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INTRODUCTION

THE CURRENT STATE OF IN-CHAMBERS PRACTICE

Ira Brad Matetsky[†]

With this issue of *The Journal of Law,* the editors continue publishing the *In Chambers Opinions by the Justices of the Supreme Court of the United States.* The original three volumes of *In Chambers Opinions* were compiled by Supreme Court Deputy Clerk Cynthia Rapp in 2001, and made accessible in an edition issued by the Green Bag Press under Professor Ross E. Davies in 2004. Previous supplements, each of which included in-chambers opinions (or "ICOs") published after Ms. Rapp completed her original compilation and additional opinions located by the editors and others, were published in 2004, 2005, 2006, 2007, 2010, and 2011. The complete contents of these volumes – comprising the opinions themselves as well as editorial material including notes, historical articles,[1] and indexes – are accessible via the *Green Bag*'s website,[2] and hard copies can be found at major law libraries.

In Chambers Opinions represented the first published compilation of Supreme Court Justices' opinions on matters resolved by individual justices acting as Circuit Justice, rather than the Court as a whole. The initial three volumes comprised 418 ICOs written between 1926 and 1998, some of which had never been previously published, and the six supplements added

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[1] *See* Cynthia Rapp, *Introduction*, 1 Rapp v (2004) (discussing the nature and history of in-chambers opinions and the history of oral arguments on applications); Stephen M. Shapiro & Miriam R. Nemetz, *An Introduction to In-Chambers Opinions*, 2 Rapp ix (2004) (discussing the emergency applications process and types of applications including stays, injunctions, stays of execution, extensions of time, and bail); Craig Joyce, *The Torch Is Passed: In-Chambers Opinions and the Reporter of Decisions in Historical Perspective*, 3 Rapp vii (2004) (discussing the history of Supreme Court Reporters of Decisions); Ira Brad Matetsky, *The Publication and Location of In-Chambers Opinions*, 4 Rapp Part 2 at vi (2005) (discussing historical practices concerning publication of in-chambers opinions and where copies of the opinions have been located in case reports, court records, and manuscript libraries).

[2] www.greenbag.org/green_bag_press/in-chambers%20opinions/in-chambers%20opinions.html.

another 103 opinions, expanding the temporal coverage of the set to the years 1852 through 2010. Because the justices' in-chambers opinions and actions continue to interest both practitioners[3] and academics,[4] future issues of *In Chambers Opinions* will continue to appear periodically in the *Journal of Law* for so long as the justices continue writing new ICOs and the editors and readers continue locating older ones.[5]

RECENT DEVELOPMENTS IN IN-CHAMBERS PRACTICE

Although applications to individual justices continue to be filed with regularity, the justices continue to be sparing in authoring opinions when they rule on the applications. Over the ten completed terms of the Roberts Court, the number of ICOs each term has ranged from none (October Terms 2007 and 2014) to three (October Term 2009). Within this admittedly small sample size, there is notable variation in the justices' authorship of in-chambers opinions. Chief Justice John G. Roberts, Jr. has written seven of the twelve ICOs published since he joined the Court in 2005, while Justices Clarence Thomas, Samuel A. Alito, Jr., and Elena Kagan have not yet published any.

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[3] *See generally* Stephen M. Shapiro *et al.*, SUPREME COURT PRACTICE, ch. 17 (10th ed. 2013) (discussing rules and procedures governing in-chambers practice on stay, injunction, and bail applications); *id.* §§ 6.5-6.8 (discussing applications to circuit justices for extensions of time to petition for certiorari).

[4] *See, e.g.,* Lumin N. Mulligan, *Essay: Did the Madisonian Compromise Survive Detention at Guantanamo?*, 85 N.Y.U. L. Rev. 535 (2010) (discussing whether individual Supreme Court Justices can effectively exercise habeas corpus jurisdiction); Daniel Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cin. L. Rev. 1159 (2008) (comprehensive analysis of jurisdiction of individual justices); *see also* Sebastian Bates, *Riding Circuit: How Supreme Court Justices Can Act Alone*, Penn. Undergrad. L.J. (Mar. 17, 2015), *available at* www.pulj.org/the-roundtable/-riding-circuit-how-supreme-court-justices-can-act-alone.

[5] For discussion of the places in which opinions have been and continue to be located, see Matetsky, *supra* note 1, at xv-xix. The editors are taking a relatively liberal approach in determining which writings by the justices on in-chambers matters are sufficiently detailed to constitute "opinions" and be included in these volumes. In this, they are following the guidance of Frederick Bernays Wiener, one of the first people to propose the comprehensive publication of ICOs, who opined: "The opinion stating reasons presents no difficulty, even when short; of course it should go in. The order or decree, even when it is long and contains elaborate recitals, seems more doubtful. Perhaps when the order sets forth reasons why it was made, inclusion would be appropriate, and the same is true of brief memoranda." Frederick Bernays Wiener, *Opinions of Justices Sitting in Chambers*, 49 L. Lib. Rev. 2, 5-6 (1956); *see also* Frank Felleman & John C. Wright, *The Powers of a Supreme Court Justice Sitting in an Individual Capacity*, 112 U. Pa. L. Rev. 981, 987-88 (1964).

Although the justices rarely explain why they do or do not write an ICO in a given case, their reasons for deciding not to write on most applications probably include the press of other business and the fact that no written explanation for granting or denying an application is usually expected of them.[6] Moreover, with respect to applications for stays and injunctions, the standards that individual justices (and the Court as a whole) employ in granting or denying such relief are relatively well-established, so that the justices may believe that opinions regarding most applications would merely explain the application of the familiar standard to particular facts, without providing broader guidance to the Bar.[7] Further, under current practices, the justices frequently refer applications for stays or injunctions to the full Court for disposition; where this is done, an ICO necessarily will not result. Finally, the most frequent type of single-justice applications, which are for additional time within which to petition for a writ of certiorari, are even more infrequently the subject of opinions.

Even less common than in-chambers opinions, under the Roberts Court and the Rehnquist Court before it, have been oral arguments on in-chambers applications. Oral arguments before individual justices on applications were held with some frequency, in chambers or at other locations, until the 1970s. (In earlier years the justices sometimes even received applicants or counsel *ex parte*; the Rules of the Court permitted applications to be presented to the justices in person until the 1950s, and this seems to have

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[6] As a general matter, the Court and its members rarely offer public justifications for their decisions other than in cases decided on the merits after briefing and argument. It is unusual for the full Court, any more than its individual members, to provide an opinion or reasoned order in cases in which the Court grants or (mre commonly) denies a stay, bail, an extraordinary writ, or other relief, and of course the Court does not explain its reasons for denying certiorari in more than 95% of the cases brought before it. *Cf.* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of Law & Liberty 1 (2015) (criticizing the Court's handling of stay and injunction applications and summary reversals).

[7] *But see* Richard Re, *What Standard of Review Did the Court Apply in* Wheaton College*?*, Re's Judicata (July 5, 2014), *available at* richardresjudicata.wordpress.com/2014/07/05/what-standard-of-review-did-the-court-apply-in-wheaton-college/ (asking whether a different standard of review is applied to stay applications considered by the full Court rather than a circuit justice); Baude, at 12 n.36. However, in a *per curiam* opinion denying a stay application in *Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009) (per curiam), the Court cited *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) as setting forth the standard of review on a stay application, suggesting that there is no difference. *See* Tony Mauro, *In-Chambers Opinions: A Footnote to the Chrysler Case*, Legal Times (June 19, 2009), *available at* legaltimes.typepad.com/blt/2009/06/inchambers-opinions-a-footnote-to-the-chrysler-case.html.

been a common practice, especially when the Court was not in session.) But oral arguments on in-chambers applications seem to have disappeared forever. The last known oral argument in chambers took place more than 35 years ago, in 1980, and none of the current justices seem interested in reviving the tradition.

