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There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important, as necessary, as much a discharge of his official duty as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

Justice Samuel Freeman Miller,
In re Neagle, *135 U.S. 1, 55-56 (1890)*

INTRODUCTION

IN-CHAMBERS OPINIONS – HISTORY AND MYSTERIES

Ira Brad Matetsky[†]

The predecessor of this publication, first compiled by Cynthia Rapp and later led by Ross Davies, was entitled *In Chambers Opinions by the Justices of the Supreme Court of the United States.* Today, in-chambers opinions by U.S. Supreme Court Justices are an endangered species. As I write this introduction in December 2017, it has been more than three and one-half years since any Justice wrote an in-chambers opinion ("ICO"), and there have been only three since October Term 2011.[1] Only the Justices know for sure why they write so few ICOs these days and whether they expect to write any more of them.[2] In the meantime, we editors of the *Journal of In-Chambers Practice* continue our search for still-obscure old ICUs and the history of in-chambers practice at the Court.

In this issue, John Q. Barrett, Professor of Law at St. John's University School of Law and the proprietor of the Jackson List blog,[3] retells the background to a series of bail applications made first to Judges of the U.S. Court of Appeals for the Second Circuit and then to Supreme Court Justices, culminating in ICOs by Justices Robert H. Jackson and Stanley Reed

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[1] The Court's website has a page listing all in-chambers opinions not yet found in bound volumes of the *United States Reports.* www.supremecourt.gov/opinions/in-chambers.aspx (last visited Dec. 20, 2017).

[2] Regarding possible reasons for the recent dearth of ICOs, and some recent changes in the Court's procedures relating to single-Justice applications, see Ira Brad Matetsky, *Introduction: The Current State of In-Chambers Practice*, 6 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (1 J. IN-CHAMBERS PRAC.) 9, 10-12 (2016).

[3] thejacksonlist.com (last visited Dec. 20, 2017). To join the Jackson List and receive periodic e-mails containing Professor Barrett's latest insight on Jackson, send a "subscribe" note to barrett@stjohns.edu. Highly recommended.

in 1950 and 1951.[4] The defendant-movants who came before Second Circuit Justice Jackson included the defendants in *Dennis v. United States,*[5] the famous (or infamous) Smith Act case, as well as several of their lawyers, who had been cited for contempt. The defendant-movants who came before Acting Circuit Justice Reed (Jackson was on vacation) in *Field v. United States* a few months later were three trustees of the Bail Fund of the Civil Rights Congress of New York. That fund had posted bail for several of the defendants in *Dennis*, four of whom absconded after conviction. This led the government to seek information from the Bail Fund, whose leaders were held in contempt of court and imprisoned for "refus[ing] to answer certain questions and to produce the records of the Bail Fund of which they were trustees."[6] Spoiler alert: the people in charge of posting bail were not allowed to post bail for themselves, an irony that surely was not lost on anyone. An earlier version of Barrett's article about these cases appeared on the Jackson List. We are grateful to him for expanding it and allowing us to share it with our readers.

The *Field* contempt proceedings led directly to an instance of Art Imitates Life. Some dates are significant: The U.S. District Court in Manhattan held Frederick Vanderbilt Field, one of the three *Field* defendants, in contempt for refusing to identify the Bail Fund's contributors, and remanded him on July 6, 1951. The other two defendants were jailed for the same offense three days later. The three men's convictions were front-page news in New York and around the country. Applications to release them on bail were denied by Second Circuit Judges Swan and Learned Hand on July 17, 1951, and by Justice Reed on July 25, 1951.[7]

As all this was taking place and making headline news, the mystery writer Rex Stout was at his home in Brewster, New York, preparing to write one of his Nero Wolfe mystery novellas. Stout started writing his

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[4] John Q. Barrett, *Jackson, Vinson, Reed, and "Reds": The Second Circuit Justices' Denials of Bail to the Bail Fund Trustees (1951)*, 7 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (2 J. IN-CHAMBERS PRAC.) 19 (2017) (discussing *Williamson v. United States*, 184 F.2d 280, 1 Rapp 40 (1950) (Jackson, J., in chambers); *Dennis v. United States*, 1 Rapp 57 (1951) (Jackson, J., in chambers); *Sacher v. United States*, 1 Rapp 55 (1951) (Jackson, J., in chambers); *Field v. United States*, 193 F.2d 86, 1 Rapp 58 (1951) (Reed, J., in chambers)).

[5] 341 U.S. 494 (1951).

[6] *Field*, 193 F.2d at 89, 1 Rapp at 60.

[7] All these dates are drawn from Barrett's article and the sources cited in it.

story on July 27, 1951, and completed it on August 10, 1951.[8] He called it "Home to Roost," which was its title in book form a year later, but his magazine editors ran it first as "Nero Wolfe and the Communist Killer."[9] The story is a murder mystery (all the Wolfe stories are). One of the characters and suspects is a man named Henry Jameson Heath, who is "one of the chief providers and collectors of bail for the Commies who had been indicted. He had recently been indicted too, for contempt of Congress, and was probably headed for a modest stretch."[10] Ultimately, Wolfe persuades Heath that despite Heath's "inviting a term in jail rather than disclose the names of the contributors" to the Bail Fund, he must reluctantly identify one particular contributor because that person's identity is vital evidence in the murder case.[11]

Why did Stout, in July 1951, create a character who was at the head of a Communist bail fund and at risk of going to jail for contempt? Partly, perhaps, because suspicion of Communism in general and of Bail Funds in particular was in the air and in the papers at the time. (This was not even the first time that worry over a possible Communist was key to the plot of a Wolfe tale.[12]) Partly, perhaps, because Stout was very much a political man – a World Federalist, a prominent liberal intellectual (who turned out to have FBI and HUAC files), but also a Freedom House trustee and an avowed anti-Communist.[13]

And partly, I am sure, because one of the *Field* defendants – the Chairman of the Civil Rights Congress of New York Bail Fund – was "Dashiell ('Dash') Hammett, acclaimed writer of mysteries including *The Thin Man* and *The Maltese Falcon*."[14] Stout knew and respected Hammett's work, if probably not all of his politics. He had ranked *The Maltese Falcon* second on a list of the all-time "ten best detective stories" that he prepared for Vincent Starrett in 1942, and kept it on updated top-ten lists in 1951

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[8] JOHN MCALEER, REX STOUT: A MAJESTY'S LIFE 375 (2002) (citing Stout's handwritten "Writing Record," John McAleer Faculty Papers, Burns Library, Boston College, box 14, folder 44).
[9] THE AMERICAN MAGAZINE, January 1952, at 127.
[10] REX STOUT, TROUBLE IN TRIPLICATE 14 (1952).
[11] *Id.* at 52-53.
[12] *See* REX STOUT, THE SECOND CONFESSION (1949); *see also* MOLLY ZUCKERMAN, REX STOUT DOES NOT BELONG IN RUSSIA 33-47, 53-59 (2016).
[13] *See generally* MCALEER, *supra* note 8, *passim*; *see also* HERBERT MITGANG, DANGEROUS DOSSIERS: EXPOSING THE SECRET WAR AGAINST AMERICA'S GREATEST WRITERS, ch. XI (1988);
[14] Barrett, *supra* note 4, at 24.

and 1973.[15] In the *New York Times*, Stout once called Hammett "the best American detective story writer since Poe, who started the whole thing."[16] Stout would have been keenly aware in July and August 1951 that while he was typing his story, his distinguished professional colleague and competitor was sitting in a federal prison.

Back to ICOs. Just as John Barrett's article tells us how in-chambers applications were handled in the middle of the twentieth century, Ross Davies' piece tells us how things were done fifty years earlier, at the turn of that century.[17] It was a simpler time. If you wanted something from a Supreme Court Justice, you showed up at his home and asked him. The worst he could do was say no. And if you wanted to know the Justice's address and what time he was most likely to be home, the Court staff would tell you. Alas, things don't work that way anymore. Davies' article is accompanied, in small and large sizes, by another of the extraordinary maps with which he graces any branch of legal or literary scholarship that catches his special attention.

Next in this issue are two very brief opinions – or documents that did the work of opinions – in another famous case, that of Sacco and Vanzetti.[18] In August 1927, Justice Oliver Wendell Holmes, the Circuit Justice for the First Circuit who was spending the summer at home in Boston, denied two applications to halt the impending executions of Nicola Sacco and Bartolomeo Vanzetti, on the ground that there was no federal issue in the case. Holmes wrote a short opinion denying the first application and a somewhat longer one denying the second.[19] In the latter, he stated that the

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[15] *See* MCALEER, *supra* note 8, at 286-87, 549 (discussing lists prepared for Starrett in 1942, for *Ellery Queen's Mystery Magazine* in 1951, and for McAleer in 1973); Vincent Starrett, *Books Alive,* CHICAGO TRIBUNE, June 13, 1943, at 104; VINCENT STARRETT, BOOKS AND BIPEDS 82 (1947); ELLERY QUEEN, IN THE QUEENS' PARLOUR, AND OTHER LEAVES FROM THE EDITORS' NOTEBOOKS 96-97 (1957).

[16] Israel Shenker, *Rex Stout, 85, Gives Clues on Good Writing*, N.Y. TIMES, Dec. 1, 1971, at 58.

[17] Ross E. Davies, *Supreme Court Practice 1900: A Study of Turn-of-the-Century Appellate Procedure*, 7 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (2 J. IN-CHAMBERS PRAC.) 33 (2017).

[18] The literature on Sacco and Vanzetti is of course vast, but a law professor's recent account focused on Holmes and Brandeis, with a good discussion of the last-minute stay attempts, is BRAD SNYDER, THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM, chs. 23-24 (2017). An interesting layman's recounting of the Sacco and Vanzetti case in the context of all the other momentous events of the year 1927 is BILL BRYSON, ONE SUMMER: AMERICA 1927 (2013).

[19] *See Sacco v. Hendry*, 1 Rapp 15 (Aug. 10, 1927) (Holmes, J., in chambers); *Sacco v. Massachusetts*, 1 Rapp 16 (Aug. 20, 1927) (Holmes, J., in chambers). *See, e.g.,* SNYDER, *supra* note 18, at 442-46, 450, 456-57 (Oxford 2017).

defense lawyers were free to seek a stay from another Justice and said he would be glad for them to try.[20] A stay was then sought from Justice Louis Brandeis, also in Boston, but Brandeis recused himself.[21] The defense team then sought stays from two other members of the Court. One group led by Arthur Hill travelled to Justice Harlan Fiske Stone's summer house on Isle au Haut, an island off the coast of Maine. Stone handed them a one-paragraph memorandum denying relief and stating that he agreed with Holmes. This writing may only have been a paragraph long, but it is a reasoned disposition of an application made out of Court to a single Justice (and on a momentous matter), so it counts as an ICO and is printed in this volume.[22]

Meanwhile, Michael Musmanno (later a Pennsylvania Supreme Court Justice) telephoned and then telegraphed to Chief Justice William Howard Taft, who was taking his own summer vacation in Canada. Musmanno asked if Taft would meet him at the border to hear a stay application. An annoyed Taft telegraphed back, collect, stating that he would not return from Canada to United States territory in order to entertain the application, which could be presented to Justices who were within the First Circuit, and which there was no jurisdiction to entertain anyway.[23]

Taft's telegram is included in *Rapp's Reports* in this issue. There should be no question that it qualifies for inclusion. ICO status does not depend on the form of a document. These volumes have included formal opinions, informal orders, handwritten scribblings, and letters to parties and counsel. Taft's telegram likewise explained, however briefly, the Chief Justice's reasons for denying the stay application, and thus served the purpose of an in-chambers opinion. To be sure, Taft disclaimed having any judicial jurisdiction while outside U.S. territory, and would have denied being in chambers (or any place that could have been a temporary chambers) at the time. The assumption that a Justice who temporarily was outside the country could not order a stay from abroad, shared by Musmanno and

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[20] *Sacco v. Massachusetts*, 1 Rapp at 17.

[21] *See, e.g.,* SNYDER, *supra* note 18, at 461-62.

[22] *Sacco v. Massachusetts*, 5 Rapp No. 11 (2 J. In-Chambers Prac.) 52 (1927) (Stone, J., in chambers); *see, e.g.,* SNYDER, *supra* note 18, at 463-66.

[23] *Sacco v. Massachusetts*, 5 Rapp No. 12 (2 J. In-Chambers Prac). 54 (1927) (Taft, C.J., in chambers); *see, e.g.,* SNYDER, *supra* note 18, at 466; MICHAEL J. MUSMANNO, AFTER TWELVE YEARS 351-57 (1939).

Taft in 1927,[24] has disappeared in more recent years. When needed, the Justices make decisions and cast votes regardless of where in the world they are at the time. The changing practice in this regard will be addressed in a future issue of this *Journal*.[25]

This issue also includes four documents that set forth Justice Wiley Rutledge's grounds for ruling as he did on four applications presented to him between 1946 and 1948.[26] In each of them, Rutledge laid out a detailed analysis of the facts and law in an in-chambers matter that he was deciding. However, the documents were never finalized and never issued to the parties, to counsel, or in one case, to a lower-court judge whose decision had been reversed and who asked why.[27] Although I speculated about the subject over a decade ago,[28] we still don't know why Rutledge prepared them – whether he planned to issue them as some sort of opinion but never got around to finalizing them, or wanted to have something in writing to bounce off someone else at the Court, or just wanted to make sure that he had the relevant facts and governing law and conclusion clear in his own mind before he ruled.[29] Quite possibly the fact that the opinions would not be published in the *United States Reports* helped deter Rutledge from polishing them further.[30]

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[24] MUSMANNO, *supra* note 23, at 352-53; *Sacco v. Massachusetts,* 5 Rapp No. 12 at 55.

[25] Anyone with insight or evidence on historical practice on this issue, or when and why it changed, should kindly contact the editors at imatetsky@ganfershore.com.

