government, or sometimes Congress, wanted taken. When you've done all the work to be able to do that, I

00:36:20 think you're well-positioned as a judge to see what you're doing when you're reading the lawyer's briefs. Then to take them apart and then to put something back together where you try to observe the bill of goods

you're being sold, look through it, and then come up with a correct answer in the opinion. Of course, there is also a huge overlap with the work of the scholar. Scholars try to do the same thing, from a different perspective,

00:36:47 but roughly the same kind of thing.

PROF. ROSENKRANZ: Do you remember any arguments in particular, or particular interactions with Justices that were noteworthy from that time?

00:37:01 JUDGE EASTERBROOK: Oh, many of the arguments were quite distinctive, but the single argument I most vividly remember, which was most interesting, was the 1 of my 20 cases that was never decided, and it was too bad. We were representing a Senator whose committee, the Senate equivalent of the House Un-American Activities

00:37:24 Committee, had been investigating something. The Senator sent out an investigator who acquired some documents, and a lawsuit follows

saying that the acquisition violated the Fourth Amendment. The Senator and the investigator invoked the Speech or Debate Clause of the Constitution saying: this is legislative material; we can't be questioned for legislative matters in
00:37:51 any other place. It's a difficult argument to make because, of course, the documents were not acquired in the halls of Congress, but they're being acquired as an input into
00:38:10 what's going on. The Supreme Court's cases contain language looking in every which direction about it. The DC Circuit decided against the Senator and the aide, and, on their behalf, we took their case to the Supreme Court. I do the brief,[37] present the oral argument. Things have gone
00:38:32 wrong by the time of the oral argument. The Senator has died;

[37] *McClellan v. McSurely*, 1977 WL 189673 (U.S.).

there has been a substitution. There are now questions about survivorship, about who is the right party, about whether estates can make Speech or Debate Clause immunity. But I stand up, and, of course, the Justices are worried, as they always are about the extremes, so I get questions like: "suppose the Senator beat the witness with a cane during the hearing?"

00:39:00 That, by the way, has happened in the history of Congress.

PROF. ROSENKRANZ: Mm-hm.

JUDGE EASTERBROOK: The members of Congress have beaten each other with

00:39:07 canes! That is why there is a Sergeant at Arms in both chambers!

[Laughter]

PROF. ROSENKRANZ: That's right.

JUDGE EASTERBROOK: Right. You get questions: is that covered by the Speech or Debate Clause? Now, I am representing this person. I have to say, "yes, sir" and give the best

00:39:23 argument I can. I can't give away

the Senator's position. This argument-- the questions started as soon as the phrase, "Mr. Chief Justice may it please the Court," had gotten out of my mouth. Questions -- hostile questions -- go on for half an hour. My time expires. I sit down. Phew! The other side gets up, and hostile questions follow for half an hour. At the end of which, I supposed, I

00:39:50 could go home and finally relax. The Chief Justice said, "Mr. Easterbrook, we asked you a lot of questions, so I'm giving you 15 extra minutes for rebuttal." I had never heard the

00:40:04 Chief Justice give anybody 30 seconds extra time. [Laughter] I stood up; I had nothing to say; I had not been planning to do it. But it was okay: They asked me 15 more minutes of hostile questions right through! There it was, the beginning of the term, fascinating issues, lots of

00:40:25 questions. November, December,

January, February, March, April, May, June… the end of the term. The last day of the term arrives. At last, they are going to decide this case. I was there in court, with many others, to receive the decision. Nothing happens. We get the order list when we get back to the SG's Office. The order list has one line: "The Writ of Certiorari is dismissed as

00:40:53 improvidently granted,"[38] period. [Laughter] About six months later, at a private function, one of the Justices[39] came up to me and said: "you know, that case was just too difficult

00:41:07 for us". [Laughter] So there you are. I argued 20 cases, got 19 decisions, and 1 that the Justices said was too difficult for them, so they were just going to give up.

PROF. ROSENKRANZ: 45 minutes of

[38] *McAdams v. McSurely*, 438 U.S. 189 (1978).
[39] Justice Stevens. See 15 Scribes J. Legal Writing 9 (2013).

hostile questions for nothing.

JUDGE EASTERBROOK: Yes. Well, another one of my memorable

00:41:25 experiences was one, a case that I didn't argue. Late in the Ford presidency, the Congress passed the Presidential Records Act which essentially confiscated Richard Nixon's tapes and papers, and then provided the future presidential papers would be public documents. Former President Nixon immediately attacks that as a Bill of Attainder, a violation of the Equal Protection

00:41:58 Clause, and probably transgressing the Declaration of the Rights of Man. It was a broad-based lawsuit. After *US v. Nixon*[40] said there was a presidential privilege, one of the

00:42:15 important questions in that case was: Would putting these papers in the archives -- subject to the kind of screening allowed by the statute--

[40] 418 U.S. 683 (1974)

would that really make it hard for presidents to get the views of advisors? Nixon's lawyers were saying yes -- as you would expect; he

00:42:38 was their client and he was taking that position. I'm a young lawyer in the office of the Solicitor General, assigned with writing the brief in this case. It doesn't really matter to me, or to my colleagues, what Richard Nixon's lawyers are saying. I want to know what Gerald Ford thinks, because he is the President. He is the first one who is going to be subject to this Act normally. You want to know what the president

00:43:04 thinks of this. Solicitor General Bork, via Attorney General Levi, sends the question over to the White House. What do you think, Mr. President? What should we be telling

00:43:19 the Supreme Court? Gerald Ford had seen far too much public discourse over claims that Nixon, or some of his officials, had interfered in the

administration of justice. And so, even though this question was asked of him by his own Department of Justice, he refused to answer. I get the answer back from the White House:

00:43:45 Mr. Solicitor General, make up your own mind. Excuse me, I'm a recent law graduate; how can I make up my mind about what will impede the duties of the President of the United States? I write some stuff down that seems sensible to me. The brief isn't due yet when President Carter takes office, and Griffin Bell becomes Attorney General, and before we filed the brief, we did it again.

00:44:15 We sent the draft of the brief, via Attorney General Bell, to the Carter White House. The answer came back: Mr. Solicitor General, make up your own mind -- I haven't been President

00:44:26 long enough to know. So this brief is filed in the Supreme Court by somebody who is a recent graduate of law school, has no real insight, and

is relying on what you read in *The Washington Post*. It's not a great way to do it. This case goes to the Supreme Court. I didn't argue that

00:44:52 case; that's the kind of case that had to be argued by higher-ups in the world. But the Supreme Court sustains it, and says roughly: well, we have been told by this recent law school graduate that this law won't hamper the President, so that must be right.[41] [Laughter] It can't be the way the world should work, but it did make for an interesting case. If you want me to tell you more, I can tell you more interesting stories.

00:45:18 PROF. ROSENKRANZ: Yes, please do.

JUDGE EASTERBROOK: I will tell you two more then from toward the end of

[41] See *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977)("[T]he fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.").

my time, when I was a Deputy Solicitor General. One of them: As I
00:45:33 said, we would – the Solicitor General would listen to anyone, and particularly anyone within the government who was concerned about the outcome. One of the cases that reached the Supreme Court in my last year in the Solicitor General's Office, was a case in which the Occupational Safety and Health Administration had
00:45:53 ordered manufacturers to reduce the concentration of benzene in the air to a very, very low level. The industry said: by our best calculation, it's going to cost two or three billion dollars per life saved. You need to do some kind of cost/benefit analysis, and on any cost/benefit analysis, this is going to flop. If you look at where the government can intervene to save
00:46:21 lives, the cheapest life-saving options are better highway design,

and broader shoulders, and shallower curbs. Money spent on highway design: that costs about $75,000

00:46:37 per life saved. Why should OSHA be spending $2 billion per life saved, when you could save many more lives with much less money by intervening on highways or by cleaning up coal plants? Sulfur dioxide is a big killer. The industry says, this has got to be

00:46:56 cost/benefit regulation. The Department of Labor is our client and OSHA is part of the Department of Labor. In the Solicitor General's Office, some assistants and I worked hard on the case, and concluded that there is a respectable legal argument that OSHA's command is to be done without regard to cost. We prepared a brief to that effect, and it was circulated to other potentially effected agencies, and

00:47:27 bombs went off elsewhere in the federal government. Alfred Kahn, the

White House's chief cost-control officer came streaming over to my office and said: you can't do this.

00:47:40 He was accompanied by the General Counsel of the EPA, the head of the Forest Service, a whole bunch of other people who have environmental concerns in the government. What they said was, roughly: If OSHA requires this industry to spend all of its available cash on reducing benzene, they won't have the

00:48:02 resources to make other, much more helpful interventions; we have to address this on a government-wide basis to see where resources are best spent. Now Kahn is a wonderful economist; you would expect him to say that. But it was more than a little surprising to me to see the General Counsel of the EPA saying: costs have to be taken into account. This is, you know, Jimmy Carter's

00:48:27 Administration: Costs have to be taken into account; we can't have

this. I said to this assembled group: Our client here is the Department of Labor. Can you sell
00:48:43 this position to the Secretary of Labor? There is a legally-respectable position either way. Can you sell this to the Department of Labor, and if not, Mr. Kahn, can you get the President to tell Secretary Marshall that he has to cave on this issue? So, back they go to the
00:49:08 White House and to the Department of Labor. Secretary Marshall refuses to budge. The President refuses to intervene. The Attorney General, who has been hearing from all these people, says: Can we ask the Supreme Court for more time until we can work this out? And my response to the Attorney General was: If the President is indicating that he is going to squelch the Secretary of Labor, we can come out the other way,
00:49:31 but if not, we have to do what our

client says.[42] And you remember what happened in that case. The Supreme Court didn't reach the merits in that case, the benzene case[43]; but the next

00:49:45 year, the same issue, whether cost/benefit analysis was required, comes up in the cotton dust case,[44] and they side with the Secretary of Labor, against the EPA, against the cost officials at the White House. So the Solicitor General was vindicated by the legal argument, but I don't think that he will be vindicated in the

00:50:06 court of history. It was a bad thing for the government to do for the very reason that Alfred Kahn and the General Counsel of the EPA were saying: the government needs its own coordinated policy. Of course, when President Reagan was elected, he

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[42] Brief for the Federal Parties, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (Nos. 78-911, 78-1036), 1979 WL 199556.
[43] *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).
[44] *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 US 490 (1981).

really wanted the OMB to take over and be in charge in a way that Alfred Kahn was not allowed to be in charge in the Carter Administration. It may

00:50:35 be that these cases led to some change in the structure of the government, maybe for the good, but not strictly as a result of the legal argument. I will give you one more:

00:50:49 a subject dear to my heart because it involves corporate and securities law. When I was in the Solicitor General's Office, the SEC and the US Attorney in New York were pursuing inside traders. They didn't really know what inside trading was. Classic inside trading is where, say,

00:51:11 the corporate managers get information about what their corporation is doing, and they buy or sell the corporation's shares ahead. But there is lots of other trading, as an economist would say, trading on asymmetric information. Trading that you have, and other people does not.

Some of it you get by generating the information yourself. And the case that came to the Supreme Court, its name was *Chiarella v. United*

*00:51:38* *States*.[45] Somebody is going to make a tender offer for some other company. The person who is going to make the tender offer knows all about it, and it's perfectly legal for them to

00:51:50 buy the target's shares in advance of the offer (although at the time, when they hit 10% ownership, they had to make a public disclosure under the Williams Act[46]). The bidder, potential bidder, wants to use that, the value of that information for its own advantage and not have it leak. But of course, it has to prepare and

00:52:10 file-- and have printed -- papers with this information, both when they hit the 10% line and when they make the tender offer. So they sign a

[45] 441 U.S. 942 (1980)
[46] The Williams Act refers to 1968 amendments to the Securities Exchange Act of 1934 enacted in 1968 regarding tender offers.

contract with their printer which says the printer promises not to use any of this information. In fact, they even put the names of the targets, and the price, and a whole bunch of other things, in code in these papers, with the code to be changed at the very

00:52:36 last time. One of the printers breaks the code, ignores his promises, trades on the information, and is prosecuted for trading on inside information. And he is

00:52:47 convicted. On appeal, the United States Attorney for the Southern District of New York says: the problem in this case -- this was obviously not classic inside trading -- the problem in this case is that the guy who was out buying stock had information that the sellers didn't;

00:53:12 we want you to say that all trading on asymmetric information is a federal felony. And the Second

Circuit says exactly that.[47] Well, if that were true, stock markets would collapse. The only reason that people go out and trade is because they think they have some extra information. Or people go out and investigate and find the truth and trade on what they have found. If you make it a federal crime to trade

00:53:42 on the news that you've scared up yourself, you've destroyed the major incentive for the efficiency of stock prices. So, this case comes to the Solicitor General's Office. The guy I

00:53:56 worked with, the Assistant to the Solicitor General I worked with, is Steve Shapiro, who went on to become a famous lawyer in his own right as the head of the Mayer Brown appellate practice group. Steve and I realized that the decision of the Second Circuit cannot be defended. Can we

[47] See United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978).

defend the judgement? Well, yes, if
00:54:20 you define inside trading the right way. It's always been a problem in the law of inside trading. What is it that prohibited these managers from trading? There is no law about that. There is a law about short-swing profits, that's Section 16b of the Securities Act, but there is no law about inside trading. This is all made up. What are you making this up for? The answer that Steve and I
00:54:42 reached was: it depends on whose information it is. If it's your information, if you generate the information, you can use it. If you are stealing it from somebody else,
00:54:56 that's a crime, and it is fraud in connection with the purchase or sale of securities. It's not a fraud about the securities; it's not a fraud about the price of the securities; but it's a fraud "in connection with". And that's the way

the statute is worded.[48] We take this
00:55:13 position in the *Chiarella* case -- it's come to be called the Property Rights Theory -- in an effort to defend this. The Supreme Court is having none of that, because, of course, it had not been argued in the Second Circuit. This is always a problem in the SG's Office where we are making up new theories. You always have to persuade the Justices that these wonderful new theories are something they can reach. So this
00:55:38 theory is noted; they reversed the criminal judgement; the Second Circuit's theory is disapproved. The Property Rights Theory is noted, but not resolved. Long after I left the
00:55:56 SG's Office, in another tender offer case, this time a partner of a law firm steals the information about a pending tender offer and trades. This time the government makes the

[48] 15 U.S.C. 78j(b).

argument that Steve Shapiro and I came up with, and the Supreme Court buys it and finally puts inside trading law on a firm

00:56:17 intellectual foundation.[49] That process lasted 20 years, and it was wonderful to have been in there on the start even though I wasn't there at the end.