On the other hand, although the Justices are rarely explaining their in-chambers dispositions in writing, and never orally, the rulings themselves are now readily accessible from the time of their issuance. In 2003, the Court began including its computerized docket records, including those relating to in-chambers applications, on its website. The docket, updated daily, places the fact that a Justice had granted or denied an application on the public record, although it typically does not include any comments that the Justice might have made in connection with the decision.[8]

Beginning with October Term 2014, the Court made a further change. Since that time,

> if an individual Justice takes an action – for example, on a request to postpone a lower court ruling – and actually creates an order, that will appear on the orders section on the Court's website as an order by an individual Justice, by name. Such orders already have been entered on the docket, and that will continue along with the website entry.[9]

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[8] A rare exception occurred in *Clarett v. National Football League*, a 2004 case in which football prospect Maurice Clarett challenged the NFL's determination that Clarett was ineligible to enter that year's draft. The Second Circuit had stayed a District Court injunction allowing Clarett to enter the draft. Clarett asked Justice Ruth Bader Ginsburg to vacate the stay. The online docket sets forth Ginsburg's decision, which might be termed a speaking order or an unofficial, mini in-chambers opinion: "Finding no cause to disturb the Court of Appeals' assessment of the relevant criteria, and noting the National Football League's commitment promptly to conduct a supplemental draft in the event that the District Court's judgment is affirmed, the application to vacate the stay is denied." Order, *Clarett v. National Football League*, No. 03A870 (Apr. 22, 2004) (Ginsburg, J., in chambers), *available at* www.supremecourt.gov/search.aspx?filename=/docketfiles/03a870.htm. (Clarett ultimately lost the litigation, and never played a down in the NFL. For the unfortunate aftermath, see en.wikipedia.org/wiki/Maurice_Clarett.)

[9] Lyle Denniston, Court To Show More Actions, SCOTUSblog (Oct. 3, 2014), *available at* www.scotusblog.com/2014/10/court-to-show-more-*actions*. To date, the Court has actually listed the single-Justice orders on the same website pages as orders by the full Court. Single-justice orders, with or without opinions, still do not appear in the *Journal of the Supreme Court of the United States*.

MCDONNELL V. UNITED STATES: A REVIVAL OF SUPREME COURT BAIL PRACTICE?

The most noteworthy such single-justice order posted to date was probably Chief Justice Roberts' in-chambers order staying the mandate of the U.S. Court of Appeals for the Fourth Circuit in *McDonnell v. United States*, and thereby effectively continuing a criminal defendant's release on bond pending the Court's consideration of his certiorari petition.

For several decades, applications for the release of convicted criminal defendants – most often federal defendants, but including state defendants as well – on bail pending consideration of their certiorari petitions or appeals represented a significant portion of the in-chambers docket. There are dozens of ICOs reported in *In Chambers Opinions* addressing defendants' applications for bail pending Supreme Court review, and in myriad more cases, the justices granted or denied bail without writing an ICO. Indeed, the very first decision reported in the chronologically arranged *In Chambers Opinions* was a lengthy 1926 opinion by Justice Pierce Butler granting bail to ten defendants who were challenging their convictions under the National Prohibition Act.[10] Two years later, Justice George Sutherland similarly granted bail to a group of defendants in *Olmstead v. United States*,[11] another Prohibition case that is remembered today for its subsequently overruled decision on the merits on the subject of wiretapping, although he did not write an ICO.

Bail applications to Justices continued to be regularly made, and sometimes granted, until the 1980s. In 1984, Congress adopted a Bail Reform Act that "made bail less available (particularly after conviction) and regularized appellate review of bail determinations. . . ."[12] Following the enactment of that statute, the leading commentators on Supreme Court procedure observed that "bail practice before individual Circuit Justices has become largely obsolete" and that "there is not a single published in-chambers opinion under the Bail Reform Act of 1984 granting bail. Nor does there appear to be any significant practice of Circuit Justices granting bail under

[10] *Motlow v. United States*, 10 F.2d 657, 1 Rapp 1 (1926) (Butler, J., in chambers).

[11] Order, *Olmstead v. United States*, Nos. 493, 522 & 533, O.T. 1927 (Jan. 24, 1928) (Sutherland, J., in chambers).

[12] Shapiro *et al.*, *supra* note 3, § 17.15, at 911.

that Act without opinion."[13] Indeed, the justices' former practice of giving serious consideration to bail applications appears to have been virtually forgotten.

One case in which a Justice did grant bail was *Chambers v. Mississippi*, in which Justice Lewis F. Powell, Jr. entered an order granting bail to a petitioner who had allegedly murdered a police officer and had been convicted of first-degree murder in Mississippi state court. Powell then denied the State's motion for reconsideration of his order, leaving Chambers free on $15,000 bail until his case was resolved. Powell published an ICO explaining his decision.[14]

A knowledgeable scholarly commentator on *Chambers v. Mississippi* construed a convicted defendant's bail application to the circuit justice as "virtually unheard of" and a "novelty," and Powell's decision to grant the application as "something remarkable."[15] Indeed, Chambers' counsel on the bail application once speculated that Powell's judicial inexperience at the time – he was in his first month on the Court when Chambers' application came before him – may have contributed to his granting the application, although the strong facts of the case and other considerations also played a role.[16] In reality, a justice's granting bail to a criminal defendant with a potentially meritorious certiorari petition, while not commonplace, was not outlandish in 1972. Of course, such relief would not typically have been granted to a defendant convicted in state (rather than federal) court, nor to one whose conviction was for murdering a police officer, but the facts in *Chambers* were unusually sympathetic.[17]

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[13] *Id.*; *see also* Shapiro & Nemitz, *supra* note 1, at xvi-xvii.

[14] 405 U.S. 1205, 2 Rapp 525 (1972) (Powell, J., in chambers).

[15] Stephan Landsman, Chambers v. Mississippi: *A New Justice Meets an Old Style Southern Verdict,* in EVIDENCE STORIES 359, 368-70 (2006).

[16] *Id*. at 370 (discussing views of Chambers' counsel, Professor Peter Weston). *See also* Emily Prifogle, *Law and Local Activism: Uncovering the Civil Rights History of* Chambers v. Mississippi, 101 Cal. L. Rev. 445, 510-11 & n. 463 (2013).

[17] *See id.* These facts included that Chambers had been free on bond for 15 months between his arrest and trial without incident, that he was an ordained minister, that he had nine children and strong community ties, and that his certiorari petition presented significant constitutional issues and depicted a trial that could be categorized as fundamentally unfair. In granting the bail application, Powell followed the recommendation of his law clerk, Lawrence A. Hammond, who recommended that bail be granted because the case presented two important legal issues and also because "it appears that this Pet[itione]r may well be innocent, making this a compelling case to take a good look at state procedural requirements which may, in this case at least, operate to deny an accused the basic substance of a fair trial." Memorandum from "LAH" (Lawrence A. Hammond) to "Judge" (Powell),

Powell's chambers file in *Chambers,* contained in the Powell Papers archived at Washington & Lee Law School, provides additional insight on the justice's decision-making. Interestingly, the file includes a memorandum by Powell stating that after he received Mississippi's motion to reconsider his order granting bail, which suggested that Chambers' re-entry into the community might lead to violence, "this matter has concerned me and accordingly I conferred with Mr. Justice Stewart [who had been on the Court since 1958]. He was good enough to review the papers (as well as have one of his clerks do so). He concurs in my view that the application to reconsider my order of February 1 should be denied."[18]

The Court subsequently granted Chambers' certiorari petition and reversed his conviction, holding in an opinion by Powell that Mississippi could not enforce its rules of evidence in a way that prevented a murder defendant from presenting evidence helping to establish that another man had confessed to the crime.[19] Chambers' conviction was reversed, and Mississippi never sought to re-try him. It is submitted that history should look kindly on Powell's decision to grant bail to a seemingly innocent man with highly colorable constitutional claims – but it is very unlikely that a justice would take such an action today.