[26] *See* Memorandum in *Bisignano v. Municipal Court of Des Moines* (Oct. 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).

[27] Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions,* 6 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (1 J. IN-CHAMBERS PRAC.) 19, 22 (2016) (citing 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, R.G. 267).

[28] Ira Brad Matetsky, *The Publication and Location of In-Chambers Opinions*, 4 Rapp supp. 2 at vi, viii-ix (2005).

[29] Again, anyone with insight or evidence on this issue – or, especially, any of the few remaining people who might have actual knowledge, such as Rutledge's clerks of the time – are most welcome to contact the editors.

[30] "[O]n one occasion, a law clerk to the late Mr. Justice Rutledge asked me whether such [in-chambers] opinions were published or could be published. I told him that the long-established practice was not to publish them in the United States Reports, and that I doubted my authority to do so. . . ."

In any event, since the documents never left Rutledge's chambers, they weren't in-chambers *opinions*, and therefore are ineligible for reprinting in *Rapp's Reports.* But they deserve greater attention and so they are included in this issue, albeit it in an Appendix ("Rapp App.") to *Rapp's Reports*. Why reprint them now? One reason is that while Rutledge was diligent in hearing in-chambers applications, he did not write ICOs in his six years on the Court.[31] These are a worthwhile substitute, especially given the detailed attention Rutledge gave the cases.[32] And also because two of these four "opinions" addressed – we end where we began – bail applications made in 1948 by five defendants who had been held in contempt of court for refusing to answer grand juries' questions about alleged Communist activities. The defendants argued that compelling them to answer would violate their Fifth Amendments privilege against self-incrimination, pointing as evidence to the then-recent Smith Act indictments in *Dennis*. Rutledge's "opinions" show that he acted thoughtfully, not reflexively, on these bail applications. But a student of Supreme Court history might guess without being told that Rutledge would be more likely than Reed to favor such an application. And so it proved, with Rutledge granting bail to all five applicants.

These four Rutledge "opinions" were located in the Rutledge Papers in the Manuscript Division of the Library of Congress. Library collections of Justices' own papers and chambers files – as opposed to official records of the Court itself – have also been the source of dozens of ICOs that the editors have located and reprinted in *Rapp's Reports*.[33] More broadly, the Justices' papers, including early drafts of opinions and communications

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Letter/memorandum 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, *reprinted in* 4 Rapp supp. 2, at xx, xxi.

[31] Thus far, *Rapp's Reports* contain only one "official" ICO by Rutledge: *Shearer v. United States*, 4 Rapp 1545 (1947) (Rutledge, J., in chambers). And that one barely qualifies: it is on the borderline between a mere form of order and an actual opinion. *Shearer* is, however, fascinating in that it reveals that in August 1947, Rutledge heard oral argument at his summer house in Ogunquit, Maine on a bail application by a defendant convicted in the Eastern District of Missouri. Two defense lawyers traveled to Maine for the argument, from Washington, D.C. and St. Paul, Minnesota respectively. The government, presumably not wanting to incur the expense or delay of transporting the lawyers who had handled the case from Missouri to Maine, had the U.S. Attorney for Maine and his Assistant cover the argument, although they must have known little about the case. Surely there is a story waiting to be told here, but for now the circumstances remain unknown.

[32] *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).

[33] *See, e.g.,* Matetsky, *supra* note 28, 4 Rapp. supp. 2, at xviii-xvix.

between the Justices about them, have shed important light on all aspects of the Court's work. They are often consulted and cited by legal academics, political scientists, and historians, and are a valued resource in all these fields. I was quite surprised, therefore, when a few months ago I read this:

> At the risk of seeming a complete philistine, however, I can't imagine why anyone would want to do anything with judges' or Justices' papers other than discard them. They are the equivalent of an artist's preliminary sketch of what becomes a painting, or the rough draft of a novel; they are superseded by the finished work; the judges' preliminary work on a case, such as it is, is superseded by the opinion. . . . [T]he best thing to do with such papers is to throw them out. There are about one thousand federal judges, Justices, etc. (not to mention law clerks and secretaries), and the amount of documentary junk they accumulate must be staggering, yet holds very little interest.[34]

The author of these words is not a philistine, complete or otherwise. He is Richard Posner, often described between 1981 and his recent retirement as the nation's most influential judge not on the Supreme Court, and still a leading scholar of law, law and economics, law and literature, and other fields. But Posner's suggestion (in his recent book *The Federal Judiciary: Strengths and Weaknesses*) that United States Supreme Court Justices or their heirs should throw away their papers – all the draft opinions, revisions, memoranda, and everything else that might shed light on how cases were decided and how important opinions that govern our lives came to be – is an ill-considered one. Many Justices or their heirs have indeed discarded or destroyed their papers – and many a legal historian has cursed them for doing it.[35]

Conversely, a great deal of important work has been done with the Justices' (and lower-court judges') papers that have been preserved. Posner

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[34] RICHARD A. POSNER, THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES 209 (2017).

[35] Twentieth-century justices who destroyed all or most of their papers included Owen Roberts, Benjamin Cardozo, James McReynolds, and Edward Douglass White among many others. Others, such as Hugo Black and Byron White, did not destroy everything but they did burn (Black) or shred (White) large portions of the files – likely the most interesting parts. *See* Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665 (2013), and sources cited therein; ALEXANDRA WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES (1986); Jill Lepore, *The Great Paper Caper,* THE NEW YORKER, DEC. 1, 2014.

knows this perfectly well. In fact, there is an example in the same book in which he suggested throwing all the Justices' papers away. In his chapter on the Supreme Court, Posner discusses *Bolling v. Sharpe*,[36] the 1954 opinion by Chief Justice Warren that unanimously struck down racial segregation in the District of Columbia's public schools, on the same day that *Brown v. Board of Education*[37] struck it down in the states. Posner discusses the Court's rationale for its decision in *Bolling,* and then continues:

> But it's interesting to note that after certiorari had been granted in the *Bolling* case but before the case was argued, Chief Justice Warren had sent a memo to the other Justices suggesting that the case could be resolved in favor of forbidding racial discrimination in the District of Columbia public schools by reference to the due process clause of the Fifth Amendment. The key passage in the memo is that "segregation in public education is not reasonably related to any proper governmental objective, and it imposes on these children a burden which constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause."[38]

I agree it is interesting that in this document – captioned a memorandum, but actually a first draft of an opinion in *Bolling* – Warren considered a rationale at some variance from that of his published opinion for the Court. Yet we wouldn't know anything about it – and about so much more of the legal history of cases such as *Brown* and *Bolling* – if the Justices' case files containing the memos and draft opinions had all been thrown away.[39] Elsewhere, there is more evidence that Posner does understand the importance of such materials for legal history and judicial biography.[40]

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[36] 347 U.S. 497 (1954).

[37] 347 U.S. 483 (1954).

[38] *Id.* at 90 (citing Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,* 68 GEORGETOWN L. J.1, 93-94 (1979). Hutchinson's analysis of the "sea change" between the draft and final *Bolling* opinions is at pp. 45-50. Warren's memorandum is captioned "Memorandum on the District of Columbia Case" and was distributed to the Conference on May 7, 1954. Hutchinson located a copy in the Harold Burton Papers at the Library of Congress; there are copies in other Justices' papers as well.

[39] Among the most important works making use of these materials are RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975, 2004), and MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007);

[40] *See, e.g.,* Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L. J. 511 (1994) (reviewing GERALD GUNTHER: LEARNED HAND: THE MAN AND THE JUDGE

So if Posner ever reads this, I hope he will renounce the idea that Justices and judges' papers should routinely be discarded – and especially that he won't apply it to his own judicial papers![41]

And who knows? – maybe the Posner Papers will themselves yield some previously unpublished in-chambers opinions, whether by the Circuit Justice for the Seventh Circuit,[42] or even by Posner himself.[43] The latter would be well outside the scope of *Rapp's Reports*, but we'll gladly create *Rapp App. II* if need be.

We hope our readers find this issue interesting and informative, and that they will share with us any suggestions for where we might locate the still-missing in-chambers opinions of the Justices of the Supreme Court of the United States, or the details of how such opinions came to be.

(1994)) (noting Gunther's "ample quotations from [Hand's] pungent, humorous, candid preconference memoranda to the other judges on his panel"); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 145 n.1 (1990) (regretting that that "[t]he New York Court of Appeals [on which Cardozo served from 1914 to 1932] steadfastly refuses to make Cardozo's, or any other judge's, pre-argument memos available to scholars"). (Regarding the latter, New York, unlike the federal courts, has treated the Court of Appeals judges' memoranda to each other as public rather than private documents, consistent with Posner's (and many others') view of how they should be treated. POSNER, THE FEDERAL JUDICIARY, *supra* note 38, at 209-11.)

[41] We know from the notes and acknowledgements in William Domnarski's biography of Posner that there is a "Richard Posner Archive" at the University of Chicago Regenstein Library, but not whether Posner's judicial papers are or will be in it. *See* WILLIAM DOMNARSKI, RICHARD POSNER 257, 259 (2017)

[42] "[W]e once had a case that took four years to be decided and was not decided until our circuit justice (Justice Stevens at the time) issued a mandamus to our court." POSNER, THE FEDERAL JUDICIARY, *supra* note 38, at 9.

[43] While serving as a Seventh Circuit Judge, Posner wrote several significant in-chambers opinions that were published in the *Federal Reporter* and have been repeatedly cited. *E.g., Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (Posner, J., in chambers) (denying motion by Speaker of Illinois House of Representatives and President of Illinois State Senate to file *amicus curiae* briefs); *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997) (Posner, J., in chambers) (denying Chicago Board of Trade's request to file an *amicus* brief on appeal, and criticizing *amicus* briefs generally as duplicative of the parties' briefs and unhelpful to the judges); *Schurz Comms. v. FCC*, 982 F.2d 1057 (7th Cir. 1992) (Posner, J., in chambers) (denying motion to recuse himself from an antitrust appeal because he had provided an expert witness on a related issue in another case before becoming a judge). Given his 36 years of taking his turns as the motions judge, there must be more such opinions that went unreported. Incidentally, Posner is on record that he finds the word "chambers" an unnecessarily pompous term for a judge's office. *See* POSNER, THE FEDERAL JUDICIARY, at 7. But he has used the phrase "(chambers opinion)" in citations – *see Voices for Choices*, 339 F.3d at 545, citing *Ryan*, 125 F.3d at 1063) – and so we need not introduce the new citation form "(Posner, J., in his office)" into this publication.

JACKSON, VINSON, REED, AND "REDS"

THE SECOND CIRCUIT JUSTICES' DENIALS OF BAIL TO THE BAIL FUND TRUSTEES (1951)

John Q. Barrett[†]

On June 4, 1951, the Supreme Court of the United States announced its final decisions of the term and then began its summer recess.

The most notable decision that day was *Dennis, et al. v. United States*.[1] The Court, by a 6-2 vote, affirmed the criminal convictions and prison sentences of eleven leaders of the Communist Party of the U.S.A. for conspiring to teach and advocate the overthrow of the U.S. government.

In a related matter, the Court also announced that day that, by the same vote, it would not review *Sacher, et al. v. United States*, the cases of six attorneys who had represented *Dennis* defendants during their long, contentious trial in New York City.[2] Following the trial, the judge had summarily convicted those attorneys of criminal contempt for misconduct during the trial and sentenced them to prison terms.

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[1] 341 U.S. 494 (1951).

[2] 341 U.S. 952 (1951).

Chief Justice Fred M. Vinson, Justice Stanley Reed, and Justice Robert H. Jackson were three of the six Supreme Court justices who comprised the *Dennis* and *Sacher* majorities.

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Under an allotment order issued by the Court in 1946 pursuant to a federal law, Justice Jackson served as Circuit Justice for the Second Circuit (New York, Connecticut and Vermont).[3] This meant that emergency matters from the Second Circuit would be Jackson's initial responsibility. In the *Dennis* case itself, for example, Jackson as Circuit Justice had in September 1950 – *i.e.*, during the Court's 1950 summer recess – granted defendants' motion for continuation of their bail through the duration of their appeals.[4]

During the June 1951 first weeks of the Court's summer recess, Justice Jackson remained mostly in Washington, working in his chambers.

In the *Dennis* and *Sacher* cases, the Supreme Court's mandates – certified copies of its judgments and opinions – were scheduled to issue late that month. Those actions would formally return the cases to the lower courts for proceedings consistent with the Court's judgments. For each defendant, that soon would lead, very predictably, to the trial judge directing him to report to federal prison to begin serving his sentence.

The *Dennis* and *Sacher* defendants sought to stay the Supreme Court's issuance of its mandates. The *Dennis* defendants, who had filed separately a petition asking the full Court to rehear the case and reconsider the lawfulness of the convictions, sought to stay issuance of the mandate and to continue each defendant's bail until the Court decided whether to rehear the case. The *Sacher* defendants, who also were seeking the full Court's reconsideration of its decision not to review their convictions, sought to stay issuance of the mandate in their cases as well.

These matters were presented to the Second Circuit Justice, Robert Jackson. He heard oral arguments from counsel, including defendants' counsel and U.S. Solicitor General Philip B. Perlman, in chambers on June 21, 1951.

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[3] *See* Allotment of Justices, 329 U.S. iv (Oct. 14, 1946).

[4] *Williamson v. United States*, 184 F.2d 480, 1 Rapp 40 (1950) (Jackson, J., in chambers).

The next day, Justice Jackson issued his decisions. In *Dennis*, Jackson denied the stay request and continuation of bail.[5] In *Sacher*, he granted the stay.[6] Among his reasons: to insure that the *Dennis* defendants would have the full assistance of counsel as their cases returned to the trial court and they surrendered for incarceration.

