INTRODUCTION

THE CURRENT STATE OF IN-CHAMBERS PRACTICE

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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.