"Unlikely," however, no longer means "impossible," as at least one exception now exists to the statement that the justices no longer grant bail pending consideration and disposition of cases brought before them on certiorari. In 2014, Robert McDonnell, the former governor of Virginia, was convicted of official misconduct charges in the Eastern District of Virginia, and sentenced to two years in prison. The Fourth Circuit affirmed McDonnell's conviction, and denied his motion to stay the mandate (and thereby hold his prison sentence in abeyance) pending his petitioning the Supreme Court for certiorari.[20] McDonnell filed his cert. petition, and simultaneously applied for a single-Justice stay of the mandate pending

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at 2 (Jan. 31, 1972), *Chambers v. Mississippi* case file, Lewis F. Powell, Jr. Papers, Washington L Lee Law School, Lexington, Va. The *Chambers* case file can be found online at scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1513&context=casefiles. I thank John Jacob of Washington and Lee University School of Law for uploading this file and making it readily accessible in response to my request for it.

[18] Memorandum re No. 71-5908, *Chambers v. Mississippi*, at 2 (Feb. 14, 1972), *in* Chambers case file.

[19] *Chambers v. Mississippi*, 410 U.S. 284 (1973).

[20] Order, *United States v. McDonnell*, No. 15-4019 (4th Cir. Aug. 20, 2015).

appeal, or in the alternative, release on bail.[21] In his application, McDonnell argued that he met the requirements for the relief he sought, including irreparable harm and a likelihood that certiorari would be granted, whether his application was considered as a stay application under 28 U.S.C. § 2101(f) or as a bail application under 18 U.S.C. § 3143(b).

McDonnell's application for a stay or bail was presented to Chief Justice John G. Roberts, Jr., the Circuit Justice for the Fourth Circuit. Had the Court been in session, Roberts might well have referred the application for consideration by the full Court. Perhaps because the Members of the Court were scattered for the summer recess, Roberts initially addressed the application himself. He did not author an in-chambers opinion, but on August 24, 2015, he entered a temporary stay order, which read:

> UPON CONSIDERATION of the application of counsel for the applicant,
>
> IT IS ORDERED that a response to the application be filed on or before Wednesday, August 26, 2015, by 4 p.m. It is further ordered that the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 15-4019 is hereby stayed pending consideration of the response and further order of the undersigned or of the Court.[22]

After McDonnell's application was fully briefed, Roberts referred the matter to the full Court, which, surprising some observers,[23] continued the stay of the mandate pending consideration of McDonnell's certiorari petition and, if certiorari were to be granted, pending the Court's disposition of the case.[24] Thereafter, the Court granted certiorari, heard the case, and on June 27, 2016, unanimously reversed McDonell's conviction and remanded for further proceedings.[25] Although further proceedings will take place on

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[21] A copy of McDonnell's "Emergency Application to Stay Mandate, or in the Alternative for Release on Bail, Pending Disposition of Certiorari Petition" is available at www.scribd.com/doc/275357151/McDonnell-Stay-Petition.

[22] Order, *McDonnell v. United States*, No. 15A218 (Aug. 24, 2015) (Roberts, C.J., in chambers), *available at* www.supremecourt.gov/orders/courtorders/082415zr_g2bh.pdf.

[23] *See, e.g.*, Frank Green, Odds Long for Former Gov. Bob McDonnell To Win Bail, *Richmond Times-Dispatch*, Aug. 30, 2015, *available at* www.richmond.com/news/local/crime/article_019ab027-1671-5a4d-b80d-12a7a1112833.html

[24] Order, *McDonnell v. United States*, No. 15A218 (Aug. 31, 2015), *available at* www.supremecourt.gov/orders/courtorders/083115zr_q861.pdf

[25] *McDonnell v. United States*, 136 S.Ct. 2355 (2016).

remand, if McDonnell is successful in avoiding retrial and another conviction, his "hail Mary" application to stay the mandate requiring him to report to prison will have saved him from serving almost a year in prison for a crime that he may not, according to the Court's analysis, have committed.

It remains to be seen whether *McDonnell* presages a return to a more liberal practice in the justices' consideration of bail applications, or stay applications having the same effect. If the circuit justices set forth their reasoning for granting or denying any such applications, or any other types of applications, or if we learn that any of their predecessors did the same, their opinions will be reported in these pages.

THE HISTORY OF PUBLICATION OF U.S. SUPREME COURT JUSTICES' IN-CHAMBERS OPINIONS

Ira Brad Matetsky[†]

By publishing *In Chambers Opinions by the Justices of the Supreme Court of the United States*, Cynthia Rapp and Ross Davies made many of these opinions readily available to the public for the first time. Just as two eminent practitioners once described the Court's belated decision to begin publishing in-chambers opinions in the *United States Reports* in 1969 as a "most welcome change" that represented "a long-overdue convenience for both the Court and the Bar,[1] the same was rightly said about the publication of *In Chambers Opinions*. But the compilation raised a pair of important historical questions: How did legal documents as significant as official judicial opinions of United States Supreme Court Justices escape reporting to begin with, and why was the Court's publication policy eventually changed so that a present-day in-chambers opinion is now readily available, at least when an authoring Justice wants it to be?

A look back through the history of Supreme Court publication practices provides the answers. From the earliest days of the Supreme Court, the Justices were authorized to dispose of certain types of applications individually. During the nineteenth century, single-Justice matters included petitions for writs of error or appeal, applications for stays and supersedeas, and habeas corpus petitions. Then as now, the Justices did not write opinions

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[1] Bennett Boskey and Eugene Gressman, *The 1970 Changes in the Supreme Court's Rules*, 49 F.R.D. 679, 695 (1970).

when they routinely disposed of such matters; a typical petition for leave to appeal, for example, might simply be endorsed "granted" (or sometimes "denied") and signed. In the unusual case in which a Justice wrote an opinion on an application, the opinion was never published in the nominate reports that became the *United States Reports*, which printed opinions only in cases decided by the full Court. Rather, the opinion would be captioned in a United States Circuit Court and published, if at all, in a reporter containing decisions of those courts, whose membership often included a Supreme Court Justice "riding circuit."[2]

To modern readers of a single-Justice nineteenth-century opinion, it may be unclear whether a Justice was acting as a Supreme Court Justice or as a Circuit Court Judge in granting a stay or supersedeas while "at chambers," even if the procedural posture is detailed in the opinion.[3] This confusion was alleviated only in the late 1800s, when circuit-riding disappeared, soon to be followed by the Circuit Courts themselves.

The situation was even more muddled in habeas corpus cases. For much of the nineteenth century, the Great Writ could be granted by the Supreme Court, the Circuit Court, the District Court, *or* by a Justice or Judge of any of them acting individually.[4] Therefore, when a Justice presided over a habeas corpus matter, it may have made little difference to anyone whether he was sitting "as" a Supreme Court Justice or a Circuit Court Judge (and hence whether he was issuing a Supreme Court "in-chambers" opinion by the standards of today).[5] What is clear is that when these opinions were oc-

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[2] Any historical work on the Court will contain some discussion of the circuit-riding era. A detailed history is found in Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003). For discussion of the historical role of Circuit Justices, see Sandra Day O'Connor, *Foreword: The Changing Role of the Circuit Justice*, 17 U. Tol. L. Rev. 521 (1986).

[3] *See, e.g., Muscatine v. Mississippi & M.R. Co.*, 1 Dill. 536, 17 F. Cas. 1067, 1068 (C.C.D. Iowa 1870) (No. 9971) (from the statement of the case: "[A]pplication at chambers was made to Mr. Justice MILLER, one of the judges of the circuit court of the United States"; from the opinion: "These are applications to me as a judge of the supreme court and of the circuit court of the United States . . . for injunctions. . . ."); *Butchers' Ass'n v. Slaughter House Co.*, 1 Woods 50, 4 F. Cas. 891 (C.C.D. La. 1870) (No. 2234) ("application … to Mr. Justice Bradley of the supreme court of the United States, at chambers" to increase amount of the bond required on an appeal from state court).