By this point in the Supreme Court's second full week of summer recess, Justice Felix Frankfurter had left Washington on vacation. He thus was not in the building when Jackson, his colleague and close friend, as Second Circuit Justice, decided the *Dennis* and *Sacher* post-decision matters (and otherwise surely would have discussed them with Frankfurter). A month later, when Jackson was on his own vacation, he wrote to Frankfurter about what he had missed at the Court in late June:

> I had a mess of bail applications. I refused the defendants in Dennis a stay pending rehearing – it seemed so absurd after the time we took on the case. But I gave the [*Sacher*] lawyers a stay to press their contempt case on rehearing. At the argument Pearlman [sic] made a bitter attack on them for their contempt [during the trial]. I cut him off, but refrained from saying anything about the pot and the kettle. But the effort at self restraint almost overcame me.[7]

On July 9, 1951, Justice Jackson embarked on his vacation. He traveled by train from Washington to San Francisco. He stayed briefly at the Bohemian Club there and then was driven north to the Club's summer encampment – the Bohemian Grove – in Monte Rio, California.

Three years earlier, Jackson had visited the Bohemian Grove for the first time, as the guest of San Francisco lawyer Arthur H. Kent, his friend and former Treasury Department deputy. In 1949, the Club elected Jackson to honorary membership. He returned to the Bohemian Grove every summer in his six remaining years.

The Bohemian Grove offered two-plus weeks of relaxation, with high-powered and professionally diverse male company, in a setting of great natural beauty. On July 20, 1951, Jackson described some of this in a letter to his daughter at her home in McLean, Virginia:

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[5] *Dennis v. United States*, 1 Rapp 57 (1951) (Jackson, J., in chambers).

[6] *Sacher v. United States*, 1 Rapp 55 (1951) (Jackson, J., in chambers).

[7] Letter from Robert H. Jackson to Felix Frankfurter, undated [est. July 23, 1951], at 4-5, in Felix Frankfurter Papers, Library of Congress, Manuscript Division, Washington, D.C. ("FF LOC"), Box 70.

> Dear Mary –
>
> Just a note to let you know I am in the land of the living and feel fine. Really never felt better – lots of fruit[,] swimming, canoeing and walking. . . .
>
> The [Bohemian Grove] program I was to appear on [as a speaker] went over fine. Quite by accident I ran upon a yarn by H.L. Mencken about judges and booze – a most ably written and amusing story.[8] With a few side remarks I read it [to the group] and it seemed to be most acceptable.
>
> Since I have already told you all that can be told about this place I simply say it seems more relaxing than ever before – probably because I am better acquainted. I sleep until 8:30 or 9 every morning and once until 10. College Presidents are a dime a dozen [here] and Herbert Hoover, mellow with age and experience[,] has been very companionable. A list of those who are Who's Who material would fill a book. The weather has been perfect – hot days and cold nights. . . . Will send a few post card views just to refresh your memories on what it is like out here.
>
> More at some later time. Love and good wishes
>
> Dad.[9]

• • •

In the *Dennis* case, following Justice Jackson's June 22, 1951, denial of the motion for a stay, the Supreme Court's mandate issued and the defendants were ordered to surrender for incarceration on July 2. Seven of the Communist Party officials did surrender but four – Gus Hall, Henry Win-

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[8] The story, an account of New York judges visiting Baltimore for a formal dinner and then disappearing for days of drinking and whoring there, causing some of their worried daughters to search for the missing judges, is part of Mencken's "The Judicial Arm," first serialized in a magazine and then published as a chapter in his memoir of his days as a young Baltimore reporter. *See* H.L. Mencken, *Days of Innocence III – The Judicial Arm*, THE NEW YORKER, Mar. 29, 1941, at 20-21; H.L. MENCKEN, NEWSPAPER DAYS 194-199 (1941). I thank Mencken biographer and expert Marion Elizabeth Rodgers for immediately, generously guiding me from Jackson's slight description (above) to the relevant Mencken writing. *See* H.L. MENCKEN, THE DAYS TRILOGY, EXPANDED EDITION (The Library of America, 2014) (reprinting NEWSPAPER DAYS) (Marion Elizabeth Rodgers, ed.); *see generally* MARION ELIZABETH RODGERS, MENCKEN, THE AMERICAN ICONOCLAST: THE LIFE AND TIMES OF THE BAD BOY OF BALTIMORE (2005).

[9] Letter from Robert H. Jackson to Mary J. Loftus, "Friday" [July 20, 1951], in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. ("RHJ LOC"), Box 2, Folder 4.

ston, Robert Thompson, and Gilbert Green – did not. They jumped bail and became fugitives. Their fugitivity immediately was the leading news story in the United States.

During 1948 and much of 1949, Judge Harold R. Medina had presided at the lengthy trial in the Southern District of New York of the *Dennis* defendants. In 1949, following the jury's convictions of the defendants, Judge Medina had sentenced them to terms of imprisonment. He also had summarily convicted a number of their attorneys of criminal contempt for their behavior during the trial and sentenced those lawyers to prison as well. (Those persons became, in the Supreme Court, the *Sacher* petitioners.)

But in late June 1951, Judge Medina was appointed to the U.S. Court of Appeals for the Second Circuit. The *Dennis* case thus was reassigned to U.S. District Court Judge Sylvester J. Ryan; when the Supreme Court's mandate issued, it went to Judge Ryan in the District Court. On July 3, he ordered the bail of the four fugitives – $20,000 apiece – forfeited. He then commenced an inquiry to determine whether any of the bail-providers had information that could lead to the fugitives.

The *Dennis* defendants had been beneficiaries of a bail bond fund collected and administered by an organization called the Civil Rights Congress of New York. This fund, a successor to the 1930s International Labor Defense fund, was established to make bail available to persons whom the fund regarded as victims of politically-motivated prosecutions.[10] About 4,000 depositors contributed to the Bail Fund, which in July 1951 held $770,000.[11] The U.S. Attorney General, J. Howard McGrath, had designated the Civil Rights Congress a Communist subversive front organization.[12]

Judge Ryan ordered the Bail Fund trustees to appear in his court and answer questions. Frederick Vanderbilt ("Fred") Field, the fund's secretary-treasurer, appeared on July 3. He answered the Judge's questions about the fund and produced most of its books, but he refused, claiming a constitutional privilege against self-incrimination, to name the persons who had provided financial assets for the Bail Fund to use as collateral. On

[10] *See* VICTOR RABINOWITZ, UNREPENTANT LEFTIST: A LAWYER'S MEMOIR 141 (1996).
[11] *See id*.
[12] *See* Russell Porter, *Bail of 14 Reds Voided Again; New Bonds Required Today*, N.Y. TIMES, July 17, 1951, at 1.

July 5, Field, newly represented by attorney Victor Rabinowitz, a member of the National Lawyers Guild, reiterated his refusal. The next day, Judge Ryan, determining that Field's privilege claim was unfounded, judged him guilty of criminal contempt and sentenced him to ninety days in prison.[13]

On July 9, Judge Ryan ordered additional Bail Fund trustees to testify. Dashiell ("Dash") Hammett, acclaimed writer of mysteries including *The Thin Man* and *The Maltese Falcon*, was the fund's chairman. Dr. W. Alphaeus Hunton, formerly an English professor at Howard University and then a Council on African Affairs official, was another Bail Fund trustee.[14] Each refused to answer questions about the Bail Fund or to produce its records, claiming a constitutional privilege against self-incrimination.[15] Judge Ryan rejected these claims and, as with Field, convicted Hammett and Hunton of criminal contempt. The Judge sentenced each to six months in prison. They promptly were taken into custody by U.S. Marshals.[16]

Field, Hammett, and Hunton, through counsel, appealed their contempt convictions and sought bail while their appeals were pending. Judge Ryan denied their bail motions.

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[13] *See* Russell Porter, *Field, Bail Trustee for Missing Reds, Is Ordered Jailed*, N.Y. TIMES, July 6, 1951, at 1, 7.

[14] Hunton's great-nephew Stephen L. Carter, a professor at Yale Law School and a noted nonfiction and fiction writer, currently is writing a biography of his grandmother Eunice Roberta Hunton Carter. She was one of New York's first African American women lawyers and, in the 1930s, a prosecutor in the office of Manhattan District Attorney Thomas E. Dewey. The book will include material on her brother W. Alphaeus Hunton. A preview is Stephen L. Carter, *Why I Support Dissent: My Great-Uncle Who Wouldn't Name Names*, BLOOMBERGVIEW, Aug. 12, 2016, *available at* www.bloomberg.com/view/articles/2016-08-12/why-i-support-dissent-my-great-uncle-who-wouldn-t-name-names. I thank Professor Carter for generously emailing with me about his family and the Bail Fund litigation.

[15] For a complete transcript of Hammett's July 9, 1951, testimony before Judge Ryan, see RICHARD LAYMAN, SHADOW MAN: THE LIFE OF DASHIELL HAMMETT (1981), at Appendix pp. 248-62.

[16] *See*, *e.g.*, Russell Porter, *Dashiell Hammett and Hunton Jailed in Red Bail Inquiry*, N.Y. TIMES, July 10, 1951, at 1, 3. Later in the month, a fourth Bail Fund trustee, Abner Green, who Judge Ryan had held in contempt but not ordered sent to prison, was convicted twice of criminal contempt and sent to prison for concurrent six month sentences, first for his refusal to produce to a federal grand jury the records of another organization, the American Committee for the Protection of the Foreign Born, which the Attorney General had found, like the Civil Rights Congress, to be a Communist front, and then for refusing to try to locate Bail Fund records. *See* Russell Porter, *Red Bail Trustee Joins Three in Jail*, N.Y. TIMES, July 28, 1951, at 1, 5; Russell Porter, *Field, Green Ruled in Contempt Again; Get 6 Months More*, N.Y. TIMES, July 31, 1951, at 1, 12.

Field's lawyer Victor Rabinowitz and his colleague, attorney Mary M. Kaufman, then took an emergency appeal to U.S. Court of Appeals Chief Judge Thomas W. Swan. Chief Judge Swan, based in New Haven, Connecticut, heard oral argument on the afternoon of Friday, July 6, in an office at Yale Law School (where he had been a professor and, for a time, the dean).[17] After Rabinowitz and Irving H. Saypol, the United States Attorney for the Southern District of New York, had argued their positions, Chief Judge Swan granted bail to Field. In a separate proceeding, Swan's colleague Judge Learned Hand granted bail to Hammett and Hunton. But within days each Judge reversed course and revoked his bail order.[18]

The lawyers then filed emergency applications for bail at the Supreme Court. When Clerk's office informed the lawyers that the Second Circuit Justice, Jackson, was on vacation in California at the Bohemian Grove, the lawyers offered to travel to Jackson and make their arguments there. Jackson, apprised of this offer, declined to make himself available.

The lawyers, informed of this, then told the Clerk's office that they would take their applications to Justice Hugo L. Black. The Clerk's office reported this to Jackson and he passed the information to Chief Justice Vinson. It appears that Vinson did not like the idea of the attorneys appearing before Justice Black (who had dissented in *Dennis*). But Vinson, himself on vacation in New York State, also was not interested in handling these applications personally. So he designated Justice Stanley Reed to act as Second Circuit Justice in Jackson's absence, and thus to hear the bail applications of Field, Hammett, and Hunton.

At this time, Justice Reed was vacationing at his home in Maysville, Kentucky. Victor Rabinowitz, representing the three applicants, traveled from New York to Maysville. U.S. Government attorney Oscar H. Davis, an assistant to the Solicitor General, also traveled to Maysville. They argued before Justice Reed in a hearing that he convened in his house.[19]

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[17] *See Field Release Due Today; In Jail Over Weekend*, DAILY WORKER, July 9, 1951, at 3.

[18] *See United States v. Field*, 190 F.2d 554 (2d Cir. 1951) (Swan, C.J.); *United States v. Hunton, et al.*, 190 F.2d 556 (2d Cir. 1951) (L. Hand, J.).

[19] *See* Associated Press report, *Justice Reed Studies Briefs on Communist Bail Fund Trustees*, July 22, 1951. Reed's house, which he purchased around 1910, began as an eighteenth century log building on a ridge overlooking Maysville. *See* JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 20 (1994). Today it is called the Newdigate-Reed House, and it is on the National Register of Historic Places. *See id.*; npgallery.nps.gov/NRHP/AssetDetail?assetID=d0c053f5-7898-4c30-8129-07a843aaa544 (visited Apr. 28, 2017).

Rabinowitz, in a 1993 draft section that ultimately did not make it into the autobiography that he published in 1996, dictated or wrote his recollection that

> Reed was not the judge I would have chosen to hear the application. A Roosevelt appointee, he had shown some liberal tendencies in his first years on the bench, but by the time the 50's came along he had retreated into a dense fog of conservatism. He was clearly out of sympathy with my argument. I was vigorously and ably opposed by Oscar Davis, one of the most energetic and competent Assistant Attorneys General [sic], and it was clear to me after a very few minutes that I was not getting through to Reed.[20]

Meanwhile, back at the Bohemian Grove, Justice Jackson wrote on about July 23 to Justice Frankfurter, who was vacationing with his wife in Charlemont, Massachusetts. Jackson included this update:

> One thing I forgot. I flatly refused to make myself available to hear latest application for bail + stay in New York Commie cases. I told [U.S. Supreme Court Clerk Harold] Willey to let C.J. [Vinson] deal with them instead of their flying here – no doubt with great publicity. But C.J. was staying up at Joe Davies['s] for the summer[21] and said he "was just as unavailable as Jackson." The Commies wanted the cases sent to Hugo [Black] but C.J. sent them to Reed. Have not heard what he did with them.[22]

At about this same time, Jackson also wrote to his son, daughter-in-law, young granddaughter, and wife (a/k/a the visiting grandmother), who were together in Cold Spring Harbor, New York. Jackson recounted

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[20] VICTOR RABINOWITZ, A MEMOIR, VOLUME II, THE COLD WAR: BAIL FUND [7/30/93] at 258, in Victor Rabinowitz Papers (TAM 123), Archives of the Tamiment Library, New York University, Box 13, Folder 3. *Cf.* RABINOWITZ, UNREPENTANT LEFTIST, *supra* note 10, at 141 (publishing only that "I traveled to Maysville, Kentucky, to make an application for bail before Justice Stanley Reed of the Supreme Court; he denied my application a few days later.").

