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Bench Briefs

President George W. Bush on February 12, 2004, nominated Missouri Supreme Court Judge William Duane Benton to the remaining open seat on the Eighth Circuit Court of Appeals.

The Senate Judiciary Committee has scheduled a hearing on Judge Benton's nomination for April 8, 2004.

Judge Benton earned his law degree in 1975 at Yale University and first used his legal education as a judge advocate for the United States Navy.

Over the years, Judge Benton also pursued additional education, earning a masters degree in business administration and accountancy from Memphis State University and an LL.M. from the University of Virginia School of Law.

Judge Benton recently was honored for his extensive work in youth law-related education, and he has also served on the boards of a variety of civic organizations.

For additional biographical information on Judge Benton, visit www.usdoj.gov/olp/bentonresume.htm and www.mobar.org/journal/1997/julaug/benton.htm.

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The Senate Judiciary Committee on March 4, 2004, unanimously sent to the Senate floor the nomination of Raymond Gruender to the Eighth Circuit Court of Appeals.

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A panel of Eighth Circuit judges, after hearing three cases in February before law students at the University of Iowa College of Law, immediately agreed on one thing – the hardest part of the job of being a Circuit Judge.

In response to a query in a post-argument question-and-answer session, Judges Michael Melloy and William Riley and Senior Judge David Hansen each identified the relative lack of interaction with people, plus the volume of work and reading, as among the most significant characteristics of the position of Eighth Circuit Judge.

The Judges contrasted the work of an appellate judge with the work of a trial judge, who has contact with attorneys and litigants and a variety of court and related

personnel. As Judge Melloy put it, now that he is a Circuit judge he usually sees just “his secretary, his law clerks and the UPS delivery person.”

Judge Riley noted that with e-mail, the Eighth Circuit Judges usually communicate electronically and no longer speak frequently by telephone. The Judges, however, make it a point to socialize and spend time together when they gather for arguments, added Judge Melloy.

Judge Hansen outlined for the law students the number of different matters – argued cases, motions, screening panels – which simultaneously occupy an Eighth Circuit Judge’s time, while Judge Riley made a rough calculation of the number of pages of briefs, opinions and supporting materials a Judge must read in preparation for each week of oral argument. Judge Hansen then quoted Senior Judge George Fagg as having once likened the job of an Eighth Circuit Judge to “running full speed down a rocky hill pursued by an avalanche of paper.”

Judge Hansen noted the number of states within the Eighth Circuit that have the death penalty and identified tough death penalty cases as being another difficult part of the job of Eighth Circuit Judge.

Judge Hansen identified the opportunity to work with the new lawyers who serve as judicial clerks as among the bright spots of service on the Court.

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Senior District Judge Paul A. Magnuson will be sitting as a **visiting judge** with the Eighth Circuit in **April** in St. Louis. Judge Magnuson served as the chief judge for the District of Minnesota from 1994 through 2001 before assuming senior status in February 2002.

Judge Magnuson has a long history of service as an Eighth Circuit visiting judge, first sitting with the Court in March 1983 after being nominated to the district bench by President Ronald Reagan in September 1981. Judge Magnuson sat as an Eighth Circuit visiting judge on almost an annual basis during the years 1990 through 2001.

Prior to assuming the bench, Judge Magnuson practiced law in the private sector in St. Paul from 1963 through 1981.

District Judge Ralph Erickson of North Dakota made his inaugural appearance as an Eighth Circuit **visiting judge** in **March** in St. Louis. Judge Erickson assumed the district court bench in March 2003 following nearly 10 years each in private practice and as a state court judge.

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The **first** two **published opinions** to appear under the name of new Eighth Circuit Judge Steve **Colloton** came out January 30, 2004. In *Hitt v. Harsco Corp.* (No. 03-2332), the panel affirmed a summary judgment in favor of an employer in an age discrimination case, and in *Harris v. Barnhart* (No. 03-1512), the panel affirmed a denial of social security disability benefits.