[4] *See generally* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. Rev. 251, 271-73 (2005); George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1972) (reprinting various versions of the habeas corpus statutes).

[5] Once in awhile it did matter. For example, it appears that Chief Justice Taney felt quite strongly that he was sitting as a Supreme Court Justice rather than exercising his Circuit Court responsibilities

casionally published, they too usually were captioned in the Circuit Court, not the Supreme Court, and were published in Circuit Court reports, not in the *United States Reports* or in unofficial Supreme Court reporters.[6]

During the first part of the twentieth century, in-chambers opinions were still omitted from both the Supreme Court's official and unofficial reports. A few opinions continued to appear in lower court reports – by now, the *Federal Reporter* or *Federal Supplement* – and by the 1940s an occasional in-chambers opinion began to be published in the *Supreme Court Reporter*. Once in awhile, by design or chance, an in-published opinion was printed elsewhere, and still more occasionally an unpublished in-chambers opinion would somehow come to be cited in a treatise or law review article, even though the typical practitioner would have no idea how to locate such an opinion.[7]

For the most part, however, any effort by a Justice to draft an in-chambers opinion or reasoned order on an application before him would go entirely unnoticed except by the lawyers and litigants in the case before him. Indeed, the Justices' knowledge that these opinions would not be published may have deterred them from continuing to prepare such opinions, even in important cases. For example, there are no known in-chambers opinions by Justice Wiley B. Rutledge, but Rutledge's papers at

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when he granted the writ of habeas corpus in *Ex parte Merryman,* Taney 246, 17 F. Cas. 144, 4 Rapp 1400 (1862). *See* Hartnett, at 279-81 & n.126; Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* 38-42 & 133-35 nn. 42-54.

[6] *See, e.g., United States v. Patterson,* 29 Fed. 775 (C.C.D.N.J. 1887) (Bradley, J.); *Ex parte Geisler*, 4 Woods 381, 50 Fed. 411 (C.C.N.D. Tex. 1882) (Woods, J.); *Ex parte Kaine*, Betts Scr. Bk. 261, 14 F. Cas. 82 (C.C.S.D.N.Y. 1852) (No. 7597A) (Nelson, J.), *dismissed,* 55 U.S. (14 How.) 103 (1852), *later opinion*, 3 Blatchf. 1, 14 F. Cas. 78, 4 Rapp 1393 (C.C.S.D.N.Y. 1853) (Nelson, J.). A seeming counterexample – *Ex parte Clark*, 9 S. Ct. 2 (Harlan, Circuit Justice 1888), a one-paragraph 1888 habeas corpus opinion by Justice John Marshall Harlan – is the exception that proves the rule: The *United States Reports* did not include the opinion, but the *Supreme Court Reporter* published this opinion under the mistaken impression that it was a decision of the full Court. Evidence that this aspect of *Clark* was heard by Justice Harlan individually includes (i) the date of the decision – August 7, 1888 – although the Court was in recess from May to October 1888 and no other opinions are dated in June, July, August, or September; (ii) Justice Harlan's repeated use of the pronoun "I" to refer to the author of the opinion; and (iii) the headnote in the *Supreme Court Reporter,* which states that "Clark presented to Mr. Justice HARLAN, of the Supreme Court of the United States, at chambers, a petition praying for a writ of habeas corpus. . . ."

[7] For one example, Justice Stanley Reed's two 1943 opinions in *Ex parte Seals*, 4 Rapp 1466 and 1468, were cited in the first edition of the Hart & Wechsler treatise, *The Federal Courts and the Federal System* (1953), and the citations were then carried forward as late as the Fourth Edition (1996), although virtually no readers of the treatise would have been able to find them.

the Library of Congress contain four memoranda explaining his rulings on important applications to him as Circuit Justice for the Eighth and Tenth Circuits.[8] These memoranda read precisely like draft in-chambers opinions, setting forth the facts and explaining the Justice's reasons for his rulings on each application. But Rutledge never finalized the opinions, they never left his chambers, and they are not filed with the Court's records in the cases. In fact, when the lower-court judge, whose denial of bail to a series of defendants had been overturned by Rutledge, wrote to the Clerk of the Supreme Court requesting a copy of the opinion for his guidance in future cases, he was told that none had been written.[9] There is no way to know whether Rutledge concluded that there was no point in drafting formal in-chambers opinions if no one would see them but the litigants in the particular case before him and their lawyers. However, at about the same time period was deciding these in-chambers applications, one of his law clerks asked the Supreme Court's Reporter whether in-chambers opinions could be published, only to receive the response was that such opinions were never published in the *United States Reports*.[10] If this non-publication was the reason Rutledge did not prepare and disseminate in-chambers opinions, then the non-publication practice caused at least four potentially significant opinions to be lost to contemporary judges, lawyers, and litigants, and also lost to history for more than 50 years.

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[8] *See* Memorandum in *Bisignano v. Municipal Court of Des Moines* (October 1946), Wiley Rutledge Papers, Manuscript Division, Library of Congress ("Rutledge Papers"), Box 154; Memorandum in *Ex parte Standard Oil Co.* ("dictated March 18, 1947"), Rutledge Papers, Box 154; Memorandum in *Rogers v. United States* and two related cases, Rutledge Papers, Box 176 (Oct. 20, 1948); Memorandum in *Bary v. United States* and a related case, Rutledge Papers, Box 176 (Nov. 3, 1948). *Rogers* and *Bary* were important bail rulings, on cases that later came before the full Court, arising from contempt convictions of Communist Party figures who refused to testify before a Colorado grand jury, and Justice Rutledge expended considerable time on these cases. *See* John M. Ferrin, *Salt of the Earth, Conscience of the Court* 406 (2004) (citing letter from Justice Rutledge to W. Howard Mann, March 1, 1949, Rutledge Papers, Box 32).

[9] Letter from Judge J. Foster Symes to Charles Elmore Cropley, Clerk of the Supreme Court, November 16, 1948, and letter from Mr. Cropley, by E.P. Cullinan, Assistant Clerk, to Judge Symes, November 18, 1948, in case file, *Rogers v. United States,* O.T. 1950 No. 20, National Archives Supreme Court case files.

[10] Letter from Walter Wyatt, Reporter, to Chief Justice Vinson, Aug. 27, 1951, Walter Wyatt Papers, Manuscript Group 10278-b, Albert & Shirley Smalls Special Collection Library, University of Virginia, Charlottesville, Va. ("Wyatt Papers"), Box 119. This memorandum is discussed in more detail below. *See infra* note 28 and accompanying text. The memorandum is reprinted in full in Matetsky, *supra* note *, at xx-xxiii.

Even though Rutledge never finalized and published any in-chambers opinions, by the late 1940s or early 1950s, several other Justices had started to do so. As of 1951, four sitting Justices (Douglas, Frankfurter, Jackson, and Reed) had published at least one opinion in a West Publishing Company reporter (the *Supreme Court Reporter*, *Federal Reporter*, or *Federal Supplement*). Increased ease of publication may have resulted from the fact that in 1946, the Supreme Court's private printer retired, and the Government Printing Office established a branch print operation in the basement of the Supreme Court Building itself. Soon after the print shop moved on-site, the Justices began utilizing it not only for their draft and final opinions for the Court, but also to print internal "Memoranda to the Conference" (or "Memoranda to the Brethren" as they were sometimes captioned before 1981). It was a short step for Justices to start having their in-chambers opinions reproduced in the in-house print shop as well. *Williamson v. United States* by Justice Robert Jackson in 1950 may have been the first in-chambers opinion to be set in type, rather than typewritten or handwritten. By the early 1950s, several Justices were having occasional in-chambers opinions set in type and circulated to their fellow Justices for their information. This ready ability to print and distribute multiple copies of in-chambers opinions surely facilitated disseminating them to the legal publishers as well.[11]

Before *Supreme Court Practice* by Robert Stern and Eugene Gressman and their successors preempted the field, a leading guide to practice in the U.S. Supreme Court was *Jurisdiction of the Supreme Court of the United States* by Reynolds Robertson and Francis R. Kirkham, which was reissued in a 1951 edition edited by Richard Wolfson and Philip Kurland. This edition contained an Appendix B headed "Opinions of Supreme Court Justices Not in the United States Reports". The appendix addressed the fact that "[a]lthough today . . . all opinions delivered when the Court acts as a body are published in the United States Reports, there are other opinions of the Justices which are either not published or are to be found only by knowledge of their likely source or by diligent search into unlikely sources."[12]

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[11] *See, e.g.,* unsigned letter to Justice Reed, apparently from a law clerk, July 25, 1951, concerning his opinion in *Field v. United States,* 193 F.2d 86, 1 Rapp 158 (Reed, Circuit Justice 1951): "Your special letter containing your Field opinion came in last evening, so I got down early this morning and went to work on it. At the request of the Clerk's office I made several copies and am having Buck run off 150 more." Stanley F. Reed Papers, University of Kentucky, Box 133.