[21] Chief Justice Vinson apparently was a guest of former U.S. Ambassador to the U.S.S.R. Joseph E. Davies at Camp Topridge, the large, luxurious Adirondack mountain camp that his wife Marjorie Merriweather Post – heiress to the Post cereal fortune; she also built a grand estate, Mar-a-Lago, in Palm Beach, Florida – owned on Upper St. Regis Lake near Keese Mill, New York. *See generally* Deena Clark, *A Visit to 'Topridge' – Camp's By-Product Is Enjoyment*, WASH. POST, Sept. 20, 1953, at S6.

[22] Letter from Robert H. Jackson to Felix Frankfurter, undated [est. July 23, 1951], at 6, in FF LOC, Box 70.

to them how he had ducked, and how Justice Reed now came to be handling, these bail applications:

> Dear Bill and Nancy + Miranda + Mother: -
>
> I have had a lot of bother with the Communists trying to reach me for bail and stays from [Judge] Ryan orders. I flatly refused to be "available" when they wanted to fly out here – with a lot of publicity – to present application. Then they wanted the cases sent to Black. I said let them go to the C.J. Well, he is up at Joe Davies['s] camp and didn't want any hot stuff so he sent them to Reed. I haven't heard what he did. But I suppose they are apt to renew the effort to get at me anytime. Not if I can help it![23]

Back in New York City, Field was transported on July 25 – before his attorney Rabinowitz had returned from his trip to Kentucky to seek bail from Justice Reed[24] – to testify before a federal grand jury investigating possible crimes of obstruction of justice and harboring the *Dennis* case bail-jumpers.[25] Before the grand jury, Field refused to answer questions about Bail Fund contributors or to produce Bail Fund records. Based on this, U.S. District Judge John F.X. McGohey convicted Field of criminal contempt and sentenced him to serve six months in prison, to run consecutively to Judge Ryan's ninety-day sentence on Field.[26]

Back in Kentucky, Justice Reed, after hearing the parties' oral arguments and studying briefs they had filed, wrote in longhand a thorough opinion.[27] It included, just for his convenience and not for publication, numerous citations to particular pages in the record of the proceedings before Judge Ryan.[28]

Justice Reed sent his opinion pages and ancillary material to his secre-

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[23] Letter from Robert H. Jackson to William E. Jackson, et al., undated [est. July 24, 1951] (in author's possession).

[24] *See* RABINOWITZ, UNREPENTANT LEFTIST, *supra* note 10, at 141-42.

[25] *See* Russell Porter, *Field, Green Ruled in Contempt Again; Get 6 Months More*, *supra* note 16, at 1.

[26] *See id*. at 12; United Press report, *Second Contempt: Field Given Six Months More in Jail*, WASH. POST, July 31, 1951, at 11.

[27] Justice Reed's longhand draft, filling ten single-spaced, yellow legal pad pages, plus various pages of notes and a page of detailed instructions to his secretary Helen Gaylord, is preserved in his archived papers. *See* Stanley Forman Reed Papers, 1926-1977, 81M3, Special Collections and Digital Programs, University of Kentucky Libraries, Lexington, Box 132. I thank Matt Harris and his colleagues at the Special Collections and Research Center, Margaret I. King Library, University of Kentucky, for assistance with this research.

[28] Letter from "SReed" to "H.G.", undated (headed "Directions"), in *id*.

tary, Miss Helen Gaylord, who was working in his chambers at the Supreme Court during its recess.[29] He instructed her to type the opinion, to save his handwritten pages (as she obviously did – they are archived in his papers), and to tell the Court's Clerk that he (Justice Reed) would sign a typed version of the opinion – to create an official typed version, it seems – when he returned to Washington.[30]

Justice Reed seems not to have mentioned anything about this bail application litigation when he spoke at a Maysville Rotary club meeting on the evening of July 24. According to local press, he said that past legal problems at the Supreme Court have evolved into the law of the land, and that today's legal problems will be resolved into the law of tomorrow. He also briefly described his fellow justices and the backgrounds that led to their respective Supreme Court appointments.[31]

The Supreme Court issued Justice Reed's opinion on July 25, 1951. It denied the Field, Hammett, and Hunton applications for bail pending appeal. Justice Reed found that Judge Ryan had legal authority to issue bench warrants for the *Dennis* fugitives, and to call witnesses to execute their judgments of imprisonment. This was especially true of the Bail Fund trustees, who by providing bail had become part of the court control process that was responsible for the defendants' required appearances. Justice Reed also affirmed that Judge Ryan had legal power to protect court work from obstruction by refusals to answer inquiries, including by holding persons in criminal contempt. And with regard to the Bail Fund records of its

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[29] Helen Gaylord, a former upstate New Yorker, began to work for Stanley Reed as his secretary in Washington in the early 1930s. *See* JOHN D. FASSETT, *supra* note 19, at 210. Gaylord moved with Reed as he was appointed to new offices, working for him at the U.S. Department of Justice when he became Solicitor General of the U.S. in 1935 and then at the Supreme Court when he was appointed a justice in 1938. Jack Fassett, a Reed law clerk during 1953-54, wrote later that Gaylord,

> [i]n addition to typing memos, communications, and opinions, … maintained Reed's docket books and his financial records, followed the status of activities of the Court, often communicated with other justices or their staffs with respect to Court matters, and, though not a lawyer, often acted as an additional law clerk, seeking requested information or research materials for Reed.

Id.; *accord generally* Interview with Helen K. Gaylord, Stanley F. Reed Oral History Project, Louie B. Nunn Center for Oral History, University of Kentucky (Mar. 18, 1981), *available at* https://nyx.uky.edu/oh/render.php?cachefile=1981OH035_Reed03_Gaylord.xml (visited Apr. 28, 2017).

[30] *See* Letter from "SReed" to "H.G.", *supra* note 28.

[31] *See Supreme Court Then And Now, Club Topic*, THE LEDGER INDEPENDENT, July 25, 2915, at 1. I thank Lisa Massey-Brown and her colleagues at the Kentucky Gateway Museum Center in Maysville for locating this article.

donors' names, Justice Reed held that the applicants had no constitutional privilege to withhold them, because the records were Civil Rights Congress property that they held as trustees, not their personal records. Justice Reed held that the refusals to provide the records had been contemptuous, and he affirmed the denials of bail pending appeal.[32]

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Justice Jackson continued to vacation, giving some thought to *Dennis* case-related matters but not handling them.

On July 26, for example, Jackson, probably unaware of Justice Reed's decision the previous day, wrote again to his daughter:

> Dear Mariska:
>
> . . .
>
> Well, it was true that I was being heckled by all sorts of things from the office. But I told the Clerk's office to lay off, that I am simply not available out here and someone else could look after the stuff, that my shop is closed until after Labor Day. They then tried to switch some of my stuff to the C.J. but he sidestepped and let it fall on Reed. Anyway I'm out from under. . . .
>
> Am getting a daily swim and sun bath, walk more miles each day than in a month at home, sleep 9 hours a night[,] eat like a horse and am lazy as hell. Really have not felt better in God knows when. . . .
>
> It might be a good thing for you to change scene a little while. . . . You seem to be about the only one in the family who does not get a vacation.
>
> Anyway love and good wishes.
>
> Daddy.[33]

A few days later, Justice Jackson, still at the Bohemian Grove, wrote again to Justice Frankfurter in Massachusetts, including these comments on the "Communist" cases:

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[32] *See Field v. United States*, 193 F.2d 86, 1 Rapp 58 (1951) (Reed, J., in chambers).

[33] Letter from Robert H. Jackson to Mary J. Loftus, "Thursday" [July 26, 1951], in RHJ LOC, Box 2, Folder 4.

Dear Felix:

. . .

We have had [a] wonderful time in this unique camp. Soon have to give it up and go back to the job. But anyway I shall do so greatly refreshed. I have not been reading the Dennis record I assure you! But I continued their bail (the attys [Sacher, et al.]) so another look could be taken at it. I suppose the Clerk sent you copy of my [June 22] memo [opinion] on it. I do not know what, if anything[,] we should, or can[,] do about it at this stage. I will be interested in your conclusions when all considerations have been canvassed.

My best to Marion and
As ever
Bob[34]

• • •

Justice Jackson remained in northern California through most of August 1951. His wife joined him there and they traveled around, visiting friends including Jackson's former law clerk Phil Neal, then a professor at Stanford Law School. (While at Stanford, Jackson interviewed Neal's top student, William Rehnquist, for what became his 1952-53 clerkship with Jackson.) On August 23, in San Francisco, Jackson delivered the keynote lecture at the California State Bar Association's annual convention.

On August 28, Justice Jackson returned to work in his Supreme Court chambers, preparing for the term that would begin in October.

On September 14, a U.S. Court of Appeals for the Second Circuit panel heard oral argument on Field's, Hammett's, and Hunton's appeals from Judge Ryan's criminal contempt judgments against them, and on Field's appeal from Judge McGohey's order holding Field in criminal contempt for failure to testify and produce documents to a grand jury. At that time, the appellants applied again, this time orally, for bail pending appeal. The panel denied those bail applications.[35] And on October 30, it affirmed the contempt judgments.[36]

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[34] Letter from Robert H. Jackson to Felix Frankfurter, undated [est. July 29, 1951], in FF LOC, Box 70.

[35] *See* Russell Porter, *Freedom Denied 4 in Red Bail Inquiry*, N.Y. TIMES, Sept. 15, 1951, at 4.

[36] *United States v. Field*, 193 F.2d 92 (2d Cir. 1951). Judge Charles E. Clark wrote the panel's opinion. Judge Harrie B. Chase joined in the entirety of Judge Clark's opinion for the Court. Judge

The next day, Field, Hammett, and Hunton applied to the Court of Appeals for bail pending their filing of petitions seeking U.S. Supreme Court review. On November 5, without hearing oral argument on the applications, a Court of Appeals panel denied them.

Four days later, the three men each applied to the Supreme Court for bail pending their filing of applications for writs of certiorari in their respective cases and Court action on such petitions. By that date, Field had completed serving his two-month sentence from Judge Ryan and was serving the six-month prison sentence he had received from Judge McGohey. Hammett and Hunton still were serving the six month sentences that Judge Ryan had imposed on them. At the Supreme Court, the Clerk's office delivered these applications to the Second Circuit Justice, Jackson, for his consideration and adjudication.[37]

Field, Hammett, and Hunton subsequently did seek Supreme Court review of their contempt convictions. On December 3, the Court denied their petitions.[38] Justice Black and Justice William O. Douglas, the *Dennis* dissenters, noted that they were "of the opinion certiorari should be granted."[39]

At the same time that the full Court denied the Field, Hammett, and Hunton petition seeking review of their convictions, Justice Jackson, as Second Circuit Justice, denied their respective applications for bail, which had been filed on November 9. He wrote no opinion; on the front page of each application, he simply wrote, vertically in the left margin, "Denied," the December 3 date, and his name.[40]

For his crimes of contempt, Fred Field served two prison sentences, the ninety-day sentence imposed by Judge Ryan and then the six-month

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Jerome N. Frank dissented in part and wrote a separate opinion.

[37] *See* Application for an Order Admitting Appellant Field to Bail Pending a Petition for Writ of Certiorari, *United States v. Field*, filed by Victor Rabinowitz, Nov. 9, 1951; Application for an Order Admitting Appellants, Hammett and Hunton, to Bail Pending an Application for a Writ of Certiorari and Decision Thereon, *United States v. Hammett* & *United States v. Hunton*, filed by Charles Haydon and Mary M. Kaufman, Nov. 9, 1951. See also Memorandum for the United States in Opposition, *Field v. United States* & *Field* [sic], *Hammett* & *Hunton v. United States*, filed by Solicitor General Perlman, Nov. 9, 1951. Each of these pleadings is located in Record Group 267, Box 6762, National Archives & Records Administration, Washington, D.C. I thank Robert Ellis and his NARA colleagues for their assistance with this research.

[38] 342 U.S.894 (1951).

[39] *Id*.

[40] *See supra* note 37.

sentence imposed by Judge McGohey. Field, whose good behavior in prison earned time off his sentences, was released from the federal prison in Ashland, Kentucky, about 75 miles east of Justice Reed's home in Maysville, on February 26, 1952.[41]

Dash Hammett was incarcerated with Field in New York City, then in Lewisburg, Pennsylvania, then in Chillicothe, Ohio, and then in Ashland, Kentucky.[42] Hammett was released on December 9, 1951.[43]

Alphaeus Hunton also served slightly less than his six-month sentence. According to Field, Hunton, an African American, was sent to an all-Negro prison rather than to the Ashland federal prison (which he might have hated more because it was "Jim-Crowed" – "blacks were housed in separate cell blocks and sat at segregated tables in the mess hall"[44]). Hunton also was released, it seems, on or about December 9.

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[41] *See F.V. Field Out of Jail*, N.Y. Times, Feb. 29, 1952, at 8; *see generally* FREDERICK VANDERBILT FIELD, FROM RIGHT TO LEFT: AN AUTOBIOGRAPHY 239-56 (1983) (describing his time as, according to his chapter title, a "Guest of the Government").

[42] *Id*. at 227, 244, 247-51.

[43] *See* Associated Press report, *Hammett Freed From U.S. Prison; Field Still Held*, WASH. POST, Dec. 11, 1951, at B11.

[44] FIELD, FROM RIGHT TO LEFT, *supra* note 41, at 249.

