

IN-CHAMBERS OPINIONS AND THE *BLUEBOOK*

Ira Brad Matetsky[†]

The *Journal of In-Chambers Practice* is on hiatus, except for this essay, for this issue of *The Journal of Law*. Our search for the U.S. Supreme Court's in-chambers opinions (ICOs) of the past is on hold because for the past several months, the archives and libraries where we do our searching have been closed. Our reporting on ICOs of the present is on hold because for the sixth consecutive year, the Court finished its most recent Term (O.T. 2019) without any justice's having authored one.

There were plenty of opportunities for the justices to have written ICOs this year if they had wanted to. Circuit justices have been presented with important stay and injunction applications on topics including emergency closures arising from the coronavirus pandemic, changes to election rules also occasioned by the pandemic, and the administration of the federal death penalty. However, the circuit justices have generally referred these applications to the full Court for decision, rather than rule on them individually. As this issue goes to press, election-related litigation before the Court is still underway. We expect to write about the Court's recent handling of its so-called Shadow Docket in a later issue of this *Journal*.

Although the justices' propensity to author ICOs has waned, ICOs received renewed attention recently in another legal institution: the just-published Twenty-First Edition of *The Bluebook: A Uniform System of Citation*. In this edition, the *Bluebook* editors have changed the recommended citation form for opinions issued by individual circuit justices, and for the first time they have listed *Rapp's Reports* — the shorthand designation for Cynthia Rapp's compilation of *In Chambers Opinions by the Justices of the Supreme Court of the United States* — as a source for locating and citing these opinions. For

[†] Partner, Ganfer Shore Leeds & Zauderer LLP, New York, NY.

better or worse, the *Bluebook* remains the leading authority on legal citations in the United States. That includes both what reporters to cite and how to cite them. The *Bluebook* editors' decision to add *Rapp's Reports* to the list of sources for ICOs is welcome, because it will promote knowledge of these reports' existence and increase the likelihood that academics, practitioners, and ultimately courts will find them, read them, and cite them.¹

Until the Twenty-First Edition, the *Bluebook* did not mention *Rapp's Reports*, which were issued as a compilation within the Court in 2001 and made available to the public by Ross Davies of *The Green Bag* in 2004. That is not to say that ICOs themselves went unmentioned. The *Bluebook's* First (1926) through Ninth (1955) Editions did not mention these opinions.² However, by the 1950s, successive editions of the *Bluebook* were becoming longer and more detailed. Meanwhile, ICOs had started to be reported with some regularity in publications such as West's *Supreme Court Reporter*.³ Reflecting these developments, in its Tenth Edition (1958), the *Bluebook* instructed in Rule 1:2:3(c) that "[a] decision by a Supreme Court Justice sitting alone in his capacity as Circuit Justice is cited only to Sup. Ct."⁴ This edition also instructed in Rule 1:3 on how one is to signify that the cited opinion is an ICO by a single justice, rather than the work of the full Court: "A decision by a Supreme Court Justice sitting along in his capacity as Circuit Justice is cited: (Douglas, Circuit Justice, 1953)."⁵ The Eleventh Edition (1967) retained these instructions, but with one necessary qualifi-

¹ Reflecting the value of coverage in the *Bluebook*, "one legal publication may actually have failed because *The Bluebook* provided no abbreviation" for it. James W. Paulsen, *Book Review: An Uninformed System of Citation*, 105 HARVARD L. REV. 1780, 1787 (1992) (citing Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 LAW LIBR. J. 19, 22 (1982)). See also Ira Brad Matetsky, *GB Meets BB*, 8 GREEN BAG 2D 341 (2005) (noting with relief that the *Bluebook's* then-new edition included a listing for *The Green Bag*).

² The First through Fifteenth Editions of the *Bluebook* are conveniently reprinted in ROBERT BERRING, ED., *THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE* (William S. Hein & Co. 1998). For convenience and simplicity, all editions of *A UNIFORM SYSTEM OF CITATION* and *THE BLUEBOOK* will be cited herein as "BLUEBOOK" with the edition number, without regard to changes in the book's official title.

³ See generally Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 6 J. OF L. (1 J. IN-CHAMBERS PRACTICE) 19 (2016).