[12] Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* 943-

Most of this Appendix addressed applications to a Supreme Court Justice acting individually – such as applications for bail, stays, or extensions of time to petition for certiorari.[13] Wolfson and Kurland observed that "[o]f course, it is rare for a Supreme Court Justice to write a full opinion upon the various applications to come before him," and that (then as now) most of these applications are denied without opinion or with only a brief memorandum. The authors surveyed some significant opinions and dispositions by single Justices in then-recent years, observed that "[o]pinions of Supreme Court Justices, acting on their wide individual authority, generally are not available at all," and provided citations to the known instances where such opinions had been reported. They concluded that "[f]or the scholar and the practicing lawyer, the failure of any publisher or of the Supreme Court Reporter to collect the published and unpublished opinions of the Justices so that they may be easily found and read is a great handicap."[14]

In March 1951, Justice Felix Frankfurter – who, in addition to being one of the first twentieth-century Justices to publish some in-chambers writings, had recently asked the Clerk to forward an in-chambers order to the *American Bar Association Journal* for publication[15] – read this Appendix and discussed it with Walter Wyatt, the Supreme Court's Reporter of Decisions.[16] Wyatt prepared a memorandum, apparently for his own use, concerning the possibility of publishing the Justices' in-chambers opinions in the *United States Reports*.[17] Wyatt also promised Frankfurter that he would raise the question at an upcoming meeting with Chief Justice Fred Vinson.[18] In advance of that

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47 (Richard F. Wolfson & Philip B. Kurland rev. ed. 1951).

[13] The Appendix also discussed occasional situations in which a Justice sat with a panel of a Court of Appeals or as a member of a three-judge district court. As Wolfson and Kurland noted, these situations are quite distinguishable from those giving rise to in-chambers opinions. *See id.* at 943-44.

[14] *Id.* at 947.

[15] *McHugh v. Massachusetts*, 36 A.B.A.J. 899 (Nov. 1950). The opinion was published together with an article headed "Considerations Involved in Granting Extensions for Applying for *Certiorari*," which the editors "published here with the thought that it will serve both the Court and the Bar through the distribution of information regarding the [Supreme Court's] practice [concerning extensions] which is not to be found in the reports of Supreme Court proceedings."

[16] There is no evidence that any of Wyatt's predecessors as Reporter ever considered this issue. For example, no reference to in-chambers opinions was located in the papers of Ernest Knaebel, who served as Reporter from 1916 to 1944. Knaebel Family Papers, Accession No. 9963, American Heritage Center, University of Wyoming, boxes 12-15.

[17] "Opinions of Supreme Court Justices not in the United States Reports", Mar. 30, 1951, Wyatt Papers, Box 121.

[18] *See id.* at 4. It is unsurprising that Frankfurter would raise an issue such as the Court's publication

meeting, Wyatt prepared a handwritten list of "Questions to Be Discussed with The Chief Justice" at their meeting,[19] which included the entry: "Publishing opinions of individual Justices, 'Orders in Chambers.'" Vinson apparently suggested at the meeting that Wyatt prepare a memorandum on this subject.

Wyatt then reworked his earlier memorandum into a more formal letter memorandum to the Chief Justice.[20] The substance of this letter was that it was unclear to Wyatt whether the applicable statutes authorized him to include individual Justices' opinions in the *United States Reports*, but that Wyatt would gladly include them if the Court or the Chief Justice directed him to. At the same time, Wyatt noted that copies of past in-chambers opinions had never been assembled anywhere, so that putting together a set of such opinions for publications could be an expensive and time-consuming project. He offered a series of suggestions for including the opinions in the *Reports,* if the Court so decided, either beginning with current and future opinions or retrospectively.

Unfortunately, Wyatt's analysis does not appear to have received Vinson's attention.[21] Several years later, after Earl Warren had succeeded Vinson as Chief Justice, Wyatt observed that he had "never been informed of a decision [on the subject of his memo] and do not know whether it ever was considered by the Court."[22]

The *United States Reports* thus continued to omit virtually all in-chambers opinions of individual Justices, although the number of such opinions continued to grow. Some of the Justices continued sending their

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policy for in-chambers opinions. *See generally* Dennis J. Hutchinson, *Mr. Justice Frankfurter and the Business of the Supreme Court, 1949-1961*, 1980 *Supreme Court Review* 143 (discussing Frankfurter's role in attempting to lead the Court on numerous procedural matters).

[19] Wyatt Papers, Box 119.

[20] Letter from Walter Wyatt to Chief Justice Vinson, *supra* note 10, *reprinted in* 4 Rapp supp. 2 at xx-xxiii.

[21] No copy of Wyatt's letter memorandum to the Chief Justice or any other documents concerning in-chambers opinions was located in the file of Vinson's correspondence with the Reporter of Decisions in the generally comprehensive Vinson Papers at the University of Kentucky, although the file contains correspondence on several other issues concerning the contents of the *United States Reports*. *See* Fred M. Vinson Papers, University of Kentucky, Louisville, Ky., Box 223, folder 5. Copies of the memorandum were, however, located in papers of some other Justices (typically annexed to later correspondence on this same issue).

[22] Draft letter ("not sent") from Walter Wyatt to Chief Justice Warren, Jan. 17, 1955, Wyatt Papers, Box 121.

in-chambers opinions to the private publishers of the *Supreme Court Reporter* and the *Lawyer's Edition*, which gladly printed them.[23] For example, in 1954, Wyatt forwarded Frankfurter's in-chambers opinion in *Albanese v. United States* to the publisher of the *Lawyer's Edition*, with the observation that the *United States Reports* did not include such opinions but that "I know of no reason why you should not report this opinion in your Reports, if you consider it advisable to do so."[24]

In January 1955, Frankfurter again told Wyatt that he believed the *United States Reports* should include in-chambers opinions. Wyatt prepared a draft letter intended to bring new Chief Justice Earl Warren up-to-date on the issue.[25] While much of this draft simply recapitulated his submission to Vinson in 1951, Wyatt updated his thoughts with the new observation that:

> When [the 1951] memorandum was written, the undersigned had received the impression from Mr. Cropley, then Clerk of the Court, that there probably were a large number of memoranda and opinions of this character buried in the files of the Court and that an attempt to collect and publish all of those previously filed would be a hurculean [*sic*] task, involving an exhaustive search of the original papers in all cases previously filed in the Court, because no separate index or list of such individual opinions had been maintained. . . .
>
> An attempt to search the original papers in all cases previously filed in the Court in an effort to find and publish all such memoranda and opinions previously filed would be impractical; but a recent conversation with Mr. Willey indicates that it would not be necessary. He advises that the practice of filing memoranda and opinions of this character is of recent origin, and he has maintained a loose-leaf file of such memoranda and opinions, though it may not be complete. His file contains 35 memoranda and opinions of this character aggregating 114 pages.