PROF. ROSENKRANZ: The US Attorney's argument before the Second Circuit would have been supervised by the Solicitor General's Office? No?

JUDGE EASTERBROOK: No. US Attorneys' Offices are self-

00:56:37 regulating. The Solicitor General's Office handles litigation for the United States in the Supreme Court, and has two approval functions. If the US loses in the Court of Appeals,

00:56:54 and wants to file a petition for rehearing *en banc*, that needs to the SG's approval. And if the US loses

[49] *United States v. O'Hagan*, 521 U.S. 642 (1997).

in the district court, the Solicitor General has to decide whether to take an appeal. So the SG's Office gets memos from litigating divisions about
00:57:12 appellate and district court losses to see whether to go to the next step, but it's not supervised. One of the frustrations, actually, about this process was that we would get an appeal memo from some division, and the appeal memo would suggest making a bad argument. Basically: here is the bad argument that lost in the district court; let's make it again in the court of appeals. No, no, no, no. It lost in the district court
00:57:31 because it was a bad argument. But there is a good argument. Somebody in the SG's Office would write the memo saying: the good argument is…. These papers would go
00:57:42 back; the appeal would be approved; the appeal would be taken. And we would see it again after it had been lost in the court of appeals with no

mention of the good argument. And I would get on the phone and say, well, would you send me a copy of your brief? I want to see why they didn't respond to that argument. And the

00:58:06 lawyer would say, well, what argument? We didn't make any argument like that. No, the US Attorney's Office is not being supervised by the Solicitor General's Office, and they aren't even necessarily reading the memos that tell them what arguments they ought to be making.

PROF. ROSENKRANZ: I can recall an Assistant US Attorney making an

00:58:27 argument in the Seventh Circuit, and you saying: Are you aware that an AUSA in Florida is making the exact opposite argument this week?

JUDGE EASTERBROOK: Oh, we sometimes

00:58:41 see that from within the Circuit. I've asked -- lawyer from Milwaukee argues this -- are you aware that the lawyer from South Bend is making the

opposite argument? Or: are you aware that last week the Solicitor General filed a brief in the Supreme Court taking the opposite position? Well,

00:58:57 you might want to go back and check to see what the Department of Justice thinks about this. And we sometimes get, at that point: sorry, we're withdrawing this argument. The Department of Justice, "Main Justice", as it's called, offers advice and sometimes sends out circulars about a lot of pending legal issues. They're not always read and followed until somebody says: you need to go check with guys in Washington, DC.

00:59:23 PROF. ROSENKRANZ: Do you think that Main Justice should more carefully supervise the US Attorneys' Offices?
JUDGE EASTERBROOK: But what are the options, right? Most of the

00:59:34 personnel involved in the Department of Justice work in the US Attorneys' Offices. That's where the litigation

is centralized. The people at Main Justice handle some cases of national import, spend much more time relatively on appeals than on trials, have some advice functions; but, basically, if you are doing

00:59:59 particularly criminal law, the criminal lawyers employed by the United States are in the US Attorney's office. Main Justice is very small. You couldn't have them take over without moving people en bloc from the US Attorney's office to the Department of Justice. The main problem is not that allocation. The main problem is: the Department of Justice, if you include the US

01:00:22 Attorney's office, is an immense law firm, and you can't keep everybody in touch with everybody else about everything at that law firm all the time. It's not physically possible.

01:00:37 It's almost impossible for a large, private law firm with 1,000 lawyers to keep in touch and avoid conflicts

where one person is arguing against the interest of another client. In a much bigger organization, like the Department of Justice, it's just a hopeless task. You do the best you

01:00:54 can when you see problems develop. It's feasible when you reach the Supreme Court, because its docket is so small compared to the, say, dockets of the courts of appeals. The courts of appeals handle 50,000 cases a year. The Supreme Court resolves 80 these days. The Solicitor General's Office can keep all of that consistent, but for the whole operation, no way.

PROF. ROSENKRANZ: So, in 1976, President

01:01:28 Carter is elected and McCree becomes Solicitor General. One can imagine him wanting to clean house or something, but, to the contrary, he quickly promotes you to Deputy

01:01:44 Solicitor General, at, I believe, age 29. A dream job for a lawyer in his

20s. [Laughter]

JUDGE EASTERBROOK: Something like that, although somebody younger than that had been Solicitor General: the man with the greatest career in the history of American law, William Howard Taft, who was Solicitor General, I think, at age

01:02:01 27, something like that. [Laughter] Anyway, yes, you could imagine somebody wanting to come and clean house, but you can't really imagine that of the Solicitor General. The history of the Solicitor General's Office, from the beginning until now, has been one in which the Office is professionally staffed. And, until recently, the only political appointee was the Solicitor General

01:02:28 in person. The first time that changed was when Bob Bork was appointed as Solicitor General, and President Nixon announced the Jewel Lafontant would be the Deputy

01:02:42 Solicitor General. It wasn't clear

that President Nixon understood that there were already Deputy Solicitors General, and Jewel was added to the staff but not as the Principal Deputy. When she left, that position of, what, politically-appointed Deputy, was not replaced. Nothing happened

01:03:05 again along those lines. Everything went forward until the Reagan Administration, when a friend of mine, Larry Wallace, who was then the Principal Deputy, the oldest running Deputy, took a position in the Supreme Court that was -- because the Solicitor General was disqualified -- took a position that was not, did not go over well with his superiors. (Although it, in the end, went over well with the Justices.) And at that

01:03:41 point, Solicitor General Lee brought in Charles Fried from Harvard to be his new Principal Deputy, and that position has kept on. The tradition of it has become that that position

01:04:04 is somebody who could be Solicitor General himself-- which of course was true; Fried became Solicitor General in his own right -- and somebody with absolutely sterling credentials: professor of law, a really top appellate advocate …. One of the people who filled that position was somebody whose name everybody now knows. It

01:04:25 was John Roberts. He was the Principal Deputy. That kind of thing is, however, just completely compatible with running the office as a career -- a place where people can make a career (and where some people have), and where there is no cleaning house. The normal tenure for an Assistant, when I was there, was maybe two or three years. I was there for five years. Harriet Shapiro, who had

01:04:56 been there longest as an Assistant, was there, ultimately, for more than 20 years. Danny Friedman and then

Larry Wallace were there for more than 30 years each. Danny went on to become

01:05:10 a judge.[50] Larry retired. And we've now had another retirement in that area: Michael Dreeben was the Criminal Deputy, sorry about that, "the Deputy with the Criminal Portfolio", for 30 years through administrations with vastly different jurisprudences, has just now retired and gone to join the faculty at your law school,

01:05:33 Georgetown.[51]

PROF. ROSENKRANZ: That's right. We are delighted to have him. So, when you've become Deputy Solicitor General, I trust you've also become a Member of the Supreme Court Bar by that point.

JUDGE EASTERBROOK: I may have become Deputy Solicitor General before I was a member of the Supreme Court's Bar,

[50] https://www.fjc.gov/history/judges/friedman-daniel-mortimer
[51] https://www.law.georgetown.edu/faculty/michael-dreeben/

but it was after the Justices had said, stop filing those motions for

01:05:59 leave to argue *pro hac vice*! It still mattered in one way. If you look in the US Reports, it lists the names of lawyers on the briefs, but only if you were a member of the

01:06:14 Supreme Court's Bar. So there were an awful lot of cases in which I wrote or edited and signed the brief, in which my name doesn't appear in the US Reports, but it does appear in the West publications or the Lawyers Co-op publications.

PROF. ROSENKRANZ: Deputy Solicitor General, of course a dream job, but

01:06:36 you decided to leave. Why was that? What prompted it?

JUDGE EASTERBROOK: I had long thought, as I said at the outset, that I wanted to be a scholar as well as a practitioner. That seemed about, after five years in the SG's Office, I was still having a blast but, you know, as I said earlier

people make their contributions in physics when they're

01:07:03 young. Legal scholars don't make their contributions quite that young. After five years in the SG's Office, I had been out of law school for six years. My

01:07:15 impression then, and still now, was that people who begin a career in the legal academy much later than that may be too much in the world of practice and not enough in the world of scholarly endeavor. I thought it was about time to go, in the hope that I would still be able to do some

01:07:34 practice on the side. Off I went, interviewed at several law schools. At one of them, the law school from which you graduated, Yale, the Dean, knowing that I was interested in music, made a very curious pitch. This was Harry Wellington when he was Dean. He said: look you should really come to Yale because New Haven is only two hours from New York, so

you can go in, watch the Metropolitan Opera, come back; it's really right

01:08:01 there. And I said, but Dean Wellington, if I go to Chicago, I can just walk across the street to go to the Opera.

PROF. ROSENKRANZ: I've always

01:08:16 considered it to be a powerful argument for Yale that it's only two hours from New York. [Laughter] So, we talked a bit about what it was like to encounter this legendary faculty at University of Chicago as a student. What was it like to go back there and then join them as a colleague?

01:08:36 JUDGE EASTERBROOK: Well, some of the ones I mentioned, like Casey Davis, had retired by then. But joining them as a colleague was just wonderful. The tradition at Chicago is that, from the moment you walk in the door on the faculty, you are treated as if you had been there for a long time. You are on a first-name basis for

everyone, and as is sometimes put, the only question anybody on the

01:08:57 faculty ever asks of anybody else is, one or another version of: so, what are you working on now? Everyone is encouraged to do scholarly work, to circulate it to other members of the

01:09:11 faculty, to comment on other people's work. It's a great group right from the beginning. One of the ways Chicago indicates that is that when there are faculty votes, including tenure votes, everybody, including somebody who just walked in the door, has the same vote as everybody else.

01:09:34 We're all in this together. It makes for a great, productive, intellectual atmosphere.

PROF. ROSENKRANZ: It's a famously rigorous, intellectual culture. To what do you attribute that?

JUDGE EASTERBROOK: There are two things, I think. One is just Chicago winter. If you are locked up indoors with these other people, you had

better get along with them well and do the best you can. And the other

01:09:57 is the people. The culture is made by the people and the people make the culture. It's an interactive effect. I mentioned earlier that Chicago, right from its beginning, wanted to

01:10:13 treat law as one of the social sciences, and one of the parts of the social-science culture is presenting workshops at which people are questioned, sometimes quite vigorously, about what they're doing. They have to defend themselves, and if they can't defend themselves, well, you better go back to the

01:10:36 drawing board and do something. There was a notorious episode in maybe my third of fourth year on the faculty, where a paper was presented in the law and economics workshop, by a famous professor of finance who in later years won the Nobel Prize in economics. It was about attempting to explain why security interests

existed. It's a very hard question, because, of course, the secured party

01:11:07 can pay a lower interest rate, but everybody else is going to pay a higher interest rate, because some of the assets are already spoken for as security. Somebody must be inducing

01:11:17 somebody to monitor. This famous finance professor wrote a paper in which he assumed that the secured party stood last in line to recover assets in the event of bankruptcy, and that would lead the secured party to monitor more. About two minutes into the talk, somebody -- it was actually

01:11:37 me – said: now, if I'm correct, the fundamental assumption of this paper is that somebody who holds a security interest is last in line in bankruptcy. Is that right? And he said: oh yes, is there any problem with that? I said, yes, in bankruptcies, he's first in line. And I then said: next paper.