SUPREME COURT PRACTICE 1900

A STUDY OF TURN-OF-THE-CENTURY APPELLATE PROCEDURE

Ross E. Davies[†]

Nowadays, "[a]n application addressed to an individual Justice [of the Supreme Court of the United States] shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief."[1] It hasn't always worked that way. Indeed, for most of the Supreme Court's history, litigants (or their counsel) who had business with individual Justices generally felt free to deal directly with those Justices, and the Justices generally reciprocated. This was partly a matter of law and partly a matter of practicality.

First, law's role. Action by individual Justices used to be required or permitted on many occasions, in response to litigants' applications of various sorts. For example, at the turn from the 19th century to the 20th (and for many years before and after),

> An appeal or a writ of error from a circuit court or a district court direct to [the Supreme Court], in the cases provided for in sections five and six of the [Evarts Act of 1891], may be allowed, in term time or in vacation, by any justice of this court, . . . and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.[2]

As Daniel Gonen has explained, "[t]he practice of allowing a single Justice to act [under Rule 36] rather than the full court was based on the point-

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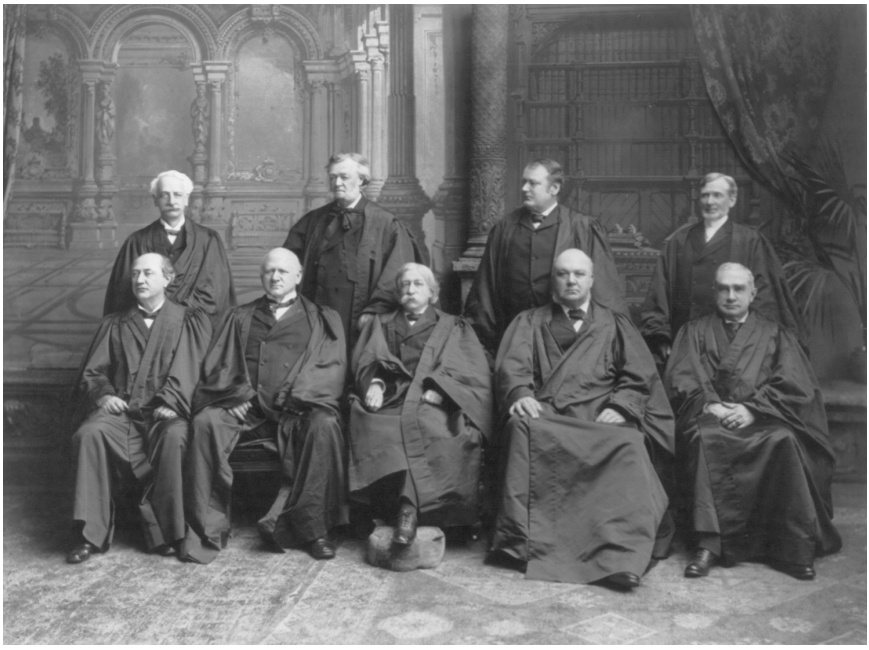
[†] Professor of law, Antonin Scalia Law School at George Mason University, and editor-in-chief, the *Green Bag*. A version of this article will be published, with more pictures and fewer words, by the *Green Bag* as a "Single Sheet Classic."

[1] S. Ct. R. 22 (2017).

[2] S. Ct. R. 36.1 (1893).



The Supreme Court of the United States. Front row, left to right: Justices David J. Brewer and John Marshall Harlan, Chief Justice Melville W. Fuller, and Justices Horace Gray and Henry Billings Brown. Back row, left to right: Justices Rufus W. Peckham, George Shiras, Jr., Edward Douglass White, and Joseph McKenna. Image source: Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62-56711 (1899).

lessness of burdening the full Court with these applications since there was little or no benefit from having more than one person process them."[3] (Sounds a bit like the rationale for the modern cert. pool, doesn't it?)

That does not, however, mean that single-Justice decisions about whether to allow a case onto the Court's docket were mere insignificant routine, though the Court's records (and much of the scholarly commentary on them) tend to foster that impression. Rather, those old allowances have a rubber-stamp aroma because there were so darn many of them, and because a record was rarely made or kept of any argument made at that

[3] *Judging in Chambers*, 76 U. CINCINNATI L. REV. 1159, 1223 (2008).

stage of litigation or of any explanation (such as an opinion in-chambers) for a Justice's decision. But those rare Rule 36 proceedings for which we do have a record, or an opinion, can be telling. Consider, for example, Justice John Marshall Harlan's rather chilling in-chambers opinion explaining his refusal to allow an appeal in a jury-and-race case:[4]

> Washington, D.C., August 24th, 1896.
>
> Dear Mr. Barrett:
>
> I have your letter of the 21st, in which it is said that you were specially desirous that I should act on the application for the allowance of an appeal in the case of Aleck Richardson from the order of the Circuit Court of the United States denying his application for the writ of *habeas corpus*. The members of our court do not, in the first instance, unless in some cases requiring immediate action, pass upon applications for writs of error or appeals in cases beyond their respective circuits. In accordance with that custom, the papers you sent to me were transmitted to the Chief Justice, who, as I learn from your letter, has refused to allow an appeal.
>
> You have the technical legal right to apply for your client to each one of the Justices of the Supreme Court, and I therefore take your letter to be substantially an application to me. Before the papers were sent to the Chief Justice, I examined them, and reached the same conclusion that he did. The only ground assigned in the papers sent by you for granting the writ is that your client was tried by a jury composed entirely of white men. It is not claimed that this resulted from any statute of the State excluding blacks from serving on juries, because of their race. If, therefore, any black man was, because of his race, excluded from the jury in Richardson's case, it was error on the part of the court in the trial, which was to be remedied by writ of error, not by *habeas corpus*. The Constitution of the United States does not secure to a black man the right to be tried by a jury composed in whole or in part of men of his race, nor does it secure to a white man the right to be tried by a jury composed in whole or in part of men of his race. The Constitution only secures to each person the right to be tried by a jury from which is not excluded, because of his race, any citizen, otherwise qualified, of the same race as that of the accused. *Ex*

[4] *In re Richardson*, 4 Rapp 1600 (1896).

> *parte Royall, 117 U.S. 241, 252, 252; In re Wood* [Publisher's note: "*In re Wood*" should be "*Wood v. Brush*"]*, 140 U.S. 278, 289; Gibson v. Missippii* [Publisher's note: "*Missippii*" should be "*Mississippi,*"] 162 U.S. 565. If you will read these cases you will perceive that there was not the slightest reason for the interference by the Circuit Court of the United States upon *habeas corpus* with the final action of the State Court, and therefore the application for an appeal from the order of the Circuit Court denying the application made to it ought not to be granted. I should feel otherwise about this application if I could perceive that there was any possibility whatever that the Supreme Court would entertain jurisdiction of the case and consider it upon its merits. If the appeal were allowed, it would be dismissed on motion. The careless allowance of appeals in such cases has no other effect than to interfere with the ordinary administration of the criminal laws of the State. If the State court in the trial of the case has denied to the accused any right secured to him by the Constitution and laws of the United States, his remedy is not by *habeas corpus*. *Pepke vs Cronan, 155 U.S. 100; Andrews vs Swartz, 155* [Publisher's note: "*155*" should be "*156*"] *U.S. 272* [Publisher's note: There should be a period at the end of this sentence.]
>
> Yours truly,
> /s/ John M. Harlan
>
> Mr. C.P. Barrett,
> Spartanburgh, S.C.

The plain, counsel-to-Justice-to-counsel nature of this communication is reflected in the typescript (not printed) original opinion, formatted as a letter addressed to Richardson's counsel, with Harlan's signature in his own hand at the end.

Second, practicality's role: During the 18th and 19th centuries, the Justices were basically solo operators, except when they were together on the bench or in conference. They had no office space at the Court. They had little or nothing in the way of administrative support for correspondence or research or errand-running or opinion-writing or anything else. They held court in a stately but not very big room in the Capitol, with a bit of space nearby for the clerk, the marshal, a small library, and some files.

The Justices did most of their work at home, where they also main-

tained their own libraries. So, if counsel wanted to correspond or meet with a Justice, the best place to write to or visit would often be the Justice's home address in Washington when the Court was in Term, or the Justice's address on circuit (or on vacation) when it was not. So, that is what counsel did, especially when time was of the essence. Consider, for example, John L. Semple, counsel to Theodore Lambert of New Jersey. Semple traveled from Philadelphia to Washington on January 2, 1895 — the day before Lambert was set to be executed for murder — to visit Justice George Shiras and apply for relief. The next day, Shiras explained his decision in the case:

> "I did not interfere with the State court in granting Lambert's counsel the provisional writ of error, which has operated as a stay of execution. In the haste with which the original application for writ of habeas corpus was urged no record was made in Judge Dallas's court. Without this record I could not interfere, although in criminal cases the defendant is entitled to the writ of error, which is merely a formal proceeding. When Lambert's counsel called upon me last night there was no time to send him back to Judge Dallas's court. His client would meanwhile have been hanged. Therefore I issued to him a writ of error contingent upon completion of the record in the court. I did not take into account the merits of Lambert's case, which was not before me. I merely made it possible for the condemned man to avail himself of such advantages as, had the proceedings been regular, he would have been clearly entitled to."[5]

Lambert eventually had his day — two days, actually — in the Supreme Court.[6] He had no success there, and his sentence was carried out on December 19, 1895.[7] But the combination of Semple's exertions on the road and Shiras's decision at home, in chambers, did extend Lambert's life by almost a year.

The Marshal of the Supreme Court made counsel-Justice contact of this sort easier by providing a useful card for counsel (which was also handy for social callers), titled "Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States." The edition for 1900

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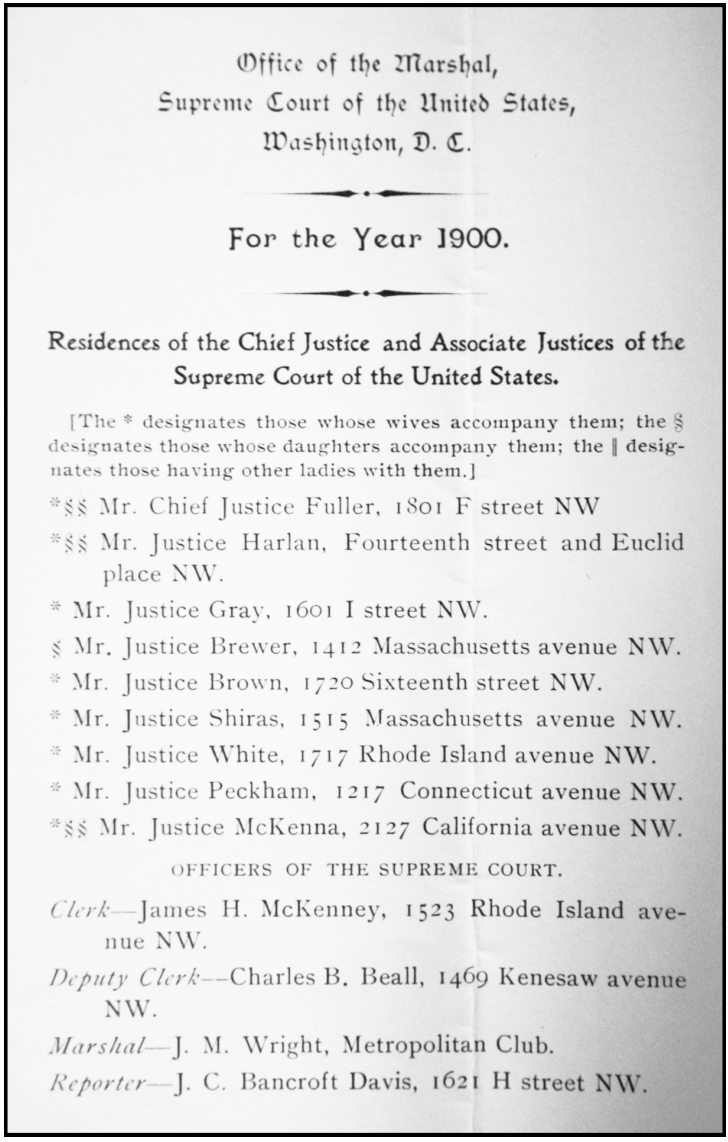
[5] *Reprieve at the Last Hour*, BALTIMORE SUN, Jan. 5, 1895, at 7.
[6] *Lambert v. Barrett*, 157 U.S. 697 & 159 U.S. 660 (1895).
[7] *Lambert Hanged at Last*, WASHINGTON EVENING TIMES, Dec. 19, 1895, at 1.

is reproduced here. And we've done the Marshal one better by providing a pair of illustrated and annotated maps that might have been useful to counsel in 1900. They might also be useful to law-tourists in 2017.



Office of the Marshal,
Supreme Court of the United States,
Washington, D. C.

For the Year 1900.

Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States.

[The * designates those whose wives accompany them; the § designates those whose daughters accompany them; the ‖ designates those having other ladies with them.]

*§§ Mr. Chief Justice Fuller, 1801 F street NW

*§§ Mr. Justice Harlan, Fourteenth street and Euclid place NW.

* Mr. Justice Gray, 1601 I street NW.

§ Mr. Justice Brewer, 1412 Massachusetts avenue NW.

* Mr. Justice Brown, 1720 Sixteenth street NW.

* Mr. Justice Shiras, 1515 Massachusetts avenue NW.

* Mr. Justice White, 1717 Rhode Island avenue NW.

* Mr. Justice Peckham, 1217 Connecticut avenue NW.

*§§ Mr. Justice McKenna, 2127 California avenue NW.

OFFICERS OF THE SUPREME COURT.

Clerk—James H. McKenney, 1523 Rhode Island avenue NW.

Deputy Clerk—Charles B. Beall, 1469 Kenesaw avenue NW.