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[23] At the same time, the practice of occasionally publishing such opinions in the reports of lower courts, such as the *Federal Reporter* or *Federal Supplement*, was discontinued. However, occasionally an opinion or order of a Justice acting in chambers, not found in any Supreme Court reporter, would be printed in another periodical, whether at the instance of the authoring Justice or otherwise. *See, e.g.*, *United States ex rel. Knauff v. McGrath*, 96 Cong. Rep. A3751, 1 Rapp 36 (Jackson, Circuit Justice 1950); *McHugh v. Massachusetts,* 36 A.B.A.J. 899 (Frankfurter, Circuit Justice 1950); *In re Wykoff*, 6 Race Rel. L. Rev. 794 (Black, Circuit Justice 1961).

[24] Letter from Walter Wyatt to Ernest H. Schopler, Dec. 14, 1954, Wyatt Papers, Box 117.

[25] Draft letter ("not sent"), *supra* note 22.

> Since this question was raised in 1951, this office also has been compiling a file of such memoranda and opinions sent to it by the authors, the Clerk, and the printers. It contains 12 memoranda and opinions aggregating 36 pages.[26]

Ultimately Wyatt did not send his letter to Warren. Instead, he suggested that Frankfurter should address his proposal for publishing in-chambers opinions in the *United States Reports* directly with his fellow Justices.[27] Whether Frankfurter did so is unknown. If he did, the suggestion was rejected.

Around this time, Frederick Bernays Wiener entered the fray.[28] Wiener was well-known to the Supreme Court, both as an advocate and as the author of numerous publications including his recent treatise, *Effective Appellate Advocacy*, and had served as Reporter for a committee that had recently drafted revised Rules for the Court. Wiener had been credited by Wolfson and Kurland with some of the citations they used in their 1951 Appendix, and Wyatt later described him as having "shown more interest in the United States Reports than any other practicing lawyer that I know."[29] In 1956, Wiener published "Opinions of Justices Sitting in Chambers" in the *Law Library Journal*.[30] This article began by noting that since 1951, when the Kurland and Wolfson appendix had been published, "there has been a marked increase in the number of opinions rendered by the Justices sitting in chambers."[31] He found it unfortunate that in-chambers opinions and orders were never reported officially, and that many of them were not available from any source at all. Noting that in-chambers applications frequently dealt with important matters, such as bail and stays, Wiener opined:

> [A]ction on the various matters submitted to individual Justices in chambers has been accompanied by an increasing number of opinions written in connection therewith. The importance of such ap-

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[26] *Id.* at 2-3.

[27] Letter from Justice Frankfurter to Walter Wyatt, Jan. 17, 1955, Wyatt Papers, Box 121; Letter from Wyatt to Frankfurter, Jan. 19, 1955, Wyatt Papers, Box 121.

[28] Professor Paul R. Baier is preparing a biography of Colonel Wiener. Pending its appearance, for background on Wiener, see, *e.g.*, Paul Baier, *Frederick the Incomparable*, 4 A.B.A. Journal e-Report No. 21 (May 27, 2005); William Pannill, *Appeals: The Classic Guide,* 25 Litigation No. 2 at 6 (1999).

[29] Letter from Walter Wyatt to Chief Justice Warren, Mar. 1, 1963, at 2, Wyatt Papers, Box 122 (suggesting Wiener as one of four potential successors to Wyatt, who was about to retire from his position as Reporter).

[30] 49 Law Lib. J. 2 (1956).

[31] *Id.* at 2.

> plications to counsel and to individual litigants – literally often of life-or-death significance to the latter – suggests that it would be helpful, at the very least, to have collected somewhere a complete list of such opinions.[32]

Wiener then appended a listing of 58 in-chambers opinions known to him, "start[ing] with Kurland and Wolfson's compilation, but [also] based in large measure on the collection maintained by Harold B. Willey, Esq., Clerk of the Supreme Court."[33] Of these 58 opinions (which actually ranged from full-fledged opinions to brief comments in handwritten dispositions), some 25 were unreported. Although the Wiener article attained some attention within the Court – Frankfurter, in particular, is known to have read it in manuscript[34] – it too did not lead to any change in the Court's publication practices.

The suggestion that in-chambers opinions should be officially reported next arose within the Court in 1960. This time, it was Justice William O. Douglas who requested that his in-chambers opinion in *Bandy v. United States* be printed in the *United States Reports*. Wyatt (who had apparently overcome his earlier agnosticism on whether in-chambers opinions should be published) wrote to Douglas that he would be "delighted" to include *Bandy* and all other in-chambers opinions in his *Reports*, but that he could do so only if he received the Court's authorization. Wyatt added that he was "unhappy about the existing situation, especially since such opinions are now being reported in the Lawyer's Edition and the Supreme Court Reporter, and failure to include them makes the United States Reports less complete than those unofficial reports."[35]

Douglas then "sounded out the opinion around the building." He found "so much feeling against the [proposed] change in the practice that I thought I would not bring it up to Conference" and instead simply asked

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[32] *Id*. at 4.

[33] *Id*. at 6.

[34] A manuscript of Colonel Wiener's article, with the notation "Read by F.F. 9/25/55," is contained in Frankfurter's archived papers. Felix Frankfurter Papers, Manuscript Division, Library of Congress, microfilm reel 67.

[35] Letter from Walter Wyatt to Justice Douglas, Nov. 22, 1960, William O. Douglas Papers, Manuscript Division, Library of Congress ("Douglas Papers"), Box 1133, also located in Earl Warren Papers, Manuscript Division, Library of Congress ("Warren Papers"), Box 417, and Wyatt Papers, Box 121.

Wyatt to send his opinion to West Publishing Company.[36] Wyatt promised to send the opinion to West Publishing but indicated that the Clerk's Office already sent such opinions to the publishers automatically, suggesting that by this time, a Justice could readily have an in-chambers opinion published, albeit unofficially, whenever he chose to. Douglas did not disclose any reasons that other Justices might have provided for opposing the publication of in-chambers opinions in the *United States Reports*. However, when Wyatt forwarded his correspondence with Douglas to Warren, indicating that he would make no change in procedure unless the Court so instructed him,[37] the Chief Justice promptly "agree[d] that changes of this character should not be made by the Reporter without Conference authorization."[38]

There matters rested for another eight years,[39] through Wyatt's retirement as Reporter of Decisions at the end of 1963. In 1964, a law-review survey of Supreme Court in-chambers practice observed:

> Having decided a bail or stay application, a Justice will often add a sentence or two, in his own handwriting, explaining his reasons or recommending further procedures to the applicant. Such scribblings are not officially reported. In the last decade, however, most "opinions" and "memoranda" filed by Justices on these matters have been reported in the Supreme Court Reporter and the Lawyers Edition. Otherwise, short memoranda and information on action taken on these applications are available to the lawyer only through the clerk's files in Washington. It would seem, unless the Justice indicates to the contrary, that all such memoranda should be printed in the official Supreme Court Reports. . . .[40]

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[36] Letter from Justice Douglas to Walter Wyatt, Nov. 25, 1960, Douglas Papers, Box 1133, Wyatt Papers, Box 121; Letter from Walter Wyatt to Justice Douglas, Nov. 30, 1960, Douglas Papers, Box 1133, Wyatt Papers, Box 121. As Douglas had requested, the *Bandy* opinion was duly published in the unofficial reporters (and, atypically for the time, in the *United States Law Week* as well).

[37] Letter from Walter Wyatt to Chief Justice Warren, Nov. 22, 1960, Warren Papers, Box 417, Wyatt Papers, Box 121.

[38] Letter from Chief Justice Warren to Walter Wyatt, Nov. 22, 1960, Warren Papers, Box 417, Wyatt Papers, Box 121.