[Laughter] The author of this paper said: well, okay, this paper is now worthless, but here is another one I am working on,

01:12:08 and I'm going to give that -- and he did! This is Chicago, right? A paper can just be dismissed like that, but the guy is working on more. That's Chicago for you.

01:12:21 PROF. ROSENKRANZ: You used to bring us to the University of Chicago Law and Economics workshop when we were clerks. I can recall the first question often was, how is this different from what Condorcet[52] said in 1775? Things like this.

JUDGE EASTERBROOK: Yes, you have to

01:12:39 be prepared to defend your ideas, and often you discover the ideas are indefensible. One of the stories that floated around the law school and the economics department, often

[52] Nicolas de Condorcet (1743-1794) was a French philosopher and mathematician. He was an Enlightenment thinker who supported a liberal economy, free public education, constitutional government, and equal rights for all humans. https://plato.stanford.edu/entries/histfem-condorcet/

told by George Stigler, was that one of the papers presented was a draft of what would become Ronald Coase's The Problem of Social Cost. He was explaining in this paper why the rule of liability doesn't matter in a

01:13:05 world of zero transactions costs where people can negotiate with each other. Everybody knew, based on the work of A.C. Pigou[53], that that was wrong. The assignment of liability had to matter. And they

01:13:26 spent the whole hour-and-a-half workshop explaining to Coase why he was wrong. Coase defended himself for an hour and a half. And then, as is common at a Chicago workshop, the members of the faculty involved recessed for dinner. By the end of the dinner, Coase had persuaded

01:13:43 everybody else that he was right. Everything had turned around. It was a three-hour experience in which

[53] https://www.econlib.org/library/Enc/bios/Pigou.html

question followed question and what was obviously wrong at the beginning was obviously right at the end. In more recent years, people have written about it as the Coase tautology: it's so right, it's not subject to being questioned. But when it was presented at the University of Chicago, everybody initially knew it

01:14:07 was wrong.

PROF. ROSENKRANZ: Amazing. Amazing. You were an incredibly productive scholar during this period, writing seminal articles on a wide variety of

01:14:20 topics: on corporate law, and antitrust law, and statutory interpretation, and the role of judges. Was there a theme to your scholarship at that point, or were you going from topic to topic as your interests led you? How were you proceeding?

JUDGE EASTERBROOK: As I said

01:14:37 earlier, one of the reasons why I wanted to go into law is because that

is where you see how everything relates to everything else, and I wanted to explore all of that from beginning to end. One of the problems in the practice of law -- not a problem but a fact -- is that most lawyers are specialized in narrow fields. They do tax, or they do ERISA, or they do one of these

01:15:03 because it doesn't pay to start from scratch over and over. But what I wanted to do in law was to do a little bit of everything -- to be very broad, even at the expense of begin very shallow.

01:15:21 Much could be organized through economics. As I said earlier, I'm on the imperialist side of economics. I think economics is helpful for organizing almost any field of inquiry, but not all of it could be. I wrote about criminal procedure from the perspective of economics, so you

01:15:42 can do a lot of this. And economic insights influenced a lot of what I

was writing about. But I really wanted to be a generalist. I'd been a generalist as a law clerk. I'd been a generalist in the Solicitor General's Office. Even when I was Deputy Solicitor General with the economic portfolio, I was busy doing other pieces of law like original jurisdiction cases and who had water rights in the West. It was just
01:16:10 fabulous to be a generalist, and I thought I would do that as a professor to the extent I could manage. If my colleagues came to me and said, "We like the broad part,
01:16:21 we're not sure we like the shallow part," maybe I was going to have to specialize a bit more. And of course, I did do some specializing, in antitrust, and securities, and corporations; but I wanted to maximum breadth I could manage. That's another reason why I ultimately found judicial work satisfying, because it's a little bit

01:16:45 of everything. By the way, Richard Posner gets some credit for this. He was the chairman of the Appointments Committee when I was in the market, and he pointed out to me at the time that I would need to concentrate in something when I came. He suggested corporations and securities, and he pointed out that the state of the art was pretty primitive, that most of the leading works in that field talked

01:17:16 about fairness as if that was some extrinsic consideration. As Richard Posner pointed out, and anybody could see, this is about economic transactions among consenting adults.

01:17:32 There weren't third party effects. It's not an aspect of poverty law. You are trying to figure out how markets can best be organized, and this is an important part of the organization of markets, so it was a field where economic analysis could really make a dent. And I took that

to

01:17:50 heart and tried to make a dent, and with Daniel Fischel[54], I think we made a little bit of a dent at least.

PROF. ROSENKRANZ: You are anticipating my next question. This period began your collaboration with Fischel, and also you co-edited a book with Richard Posner in this period, the *Antitrust* book.[55]

JUDGE EASTERBROOK: Mm-hm.

PROF. ROSENKRANZ: Can you talk a bit about those collaborations? You have

01:18:19 such a strong, distinctive voice. Were there challenges? How did that process work?

JUDGE EASTERBROOK: No. I worked very well with Professor Posner. I

01:18:29 worked very well with Professor Fischel. And there was one other collaboration at the time: Bill

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[54] Daniel R. Fischel (born 1950) is the emeritus Lee and Brena Freeman Professor of Law and Business and former Dean of University of Chicago Law School. https://www.law.uchicago.edu/faculty/fischel

[55] Richard A. Posner & Frank H. Easterbrook, Antitrust: Cases, Economic Notes and Other Materials (2d ed. 1980).

Landes, Dick Posner, and I did an article together on contribution and claim reduction in antitrust, in which, I will say, all of the equations were contributed by Bill Landes.[56] For all other articles in which there were

01:18:49 equations, I followed the John Langbein rule. When I arrived on the faculty, John Langbein said, "I follow a simple rule: I read an article until I reach the first equation, and then I put it down." After that, all equations in my articles, other than the one with Landes and Posner, were in an appendix, so Langbein had to read the whole thing before he got a chance to put it down! On the

01:19:18 question of collaboration, Dan Fischel had wanted to do that. We first met when -- he four years

[56] *See* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & EcON. 331, 353-64 (1980).

behind me in law school -- we met in DC when he was clerking for Justice Potter

01:19:35 Stewart. And he knew, even then, that he wanted to do corporations and securities and was hoping that I might be amenable. We were working together starting shortly after that. And since we were thinking both along economic lines—and when we weren't writing, we were reading. We were reading the latest

01:19:56 finance literature. We were going to the workshops with the leading finance scholars. You learn an awful lot at Chicago, so the fact that you're in a law school doesn't mean that you're remote. We started talking about how agency costs would influence the allocation of rights in tender offers, and that was our first big article together.[57] Obviously, we

[57] Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981).

wrote lots more and ended up writing a book.[58] But since

01:20:26 we were thinking alike about how to go about this, by thinking about the economics and what would make the most productive set of rules of law for people who wanted to invest and

01:20:42 be entrepreneurs -- you're asking the same questions, you come out in about the same way. With Richard Posner, it was somewhat different, because the casebook that he and I worked on together was, as the introduction to it says, a remote version of a set of materials that Edward Levi and Aaron Director had first put together. In

01:21:05 the early years, when Levi would teach three classes a week on law, and Director would come in the fourth day and explain why everything Levi had taught the last three days was wrong -- because Levi was teaching the cases, and Director would explain

[58] Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1996).

why the cases were all crazy! This was, of course, the focus-- a principle focus, if not the principal focus -- of *The Journal of Law and Economics* when

01:21:30 Aaron Director founded it in 1958. It was to do case studies of the Supreme Court's antitrust cases to show where things had gone wrong. Then the casebook, which Director and

01:21:47 Levi put together, never formally publishing the materials they put together, were a combination of the cases and economic analysis. Dick Posner had then made that more formal and put out an edition as a casebook. The two of us together continued that.[59] We wrote long,

01:22:06 economic notes about these cases. We wanted to-- the two of us agreed that if we were going to ask the students to think about the cases, we really had to give them the cases, so the

[59] Richard A. Posner & Frank H. Easterbrook, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed. 1980).

cases in the Posner and Easterbrook book are very lightly edited. We took out as little as we could, so the students could see how judges were thinking. And then they would be challenged by an economic note about the field, and how would you think
01:22:40 this through, and then maybe some concrete hypotheticals about what's coming next. But this combination of cases and detailed economic notes was something that we both thought
01:22:51 was pedagogically the best way to deal with antitrust law. So, these were very happy collaborations.

PROF. ROSENKRANZ: The first culminated in *The Economic Structure of Corporate Law*, which many think to be the best book written about corporate law, and the *Antitrust* casebook, of course, a fantastic accomplishment as
01:23:09 well. And you're still early in your academic career. Those things were amazing accomplishments. You were

teaching as well, of course. What subjects were you teaching?

JUDGE EASTERBROOK: Well, I was teaching Corporations, and Securities, and Antitrust. When teaching Antitrust, it was in the same tradition. I was co-teaching it with Bill Landes. And I would do the legal

01:23:36 parts, and Landes would do the economic parts. But I tended to get into the economics much more than Edward Levi had, and Bill Landes tended to get into the law much more than Aaron Director

01:23:50 had, so it was much more of a co-taught course. But I wanted to branch out. I insisted on getting the chance to teach criminal procedure, and I shocked my faculty members, my fellow faculty members, by saying: if you let me teach criminal procedure, I'm going to teach criminal

01:24:05 procedure. That is, I'm going to teach things like: how you get

discovery in a criminal case and what happens in a criminal trial. The tendency was to teach, as criminal procedure, the Fourth Amendment law of search and seizure. Well, that's important in criminal law, but it's not criminal procedure. I wanted to teach a criminal procedure analogue to the civil procedure course that everybody got in law school. They

01:24:37 let me do it -- once. [Laughter] I didn't really want to do it again-- part of the project of doing a little bit of everything. And so they let me teach civil procedure, once, and Con Law I,

01:24:51 once. Con Law I, at the University of Chicago, is Articles I, II, III, IV, and V of the Constitution. It is the basic structure of government. I took that from Gerhard Casper[60] when he was a young faculty member, and

[60] Gerhard Casper (born 1937) is a former president of Stanford University from 1992 to 2000, a former Dean of the University of Chicago Law School from 1979 to 1987, and a former provost of the University of Chicago from 1989 to 1992. https://gcasper.stanford.edu/

Casper had begun it by saying: We're going to teach the way the government of the United States is put together.

01:25:11 All of these things in the amendments that you keep reading about and seeing on TV, that's kind of an afterthought. We're really going to do the Constitution here. So I got to teach that course too. Then I started-- well, I took over a seminar called The Seminar on the Supreme Court, which I had taken from David Currie[61] and Phil Neal,[62] in which the students work through, and they

01:25:35 read cert petitions, and they read briefs, write fake opinions, circulate them among themselves, see if you can get a majority of the seminar to sign on to your opinion.