⁴ BLUEBOOK 10th ed at 17 (1958). The fact that some ICOs were reported elsewhere was not mentioned.

⁵ *Id.* at 18.

cation to the first: “A decision by a Supreme Court Justice sitting alone in his capacity as Circuit Justice is cited (if possible) to S. Ct.”⁶

The Twelfth Edition (1976) of the *Bluebook* was the first to appear after the Court began including ICOs in the official *United States Reports* in 1969.⁷ The instructions in what was now Rule 10:3:1(c) were changed: “Cite a decision by a Supreme Court Justice sitting in his capacity as Circuit Justice to U.S. (post-1969) or S. Ct. (pre-1969).”⁸ Rule 10:4(a), covering how to designate the jurisdiction that issued an opinion, was unchanged, with the form “(Douglas, Circuit Justice, 1953)” still being used.⁹ In a table in the back of the book, the *Bluebook* recapitulated the instructions: “**Circuit Justices** (e.g., Douglas, Circuit Justice). *Cite to U.S. or S. Ct., in that order of preference.*”¹⁰

The Thirteenth Edition (1981) adhered to these citation rules for ICOs, but offered a specific example: “Cite a decision by a Supreme Court Justice sitting along in his capacity as Circuit Justice: Russo v. Byrne, 409 U.S. 1219 (Douglas, Circuit Justice 1972).”¹¹ The table in the back now instructed that for the opinion of a circuit justice, such as “(Rehnquist, Circuit Justice)”, one should “[c]ite to U.S., S. Ct., or U.S.L.W. if therein, in that order of preference.”¹² But in welcome recognition of the complicated history of the reporting of ICOs, the *Bluebook* editors added: “(A few other opinions are reported in other reporters. E.g., United States v. Motlow, 10 F.2d 657 (Butler, Circuit Justice 1926).)”¹³

The next seven editions of the *Bluebook*, from the Fourteenth (1986) through the Twentieth (2015), left the basic citation format for ICOs unchanged.¹⁴ One minor change was that the *Lawyer’s Edition* was added to as a permissible source: “Cite to U.S. if therein; otherwise, cite to S. Ct., L.

⁶ BLUEBOOK 11th ed. at 17 (1967); see also *id.* at 20.

⁷ See Matetsky, *supra* note 3, at 31.

⁸ BLUEBOOK 12th ed. at 38 (1976)

⁹ *Id.* at 41.

¹⁰ *Id.* at 100.

¹¹ BLUEBOOK 13th ed. at 45 (1986). Note that the comma after “Circuit Justice” has disappeared. In this citation in the Thirteenth Edition, there is visible extra space between “Justice” and “1972”, reflecting that removing the comma must have been a last-minute change. See *id.* In later editions the space was closed up, but the entry was otherwise unchanged. E.g., BLUEBOOK 14th ed. at 45.

¹² BLUEBOOK 13th ed. at 133.

¹³ *Id.* The example of *Motlow* was an inspired choice because — as reflected in its parallel citation, 1 Rapp 1 — it was the first ICO reported in the main compilation of *Rapp’s Reports*.

¹⁴ E.g., BLUEBOOK 20th ed. at 105, 233 (2015)

Ed., or U.S.L.W. in that order of preference.”¹⁵ *Russo v. Byrne* and *United States v. Motlow* remained the sample citations through several editions, although beginning with the Eighteenth Edition (2005), the tables replaced the citation of *Motlow* with two opinions that, while written by “circuit justices,” were not ICOs.¹⁶

The *Bluebook*'s treatment of ICOs is significantly upgraded in the Twenty-First Edition (2020). In their Preface, the editors explain that a new “**Rule 10.6.2** was added to bring *The Bluebook* into conformity with current U.S. Supreme Court practice regarding citations to stay or bail applications ruled upon by a single Justice.”¹⁷ The text of Rule 10.6.2 on “In-Chambers Opinions” briefly describes what ICOs are and instructs that “[t]o cite such an opinion, include the parenthetical ‘(Lastname, J., in chambers)’.”¹⁸ This is a notable change from the previous form “(Lastname, Circuit Justice)” that was recommended from the Tenth through Twentieth Editions. As presaged in the Preface to the Twenty-First Edition, the change brings this aspect of *Bluebook* form in line with the Supreme Court’s own longstanding practice, as recommended by the Reporter of Decisions and uniformly followed in the *United States Reports* for many decades.