[39] *See also* Letter from Walter Wyatt to Judge Simon E. Sobeloff, May 29, 1961, Wyatt Papers, Box 121 (explaining that in-chambers opinions were never published in the *United States Reports* and that "[d]uring the 15 years that I have been with the Court, the question whether such opinions of individual Justices 'in chambers' should be reported in the United States Report[s] has been raised formally or informally two or three times and I have never been authorized to report them in the United States Reports").

[40] Frank Felleman & John C. Wright, Note, *The Powers of a Supreme Court Justice Acting in an Individual*

On May 2, 1968, the Clerk of the Supreme Court, John F. Davis, and the Reporter of Decisions, Henry Putzel, Jr., addressed a memorandum to Warren concerning "several aspects of their respective procedures relating to the issuance and publications of opinions, orders and judgments of the Court."[41] The first recommendation contained in this memorandum was headed "United States Reports – In-Chambers Opinions" and read:

> At the present time, in-chambers opinions by individual Justices are not printed in the United States Reports. Many of them are published in the Supreme Court Reporter and in the Lawyers Edition. It has been suggested that consideration be given to printing in the back of the preliminary prints and bound volumes such of these in-chambers opinions as have precedential value. Sometimes orders on extensions of time, bail, and stays are accompanied by short notations, most frequently handwritten, which ordinarily would not be of sufficient importance to justify publication. Probably all in-chambers opinions which are set in type would fall in the category of such opinions which would appear in the United States Reports. In addition, there will probably be others which a Justice will wish to have published.[42]

In July 1968, Warren circulated this memorandum to the Conference for discussion during the new Term,[43] but the issue was not immediately resolved. The question recurred in 1969, when Justice Douglas requested publication of his opinion in *Levy v. Parker*, a bail case involving a soldier who had spoken out against the American involvement in Vietnam. Justice Douglas suggested that Putzel discuss the Conference's consideration of publishing in-chambers opinions with Justice William Brennan. Brennan did not recall the Conference's having decided whether such opinions should be published, although "Mr. Justice Brennan authorized [Putzel] to say that he feels strongly that these opinions should be published in the official Reports."[44]

Capacity, 112 U. Pa. L. Rev. 981, 987-88 (1964).

[41] Memorandum to the Chief Justice, May 2, 1968, Warren Papers, Box 417. In addition to the reporting of in-chambers opinions, the memorandum addressed matters such as the reporting of *per curiam* opinions, the effectuation of changes made in opinions after their initial publication, and the content of the Supreme Court's *Journal*.

[42] *Id.* at 1.

[43] "Memorandum for the Brethren" from Chief Justice Warren, July 9, 1968, Warren Papers, Box 417.

[44] Letter from Henry Putzel, Jr. to Justice Douglas, Sept. 18, 1969, Douglas Papers, Box 1133.

Douglas's and Brennan's view that in-chambers opinions should appear in the *United States Reports* soon carried the day. On December 1, 1969, Putzel wrote to new Chief Justice Warren E. Burger to confirm "your advice that the Court in Conference has approved publication in the United States Reports of in-chambers opinions of individual Justices."[45] To be included in the Reports were "[a]ll in-chambers opinions . . . that are printed in the Court's Print Shop unless the author advises me of his desire not to have a given opinion published," as well as any other opinions that the authoring Justice requested be published.[46] Accordingly, volume 396 of the *United States Reports* included the twelve in-chambers opinions that had been printed in the Court's Print Shop since the end of October Term 1968, and such opinions have been a regular feature of the reports ever since.

Wyatt and outside commentators had sometimes suggested that the United States Code, which directs the Reporter of Decisions to print opinions *of the Court* in the *United States Reports*, precluded including in-chambers opinions in the Reports.[47] The Code sections that concerned them have never been amended, but no one has questioned the Reporter's authority to publish these opinions in the *Reports* at the Court's direction. On the other hand, neither have the compilers or publishers of *In Chambers Opinion* been able to secure a "special appropriation" from Congress to facilitate locating and printing the backlog of in-chambers opinions, as Reporter of Decisions Wyatt also once suggested.[48] This too remains a task for future researchers.

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Walter Wyatt opined more than 60 years ago that searching for and publishing all of the Justices' in-chambers opinions through that time "would necessitate a search of the huge mass of original papers, . . . would take years and would be costly; but the result might be worth what it would cost."[49] The editors think it has been worth the efforts we have expended in doing it.

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[45] Letter from Henry Putzel, Jr. to Chief Justice Burger, Dec. 1, 1969, Douglas Papers, Box 1133.
[46] *Id.* It is unknown whether any Justice has ever exercised the privilege of requesting that a "printed" in-chambers opinion not appear in the *United States Reports.*
[47] Letter from Walter Wyatt to Chief Vinson, *supra* note 10, at 2, 4 Rapp. supp. 2 at xx-xxi (citing 28 U.S.C. §§ 411(a) and 673(c)); Stern & Gressman, *Supreme Court Practice* 538-39 & n.4 (4th ed. 1969).
[48] Letter from Walter Wyatt to Chief Justice Vinson, *supra* note 10, at 6, 4 Rapp supp. 2 at xxii.
[49] *Id.* at 7.

The Recent Past and Near Future of Reporting In-Chambers

Ross E. Davies[†]

Compiling in-chambers opinions in traditional books of cases was a good idea in 2001 – when Cynthia J. Rapp created the first three volumes of *A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States* (aka *Rapp's Reports*) – and 2004 – when the *Green Bag* published them. Now the time has come to make some changes. *The Journal of In-Chambers Practice* – Ira Brad Matetsky's new periodical, the first issue of which you are now reading – is where those changes will take place. Here are the basics:

Final Publication of *4 Rapp*

Since 2004, Rapp, Matetsky, and I have been collecting and annotating in-chambers opinions for a fourth volume of *Rapp's Reports*. The *Green Bag* has been publishing those opinions in a series of preliminary pamphlet installments. The cover of each of those *4 Rapp* preliminary prints features this appeal:

> NOTICE: This supplement is subject to revision before the complete, bound edition of *4 Rapp* is published sometime in the next few years. Please notify the *Green Bag* (editors@greenbag.org) of any errors you find, so that we can fix them now.

Later this year, we will combine those preliminary prints (with corrections) into the final book version of *4 Rapp*. So, if you catch an error in any of those preliminary prints – all of which you can read for free by visiting

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[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

www.greenbag.org and clicking on the "In Chambers Opinions" button – please let us know before September 30, 2016.

The final bound version of *4 Rapp* should be in print by December 2016. It will, in all likelihood, be the last traditional opinion-compilation volume in the *Rapp's Reports* series.

But it most certainly will not be the end of *Rapp's Reports*. Print publication will continue in *The Journal of In-Chambers Practice* – see, for example, pages 38-43 in this issue. In addition, *The Journal of In-Chambers Practice* will be available electronically on Westlaw and HeinOnline, on the websites of the *Journal of Law* and the *Green Bag*, and probably in other online resources as well.

IN-CHAMBERS OPINION REPORTING IN *THE JOURNAL OF IN-CHAMBERS PRACTICE*

New in-chambers opinions, and newly discovered old ones (which we keep finding in various archives and libraries), will be published in the "Rapp's Reports" section at the back of *The Journal of In-Chambers Practice*. There will be a half-dozen notable differences between this new format and the old format used in *1 Rapp* through *4 Rapp*:

1. Headnote: In *1 Rapp* through *4 Rapp*, some opinions have explanatory headnotes and some do not, and headnote content varies pretty widely. From now on, each opinion will be introduced by a signed editorial headnote which will include, at least: (a) a citation to the original source of the opinion (for example, a record in an archive or library, or a page in a book, or the name of an individual collector); (b) the name of the author of the opinion and the basis for that identification; (c) the date the opinion was issued and the basis for that judgment; and (d) the recommended citation for the opinion. See, for example, pages 38-43 in this issue.