01:25:50 And Phil Neal, when he as teaching

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[61] David Currie (1936–2007) was a Professor of Law at the University of Chicago, noted for his histories of the Constitution in Congress and the Supreme Court. http://www-news.uchicago.edu/releases/07/071016.currie.shtml

[62] Phil Neal (1919-2016) was a professor at the University of Chicago Law School for 21 years starting in 1961 and served as its sixth dean between 1963 and 1975. https://www.chicagotribune.com/news/obituaries/ct-phil-neal-obituary-20161102-story.html

that seminar, and I was a student, very roughly criticized one of my two opinions because, although it was a fairly simple case, I had gone on for something like 15 pages. Neal said, if you can't finish an opinion in 10 pages, that indicates that you

01:26:09 haven't really understood the case. [Laughter] Neil wanted it to be short. Well, I liked being short, and I've taken that to heart too. I've tried to write short opinions. As I mentioned, when I mentioned Judge Campbell, for whom I clerked, you want to think about every problem; you don't have to write about every problem. You can throw things away. One of the great benefits of the word processor is that it reduces the cost

01:26:38 of editing a manuscript. You can do two things with that cost reduction. You can edit more tightly and throw things away easier, or, since the cost per word is going down, you can

write

01:27:05 more words. Some people: the second effect has dominated, and we get more words. I've always tried to make sure the first effect dominates: the cost of editing is going down, so it's easier to rearrange, tighten, condense, throw away stuff you really shouldn't have written in the first place. Anyway, I then taught the

01:27:26 Supreme Court seminar jointly with Cass Sunstein,[63] who was then a brand new member of the faculty. The Supreme Court seminar traditionally has been taught in faculty members' homes, so it was wonderful to have the students come into your home, serve them some cookies, and then make sure they are being properly grilled on what's on the Supreme Court's docket this year. And then,

[63] Cass Sunstein (born 1954) is an American legal scholar, particularly in constitutional and administrative law, who was the Administrator of the White House Office of Information and Regulatory Affairs from 2009 to 2012. https://hls.harvard.edu/faculty/directory/10871/Sunstein

you

01:27:41 get to add-- at Chicago the norm is you also teach a seminar every year. You have to make up your own seminars, so I've made up, over the years, quite a variety of seminars,

01:27:57 one of which I'll be teaching this year just called "Legal Interpretation" or, as I sometimes say, "Legal Interpretation from Wittgenstein[64] to Public Choice". [Laughter] The students don't expect that they're going to start with the philosophy of language, but they

01:28:15 do. My very favorite seminar, my very favorite class, which I initially offered to the students under the title "Defunct Doctrines". Here's the idea: you don't really know the way the legal system works until you see doctrines from beginning to end. Almost everything

[64] Ludwig Wittgenstein (1889–1951) was an Austrian philosopher known for his work on the philosophy of language. https://plato.stanford.edu/entries/wittgenstein/

that students do in law school is to look at flourishing doctrines, and faculty might ask: is this a good doctrine, or where is going to go next, or

01:28:40 something like that. Legal history plays a very tiny role. But you don't study dead doctrines, with one exception. In civil procedure you always study that *Swift v. Tyson*[65]

01:28:51 got overruled by *Erie Railroad*[66], but other than that you don't see the beginning to the end. I thought if people really are going to understand doctrines and the way the legal system works, you need to look at doctrines as they're born. You need to see how they come under pressure from circumstances in the world, and

01:29:15 sometimes from jurisprudential developments. Then you need to see how they end, and, like a species, if they really filled an evolutionary

[65] *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)
[66] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)

niche, they'll have a life after death. Something will replace them, something like it with a different name. And so I put together a series of materials, one sequence per week, where the minimum time between birth and death of the doctrine was 60

01:29:43 years. But I wasn't really happy unless the doctrine had lived, like *Swift v. Tyson*, for 100 years before it went away. Then each week, we go through those materials that students

01:29:53 are assigned, to read the cases, to read some secondary materials about them. And the seminar is organized as a positive exercise. It's not: was that a good doctrine, or were you happy that it went away? It was: why did this doctrine exist? What about the world brought forth this

01:30:14 doctrine? And what about the world killed this doctrine? And it wasn't a change in the Constitution. These aren't doctrines that are responding to Constitutional Amendments. Some

of them are statutory documents. *Swift* to *Erie* is about the Rules of Decision Act[67]. One of the doctrines that I teach now, when I do this, is the *per se* treatment of resale price maintenance, which was born in *Dr. Miles*[68] and died in *Leegin*[69] 100

01:30:47 years later, so you get to see the whole sequence. I think it's a wonderful experience for the students. The line I keep taking is: almost always, when a doctrine dies,

01:31:03 the opinion killing it will contain a legal archeology argument. It will say: well, you know, we've made a closer study of the past and discovered that this was wrong all along. Justice Brandeis[70] made such an argument in *Erie Railroad*. The argument Justice Brandeis made in

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[67] 28 U.S. §1652.
[68] D*r. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)
[69] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)
[70] Louis Brandeis, (1856–1941) was an American lawyer and Associate Justice on the Supreme Court of the United States from 1916 to 1939. https://www.oyez.org/justices/louis_d_brandeis

*Erie Railroad* was that Congress just
01:31:24 never had the power to have a national commercial law even in interstate transactions. This was not something Justice Brandeis believed for 30 seconds, because, at the same time, the Supreme Court was making up national rules for commercial transactions! The world is full of federal, common law. Now, if you look at ERISA, the law of pensions, they're almost all
01:31:49 contractual. ERISA preempts state contract law for the law of pensions. Where does the law of ERISA come from? It's made up by federal judges as national commercial law, and the
01:32:04 Supreme Court has been quite explicit about that. It's just a federal law of contracts for a certain kind of contract. So Justice Brandeis -- you can't look at *Erie* and say that's all unconstitutional. What really happened? What happened, I think it was very nicely said by Justice

01:32:21 Frankfurter[71] in later years, that *Erie* disapproved a way of thinking about the law. It disapproved legal, natural law thought; or, as Holmes[72] said, "the common law is not a brooding omnipresence in the sky."[73] It's not something out there independent of the judges. *Erie*[74] had pretended that it was. It was just something out there to be found. By the time the 1930s roll around, nobody thinks that way anymore. All the Justices are

01:32:52 positivists. Law has some human footing, and that meant that the intellectual foundation of *Swift v. Tyson* was gone, but it was totally mis-explained by the

01:33:04 Justices. And going through that

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[71] Felix Frankfurter (1882-1965) was an Austrian-American jurist who served as an Associate Justice of the Supreme Court of the United States from 1939 to 1962 and was a noted advocate of judicial restraint in the judgments of the Court. https://www.oyez.org/justices/felix_frankfurter

[72] Oliver Wendell Holmes Jr. (1841–1935) was an American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932. https://www.oyez.org/justices/oliver_w_holmes_jr

[73] *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917)(Holmes, J., dissenting).

[74] Sic. *Swift*.

exercise, over and over, that something about the world or about our intellectual heritage has changed, not about your ability to pick up a rock and find some legal document. But that's really where legal change comes from. Getting students to understand that and see it in our

01:33:28 history with detail is, I think, incredibly helpful. Oh, by the way, the first time I offered this class, no one signed up for it. I had made a marketing error. I had accurately titled it. [Laughter] The title, as I said, was "Defunct Doctrines", and then the catalog description said: This looks at the lifecycle of legal doctrines. It looks at their birth; it looks at how they come under

01:33:52 pressure; it looks at how they go away; and it's a study of why these things happen, rather than whether the doctrines are good or bad. Nobody signed up, and I asked some

students

01:34:02 why. They said: Well we don't want "Defunct Doctrines" on our transcripts; law firms would think we were from Yale or something. [Laughter] So, I offered it again the next year, but I had changed the title. The title the next time, and the title ever since, has been "Evolution of Legal Doctrine",

01:34:21 and ever since, it's been vastly oversubscribed, because every student wants "Evolution of Legal Doctrine on his transcript! [Laughter]

PROF. ROSENKRANZ: It's a fascinating point both about the way doctrine evolves and about legal education. Have you thought about pulling those materials into a book or writing on this topic?

JUDGE EASTERBROOK: No. I mean when people say they're really interested,

01:34:46 I send them the syllabus, and it's a very detailed syllabus. It's got the case sequences; it's got the

secondary reading; it's got other related topics for people to get into
01:35:01 if they're interested. I send these to professors, who say: "This is fabulous. I'm going to offer this myself". I haven't heard of anybody else yet actually offering it, because it's, well, it's very unusual by law school standards; but I think it really helps the student a lot, and it's been a lot of fun for me
01:35:19 over the years.

PROF. ROSENKRANZ: Has teaching that class informed your work as a judge?

JUDGE EASTERBROOK: Thinking the thoughts that are involved in that class informs my work as a judge, but I don't think it's the class itself. It's the same reason I wanted to put a class like that together and to ask whether legal archeology is really what's driving the change in law.
01:35:51 That question is terribly important. I'm an originalist, in my capacity as a jurisprude, for jurisprudential

articles I've written when I was on the faculty (and still occasionally), and

01:36:08 for work I do as a judge. The meaning of a text lies in the meaning it had to the people who were alive at the time the text was adopted. That's what the words-- you try to figure out what the words meant in the legal culture. But I am also a skeptic about most claims that you

01:36:29 can recover that -- if you're thinking about the Constitution -- that you can recover that at 230 years length. Those of us who are living now were not alive and participating in that legal culture. One of the reasons I start my legal interpretation class with Wittgenstein, one of the famous philosophers of language who was skeptical about the ability of language to convey things, is that the only way out of Wittgenstein's

01:37:06 skeptical paradox is to recognize

that the meaning of words lies in how they're heard by a contemporary community of hearers. You can try very hard to reconstruct that, and

01:37:20 it's essential that legal historians try to do it, but it's extremely difficult as we move farther from original, legal cultures. And that's true, not just for the Constitution, but for statutes. One case I had when I was in the Solicitor General's Office -- where I was on one side for the government, wrote the government's

01:37:42 brief, and Richard Posner wrote the brief on the other side -- was about the meaning of a federal statute exempting agricultural cooperatives from the Sherman Act.[75] What did that mean? Did it mean "agricultural cooperatives" as of 1920 when that law was enacted? And how would you discover exactly what that was? Or

[75] *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978).

did it mean anything to which the label ”agricultural cooperative” got

01:38:06 slapped now, which could be a completely different worldwide cartel? Posner took the view, for his client, that, since language is plastic, it means whatever we want,

01:38:18 and we want it to cover everything. And I took the originalist view that you really have to figure out what that was.[76] And the majority of the Supreme Court went with my view, while admitting, as the government’s brief had also admitted, that reconstructing what an agricultural—

01:38:40 that if you’re in the 1970s, figuring out what the legal community of 1920 understood by an “agricultural coop” was really very hard. Things are not made easy by dictionaries. Originalists seems to be fond of dictionaries, but dictionaries just

[76] Brief for the United States, *National Broiler Marketing Ass’n v. United States*, 436 U.S. 816 (1980) (No. 77-117), 1978 WL 206677.

give you examples of the possible range of meaning. It doesn't tell you what things meant in context. I think the World Wide Web has made things even worse. The Supreme Court

01:39:06 in the last 20 years has had cases where you put a word into Google and see what comes up and see what the range is. There was one case 15 years ago in which Justice Ginsburg[77]

01:39:23 was quoting from the Bible and from an opera program of a Carson City opera of 100 years ago to see what one word meant. And Justice Breyer[78] had his clerks do the same exercise and pointed out something completely different. It doesn't help. The evolution of legal corpuses where you can see more words in context and get

01:39:49 more probability weightings is more helpful, but it still doesn't

[77] Ruth Bader Ginsburg (born 1933) is an Associate Justice of the U.S. Supreme Court. https://www.oyez.org/justices/ruth_bader_ginsburg

[78] Stephen Breyer (born 1938) is an Associate Justice of the Supreme Court of the United States. https://www.oyez.org/justices/stephen_g_breyer

recreate the original legal culture. So even if you think the job of interpretation is figuring out what language meant in its original linguistic and social context, you have to be suitably modest about your ability to do that, or you're going to make all sorts of mistakes.

PROF. ROSENKRANZ: You mentioned, in
01:40:16 passing, corpus linguistics; do you think that these recent developments in this field are promising and could you talk a bit more about that?

JUDGE EASTERBROOK: Well, they're
01:40:25 more promising than plopping a word into Google and seeing what the range of options that comes out is, because you can do more with context. But I have yet to use a corpus in an opinion. I'm watching the debate with interest, but I haven't yet to use it, because you can't use the
01:40:48 available corpuses to search texts like the legal text. A legal text is a very peculiar document. It's

addressed, usually, not to the general public. Some are. "Thou shalt not kill." Both in the Ten Commandments and in the United States Code, that's addressed to the general public. But the Clean Air Act of 1970[79] is not addressed to the general public. It's not at all clear who it's addressed to. Knowing how-- one of

01:41:16 the key words in the Clean Air Act is the word "feasible". I could go to a legal context and find that that word has slightly changed over time, but it's not going to tell you whether it

01:41:31 means, say, economically feasible or engineering feasible. They are completely different, and a legal corpus isn't going to give you that answer. It just won't. You have to have some other way of figuring out what that is.

[79] Codified as 42 U.S.C. § 7401, The Clean Air Act of 1963 is a United States federal law designed to control air pollution on a national level.

PROF. ROSENKRANZ: What's the other way?