Judge Colloton took his oath in late September 2003 and first sat with the Court in November 2003, with a public investiture ceremony following in December 2003.

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Eighth Circuit **Judge Diana Murphy** of Minnesota **resigned** from the U.S. **Sentencing Commission** effective January 31, 2004. According to the *Third Branch*, the newsletter of the U.S. Courts Administrative Office, Judge Murphy cited as the reason for her decision the time pressures created by the combination of Commission duties and maintaining her Eighth Circuit docket.

Judge Murphy had served on, and been the Chair of, the Commission for approximately four years.

Association News

The Association **website** has a **new home** courtesy of the William H. Bowen School of Law, University of Arkansas at Little Rock. The **new web address** for the site is www.law.ualr.edu/eighthcircuitbar.

The Association website previously was hosted, without charge, by the law firm of inaugural Association president Eric Magnuson. The Association sought a new arrangement to avoid any appearance of law firm affiliation, and the UALR Law School offered to assume hosting and updating obligations, again without charge.

The Journal of Appellate Practice and Process, with which the Association co-sponsored a program last year, is based at the UALR Law School.

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Members of the Eighth Circuit Bar Association were **on hand** for the February 19, 2004, **visit** of the Eighth Circuit to **Iowa City**, Iowa. An Eighth Circuit panel heard three cases in the Levitt Courtroom/Auditorium of the Boyd Law Building on the University of Iowa campus, and the Association made arrangements for its members to be invited to the post-argument reception sponsored by the University of Iowa College of Law. All Association members with Iowa addresses received notice of the arguments (which were open to the public), in addition to the invitation to the reception.

The Eighth Circuit periodically sits at each law school within the Circuit but had not visited the University of Iowa College of Law since 1996.

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More than a year has passed since the Association officially accepted its **first members**, which means that the development and implementation of a **membership renewal drive** soon will be an Association priority. The Association membership year runs from July 1 through June 30, so members who joined in March, April, May or June of 2003 will in effect receive up to four “free” months of membership, as their renewals will not be due until July 1, 2004.

In addition, members who have joined since January 1, 2004, will not be asked to renew until July 1, 2005.

Members who need to renew for the year beginning July 1, 2004, can expect to receive notice by e-mail beginning in May or June. Dues remain

at \$35 for a regular member, and both charter and regular members should renew at this level. The one-time option for charter membership has expired.

The dues exemption continues for judicial and law clerk members as identified in the Association bylaws.

The Association during its first year in existence co-sponsored a continuing legal education program, hosted a breakfast at the Judicial Conference, published this newsletter, and arranged for members to mingle with Eighth Circuit Judges on two occasions when panels sat outside St. Louis/St. Paul. The Association is planning a combined annual meeting and continuing education program for September 2004 in St. Louis.

Inquiries regarding membership renewal – or new membership – should be directed to Leigh Chiles at Ichiles@barrettdeacon.com.

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The Association Board of Directors at its February meeting approved **revisions** to the **Association bylaws**. The two main changes relate to the Association leadership structure.

First, the new bylaws provide for the office of president-elect, with the holder of that office automatically to become Association president the next year. The president-elect serves as a member of the Board and performs the duties of Association president in the president’s absence.

Second, the new bylaws provide for the staggered election of directors to maintain greater continuity in Association affairs. The current directors were elected for three-year terms under the original bylaws; and when the new plan becomes effective beginning in 2006, one-third of the directors will be replaced each year.

The Amended And Restated Bylaws are posted on the Association website.

Higher Authority

The U.S. Supreme Court in a decision issued March 24, 2004, **reversed** the **Eighth Circuit** in a case involving the **statutory interpretation** of a provision of the Telecommunications Act of 1996.

See *Nixon v. Missouri Municipal League* (reversing 299 F.2d 949).