2. Opinion formats: In *1 Rapp* through *4 Rapp*, we attempted – sometimes with limited success – to mimic the widely varied and sometimes very informal formatting of in-chambers opinions in their original formats. For *Rapp's Reports* in *The Journal of In-Chambers Practice* we are abandoning that well-intentioned but practically useless approach in favor of a more nearly (but not absolutely) consistent format that preserves the content of the opinions while making them easier to read, and to look at.

3. Cumulative Tables and Indexes: In *1 Rapp* and *4 Rapp*, there are some excellent reference tools. As wonderful as they are, we are going to stop updating them because, with in-chambers opinions searchable online, the cost-benefit ratio strikes us as too high. Maintaining those tables and indexes requires a lot of work, and publishing them requires a lot of pages.

4. Complementary primary content: Because we modeled *1 Rapp* through *4 Rapp* on traditional case-reporter volumes, it was inappropriate to include too much material other than reference resources connected to the opinion themselves – that is, the cumulative tables and indexes. We were limited, or at least felt limited, to a preface and, sometimes, an introductory essay. By housing *Rapp's Reports* in a scholarly and practical law journal, we are now free to include as much additional material as the editor-in-chief, Matetsky, sees fit to allow. So, now the sky – or at least the ceiling in-chambers – is the limit.

5. Mistakes: One other benefit of moving from the traditional case-reporter format to the journal format is that we will be able to publish reporting errors in the "Errata" section of this journal (wherever that might turn out to be), where the errors will be searchable online. In a case-reporter system, errata are traditionally not so accessible.

6. Volume 5: For purposes of citation – and just in case we decide to produce another compilation volume someday – the in-chambers opinions section of *The Journal of In-Chambers Practice* will be labeled "Rapp's Reports, Volume 5," and the opinions themselves will be numbered sequentially by their appearance in the journal.

There will, I expect, be other improvements and innovations in in-chambers opinion reporting under Matetsky's leadership. The ones I've listed here make for a good start, though.

Rapp's Reports

Volume 5

in The Journal of In-Chambers Practice

5 Rapp no. 1 (1934)

KNAUER V. HUGHES

HEADNOTE

by Ross E. Davies

Source: RG 267, Entry 30, Box 1, Records of the Supreme Court of the United States, National Archives and Records Administration, Washington, DC.

Opinion by: Owen J. Roberts (noted in source).

Opinion date: June 27, 1934 (noted in source).

Citation: Knauer v. Hughes, 5 Rapp no. 1 (1934) (Roberts, J., in chambers), 1 J. In-Chambers Practice 38 (2016).

Additional information: This opinion, issued in response to an application for a writ of habeas corpus, is in letter form, typed on Supreme Court stationery. It appears to have been written at Justice Roberts's home in Kimberton, Pennsylvania.

OPINION

Kimberton, Pa.,
June 27, 1934.

A. Bert Polonsky, Esq.,
9 East Forty-First Street,
New York, N.Y.

My dear Sir:

I acknowledge receipt of your letter of June 23. I have reconsidered the Knauer application in the light of the correspondence you submit. I am still of the opinion that the issuance of a writ is not justified.

If I were of a different view as respects the merits of the application, I would still feel compelled to refuse a writ as I understand Knauer's term will expire in September. The writ would be returnable at the session of the Court in October and at that time the question would be moot.

You are of course at liberty to apply to any of the Justices of the court as my action in declining to issue a writ is in no sense an adjudication.

Yours sincerely,
/s/ Owen J. Roberts

5 Rapp no. 2 (1950)

McHugh v. Massachusetts

Headnote

by Ross E. Davies

Source: Considerations Involved in Granting Extensions for Applying for Certiorari, ABA J., Nov. 1950, at 899.

Opinion by: Felix Frankfurter (noted in source).

Opinion date: September 30, 1950 (noted in source).

Citation: McHugh v. Massachusetts, 5 Rapp no. 2 (1950) (Frankfurter, J., in chambers), 1 J. In-Chambers Practice 40 (2016).

Additional information: This opinion was published in the ABA Journal in an article without a byline, with an introduction that reads in part:

> Title 28, United States Code, Section 2101(c), delimits the time within which an application for writ of certiorari to the Supreme Court, in a vast majority of cases, may be made. It also provides for an extentsion of that time by the Court or a Justice thereof when a request based upon substantial grounds is submitted prior to the expiration of the basic time limit fixed by the statute. . . .
>
> A recent order entered by a Justice of the Supreme Court is expository of the considerations counsel should keep in mind in applying for extension of time under the statute. Charles Elmore Cropley, the Clerk of the Court, has sent a copy of this order to the JOURNAL, and it is published here with the thought that it will serve both the Court and the Bar through the distribution of information respecting the practice which is not to be found in the reports of Supreme Court proceedings.

Opinion

Patrick J. McHugh, et al., Petitioners,

vs.

Commonwealth of Massachusetts,

Whereas the most effective petitions for certiorari are those which state with brief clarity the federal questions that were duly raised in a deci-

sion sought to be reviewed so as to make apparent the substantiality of such federal questions; and

Whereas the ninety days within which such a petition must be filed is of a length which takes into account other professional engagements of counsel; and

Whereas it is to the public interest that litigation be disposed of as expeditiously as possible; and

Whereas the issues in this case, as set forth in this application, claimed to be such as to warrant the granting of a petition for a writ of certiorari, do not need much elaboration of what is set forth in the application for an extension of time,

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1950, provided that notice of this extension is given to opposing counsel forthwith.

Felix Frankfurter
Associate Justice of the Supreme Court of the United States
Dated this 30th day of September, 1950.

5 Rapp no. 3 (1951)

TERRA V. NEW YORK

HEADNOTE

by Ross E. Davies

Source: Papers of Robert Houghwout Jackson, Box 171, Manuscript Division, Library of Congress, Washington, DC

Opinion by: Robert H. Jackson (collection in which source was found).

Opinion date: September 30, 1950 (noted in source).

Citation: Terra v. New York, 5 Rapp no. 3 (1951) (Jackson, J., in chambers), 1 J. In-Chambers Practice 42 (2016).

Additional information: This opinion was typed on a sheet of plain paper, with no signature on the signature line at the bottom. See also Terra v. New York, 342 U.S. 938 (1952).

OPINION

William Terra and Joseph Terra,

v.

The People of the State of New York.

I grant this appeal, as is my custom when a case is technically appealable, in order that the decision as to whether it has substance may be made by the full Court.

I deny a stay and bail pending action by this Court, because, while appealable on the ground that it presents a federal question, I think the case does not present a substantial one. The opinion of the Court of Appeals, in my view, is so clearly right, under our authorities, that I would favor dismissal of the appeal for want of a substantial federal question. Therefore, I should not grant bail. If the Court disagrees and notes probable jurisdiction, application for bail may be renewed to the full Court.

Associate Justice of the Supreme
Court of the United States
December 15, 1951.

5 Rapp no. 4 (1954)

Breslin v. New York

Headnote

by Ross E. Davies

Source: Papers of Robert Houghwout Jackson, Box 188, Manuscript Division, Library of Congress, Washington, DC

Opinion by: Robert H. Jackson (noted in source).

Opinion date: June 28, 1954 (noted in source).

Citation: Breslin v. New York, 5 Rapp no. 4 (1954) (Jackson, J., in chambers), 1 J. In-Chambers Practice 43 (2016).

Additional information: This opinion was typed on a sheet of plain paper.

Opinion

On Application for Stay.

James J. Breslin, Petitioner,
v.
The People of the State of New York.

The application herein is denied. Examination of the petition for rehearing does not indicate any intervening event or consideration that was not before the Court at the time of denial of the petition for certiorari. I am unable to say, in view of the denial by the full Court, that a substantial question exists for review by this Court.

I am unable to grant the request for oral argument, as I am leaving the city. This denial is therefore without prejudice to a renewal of the application before any other Justice of this Court.

/s/ Robert H. Jackson

Associate Justice, Supreme Court
of the United States
June 28, 1954