01:41:48 JUDGE EASTERBROOK: Oh, going back and looking at legal documents as of the time, real legal documents. I tend not to go back and look at the legislative history, because most of the legislative history is-- well, it's interest groups having their say. Every once in a while, you know a piece of legislation, it's clear on the surface that one interest group carried the day and got everything it

01:42:08 wanted. It's pretty rare, but it happens. And then you might go back and say: this is what the interest group was telling Congress; well, that's a good approximation for what the legal

01:42:22 community is. But most of the time, it's different factions fighting on the floor or in the different committees, and the language can't be vetoed by the president, it can't be amended by the House or the Senate on

the floor. Most likely, it isn't even published until after the bill has been approved. It's not going to be helpful for that purpose without some other indication that that's the normal legal understanding of those

01:42:55 words at the time -- and if you could get that normal indication, you probably can get it without needing to consult the legislative history. But you might think about it as a check on the tendency, which we all have, to assume that what a word means to me today is the way it has always

01:43:15 meant even in a different context. If what you're going to do, if the alternative to legislative history, is to rely on your own sense of language, that's worse, because it's

01:43:25 more narrow. It's not objective enough. You need to know how the words work in the larger legal community, and you are not that, so some means of trying to be more

objective and to look outside yourself is needed. Usually the dictionary doesn't work for that purpose. Legal corpus has more of a

01:43:44 potential, but with care. And legislative history, in some circumstances, can be useful, but I must say not any differently than I would treat an editorial in *The New York Times* written at the same time about: "Congress is about to do the following terrible thing to us if it passes this language!". Okay, well that's what it means to things. It's the same thing for which you would

01:44:11 use the Federalist Papers[80] -- and the Anti-Federalist Papers, where Brutus would tell you: "the Constitution is going to ruin the country because …!" Well, you know, a significant

01:44:24 fraction of intelligent people thought that. You need to know that

[80] The Federalist Papers are a collection of 85 essays written by Alexander Hamilton, James Madison, and John Jay to promote the ratification of the United States Constitution. https://www.congress.gov/resources/display/content/The+Federalist+Papers

words had that kind of meaning. I've got up on my shelf -- it's out of the field of view -- a wonderful set of volumes put together by a legal scholar and a legal historian called *The Founders Constitution*,[81] which puts together

01:44:44 these founding era extrinsic documents for almost every provision in the Constitution. I consult that a lot, because that helps to tell you, to the extent you can at such a long remove, how people used words like that, how intelligent lawyers used words like that at the time.

PROF. ROSENKRANZ: I have to correct you. I believe that it's in the frame, just over your shoulder actually. [Laughter]

01:45:07 JUDGE EASTERBROOK: Okay, well that's terrific!

PROF. ROSENKRANZ: You've also written, quite eloquently, on the

[81] http://press-pubs.uchicago.edu/founders/

topic of what to do when law runs out, when

01:45:19 you've used all these tools, and you cannot reach a resolution. Do you want to talk a bit about that?

JUDGE EASTERBROOK: Yes. Well, I think the answer is very simple. It's one word: democracy. It's the first Articles of the Constitution, what the Framers really gave us. Benjamin Franklin's line: What have

01:45:36 you given us Mr. Franklin? A republic, if you can keep it. The way in which legal problems are to be worked out is by having elections and having people vote. By having -- as Madison tried to divide the interest, to divide the terms for which legislatures sit, to divide the interests in different parts of government, to divide them spatially by subject matter and by time --

01:46:05 having a long-running clash and that process would produce an outcome. One of the things I hear which I just

do not understand is the claim that, unless the Supreme Court is serving

01:46:18 as a continuing constitutional convention and making up new rules, “we will be ruled by the dead hand”. No. We won’t be ruled by the dead hand. We will be ruled by democracy. We will be ruled by the people we elect. Some of the people we elect will be bad. Some of the people who

01:46:37 are not bad, will do bad things. One of the things you learn in social sciences is the law of unintended consequences. People who have the best public interest at heart, don’t completely understand what they’re doing, and they may make things worse. It just happens, all the time. The solution is to change the law or throw the bums out and do it again. It’s not to pretend that judges have some wisdom. First, I don’t have any

01:47:09 more wisdom than those people. I may be a little better read, because I don’t have to deal with constituents,

but I don't have any more wisdom than those people. The terrible problem
01:47:24 with people in my position is that you can't throw me out of office. If I make a mistake, you're kind of stuck with me. One of the things that Daniel Fischel and I emphasized, probably to the point of making people sick, in corporate law is that you need to try to get incentives right, because most people are lazy
01:47:48 most of the time. Getting people to work hard in corporations is hard. You need fairly sophisticated incentive schemes to get them to do that. Then you'll discover that even the people who work hard and do their best, some of them are just better at this job than others. So you need, in corporations, for the economic market to work, a good set of incentives, and you need to throw people out of
01:48:11 office. Now apply this to judges. What the business world calls a good

set of incentives, the judicial world calls bribery. [Laughter] If I were to decide some case according to my
01:48:31 estimate of how much money one side would make and what percentage of that they would pay me, they would throw me in jail and properly so! Right? So, what's essential in the business world is forbidden. Then if I make a terrible mistake and keep right going on making terrible
01:48:46 mistakes, and I prefer to spend my life on the golf course than in the library, you can't get rid of me! [Laughter] It's not a good governance device. The governance device we have in Congress, in the House, in the Senate, in the presidency, in the agencies, is not itself a very good governance device; but it's better than one where you can't fire people who are-- where the people who are making decisions don't
01:49:17 have any incentives and can't be fired. Every once in a while, I will

quote Churchill's line that democracy is the worst form of government ever invented, except for every other form.

01:49:33 It's a terrible form of government, but you can't make it better by handing problems over to people you can't fire.

PROF. ROSENKRANZ: I'm afraid I have to correct you once again, Judge. You do have more wisdom than most of those folks. [Laughter] Let me take you back to that period at University

01:49:51 of Chicago. You were incredibly prolific then, but at the same time, amazingly, you were involved in private practice. You were a principal at Lexecon which, I think, was quite a different model at the time. Will you talk a bit about that?

JUDGE EASTERBROOK: Sure. Lexecon was created, I think probably a year before I joined the faculty at the

01:50:12 Law School, by Richard Posner, Bill

Landes, and Andy Rosenfield, as a law-and-economics consulting firm. It's right built into its name, lex-econ: law, economics. The original model

01:50:28 was to help people -- since economics was becoming more important in antitrust and corporate law -- to help litigants gather the data they needed; and to put them together with serious experts -- with the George Stiglers of the world or the Gary Beckers -- who would do serious economic

01:50:49 work, gather information, crunch the numbers, and tell people-- basically tell them what it is. And if that turned out not to help them, you always hoped they would pay your bill and go away. And if it did help them, perhaps Lexecon would provide a testimonial witness. When I got there, there were a lot of people who also wanted to provide a lawyer who would talk to this. Lexecon could

not be, and isn't now, a law firm, because of a rule of

01:51:27 the ABA and most state bars that non-lawyers can't own an interest in a law firm. I find this a very peculiar rule. It's not the rule in most places in the world. In

01:51:38 England, for example, the big firms of solicitors have lawyers and accountants in them. But in the US, an accountant, a non-lawyer, can't own an interest in a law firm. But since I was interested still in practicing appellate law -- part of my, "gee I'd like to do a bit of everything," my desire to do that-- we did offer my

01:51:53 services through Lexecon. Lexecon would technically not be a law firm -- I just signed the briefs in my own name -- but Lexecon provided support services for me in my role as a lawyer. That was how I got back to-- I argued a number of cases in courts of appeals around the country, and

got back to argue three more cases in the Supreme Court: one for the California wine industry[82]; one for the

01:52:32 NAACP in its litigation about its televised football contracts[83]; and one for Jefferson Parish Hospital District Number No. 2 of Louisiana, in which the Supreme Court finally,

01:52:45 although by a slightly different verbal formulation, jettisoned the rule that tie-in sales are unlawful *per se*.[84] In each of those I tried to bring a little economic knowledge to the table.

PROF. ROSENKRANZ: I recall meeting one of your private clients who said,

01:53:08 when he was first introduced to you, and learned your hourly rate, he was shocked by how high it was; but then, when he got the final bill, he was shocked that you had written the

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[82] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)
[83] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984).
[84] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

brief in such a short amount of time! It turned out to be a bargain!

JUDGE EASTERBROOK: Yes, people said that. It's true. I tended to be able to do things faster than many other lawyers, and I charged a higher rate per hour in the hope that people were getting more per hour. I had

01:53:35 one client who just really wanted me to work on a fixed fee, and I knew enough economics to say, no, no, no: If my fee is fixed, then from your perspective my time is free, and you

01:53:52 will want to use too much of it. So I said, okay, you really want to work on a fixed fee. I took the number of hours that I thought I would need to write the Supreme Court brief in that case, doubled it, multiplied the doubled number by my standard hourly rate, and said I'll do it for this fee. They agreed -- and it was a bad

01:54:15 bargain for me, because they wasted even more of my time than I thought was possible. I never did that

again. [Laughter]

PROF. ROSENKRANZ: While you were doing all this work, out in the world, Ronald Reagan was elected president in 1980, and he soon set about appointing almost all of your friends to the various courts of appeals.

JUDGE EASTERBROOK: He certainly did

01:54:40 appoint a lot of my friends.

PROF. ROSENKRANZ: Did you start to hope or think that maybe your day would come?

JUDGE EASTERBROOK: I had known, as I

01:54:58 said long ago in this conversation, that I thought one of the things I would like to try was to be a judge, to see if I could write the opinions better than all the ones that are getting criticized in law school classes -- both the ones I had as a student and, of course, all the

01:55:14 criticism of judges I was now doing as a faculty member or as a scholar. So, yes, it was a great, great

opportunity. It turned out that the Reagan administration was interested in jurisprudes of a particular stripe, originalists. One of the great things about the Reagan Administration is, they didn't care about your private beliefs, or your religion, or your …. Right? One of the great debates at the time then -- and

01:55:47 now -- was the right thing for judges to be doing about abortion. I was well known among my friends as favoring ready availability of abortion for anybody who wanted it -- and well known

01:56:03 among my friends as thinking that the Constitution didn't say anything about abortion, that this was a legislative matter. I was well known among my friends as an atheist, but also as thinking that the Constitution-- well, you look at the First Amendment, it's got substantial protections for religion. And I was

well

01:56:15 known among my friends as somebody who didn’t think that his views of wise public policy was what he ought to be doing on the bench. Well, it turned out that that made my set of views attractive to people who did not assume that your views about wise public policy meant the same thing as what you were going to do as a judge. You watch, in political debates, all the time, people can’t tell these two

01:56:53 things apart. The Reagan Administration could tell these things apart. And they are different -- interestingly so. And certainly the Reagan Administration was interested

01:57:06 in younger people. One of my young friends, who had been the captain of the University of Chicago debate team when I was its debate coach in law school, became an Associate Deputy Attorney General with a portfolio for finding judges. He thought that I

might be interesting, and Richard
01:57:28 Posner might be interesting; this
Antonin Scalia[85] fellow might be
interesting, and that Robert Bork
fellow might be interesting. These
were among names floated. Of course,
Bork and Scalia had much higher
visibility than I did, so their names
were floated earlier and more often.
But then one of my colleagues on the
faculty, Ken Dam, became Deputy
Secretary of State, and he thought
that I might be a good judge, so the
01:57:55 name entered the Department of
Justice from various directions.
They asked people like Bork whether
they thought I might be a good judge,
and Bork nodded. That carried a lot
01:58:12 of weight in the Reagan
Administration.

PROF. ROSENKRANZ: They also favored the appointment of academics. Do you

[85] Antonin Scalia (1936–2016) was an American lawyer, jurist, government official, and academic who served as an Associate Justice of the Supreme Court of the United States from 1986 until his death in 2016. https://www.oyez.org/justices/antonin_scalia

think that's wise?

JUDGE EASTERBROOK: I don't know that they favored the appointment of academics. It wasn't viewed as disqualifying. If you look at the

01:58:29 judges appointed by the Reagan Administration, there aren't that many academics. There may be a few more per capita than were appointed in the Carter Administration, probably not as many as were appointed in the Franklin Roosevelt Administration. But being an academic is one place, since you can write freely, where you can identify yourself as somebody who is an

01:58:56 originalist, or a textualist, or somebody who thinks that the judge's job is to do something other than enact his policy preferences. You can make that clear as an academic

01:59:15 easier than you can make it clear in private practice.

PROF. ROSENKRANZ: The proportion might have been small, but many of

the prominent names you mentioned were academics.

JUDGE EASTERBROOK: Yes, and of course, Ralph Winter, who went on the

01:59:26 Second Circuit. Yes, there were prominent academics, but there were plenty of academics left. [Laughter] This was not a raid on the legal academy.

PROF. ROSENKRANZ: So in 1984, President Reagan did get around to nominating you to the US Court of Appeals for the Seventh Circuit. How did you find out?

JUDGE EASTERBROOK: There had been a discussion of my nomination to an

01:59:50 earlier vacancy, and I was told that, for political reasons, including the fact that Richard Posner had just gone from Chicago to the Seventh Circuit, that you couldn’t appoint two

02:00:05 Chicago academics in a row. As I say, there were other good candidates. You didn’t have to be an

academic to be a good candidate. So I wasn't going to get that vacancy, but that if there ever was likely to be another, "please answer your phone". [Laughter] That was essentially the position in which this was left. And

02:00:37 in 1984, Congress created two new positions on the Seventh Circuit. So I was told, the day the President signed the bill: Some papers are coming to you; why don't you fill them in. [Laughter]

PROF. ROSENKRANZ: When the phone ultimately rang, who was calling?

JUDGE EASTERBROOK: Well, you always have to fill in papers before you get the phone call.

02:01:04 PROF. ROSENKRANZ: Yes.