The Court, with one justice dissenting, held that 47 U.S.C. §253, despite its broad language prohibiting state and local governments from limiting entry into the telecommunications services market, does not preempt state and local attempts to limit the ability of political subdivisions to provide telecommunications services.

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The U.S. Supreme Court earlier this year **reversed** the **Eighth Circuit** in a Sixth Amendment case but **remanded** for **further consideration** on the controlling issue. See *Fellers v. United States* (124 S. Ct. 1019, reversing 285 F.3d 721). The case involved a criminal defendant’s post-indictment inculpatory statements made without opportunity to consult counsel: and the Court held that regardless of the absence of an “interrogation,” the statements in question were improperly obtained under the Sixth Amendment “deliberately elicited” standard.

The Court, however, declined to reach the issue of whether the defendant’s subsequent statements also should have been suppressed as “fruits” of the constitutional violation. Rather, the Court remanded the case for the Eighth Circuit to consider in the first instance whether the Fifth Amendment “fruits” analysis of *Oregon v. Elstad* applies in the Sixth Amendment context also.

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The U.S. Supreme Court on February 23, 2004, granted **certiorari** in the **Eighth Circuit** case of *Jama v. Immigration & Naturalization Serv.*, 329 F.3d 630. The Eighth Circuit panel, with one judge dissenting, held that an alien in certain circumstances can be ordered removed to a designated foreign country even if the country in question has not agreed to accept the alien.

The Eighth Circuit’s ruling created a **circuit split** on the interpretation of 8 U.S.C. §1231(b)(2)(E).

The case will be held over for argument during the Supreme Court’s October 2004 term.

Time, Place & Manner

The Eighth Circuit in **April** will sit **en banc** for the first time this court term. **Two cases** are scheduled for the Wednesday of court week, in St. Louis.

The first case, *Brown v. Luebbbers* (344 F.3d 770), involves the exclusion from evidence of a favorable character letter during the penalty phase of a state death penalty case. The panel, with one judge dissenting, held that the exclusion violated the defendant’s Eighth and Fourteenth Amendment rights and was not harmless; remand was for either imposition of a life sentence or a new penalty phase hearing.

The second case, *U.S. v. Palmer* (No. 03-1333, decided 10-14-03), involves the interpretation of 18 U.S.C. §3583(h) regarding the maximum sentence that may be imposed after revocation of a defendant’s supervised release. The panel, in an unpublished per curiam opinion, held that it was bound the prior panel decision in *U.S. v. St. John*, 92 F.3d 761, 766 (8th Cir. 1996); but Judge Riley, in a separate concurrence, urged **en banc** reconsideration of the issue.

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A **panel** of the Eighth Circuit **sat in Omaha** on March 8 and 9, 2004, before moving to St. Louis for the balance of court week.

According to Eighth Circuit Clerk Michael Gans, the Court, because of cost considerations and budget limitations, has been cutting back on regular court sittings outside St. Louis and St. Paul. Beginning with the completion several years ago of the new federal courthouses in Omaha and Kansas City, the Circuit had been trying to sit regularly in those locations up to twice a year.

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According to a report available on the website of the U.S. Courts Administrative Office, the **Advisory Committee** on Appellate Rules at its April meeting will review and **discuss the public comments** received in response to the series of

proposed FRAP amendments circulated last August.

The Advisory Committee as of mid-January reportedly had received approximately 120 comments, directed mostly toward a proposed new rule regarding citation of “unpublished” opinions. Additional comments were to be accepted through February 16, 2004.

The next step in the amendment process is approval of the proposed amendments by the Advisory Committee. The target effective date for this group of amendments, assuming approval at all necessary stages, is December 1, 2005.

For additional information about the proposed amendments (reported in earlier newsletters), the amendment process or the flow of public comment, see the Administrative Office website, www.uscourts.gov, and/or specifically the March 2004 report of the Rules Standing Committee to the Judicial Conference.

Issues on Appeal

A panel of the Eighth Circuit recently in *Watts v. Norris*, 356 F.3d 937 (2004), identified an additional **procedural consideration** that will limit the availability of an **appeal** in some **habeas corpus** cases.