Marshal—J. M. Wright, Metropolitan Club.

Reporter—J. C. Bancroft Davis, 1621 H street NW.

Image source: National Archives, RG 267, Entry 72, box 3 (1900).

Today, lawyers — indeed, all people — have it much easier. No matter the time of year or the nature of our business, when we want to communicate with a Justice we simply address our filings or other papers to the Supreme Court's house at 1 First Street NE, Washington, DC 20543 (and also file briefs electronically[8]). But while we have been freed from much complicated and costly rigmarole, we never come to a Justice's home, or chambers.[9]

NOTES ON RESIDENTIAL WORKPLACES OF MEMBERS OF THE U.S. SUPREME COURT IN WASHINGTON, DC

Chief Justice Melville W. Fuller, 1801 F Street NW.

The Chief Justice and his family were the latest in a long line of formidable occupants — Tobias Lear, Tench Ringgold, John Marshall, Joseph Story, William Johnson, Gabriel Duvall, Smith Thompson, John McLean, Henry Baldwin, Sally and William Carroll — of the building now known as the Ringgold-Carroll House.[10]

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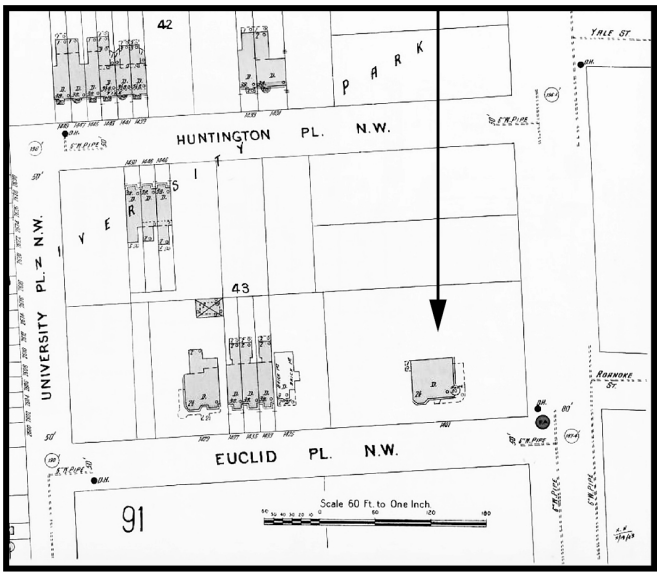
[8] *See* S. Ct. R. 29.7 (2017).

[9] *Cf.* J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING, book one, ch. XI (2d ed. 1965).

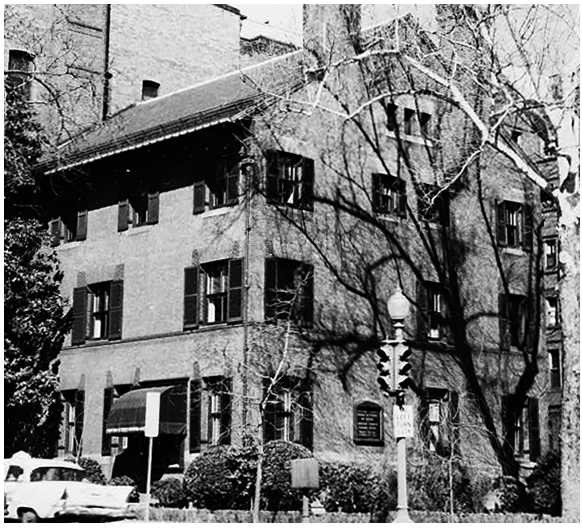
[10] *See* Library of Cong., Prints & Photographs Div., repro. no. HABS DC,WASH,34--6 (n.d.); see also History of 1801 F Street, dacorbacon.org.



Justice John Marshall Harlan, 1401 Euclid Place.

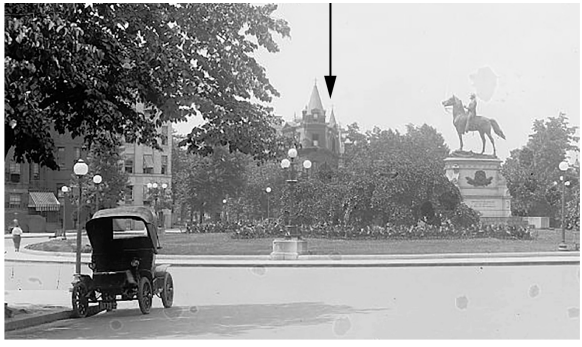
As this detail from a contemporary street plan shows, the Harlans did not have many neighbors out in the boondocks, just off what was then called "Fourteenth Street, Extended" (see the downward-pointing arrow). Harlan's commute to the Supreme Court's chamber in the Capitol was longer than any other Justice's, but what was then a barely suburban home suited his lifestyle well. It was conveniently located between the three central Cs of his life: Church (the New York Avenue Presbyterian at 1313 New York Avenue NW, for faith), Course (the Chevy Chase Club in Bethesda, Maryland, for golf), and Court (the Supreme, at the U.S. Capitol, for law).[11]

[11] *See* SANBORN MAP CO., INSURANCE MAPS OF WASHINGTON, DC, vol. one, Library of Cong., Geography & Map Div. (1903); *see also* MALVINA SHANKLIN HARLAN, SOME MEMORIES OF A LONG LIFE, 1854-1911 at 117-18 (2002); James W. Gordon, *Religion and the First Justice Harlan*, 85 MARQ. L. REV. 317, 333-36 (2001); Ross E. Davies, *The Judicial and Ancient Game*, 35 J. SUPREME COURT HISTORY 122, 124-25, 131, 137-39 (2010).



Justice Horace Gray, 1601 I Street NW.

Gray's residence on the northwest corner at the intersection of Sixteenth Street and I Street NW would be, if it were still standing today, next door to the offices of O'Melveny & Myers LLP, the bobbleheadquarters of the Green Bag. Alas, the Gray residence is long gone.[12]



Justice David J. Brewer, 1412 Massachusetts Avenue NW.

From his home on the west side of Thomas Circle (with its equestrian statue of General George Henry Thomas), Brewer had a lovely view of the

[12] *See* Library of Cong., Prints & Photographs Div., repro. no. HABS DC,WASH,154--1 (n.d.).

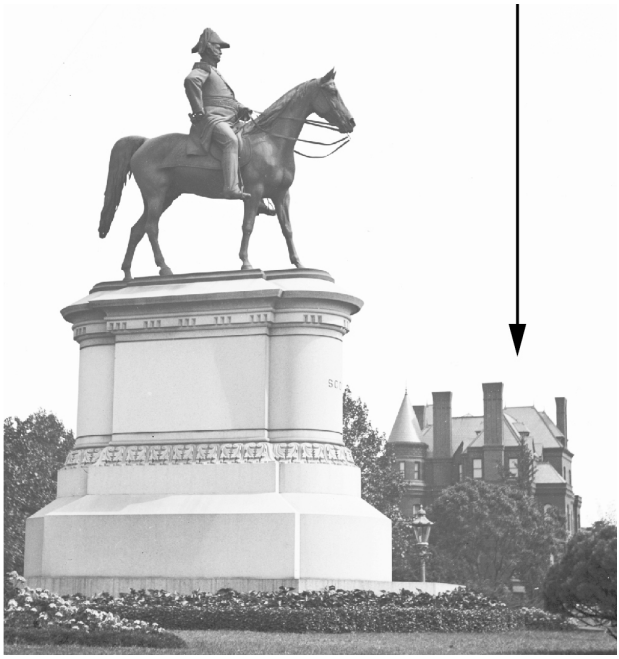
park-like circle and the Luther Place Memorial Church beyond. (The church still stands, where Vermont Avenue and Fourteenth Street meet at the circle.) The Brewers' home is in the background of this photograph (see the downward-pointing arrow), which was snapped from the east side of the circle, on Massachusetts Avenue.[13]

Justice Henry Billings Brown, 1720 Sixteenth Street NW.

After he was elevated to the Supreme Court in 1890, Brown bought a lot and commissioned an enormous (and enormously expensive) new house to fill it — now known as the Toutorsky Mansion — for himself and his spouse, Caroline. There they lived until their deaths in 1913 and 1901, respectively. Brown did not, however, insist on moving about the city in comparable splendor. He frequently rode the buses (aka "herdics") that rolled up and down Sixteenth Street.[14]

[13] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-npcc-31843 (ca. 1910-1925).

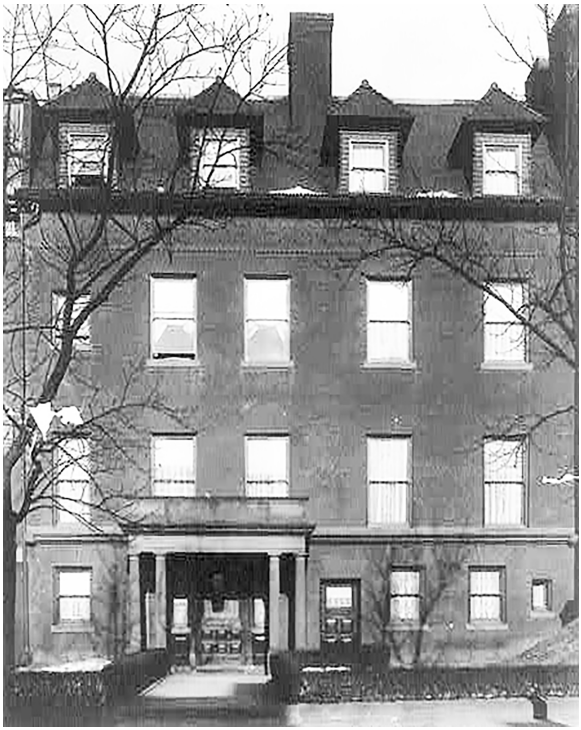
[14] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62-56822 (1895); *see also Justice Brown in the Lists to Solve Herdics Problem*, WASHINGTON TIMES, May 27, 1911, at 3.



Justice George Shiras, Jr., 1515 Massachusetts Avenue NW.

"The large house at the junction of N Street and Massachusetts Avenue" — visible in this photograph, to the right of the south-facing equestrian statue of General Winfield Scott (see the downward-pointing arrow) — "is the residence of Supreme Justice Shiras," according to the 1901 edition of Rand, McNally & Co.'s Pictorial Guide to Washington and Its Environs. Shiras lived across the street from the famous "Louise Home," which occupied the entire block on the south side of Massachusetts Avenue between Fifteenth Street and Sixteenth Street.[15]

[15] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-npcc-00115 (ca. 1918-1920); *see also* Historical Sketches of the Charities and Reformatory Institutions in the District of Columbia, House Report No. 1092, 55th Congress, 2d Session 144-48 (1898).

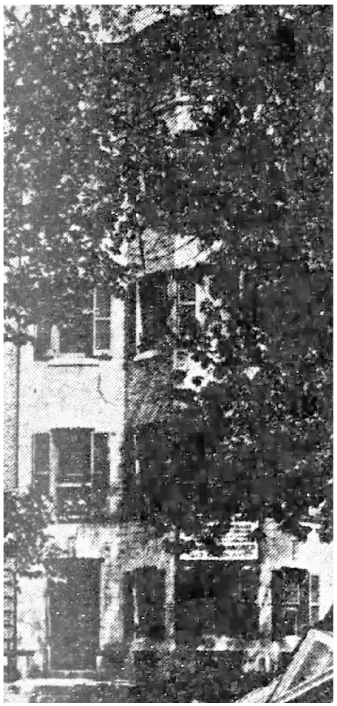


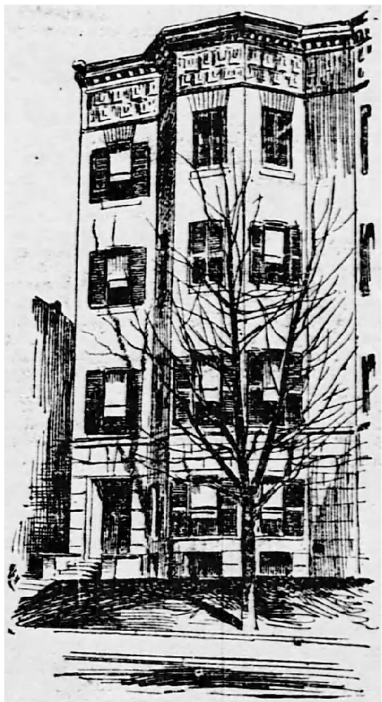
Justice Edward Douglass White, 1717 Rhode Island Avenue NW.

White was reputedly an extraordinarily congenial colleague on the Supreme Court and generally a very nice person, as this effusive profile, published when he became Chief Justice in 1910, suggests:

> An invitation to the home of the Justice is a chance to get acquainted with real hospitality. The Justice enjoys good company and he always has the latch string out for his friends. Furthermore, he is accessible to those persons who might want to talk to him on public business out of hours.
>
> A caller at the White House, whether he is a belated messenger boy hunting a number or a dignified Senator, is received with equal consideration. If the Justice himself answers the door, as he often does, the graciousness of the greeting to the caller is habitual and not measured by the social stature of the person he greets.[16]

[16] ST. LOUIS POST-DISPATCH, Dec. 18, 1910, at 10; *see also* Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62- 86851 (1910).