JUDGE EASTERBROOK: But, over the summer, the President called personally. And the standard White House switchboard says, "Please

02:01:27 hold for the President." I bit my tongue and didn't say, the president

of what? The president of US Steel? [Laughter] So I had a short conversation with Ronald Reagan and, he being a good actor, he stuck to his script. He offered me the Seventh Circuit. Not the Sixth or the Fifth

02:01:34 or any-- we had a short chat about jurisprudence, and he then hung up and, I assume, went to offer some other position to somebody else. I thought it was very nice that people were getting calls from the President. I don't think that had happened with any frequency since the Eisenhower Administration.

PROF. ROSENKRANZ: It's very nice that he called personally. Now it was August of 1984, and, I believe, the

02:01:57 Senate decided to hold the nomination until the election. Was that nerve-wracking, surprising?

JUDGE EASTERBROOK: Politics is politics. A political deal was cut at

the time that something

02:02:10 like 100 new judicial positions were being created. The political deal, I was told by several sources, was that the President could fill 10 of them before the election, his choice, and the others would be held until-- to abide the election, where Reagan and Walter Mondale were contesting the 1984 election. And I was in the first

02:02:37 group of 10. One of the 10 very promptly dropped out. One of the other 10 was Paul Bator,[86] who had been nominated to the DC Circuit, and he, almost as soon as he was nominated, he got word from his doctor that he had a serious heart problem, so he withdrew his nomination. We were now down to nine and the package of nine was supposed to go forward and be confirmed before

[86] Paul Bator (1929–1989) was a Supreme Court advocate and expert on United States federal courts who taught for almost 30 years at Harvard Law School and the University of Chicago Law School. https://undergrad.stanford.edu/people/paul-bator

the election. One

02:03:06 of the Democratic Senators, however, grew unhappy that a Republican Senator had filibustered one of his bills. And he decided he would wreck the judgeship package in return. So two

02:03:16 names, out of the remaining nine, were held back: Edith Jones[87] and me. The fact that they were the two youngest names in the package must surely have been a coincidence! So Edith Jones and I had to wait for the election, which we did. If even Walter Mondale thought he was going to win that election, I would be surprised.

02:03:40 PROF. ROSENKRANZ: So: frustrating, but not very concerning.

JUDGE EASTERBROOK: Yes.

PROF. ROSENKRANZ: Reagan, of course, was re-elected by a landslide and re-nominated you.

[87] https://www.fjc.gov/history/judges/jones-edith-hollan

JUDGE EASTERBROOK: Yes.

PROF. ROSENKRANZ: Then the confirmation process began. What was that process like?

JUDGE EASTERBROOK: That was already

02:03:55 over. I had my hearing in the fall of 1984, and Strom Thurmond[88] was the only Senator who showed up for the hearing. I think I would have been a more controversial figure today than

02:04:07 I was in '84. There were some follow-up questions in writing from Senator Metzenbaum,[89] and then I was pretty much immediately reported out by the Senate Judiciary Committee. The norm at the time was that anybody reported out of the Judiciary Committee by unanimous consent -- which I was: Howard Metzenbaum voted for me --

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[88] Strom Thurmond (1902–2003) was a politician who served for 48 years as a United States Senator from South Carolina. https://www.nytimes.com/2003/06/27/us/strom-thurmond-foe-of-integration-dies-at-100.html

[89] Howard Metzenbaum (1917–2008) was a politician and businessman who served for almost 20 years as a Democratic member of the U.S. Senate from Ohio. https://www.nytimes.com/2008/03/14/us/14metzenbaum.html

02:04:31 would just be confirmed on the executive calendar that night or the next day. But as I say, in retaliation for something else, Judge Jones and I were held up, and we weren't confirmed. (*The Chicago Tribune* published an article reporting that I had been confirmed, because they just assumed that the executive calendar was going to be confirmed, and they ran an "oops" the next day saying,

02:04:58 two of them on that calendar were not confirmed.) We didn't go through that again. There was no more hearing. There was a delay in the Senate, because Ed Meese was then being

02:05:14 considered. His nomination for Attorney General was pending, and that was highly controversial, so no judgeship business was done until they were done with Meese. After Meese was confirmed, they started confirming the judges who had already

been on the plate, had had hearings.

02:05:34 There were no new hearings. And I found out about that when I got a call from the Senate the morning after they reported me out saying, congratulations. I got a call from Duke Short, who was the chief staffer, saying: you were confirmed last night! I said, huh, what? [Laughter] I didn't even know I had been reported out of committee, but that time the norm worked: reported out, instant confirmation by unanimous consent.

02:05:58 Not something that happens anymore.

PROF. ROSENKRANZ: Talk about that a bit. The process has changed a lot, has it not?

JUDGE EASTERBROOK: The process has

02:06:12 changed historically. One of the articles I wrote as part of my legal breadth is an exchange with David Currie about who is the most insignificant person ever to serve on

the Supreme Court.[90]

PROF. ROSENKRANZ: Yes.

JUDGE EASTERBROOK: We gathered up historical data. One of the things

02:06:30 you find by looking back in the history of the Supreme Court was that people were nominated to the Court and confirmed before they knew they were under consideration. It took a few days for the horses to get a message from one place to another, and so there were people who were nominated and confirmed to the Supreme Court and never took the oath, because they sent back a letter

02:06:54 saying: "I don't want to be a Justice of the Supreme Court. I would rather be …," and then here insert Governor of New York, or a member of the legislature in …. So we've had

02:07:08 everything from that to periods when no judge of any kind could be confirmed. When Andrew Johnson was

[90] Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. L. Rev. 481 (1983).

President, none of his nominations for any judiciary position was confirmed. When he became President, the Supreme Court was authorized to have ten Justices. They started dying or

02:07:25 retiring, and every time that happened, Congress passed a law, over Johnson's veto, reducing the size of the Supreme Court, so he couldn't even send up a nomination! We aren't in that position now. Historically, we've gone from very swift and easy confirmations to absolutely impossible confirmations. We had the period in the Jackson Presidency where he nominated Roger Taney[91] to an Associate Justiceship, and he was

02:07:54 rejected by the Senate. Then John Marshall dies. The President nominates Taney to be Chief Justice of the United States, and he is

[91] Roger Taney (1777–1864) was the fifth Chief Justice of the U.S. Supreme Court, holding that office from 1836 until his death in 1864, and serving as a strong advocate for slavery. https://www.oyez.org/justices/roger_b_taney

confirmed! Hard to imagine from
02:08:09 today's perspective, but these things have happened. So, today, we are at a low ebb in trust -- and I think it's really a matter of trust. If Party A believes that their nominees will be sent forward in the traditional way, they'll cooperate; but these days, neither party believes that of the other. And so they are playing a long game
02:08:27 of each obstructing the other but making things worse. We've had periods like this historically. They have been solved. How and when the current period of obstruction will get solved is very hard to know, but it is, I think, important that it get solved.

PROF. ROSENKRANZ: So you arrive at the Seventh Circuit. You are all of 36 years old. To begin this part of our
02:08:55 discussion, could you just describe, a bit, the rhythm of life in your

chambers, and the path that a case takes through your chambers?

JUDGE EASTERBROOK: Sure. It's

02:09:11 actually pretty simple. The lawyers file their briefs, and the cases are assigned to a day for argument. And then the court draws, in one way or another, lots to determine which judges sit on that day. So you learn maybe three weeks, sometimes four weeks, before the argument, what day

02:09:34 you'll be sitting and what cases there are. The papers are distributed to chambers. In my chambers, I had two law clerks. Each of the law clerks gets a set of the papers, and I get a set. And we read the papers. What that means for me is: I start with the district court's opinion, figuring out what's gone on. Then I try to get a sense of what the appellant is complaining about, and I read the appellant's

02:10:03 brief through with that knowledge. Then I read the appellee's brief and

the reply brief -- but, along the way, stopping to read any cases they're citing that I don't already know, that

02:10:16 seem to be important. And any parts of the record, the appendix, that seem to be important -- on which the parties disagree. That is, for me, a very fundamental point: if the parties agree that something is a fact, then, as far as I'm concerned, it is a fact. And the fact that the district judge didn't think that was a fact--. If the

02:10:37 parties in the court of appeals agree something is a fact, it's a fact, so far as I'm concerned. Doing this is a lot simpler now than it was when I joined the court in 1985, because over on my desk now is a computer. It's connected to the internet. Every Supreme Court opinion in history can be brought up in a few keystrokes. When I joined the Court, judges did not get

02:11:03 computers issued. The judiciary as a whole, even in the library, did not have access to Lexis or Westlaw. If I wanted to find some cases, it was done using the West keynote number

02:11:19 system, and so over on my bookshelves, I had *The Supreme Court Digest*, in the hope that you might be able to find a Supreme Court case if you could remember it. Well, I was pretty good at remembering Supreme Court cases, at least from the time I started in the Solicitor General's Office. But

02:11:36 finding law took a lot more time then than it does now, so it was more complicated getting ready. After my clerks and I had read this, we would sit down and discuss the cases and the goal was to do this a week before oral argument and just go over it. Talk about: What are the issues? What are the problems? What have the lawyers said that's helpful? What have the lawyers said that's

transparently false? Where do we
02:12:05 obviously need more research? And at that point, I would often ask the clerks to go do more research. And doing this a week in advance gives us time to think through. Do the
02:12:20 research, think through, go read some more opinions. Go delve in the record if really necessary, if the parties didn't agree, and we had to figure out what was there. Then the oral argument happens. The judges immediately recess and discuss the case after the argument. Of course, they're discussing it during the
02:12:38 argument, because, so far, when an appellate judge comes to argument, the judge and his or her clerks have talked about the issues; that's been happening in the other chambers; and now you get the perspective of 9, 10, 11 different heads brought in at the argument and in the conference afterwards. And then, after that's all over, I come back, talk to my

clerks again. We may repeat this cycle,

02:13:02 particularly for the cases that are assigned to me to write. And then, after any more research that needs to be done has been done-- or at least what research I think needs to be

02:13:15 done has been done -- I sit down and try to write an opinion. My initial opinions were longer than my current opinions because, as I just said, didn't have word processing gear! It was too hard to edit. The Court had a very old Wang system in which you could type words, and at the end

02:13:37 of a line, you had to put a hard carriage return. It had no way to deal with footnotes. (That's one of many reasons why I try not to use footnotes.) I would tend to write my opinions in my law school office on weekends, because I had my own computer. I had an Apple Macintosh 512 SE, with a screen about yea big, but it had word processing software.

And I could have it printed, I could have the draft printed, on the Law School's daisy wheel printer. This is ancient technology. Bring it in, and my secretary, Mary Beth, who is still here, would then put it through optical character recognition, try to

02:14:27 correct it, bring it into the Wang system, and we would have something to work on. I spent my first five years on the Court fighting like the dickens to get judges computers and Westlaw and Lexis access. It took a long time, but we finally did, and now, they're everywhere. And *The Supreme Court Key Number Digest* is gone from

02:14:51 my shelves! But I still have, in another part that I think is out of frame, I have everything from 1 US to the most current copies. The US Code and the US Reports, that's the basic law.

PROF. ROSENKRANZ: Unlike almost all federal judges, you draft your own

opinions. Why do you do that?

JUDGE EASTERBROOK: Because I want to write! I do it, in part, because legal writing is good for me, and I think

02:15:26 I'm reasonably good as a legal writer, so I can do more what I want. I do it, in part, because I've been at the law business a lot longer than my clerks, so I know what it is ought to

02:15:44 be done to make an opinion work; whereas law clerks are pretty much guessing. I discovered this when I was in the Solicitor General's Office. A litigating division of the Department of Justice -- the Antitrust Division, the Criminal Division, the Civil Division -- would always send the

02:16:01 Solicitor General a draft of the brief or the cert petition they wanted filed. Sometimes, I could edit that. But sometimes it would take me so much more to edit it than

it would just to start from scratch, that I would take this document, use it as a research memo, and I would write a brief from scratch. So the last reason for why I'm doing it, is that it's easier for me to do it than to edit, because the editing part-- not only

02:16:32 are you starting from somebody else's template, but a large part of editing is a teaching function. As I'm sure you remember, I followed a policy when you were a law clerk, and I still

02:16:44 follow it: Every law clerk gets to do one draft every year.

PROF. ROSENKRANZ: Yes.

JUDGE EASTERBROOK: It takes me much more time to deal with the law clerk drafts than it does for me to write an opinion from scratch.

PROF. ROSENKRANZ: But surely mine was an exception.

02:16:58 JUDGE EASTERBROOK: It takes me much more time-- oh did I just say that?

[Laughter] You wrote a very good draft, and, in fact, my law clerks generally write very good drafts, but they are drafts from fourth-year lawyers. They are by people who are just beginning their legal career, and it's not as good as you would be able to do today.

PROF. ROSENKRANZ: How long does it
02:17:23 usually take you from when the opinion is assigned to you to when you have a serviceable draft?