The case involved a habeas petition by a state prisoner, and the district court had rejected the petition on two independent grounds: statute of limitations, and the petitioner’s failure to have raised the habeas grounds in state court. The Eighth Circuit granted a certificate of appealability limited to the statute of limitations issue but subsequently raised on its own motion the lack of an Article III “case or controversy” and dismissed the appeal because, due to the state court procedural default, the petitioner would realize no benefit from a reversal of the district court’s statute of limitations ruling.

The Eighth Circuit panel reexamined the earlier Circuit decision regarding the scope of the certificate of appealability but ultimately declined to expand the certificate because the procedural default issue did not meet the requirements of 28 U.S.C. §2253.

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The Eighth Circuit, **on remand from the U.S. Supreme Court** in *Republican Party v. White* (Nos. 99-4021, -4025 & -4029, decided March 16, 2004), invalidated a portion of the Minnesota Code of Judicial Conduct limiting the speech of judges involved in judicial elections. The panel in its original decision, published at 247 F.3d 854, had rejected First Amendment challenges directed to each of three different clauses appearing in Minnesota’s Canon 5.

The U.S. Supreme Court granted certiorari with regard to the challenge to just one of the three clauses, and it reversed the initial Eighth Circuit ruling, 536 U.S. 765 (2002), as to that clause. The Eighth Circuit on remand directed that the district court enter summary judgment invalidating that clause.

The Eighth Circuit panel, however, also held that it could and should reconsider its ruling as to the other two challenged clauses insofar as the Supreme Court’s reasoning might affect the analysis of those clauses. The panel then reaffirmed its initial ruling as to one of the remaining clauses and remanded for further proceedings with regard to the other clause.

Judge Beam, who dissented from the original panel decision, dissented again, arguing that the U.S. Supreme Court’s ruling required the invalidation of all three of the challenged clauses. Also, Judge Beam disputed the panel’s use of “law of the case” terminology in determining whether or not to revisit the clauses not considered by the Supreme Court. Judge Beam contended that the reconsideration was required by the Supreme Court’s mandate.

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The Eighth Circuit’s decision in *Hunter v. Underwood* (Nos. 02-3244 & 03-2853, -2260 & -2040, decided 4-1-04) provides an example of how the Court may handle an **attorney’s last-minute inability to appear for argument** due to illness. After the appellant’s counsel called in the morning of the argument to inform the Court that he was ill and could not attend, the Court took the case under

submission without argument but invited the appellee's counsel, who was present, to file a motion for travel expenses and argument preparation time. The Court, however, ultimately declined to award fees and expenses when appellant's counsel denied bad faith in his failure to appear or give greater notice and the Court concluded it had no evidentiary basis to make a contrary finding.

Footnotes

The Eighth Circuit reportedly owns three **Chief Justice Rehnquist "bobblehead" dolls** which it keeps "under lock and key" due to the dolls' popularity on ebay.

According to an article in the July/August 2003 edition of the Eighth Circuit Library newsletter, the circuit libraries in St. Louis, St. Paul and Kansas City each received one of the approximately 1,000 copies of the bobblehead commissioned by an offbeat law review known as the *Green Bag*. The Library newsletter further reports that the doll features a variety of details that would be significant to an "insider" and that the Chief Justice Rehnquist has seen, and is amused by, the doll.

For further information regarding the doll and its "insider" details, visit <http://www.ca8.uscourts.gov/library/julyaug03.bobblehead.html>. The Eighth Circuit Library posts selected articles from its newsletter on the library website and added the Rehnquist bobblehead article to the site earlier this year.

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This **newsletter** is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. Comments and suggestions should be addressed to committee chair Margaret Callahan (mccallahan@belinlaw.com) or vice-chair Annamary Dougherty (adougherty@cgwg.com). The committee would welcome additional members and/or occasional contributors.