The *Bluebook* states that ICOs since 1969 have been officially reported in the *U.S. Reports*, which is true (with a few exceptions), and that some pre-1969 ICOs had also appeared in the *United States Reports*, which is incorrect.¹⁹ As one would expect, an ICO is to be cited to the *United States Reports* where possible, with a form such as “*Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers).”²⁰

¹⁵ *Id.* at 233.

¹⁶ *Id.* The first, “*Halperin v. Kissinger*, 807 F.2d 180 (Scalia, Circuit Justice, D.C. Cir. 1986)”, was a D.C. Circuit case, decided by a three-judge panel, which represented unfinished business from Scalia’s tenure as a Court of Appeals judge before he was elevated to the Supreme Court. Although no formal Allotment Order or list of circuit justice assignments records the fact, Scalia apparently arranged to be designated as a “Circuit Justice” for the D.C. Circuit so he could vote on the remaining cases that he heard while on that court. *Id.* at n.*. Thus, *Halperin* is a D.C. Circuit case, not a Supreme Court Justice’s ICO. The second example, “*United States v. Benson*, 31 F. 896 (Field, Circuit Justice, C.C.D. Cal. 1887)”, was an ordinary instance of a justice sitting as a member of a circuit court under standard nineteenth-century practice. These examples are still used today, see BLUEBOOK 21st ed. (2020) at 227, and should probably be replaced.

¹⁷ BLUEBOOK 21st ed. (2020) at vii.

¹⁸ *Id.* at 108.

¹⁹ *Id.* at 108-09. Some ICOs before 1969 were published in the *Supreme Court Reporter* and elsewhere, but not in the *United States Reports*. See Matetsky, *supra* note 3.

²⁰ BLUEBOOK 21st ed. at 109.

What, however, about citing an ICO that is not found in the *U.S. Reports*? Significantly, the Twenty-First Edition adds for the first time that many pre-1969 ICOs “have been gathered by Cynthia Rapp and published in a multi-volume set, *In Chambers Opinions by the Justices of the Supreme Court of the United States*, that also includes the opinions written after 1969.”²¹ ICOs not found in the *U.S. Reports* are now to be cited to these reports, and an example is given: “*Sacco v. Massachusetts*, 1 Rapp 16 (1927) (Holmes, J., in chambers).”²² Table T1.1 in the “Blue Pages” directs that for cases decided by “**Circuit Justices** (e.g., Sotomayor, J., in chambers): Cite to U.S. if therein; otherwise, cite to S. Ct., Rapp, L. Ed., or U.S.L.W. if therein, in that order of preference.” “Rapp” is defined in the table as “Rapp’s In Chambers Opinions, 1925-date.”²³

Cynthia Rapp’s efforts in compiling 75 years of the justices’ ICOs, Ross Davies’ efforts in issuing and publicizing commercial and online editions of what he christened *Rapp’s Reports*, and the editors’ efforts in searching for additional unreported ICOs and editing this *Journal* all shared the objective of making these opinions available to justices, jurists, practicing lawyers, academics, and legal historians. We hope the *Bluebook*’s mention and description of these reports will further this goal.

²¹ *Id.*

²² *Id.* at 109.

²³ *Id.* at 227. There is a minor discrepancy between Rule 10.6.2, which indicates that if an ICO is not found in the *U.S. Reports* it should be cited to Rapp, and Table T1.1, which indicates that only if an ICO is not found in the *United States Reports* or in West’s *Supreme Court Reporter* it should be cited to Rapp. Now that this nit has been picked, it can be clarified by the editors of the Twenty-Second Edition five years hence. More substantively, we invite the *Bluebook* editors to mention in the Twenty-Second Edition or in an interim online supplement that (1) *Rapp’s Reports* have subsequently been expanded to include some opinions that pre-date 1925, and (2) the entire contents of *Rapp’s Reports* are readily available without charge on the *Green Bag*’s website, www.greenbag.org.