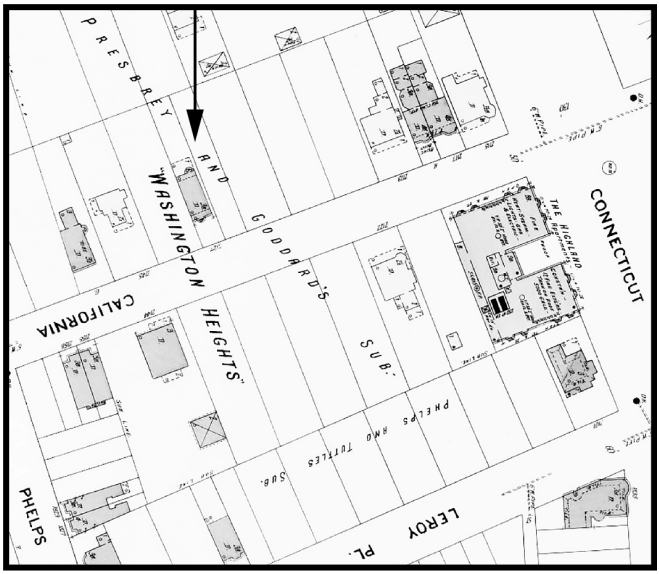




Justice Rufus W. Peckham, 1217 Connecticut Avenue NW.

The four-story home of the Peckham family, two blocks south of Dupont Circle, had been adjacent to greatness. Alexander Graham Bell built his Volta Laboratory at 1221 Connecticut Avenue, but Bell moved the lab to 2020 F Street NW before the Peckhams moved in at 1217 Connecticut Avenue. Lacking a good photograph of the Peckham residence, what we have here is a bad photograph of it taken when some trees in front of the house were leafy (left) and a not-bad sketch drawn when the trees were bare (right).[17]

[17] *See* WASHINGTON TIMES, Sept. 9, 1911, at 4; WASHINGTON EVENING STAR, Feb. 13, 1897, at 13; *see also* Raymond R. Wile, *The Development of Sound Recording at the Volta Laboratory*, 21:2 ARSC J. 208 (1990).



Justice Joseph McKenna, 2127 California Avenue NW.

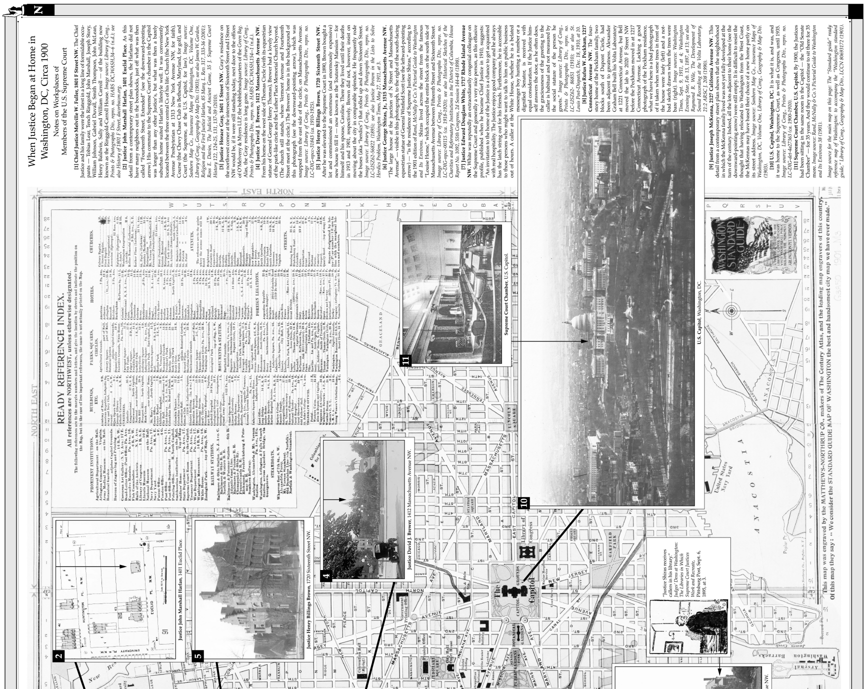
This detail from a contemporary street plan shows that the neighborhood in which the McKenna family lived was not yet fully developed at the turn of the century. Indeed, all the lots adjacent to their home (see the downward-pointing arrow) were still empty. It is difficult to resist the thought that having relocated to Washington from the West Coast, the McKennas may have based their choice of a new home partly on its street address.[18]

[18] *See* SANBORN MAP CO., INSURANCE MAPS OF WASHINGTON, DC, vol. one, Library of Cong., Geography & Map Div. (1903). (Today, by the way, California Avenue is a Street.)

APPENDIX

THE "SINGLE-SHEET CLASSIC" VERSION OF THIS PAPER (REDUCED)


Joseph McKenna
Melville W. Fuller
Rufus W. Peckham
Edward Douglass White
Horace Gray
Henry Billings Brown
George Shiras, Jr.
David J. Brewer
John Marshall Harlan
When Justice Began at Home
Office of the Marshal, Supreme Court of the United States, Washington, D.C.
For the Year 1900.
Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States.
NOWADAYS,


When Justice Began at Home in
Washington, DC, Circa 1900
Notes on Workplaces of
Members of the U.S. Supreme Court

"Justice Shiras receives callers in his library." *Judges' Dens at Washington: The Libraries in Which Supreme Court Justices Work and Recreate*, PITTSBURG POST, Sept. 6, 1895, at 3.

RAPP'S REPORTS

VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

5 Rapp no. 11 (1927)

SACCO V. MASSACHUSETTS

HEADNOTE

by Ira Brad Matetsky

Source: 5 N. SACCO *ET AL.*, THE SACCO-VANZETTI CASE 5534 (2D ED. 1969).

Opinion by: Harlan Fiske Stone (noted in source).

Opinion date: August 22, 1927 (noted in source).

Citation: Sacco v. Massachusetts, 5 Rapp no. 11 (1927) (Stone, J., in chambers), 2 J. In-Chambers Practice 52 (2017).

Additional information: In August 1927, Justice Oliver Wendell Holmes, the Circuit Justice for the First Circuit, denied two applications to stay the impending executions of Nicola Sacco and Bartolomeo Vanzetti. *See Sacco v. Hendry*, 1 Rapp 15 (Aug. 10, 1927) (Holmes, J., in chambers); *Sacco v. Massachusetts*, 1 Rapp 16 (Aug. 20, 1927) (Holmes, J., in chambers). When he did so for the second time, Holmes added that "although I must act on my convictions I do so without prejudice to an application to another of the Justices which I should be very glad to see made, as I am far from saying that I think counsel was not warranted in presenting the question raised in the application by this and the previous writ." *Sacco v. Massachusetts*, 1 Rapp at 17. The defense lawyers then asked Justice Louis Brandeis, also located in Boston, for a stay, but Brandeis recused himself. Defense attorney Arthur Hill and three colleagues next traveled 200 miles by car and boat from Boston to Justice Harlan Fiske Stone's summer house on Isle au Haut, an island off the coast of Maine. Stone denied relief in a one-paragraph memorandum, quoted below. The text is found in the five-volume compendium of the record of the case, cited above, as well as in various contemporary newspapers. (For the rest of this story, at least insofar as in-chambers practice is concerned, see the next opinion.)

OPINION

Application considered and denied without prejudice to application to any other Justice. I concur in the view expressed by Justice Holmes as to the merits of the application and action of counsel in presenting it.

5 Rapp no. 12 (1927)

SACCO V. MASSACHUSETTS

HEADNOTE

by Ira Brad Matetsky

Source: MICHAEL J. MUSMANNO, AFTER TWELVE YEARS 356-57 (1939); William Howard Taft Papers, Library of Congress, Manuscript Division, Reel 294.

Opinion by: William Howard Taft (noted in source).

Opinion date: August 22, 1927 (noted in source).

Citation: Sacco v. Massachusetts, 5 Rapp no. 12 (1927) (Taft, C.J., in chambers), 2 J. In-Chambers Practice 54 (2017).

Additional information: The Sacco-Vanzetti defense team also asked Chief Justice William Howard Taft to stay the impending executions. Taft was at his summer house in Canada, and everyone assumed that he would have to return to United States territory before he could take any judicial action. Defense lawyer Michael Musmanno (later a Pennsylvania Supreme Court Justice) telephoned and then telegraphed to Taft, asking him to travel to the border and grant relief. Taft's telegram in response, which is quoted and discussed in Musmanno's book about the case, is given below. We are treating it as an in-chambers opinion, although in deference to Taft's view that he could not act as a justice while outside the United States, perhaps it should be called an out-of-chambers opinion.

OPINION

Quebec, Canada
August 22, 1927

M. A. Musmanno
Attorney, Sacco-Vanzetti Case
Boston, Mass.

You advised me by telephone at nine last night that you wished to apply to me for a stay of execution upon a petition for a writ of certiorari filed in

the United States Supreme Court in the Sacco-Vanzetti Case. Communication was difficult and I requested you to submit what you had to say in a telegram. At 2 a.m. your telegram reached me as follows: "Would Your Honor consider crossing the border to pass upon question of stay of execution of Sacco and Vanzetti scheduled to be executed midnight August twenty-second. Please wire at what point you will hear presentation of case and I will meet Your Honor there." The authority to grant such stay is given to a justice of our court. Under the statute and our rules there is no specific authority giving the right to apply to more than one justice. By telephone you advised me that you had made such an application to Mr. Justice Holmes, to whom disposition of such matters in the first judicial circuit has been regularly assigned by the court and that Mr. Justice Holmes had refused your application but expressed no objection to your applying for a stay to any other member of our court. Mr. Justice Brandeis and Mr. Justice Stone are now within the First Judicial Circuit, yet you request me, who is not within the jurisdiction of the United States at all and could hardly order a stay from here, to proceed to the border and there hear your application. Compliance with your request would involve a day's journey by rail from here and I could not reach the border leaving here by first train in the morning until a short time before midnight when the present stay of execution expires. Were application to be presented to me under such circumstances I would feel constrained to defer to Justice Holmes' decision who is advised as to the whole case having heard two applications on it. The defendants have had the benefit of the fullest consideration according to Associated Press dispatch purporting to give the text of the decision of the Supreme Court of Massachusetts in this case handed down Friday last which reached me Saturday night. The absence of jurisdiction in our court to grant the writ of certiorari in this case seems to be apparent. The unusual character of your request justifies this reference to that decision as reported as added reason for my not going to the border.

W. H. Taft

APPENDIX TO

RAPP'S REPORTS

VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

Introductory Note

The four documents that follow were all apparently dictated by Justice Wiley Rutledge, between 1946 and 1948, in connection with applications that were made before him as a single Justice of the Supreme Court. They cannot be called in-chambers opinions, because as far as the editors have been able to discover, they were never issued as opinions. But they reflect Rutledge's detailed reasoning in ruling on four significant in-chambers applications, and they also shed light on contemporary in-chambers practice, including the Justice's hearing applicants' counsel orally and (in one case) conferring with another Justice before ruling. They therefore merit reprinting, albeit in this Appendix to, rather than the body of, *Rapp's Reports*. The four "opinions" were located in the Wiley Rutledge Papers in the Manuscript Division of the Library of Congress, Boxes 154 (*Bisignano* and *Standard Oil*) and 176 (*Rogers* and *Bary*). They are typed on ordinary paper and unsigned. Some very minor handwritten corrections have been implemented without notation of the fact. For more information on these documents, please see the introductory essay to this volume, 2 J. In-Chambers Practice at 14-15.

5 Rapp App. no. 1 (1946)

BISIGNANO V. MUNICIPAL COURT OF DES MOINES

Application for Stay
Hearing on October 9, 1946

Al Bisignano vs. Municipal Court of the City of Des Moines, Iowa, and Harry B. Grund, Respondents.

The application presented to me on Wednesday, October 9th, by counsel for petitioner Bisignano in person was for a further stay pending the filing of a petition for certiorari in this Court and action thereon. Upon denial of petitioner's petition for rehearing by the Supreme Court of Iowa, that court issued a stay order, this action being taken en banc. The order was conditioned several ways, one of which was that the petitioner should file in this Court his petition for certiorari within twenty days. The time for filing petition for certiorari and therefore the stay expires on October 13th, since the stay order was issued September 23d. The order was made in exact accordance with the petitioner's request, including the twenty-day condition. The request was made, according to counsel's statement, in the belief that printed copies of the record were available and could be procured for filing here. However, after the order was entered it was discovered that the seventeen copies of the record which had been filed in the Supreme Court of Iowa had been distributed to various law schools and others interested after that court had taken its final action on the ease. Counsel apparently were relying upon having these copies made available for filing here. They did not anticipate having to have the record printed again. Upon discovery of the fact that the existing copies had been distributed and would not be available, counsel found it impossible to secure a printer who could do the work of printing the record in time for the required number of copies to be filed here within the twenty days allowed by the stay. Thereupon counsel applied to Chief Justice Garfield of the Supreme Court of Iowa on October 2d for an extension of the time for operation of the stay. According to counsel's statement made to me in chambers, Justice Garfield denied the stay for the reason that, although he had power to extend the time for its operation, he did not feel that he should

do so since the entire court had acted upon petitioner's original application and had granted the relief thereby sought in exact accordance with the terms of the application. It was stated to me that Chief Justice Garfield did not state any other reason for his denial of the application for extension, either orally or formally in his order of denial.

The sentence which was imposed in this case was a fine of $500 and six months imprisonment. The time for filing the petition for certiorari in this Court will not expire until sometime in December, around the 13th. Further time will be required for action by this Court and if the petition should be granted and the cause set for argument it is entirely possible that unless the extension is granted petitioner would have served his full term before the cause is finally disposed of here.

In my judgment the petition raises a substantial federal question, although I have some doubt whether the question was raised in time in the courts of Iowa. An examination of the record and of the various papers upon which the case was considered in the Supreme Court of Iowa discloses that if the federal question was raised as such in the contempt proceedings before the Municipal Court of course it was more incidentally with reference to the state grounds argued there than as independent and distinctive separate federal grounds. There are suggestions in the record of violation of federal rights, but the assignments with respect to them were certainly not clear and definite.