JUDGE EASTERBROOK: It's changed over time. When I began, and I didn't
02:17:34 have any backlog, and there were not as many competing responsibilities, I would try to get that done in two or three weeks. On average, my opinions came out about a month after oral argument. The longer I've been on the bench, the longer it's taken, I think, on average. There are a
02:17:54 variety of reasons for that. One reason why I liked the prospect of becoming a judge was that Hanna Gray,

the President of the University of Chicago, had decided I was good at committee work and was putting me on more and more committees: the Distributed Computing Committee, the Library Committee; the dean made me the chairman of the Appointments Committee. I could see my life as being sucked more into committee work
02:18:18 and less academic work. I got to start from scratch on the court of appeals: no committees, no extra work. But, as time has gone on, there have been committees, and special
02:18:34 assignments, and other things to do. Life has its own complexities of other kinds that take time, so I take longer now than I used to. It doesn’t take me longer to write an opinion than it used to. I may even do that faster, but it is harder to find the hours in the day when I can write an opinion. It’s not simply
02:18:59 that there are competing obligations: being on judicial committees, being

on the Judicial Conference[92], being on committees under the Judicial Conduct and Disability Act of 1980, and so on. It's that the time in the day is more broken up, and I think that's a result of the internet and email. You get your work done-- I get my work done, when I can just say, today I am doing nothing but research and
02:19:29 writing on opinion X, and I just manage to have no interruptions. But most of the time, the email is going *bing*, I've got X from another judge that I want a response to right now.
02:19:43 It's harder to isolate blocks of time, because we've moved to less paper and more electronic. There's a sense in which the electronic world is more efficient. One of my committee assignments, here at the court, has been to chair the Technology Committee to produce more
02:20:01 technology, and to make sure

[92] https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference

everybody's got a smart phone and an iPad, and that you can carry all of these interruptions with you 24 hours a day, even when you're on an airplane! But it does make it harder to find blocks of time to write opinions.

PROF. ROSENKRANZ: It might take longer than it used to for you, but I think it's safe to say you're still faster than virtually anyone else in the

02:20:27 federal judiciary-

JUDGE EASTERBROOK: I don't know that I'm faster than anybody else. I'm still on the fast end, and I'm still on the short end, and I'm happy to be

02:20:39 both. But I think it matters more to be short than to be fast. What you want is an opinion that can be understood by the attorneys and the clients, can be read by them during this lifetime, and understood by the press if there is some interest. I try to write for somebody who is an

intelligent high school graduate, and I have to use

02:21:05 some legal words, and cite legal things in it, but otherwise, not to use distinctively legal phrases or any complication. But just to write simply, so that if I'm wrong, people can see very easily just how wrong I am.

PROF. ROSENKRANZ: I think you'll agree with me that most legal writing is extremely tedious to read.

JUDGE EASTERBROOK: It's extremely

02:21:25 tedious and formulaic. This goes back to the question why I don't want drafts from my clerks. Law students learn to write legal writing, largely by reading the stuff that's in their

02:21:41 case books and the stuff they look at for research. Much of that is written by other law clerks, or it's written by judges who desperately needed an editor and didn't have one.

PROF. ROSENKRANZ: How would you advise law students and lawyers,

judges to make their writing better?

02:22:05 JUDGE EASTERBROOK: Every year now, I give a welcoming talk followed by a discussion with all the newly arriving law clerks, both chambers law clerks and the staff attorneys, to talk about legal writing. I point to some sources where I think they would learn what they need to learn, and number one on my list is always Strunk & White[93] and then Brian Garner's version of it, *The Elements of Legal Style*. I point out that

02:22:33 things have already gone wrong, by the fact that Bryan Garner's *Elements of Legal Style* is four or five times as long as Strunk & White, in part, because there are four or

02:22:44 five times as many extra errors that need to be corrected. I tell the clerks and the staff attorneys that they can be better legal writers by getting out of their head the idea

[93] William Strunk Jr. & E.B. White, The Elements of Style (4th ed., Longman 2000).

that legal writing is a distinctive area. Legal writing, good legal writing, is good writing, period. That's why I tell them to read Strunk

02:23:10 & White: it's about good writing, about writing short, punchy, active voice. And you won't learn good legal writing, or good writing, by reading most-- the work of most judges -- or, heaven forfend, the work of most law professors, who are even more tedious! You learn good writing by reading good writing, so I tell them: read good novels, or pick up things like *The New Republic*, or, until recently,

02:23:34 I would have recommended *The Weekly Standard*. In fact, I tell them: all you liberals should read *The Weekly Standard,* and, you conservatives, you should read *The New Republic*, because

02:23:54 somebody is trying to discuss an interesting and difficult issue in the space of four or five single-spaced pages. You have to do that by

condensing, and you have to do that by making a strong, logical argument. All the jargon is gone, because you are trying to reach a general

02:24:16 audience. You want to read things that you are not already convinced of. You want to read things that might or might not succeed in persuading you. But you want to do this outside the field of reading judges' opinions. You are engaged in a field where it's good, after you've decided what the right thing to do is, you want to make a persuasive explanation about why that's the right thing to do. That's

02:24:42 why you want to read persuasive rhetoric. I'm not so foolish as to recommend that people go and read Cato's essays anymore, because he was talking about things that are too far

02:24:54 removed, but the devices of rhetoric that the Catos of the world used are still the devices of rhetoric. You will find them in the pages of *The*

*New Republic,* or *The Atlantic*, or, sad to say, no more *The Weekly Standard*. I think less so in *The National Review*, which might substitute for it, but I don't think is as cogently

02:25:18 written. But that's where you want to go, it's what you want to read to see how to be a good writer, and then you apply those skills to what you're doing in law.

PROF. ROSENKRANZ: You write with such glorious verve, and one side effect is that your opinions are often excerpted in case books. Are you writing, in part, for law students?

JUDGE EASTERBROOK: As I said, I'm

02:25:42 writing for intelligent high school graduates. Law students are in that category, I think. I'm not writing, particularly, for law students, but I want to write in a short, compact way,

02:26:05 and I think my opinions end up in

case books in part because they are relatively low on jargon, and in part because scholars, like the rest of us, don't want to waste a lot of time editing the drivel out of the opinions. If you have less drivel in them to begin with, they don't

02:26:21 have to be edited, or at least not edited in the same way. But it's not that I want them in case books. I want to write something that will simply, logically, and in short compass resolve a problem. I just wrote a draft yesterday in an area where there's a conflict among the circuits on some legal issue. In this conflict, five circuits have written opinions. If I just took and analyzed everything that each of them

02:26:55 had said, to see whether we agreed with it or not, I would certainly be writing a 40-page opinion. In fact, my opinion is about eight pages long, and it's because all it discusses is

02:27:07 what matters to me: all that's

necessary, the minimum necessary, to resolve the problem. Then it says: You've got this circuit this way, these circuits that way. Here's the problem. Here's the statute, which gets quoted. And here is how you have to parse it, and here is why -- in your own words. This was something that,

02:27:31 not only did Phil Neal teach when I was a law student, when he insisted that opinions be under 10 pages; it was an important part of the academic culture at the University of Chicago. Much of scholarly culture is counter-punching: that is, you report that scholar X has said this, but it's wrong, because that. Then he said that and that's wrong because that. You arrive as a junior faculty member

02:28:00 at the University of Chicago, the first thing you're told is: no counter-punching. Study a subject; reach your conclusions about what ought to be done; and explain them.

If
02:28:13 somebody wants to counter-punch you, they can go ahead and do it, but you have written a comprehensible article that people will read and be influenced by. And that's what I'm trying for as a judge. Instead of counter-punching other people's arguments, you do your best to
02:28:31 understand all of the arguments, and then you set out what really matters. And if you've made a persuasive demonstration, you'll be influential; and if not, your error will be quite evident to everybody, without them having to work real hard to find it.

PROF. ROSENKRANZ: You've described the goal of writing that is crisp and clean and as short as it can be, but it has to be said that your writing
02:28:52 is also delicious. It makes me laugh out loud on multiple occasions. [Laughter] You can't say that about many judicial opinions.

JUDGE EASTERBROOK: Well, it's

02:29:11 because I try not to write like a judge. I'm not trying to write in clichés; I'm trying to write more like a journalist, in which opinions begin with little stories, and some of them are interesting stories about the world and some of them are just quite mundane. But this is also part of my thinking about what law is. Most

02:29:38 judicial opinions, appellate opinions, begin by saying: the issue in this appeal is X, and I'm now going to discuss X. I don't think that's how law works. Issues aren't born, cases aren't born with issues. Disputes are born with facts. What issues matter is something that works out of where the facts are taking you. It tells you what kind of thing this is, and legal rules may be pertinent to

02:30:12 that. Then a legal rule gets brought in as a way of resolving it. But the whole result can be read as a story.

It's a story, in part, about the world. It's a story, in part, about how the

02:30:23 law organizes the disputes in the world. But that's why I went to law school, as I said earlier on. You keep that in mind, it also influences how you write an opinion on the court of appeals.

PROF. ROSENKRANZ: You've mentioned that you have two law clerks per

02:30:38 year. You're entitled to four. I know from personal experience that you could easily get by with zero. Why is it that you have clerks at all?

JUDGE EASTERBROOK: Well, I could not get by with zero! It would not work at all. First, I've described the way we do business. Everybody reads all the briefs, and everybody talks about every case, because three heads are better than one. Two heads are

02:31:09 better than one, too. The classical judge / law-clerk relation was just

one judge and one law clerk. That's how it began with Horace Gray[94] on the Supreme Court, and that's how it was

02:31:24 until relatively recently. Through the early 70s, Henry Friendly[95] would have only one law clerk a year. I don't think Learned Hand[96] ever had more than one. Maybe I could get by with one, to be a sounding board, to provide extra ideas. And, of course, when I do a draft, my instructions to my clerks are: find all the problems.

02:31:47 See what's wrong about it; see how it can be reorganized; see how it can be shortened. Occasionally, clerks tell me that I really have left out one point that needs to go back in. I don't like that, but I will often put

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[94] Horace Gray (1828–1902) was a jurist who served on the Massachusetts Supreme Judicial Court, and then on the United States Supreme Court. He was the first Justice on both courts to hire a law clerk. https://www.oyez.org/justices/horace_gray

[95] Henry Friendly (1903–1986) was a United States Circuit Judge of the United States Court of Appeals for the Second Circuit. https://www.cnn.com/2012/04/17/politics/friendly-judge-biography/index.html

[96] Learned Hand (1872–1961) was a judge, serving on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. https://www.britannica.com/biography/Learned-Hand

something back in. Having other points of view is very valuable, and it's not something you can do by yourself; even if you got a good grasp of the law, listening to how
02:32:13 others react to the same problem is terribly important, if you're going to get this right. I think having two law clerks means they can talk to each other a lot, especially when I'm
02:32:30 not around to talk to them, and that that will make the advice I get from them better. But I don't think that benefit goes past two. The common organization in chambers that have three or four law clerks--(Heaven forfend, when I was Chief Judge, I could have had five law clerks and an
02:32:56 administrative assistant. I had no desire for this staff.) The organization in other chambers is that the work is divided up so that, in a chambers with four law clerks, each clerk works on one fourth of the cases, and the clerk's work doesn't

overlap. And so it's as if the judge really had only one law clerk, because there is only one extra head looking at things. I think it is much better to have two law clerks, and have everybody

02:33:20 look at everything: you get more advice; more errors are likely to be found.

PROF. ROSENKRANZ: I thought you enjoyed having us around really for

02:33:33 the purpose of introducing us: This is my clerk Laurie,[97] who was educated in Australia, and my clerk Nick, who was educated at Yale, and thus I have no one who knows anything about American law!

JUDGE EASTERBROOK: No. That's not quite right. Laurie had learned some American law when he was in England.

02:33:50 And, of course, I hired you on the recommendation of an NYU professor,

[97] Laurence P. Claus is a Professor at the University of San Diego School of Law. https://www.sandiego.edu/law/faculty/biography.php?profile_id=2735

my former clerk Barry Adler. Barry said, now look, it's true, Nick will be getting his degree from Yale, but he's had a good legal education. He had a year at NYU before he transferred to Yale. And, of course, he's taken my classes at Yale. He, actually for a Yale student, knows a lot more American law than most!

02:34:18 [Laughter]

PROF. ROSENKRANZ: Other than your steady diet of legal briefs, what do you read to keep current on legal developments?

02:34:32 JUDGE EASTERBROOK: These days, I tend to read legal blogs. I always read Howard Bashman's *How Appealing* blog,[98] and he has wonderful links to other legal developments. But I follow my own advice: I read "il-legal" things. It's not simply that I read magazines like *The Atlantic* and *The*

[98] https://howappealing.abovethelaw.com

*02:34:57* *New Republic*; I also read science. I told you earlier that I thought once I would do physics. I read *Nature*; I read *Science*; I read the top journals, in an effort to stay current with what is going on in the world. I want to understand the way the world works, and there is some interaction between law and science, but not as much, so I go and read science, which, I think, helps me, and may even help litigants. Although there was a famous

02:35:30 circumstance 20 years ago, where after Danny Boggs[99] had written the opinion in some environmental case on the Sixth Circuit, the losing side moved to disqualify him, on the ground

02:35:42 that his opinion revealed that he had read some articles in the journal *Science* -- and that obviously

[99] Danny Boggs (born 1944) is a Senior United States Circuit Judge of the United States Court of Appeals for the Sixth Circuit. https://fedsoc.org/contributors/danny-boggs

disqualified him, because he actually knew something about the case he was writing about! Danny wrote a very interesting opinion denying the proposition that you were disqualified by knowing too much

02:36:03 science. No one has filed that motion for me, but I would now just point to Danny's opinion. Knowing more science is good.

PROF. ROSENKRANZ: I don't know if I ever told you this. Very early in my clerkship, you had a FedEx package arrive and it was a book. I was a bit in awe and very curious what book did you need right then to carry on with your work with such urgency. I

02:36:21 peaked around the corner as you opened the box and pulled out what turned out to be a giant volume on the topic of volcanoes! [Laughter] I was quite surprised.

02:36:46 JUDGE EASTERBROOK: It wasn't something I needed to write an opinion, but it was something I was

interested in. I still know where that volume is. It's in Alaska, by the way, where there are more volcanoes than there are in Chicago.

PROF. ROSENKRANZ: You've talked a bit

02:36:59 about being an originalist and what that means. Would you like to say anything more about that?

JUDGE EASTERBROOK: The more I would like to say about that is: judges, like other governmental actors, need justification for what they are doing. Judges are, of course, the people who insist that the Federal Trade Commission or the Federal Communications Commission have a firm legal basis for what they're doing.

02:37:33 The judge will insist that that be some enacted statute, a transfer of authority to there. The Federal Communications Commission people are, of course, political actors. They

02:37:48 serve on very short terms. They'll be gone with the next president, if

not before. Judges have to demand of themselves the same thing they demand of all litigants, including all other governmental actors. That is, that what they are doing be democratically justified by an enacted text. You can't seek a justification in the

02:38:14 text if what you're saying effectively is, well, there is that text, but I'm like Humpty Dumpty: words mean whatever I say they mean, neither more nor less.[100] The words have to have conveyed some authority, or the judge is just as much out in the middle of the air as the Federal Communications Commission guy who is acting, as judges are fond of saying, *ultra vires*, you know, without authority. The more play in

02:38:42 the joints a judge finds in old

[100] Lewis Carroll, *Through the Looking Glass and What Alice Found There*, in *The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking Glass* 166, 269 (Martin Gardner ed., 1960)("'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master - that's all.'").

words, the more the judge is saying what he or she is about to do is really illegitimate, that it should be a democratic problem and kicked back

02:39:04 to the democratic branches. That's always been where I think the instinct for textualism and originalism comes from. It comes from the recognition that judges have a limited role to play in a representative government and that justification for judicial action is

02:39:22 absolutely essential and can't be had by saying -- through Humpty Dumpty's rationale. That's why. And it's really simple. It's not that textualism is the only way to construe a text. When I'm teaching interpretation, I point out that, if you are teaching English literature, you are not a textualist, because the goal of teaching English literature is to expand people's intellectual horizons. So if you want to read

*Billy*

02:39:46 *Budd*[101], to think of a law-and-literature novel, you're not trying to read it as a treatise on the laws of war, or whether Captain Vere was really correctly implementing the principles

02:40:01 of drumhead court martials. No. It's a morality play. You are teaching it for a totally different reason than teaching the law of war. The way in which you teach, the way in which literature is understood, the way in which words are understood, in that kind of classroom is so totally different from the way in

02:40:22 which you have to use words to justify your behavior -- which, in the case of my job, includes telling people that they have to pay billions of dollars or in extreme cases,that they have to die. I have to tell

[101] Herman Melville, BILLY BUDD, SAILOR (Harrison Hayford & Merton M. Sealts, Jr. eds., Univ. of Chi. Press 1962) (1924).

people that they have to die, and I have to be right about whether that's right or not.

PROF. ROSENKRANZ: What role does economics play in your process and

02:40:50 how does it relate to what you've just said about textualism originalism?

JUDGE EASTERBROOK: To the extent there is an economic structure in the

02:41:04 statute then, well, you'd better get that right, if it's telling you to do something economic. But most statutes-- and we come back to one I mentioned earlier, the Occupational Safety and Health Act tells OSHA to achieve safety but does not have built into it, a cost/benefit rule.

02:41:22 I don't think you can use economics to put into a statute -- something that any economist would think wise, which Professor Kahn thought wise -- but you can't use it to put it into a statute in which it isn't there. But if it is there, you'd better do the

economics right. But then there are statutes that don't have any -- I don't want to say "don't have any there there",[102] though I'm tempted. Think about the antitrust laws. Ever since Justice Brandeis

02:41:57 said that the Sherman Act is internally contradictory, because it says, no contracts, combinations, or conspiracies in restraint of trade, but every contract restrains trade *ex*

02:42:17 *ante*.[103] If I agree to sell you this 500-weight of honeydew melons, I've agreed not to sell them to anybody else. I've agreed to sell them to you, so *ex post* trade is restrained. How do you make sense of that, if you don't think the Sherman Act has banned the law of contract? Justice Brandeis said, well you have to ask

02:42:38 what's economically reasonable. And it's been understood, by consent of

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[102] See Gertrude Stein, EVERYBODY'S AUTOBIOGRAPHY 289 (Cooper Square Publishers, Inc. 1971)("there is no there there").
[103] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

all three branches of government, at least since 1920, that the antitrust laws have authorized the federal judiciary to make up a common law of trade relations. That was actually the line taken by Circuit Judge Taft in the first great Sherman Act case, the *Addyston Pipe & Steel* case,[104] in which he wrote what I still count

02:43:04 the greatest antitrust opinion of all time, in 1898, explaining why that particular cartel was illegal under the Sherman Act. (The Supreme Court ultimately affirmed a much inferior

02:43:18 opinion.) Taft explained why this had to be about the common law of trade. And ever since then, this has been a legitimate field of inquiry. If you are trying to make up rules that, as an economic matter, will promote competition and deter monopoly, you had jolly well better know what

[104] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

02:43:39 promotes competition and deters monopoly! That you end up with an economic question. And there are a few other parts of the law where that's true: the Supreme Court treats admiralty as a common law field, and there are a few more. They are properly resolved by economic principles.

PROF. ROSENKRANZ: You are famous for discovering jurisdictional issues and problems in cases that the lawyers

02:44:11 have not noticed. Why does it elude the lawyers, and why is it so important?

JUDGE EASTERBROOK: I don't know why it eludes the lawyers. It

02:44:24 shouldn't, although that may have to do with specialization again. (I'll come back to that.) But why it matters to me is the same thing I've just been emphasizing. The first question any government actor needs to answer is: by what right? By what authority can I tell you that you've

got to pay Jones a million dollars? And it's not

02:44:41 just that I think the world would be better off if you paid Jones a million dollars. It's that somebody has authorized me to make that decision. Now this is summed up as the principal that federal courts are courts of limited jurisdiction, while states courts, at least most state courts in most states, are courts of general jurisdiction. If you've got a dispute, you take it to a state

02:45:03 court. If you come to a federal court, it's got to be authorized -- authorized by Article III, authorized by a statute -- and I'm not authorized to resolve the dispute unless that's

02:45:19 true. Now, the Supreme Court 200 years ago, adopted the rule that judges have to implement limits on their jurisdiction even if nobody asks. I'm not at all sure that that's right. The American Law

Institute, now 40 years ago, and Henry Friendly before that in Friendly's

02:45:33 marvelous book, *Federal Jurisdiction: A General View*, Friendly argued that that was a mistake on the Supreme Court's part: that if jurisdiction was missed by the parties, it should be treated like any other forfeitable issue. That is, by the way, how we treat issues of personal jurisdiction. If the party doesn't urge that the court lacked jurisdiction over his person, that's just gone. That could be true about subject-matter

02:46:05 jurisdiction, but the Supreme Court's official rule is that subject-matter -- the court has to address that for itself, even if the parties didn't. I take seriously,

02:46:20 the limitations on what we are supposed to be doing, so that's where that comes from. Now, as for why the lawyers don't do it, most lawyers are

specialists. You get lawyers who specialize in age discrimination cases, or lawyers who specialize in antitrust cases, and they come and
02:46:39 they prepare to discuss antitrust. They are not jurisdictional specialists. That's not a category outside the law school, or outside Henry Friendly. So we have all sorts of rules that tell the parties they have to address this, but they are just not very good at it because it's not their field of specialty.

PROF. ROSENKRANZ: Id' like to ask you a question about Judge Posner. You met him when he walked into your
02:47:05 Torts class on the first day. He was a professor of yours; he was then a colleague of yours at U Chicago; he was a co-editor, co-author of yours; and now a colleague on the Seventh
02:47:25 Circuit. You are both giants in the field of law and economics. You are both giants in many other fields as well. And yet, you actually seem to

have quite different philosophies of judging. I wonder if you could just talk a bit about that relationship, and his influence on you, your influence on him, and the

02:47:56 distinction.

JUDGE EASTERBROOK: It's not clear that we've had any influence on each other in that respect. Now, as I've emphasized several times, I think the first question for a judge is: by what right? Why do I have any authority to resolve this? The question for Judge Posner, as he's said both formally and informally is: If I do this, will I get impeached? Judges

02:48:17 throughout history have assumed powers not given. You have only to read a smattering of Supreme Court opinions to see that happening. So if they can do it, why can't I? And I can

02:48:29 make the world better by doing that. Well, but I don't think the world is

made better by people assuming, purporting to exercise powers that they weren't given. And I've never understood why -- if I were a political figure, when I got an opinion that says, well, you know, the reason that you should do this is because I'm a

02:48:56 judge and I say so -- why the President doesn't say: thank you very much for your advisory opinion, Judge so-and-so; the reason we are not doing it, is because I'm the President and I say so. The only reason a President should obey a judicial order is because the judge was actually authorized to do what he did. If you think about the case establishing judicial review, *Marbury*

*02:49:17* *v. Madison*,[105] John Marshall spent his entire opinion saying: this is about who has been authorized to do particular things. Part of the

[105] 5 U.S. (1 Cranch) 137 (1803).

genius of it, of course, is that he

02:49:30 ends up saying: there is this statute authorizing us to issue the writ of mandamus to give Mr. Marbury his commission to be a justice of the peace, but that's not authorized by the Constitution, so we can't do that. It was in denial that he asserted judicial authority. And it's still the

02:49:48 case that questions of what's been authorized are first. It's not, you can't get authority out of saying, it's a good thing to do it. When presidents do that, judges tend to scoff. When President Truman seized the steel mills in the Korean War, and said, this is the only way to prosecute the war successfully in this steel strike, the Supreme Court said: No, you need authority.[106] You haven't got it directly in Article II.

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[106] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

02:50:17 You haven't got it from statute. No matter how good an idea it is, you can't do it. What judges said about the President in the *Steel Seizure Case* is true about judges. That's

02:50:33 what I believe. Dick Posner has never believed that, but I don't see how he thinks it can be true about presidents but not about judges.

PROF. ROSENKRANZ: Judge, final question: Your life changed quite dramatically. You are, against all odds, married a few years ago.

JUDGE EASTERBROOK: At age 65.

02:50:54 [Laughter]

PROF. ROSENKRANZ: You are spending a fair amount of time in Alaska, despite the fact that it's in the Ninth Circuit. I hope you can reassure us, though, that you will continue to teach and continue to sit on this bench for many, many years to come.

JUDGE EASTERBROOK: I've been invited to come sit on the Ninth Circuit, and

I have declined, saying, I have no
02:51:16 real desire to spend my career writing dissenting opinions on the Ninth Circuit, when I could be writing majority opinions on the Seventh Circuit. I was worried, initially,
02:51:32 given the high reversal rate of the Ninth Circuit in the Supreme Court, that my wife and I had our marriage solemnized in Alaska by a judge of the Ninth Circuit who both of us had known for a long time (my wife for a much longer time than I). I was worried that the Supreme Court was going to summarily reverse our wedding! But the statute of limitations came and went, and we are still very happily
02:51:53 married. [Laughter]

PROF. ROSENKRANZ: Congratulations! And please let me thank you on behalf of the Institute for Judicial Administration of the NYU School of Law and on my own behalf. It’s been

a great pleasure sitting down with you.

JUDGE EASTERBROOK: Thank you for the questions. I have greatly enjoyed

02:52:11 it.

[END RECORDING]