The same thing is true also with reference to the original application for certiorari, that is, the petition, which was filed in the Supreme Court of Iowa. Most of the specific assignments of error relate to alleged deviation from state statutory and constitutional requirements. The latter include the alleged deprivation of the right to trial by jury pursuant to the provision of the Iowa constitution cited in this respect. There are suggestions also in this petition that the effect of the proceeding may be to have denied petitioner's federal constitutional right as a matter of due process and also perhaps as one of equal protection of the laws. However, these suggestions seem to have been made as incidental to and supporting reasons for the basic and clearcut assignments with reference to alleged deviations from state law. And at the end of the petitioner's brief in argument before the Supreme Court of Iowa it is said that that court should reverse the decision and thus secure to the petitioner his alleged right to trial by jury under the Iowa constitution, in order that he may not be required to

rest his case upon his federal constitutional rights to due process and equal protection. It is thus doubtful whether the federal questions were squarely raised either in the Municipal Court or by the original petition for certiorari and the briefs in the Supreme Court of Iowa.

However, the petitioner filed various other papers in the Supreme Court of Iowa, including a reply to the brief of the respondents, and also filed a petition for rehearing and later an amended petition for rehearing. The amended petition for rehearing clearly and squarely raised the federal question. It is not clear that the original petition for rehearing was basically different in this respect from the original petition for certiorari. Moreover, in its opinion denying certiorari the Supreme Court of Iowa does not squarely rule on the federal constitutional questions. But it does not appear from the record at any rate by any positive evidence that in passing upon the petition and the amended petition for rehearing it did not rule on these questions. Nothing in the order granting the stay of procedure or in the further order of Chief Justice Garfield denying an extension of the stay suggest that the court did not pass upon the federal constitutional question, at any rate in disposing of the petition for rehearing. On the contrary, it would seem that when the court en banc allowed the stay order in exact accordance with the petitioner's application for that relief it in effect and implicitly confirmed the fact that federal questions had been presented and determined in the court's action. Justice Garfield's action in refusing to extend the stay does not negative this in any way, nor do his asserted reasons for taking that action do so.

In short, I am not too clear that the petitioner raised his federal questions clearly and distinctively as such appropriately and in time in the state court. I am inclined to think that if the Supreme Court of Iowa had denied his stay or refused to extend the time for the stay to operate on the ground that he had raised the federal question too late, that is, on his amended petition for rehearing, I would feel bound by their action under our authority in that respect. But in the absence of anything to indicate that the Iowa Supreme Court acted on this ground, I am inclined to think that the question has been timely raised and, if so, I have no doubt that the matter is of sufficient importance that the petition for certiorari will be at least sufficiently meritorious to be presented to this court for its action and, as presently advised, I would think that the petition should be granted and set for argument here.

In short, I think that in all probability the petition for certiorari should be and will be granted, and if any question should be raised by the respondent as to the timeliness of the raising of the federal question that question also should be set down for argument here.

Being of these views, it seemed to me that the stay order should be extended in order to allow the petitioner sufficient time to perfect his application here and that a failure to extend the order might in substance have the effect of rendering the case moot, if not entirely, then at any rate so with respect to the application of the portion of the penalty which requires imprisonment. It is my judgment also that, inasmuch as the Supreme Court of Iowa felt that bond should be given to indemnify the respondent on account of costs and so forth, a similar condition should be imposed here. Accordingly, I have today signed an order for extending the time for operation of the stay, conditioned upon the filing of a satisfactory bond in the sum of $2000 and upon the filing of the petition for certiorari within the statutory time.

5 Rapp App. no. 2 (1947)

EX PARTE STANDARD OIL CO.

Ex parte STANDARD OIL CO.

> Application for leave to file Petition for Writ of Mandamus or in the alternative Writ of Prohibition.

The application made to me March 17, 1947, was for a stay of an order of the District Court of the Western District of Missouri entered by Judge Collett on January 29, 1947, in the case of Smithey v. Standard Oil Company of Indiana.

The material facts are as follows. The suit was one brought under the Fair Labor Standards Act, originally in the state courts. Motion for removal to the federal court was denied in the state court, but after the denial the defendant Standard Oil Company removed the case to the Federal District Court pursuant to the statutory procedure providing for such action. The plaintiff in the state court suit moved in the federal court to dismiss the proceeding or to remand to the state court for want of jurisdiction in the federal court. Judge Collett entered an order remanding the cause. In doing so he stated that the district courts of the country are divided on whether there is jurisdiction in the federal court in such cases, splitting about 60-40 against the jurisdiction. (The theory against jurisdiction seems to be that the Fair Labor Standards Act, by giving the plaintiff a choice to sue either in the federal or in the state court, impliedly repeals the applicability of the general removal statute to such cases, a theory which seems to me as I am presently advised without substantial foundation.) Judge Collett went on to say in his order that his own view was that the federal district court has jurisdiction in such cases, but a majority of the judges of the United States District Court for the Western District of Missouri hold the contrary view. He then went on to say that there should not be two conflicting rules of law working out of the same courthouse and accordingly, though he thought the motion to remand should denied and that there was jurisdiction, still in view of the position held by the majority of his brethren he would order the remand. He expressly stated that this action would constitute an invitation for mandamus. Nevertheless he entered an order for remanding the cause to the state court, but in doing so suspended its effectiveness for twenty days, this obviously to enable the

defendant to apply for review of his action to the Circuit Court of Appeals or here by way of mandamus. The Standard Oil Company applied to the Eighth Circuit for such relief.

As of the time the case came to me for application for stay the suspension of the effectiveness of Judge Collett's order had been extended to Tuesday, March 18. The Eighth Circuit Court of Appeals in the meantime had heard the matter, had also indicated to counsel that its view that Judge Collett's order of remand is not reviewable and had further indicated it would hand down its decision to that effect on Tuesday, March 18.

In these circumstances counsel for Standard Oil applied to me for a stay order directed either to suspension of the proposed action of the Circuit Court of Appeals or to the going into effect of Judge Collett's order of remand pending application here for a writ of mandamus or in the alternative of prohibition or in the alternative of certiorari. Mr. R. F. O'Bryen, of St. Louis, and Mr. Robert F. Schlafly, also of St. Louis, appeared in person in my chambers at three o'clock in the afternoon of Monday, March 17, to present their application. After hearing them I denied the application without prejudice to further application to another Justice of this Court.

My reason for doing so was as follows: This Court has held repeatedly that orders of federal district courts demanding causes removed to state courts are not reviewable under 28 USC § 71. United States v. Rice, 327 U. S. 742, 751; Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 378-381; Metropolitan Casualty Co. v. Stevens, 312 U. S. 563, 568-569; McLaughlin Bros v. Hallowell, 228 U. S. 278; Missouri Pacific Ry. Co., 160 U. S. 556, 582-583. In entering my order of denial I cited the *Metropolitan Casualty* case as direct authority and the *Rice* case cf.

Before reaching final conclusion I discussed the matter with Justice Reed. Together we examined the authorities and came to the conclusions (1) that a federal court's order remanding a removed cause is not reviewable either directly or indirectly, that is, by certiorari or appeal or by extraordinary procedure such as mandamus, prohibition, etc. (2) It was our conclusion that the only available mode of review for denial of the right to remove, under the authorities cited above, is by the following procedure. When the defendant (party seeking to remove) moves for an order of removal in the state court proceeding and it is denied, he then has the choice of one of two courses. In the first place, he can then follow the statutory procedure and remove the cause to the federal court by filing the proper

application in that court. If the court then sustains the removal the litigation continues in the federal court and the question of the validity of the court's action in allowing the removal comes to this Court with the case on the merits. If then this Court determines that the removal was properly allowed, that is the end of the matter. If it determines that the order sustaining removal was improperly granted then the case may be reversed on that ground alone and the cause goes back to the state court for further proceeding, the question of removal having thus been finally determined.

On the other hand, if the federal district court concludes that removal is not proper and enters an order remanding the cause to the state court, that also ends the matter of removal. Under the authorities that action is not reviewable and the state court is bound by the federal court's actions. If the state court does nothing more than follow that action (that is, does not again deny removal but on different grounds from those first raised), and the cause then proceeds through the court of last resort of the state to this Court, the state court's action in following the federal court's decision presents no federal question and this Court in this situation will assume that the removal was proper and proceed to determine the cause on the merits. Metropolitan Casualty Co. v. Stevens, supra. Thus by removing the cause to the federal court and securing there an adverse decision upon the right of removal, the party removing actually forecloses his right to have review of the question of the propriety of the removal, either by the Circuit Court of Appeals or by this Court. In my opinion the foreclosure is effective against extraordinary modes of review, e. g., mandamus, just as it is against normal review procedures.

The only way therefore in which a person wishing to secure review by this Court of his right of removal can do so is by exercising his right to remove to the federal court after the state court denies his motion to remove. When that denial occurs the party must choose between going to the federal court on his own motion and running the risk that he will be foreclosed of review on removability if that court finds that removal is improper and, on the other hand, saving his exception to the state court's denial, proceeding with the cause on the merits through the state courts and then bringing to this Court along with the merits the question of the validity of the state court's action in denying removal. In this way it is the state court's judgment that removal is not improper rather than the federal court's which comes under review here.

This apparently has been the law since 1910, when the removal statute was amended following the decision in 213 U. S. by Justice Day in _____ v. _____. [Publisher's note: Blanks in original. The case referred to was probably *Chesapeake & Ohio Railway Co. v. McCabe*, 213 U.S. 207 (1909).]

In my judgment the statute as it is now interpreted constitutes something of a trap. Thus in this case I suspect that Standard Oil elected to remove to the federal court without realize [Publisher's note: "realize" should be "realizing"] that in doing so they were running the risk that its adverse decision would foreclose their right of review on removability. Nevertheless, I think that clearly is the law under repeated decisions and for that reason I was unwilling in this case to grant the stay. It should be added perhaps that, although I think the applicant here must now go forward with the cause in the state court, he may possibly preserve his question and secure a reconsideration of it by assigning error in that respect if and when the cause comes here on the merits. This would mean, however, that we would have to overrule the prior decisions, especially the Metropolitan case, in order to give him relief at that time.

The applicant made a further point, namely, that Judge Collett, by accepting the views of the majority of his brethren rather than his own expressly stated contrary ones, acted arbitrarily and not judicially and that this additional ground gives ground for the relief sought. I do not think it can be said that Judge Collett either substituted his personal judgment for his judicial judgment or that he acted arbitrarily. He was simply giving effect in his judicial action to a majority view of the law with which he disagreed. Although he was not at the time he acted bound by any decision of a higher court on the question, I think he did exercise a judicial judgment and I could not hold to the contrary on these facts.

Wiley Rutledge
Dictated March 18, 1947.

5 Rapp App. no. 3 (1948)

ROGERS V. UNITED STATES

Jane Rogers vs. The United States of America
Nancy Wertheimer vs. The United States of America
Irving Blau vs. The United States of America

APPLICATION FOR BAIL PENDING APPEAL

This is an application for bail pending appeal by the three persons named in the caption made upon a single record of proceedings in the District Court. Each of the three was called before a federal grand jury sitting in Denver, was required to answer certain questions, refused to do so, and thereafter was cited to the United States District Court for the District of Colorado for contempt on account of such refusal. After hearing, the District Court committed each for contempt, imposing sentences upon Mrs. Rogers and Miss Wertheimer of imprisonment for four months and upon Mr. Blau for six months. At the same time the court denied bail in each case.

Thereupon an appeal was noted in each case to the United States Court of Appeals for the Tenth Circuit. Thereafter application for bail and for habeas corpus was made in succession to Chief Judge Orie Phillips, sitting as a district judge; to Circuit Judge Bratton; to myself; and finally to the United States Court of Appeals for the Tenth Circuit. In succession each of these applications was denied. The application to myself was made prior to application to the Court of Appeals, on October 8th. It was denied on October 12th, without prejudice to a further application to the United States Court of Appeals for the Tenth Circuit and without prejudice to a further application to myself. Then followed the application to the Court of Appeals, followed by hearing and denial of the application on October 21st. The appeals have been set for argument on the merits and as I understand, on application for habeas corpus on November 29, 1948.

In my opinion Rule 46 (a) (2) of the Federal Rules of Criminal Procedure is still controlling to authorize the application which is now submitted to myself as Circuit Justice of the Tenth Circuit. Ordinarily the greatest weight would be given on such an application to the decisions of the various judges and the Court of Appeals which have preceded this application. However, under Rule 46 (a) (2), in my opinion, I am required to exercise

my own independent judgment, particularly concerning the question whether the case which is pending on appeal "involves a substantial question which should be determined by the appellate court." In this case, notwithstanding the weight properly to be given to the previous determinations, I have concluded that such a question is presented by the appeal and therefore that bail should be allowed.

I have had the benefit of reading in full the record upon which the judgment of the Court of Appeals denying bail was entered. I have not had an opportunity of examining a copy of the formal judgment or order of that court denying bail. I am informed, however, that the action was taken without the filing of an opinion and merely upon the formal finding that no cause had been shown for relief in the opinion of that court.

The record does not disclose the nature of the grand jury's inquiry except in the following statement made by Mr. Goldschein, Assistant Attorney General aiding the Grand Jury in its investigation, to the District Court in presenting the case to that court at the time of the citation:

"This grand jury is not interested in what the political beliefs of these witnesses who came before the grand jury are; they are not interested in who they believe in or what their political philosophy is; they are interested in whether or not these particular witnesses hold an office in the Communist Part [Publisher's Note: the word "Part" should be "Party"] and whether or not they have in their possession any books or records which show a matter of interest to this grand jury, a matter of inquiry for violation of a federal statute – not a theory, a belief or a politicalism." (R. 17.)

The record is not identical in its disclosures concerning the facts relating to the three applicants. Nor is it entirely clear cut concerning the particular questions for refusal to answer which each petitioner was cited and sentenced. However, it does show that Miss Wertheimer declined to answer an inquiry whether she was a member of the Communist Party and other questions relating to possible affiliation with and activity in connection with or on behalf of that party. Mrs. Rogers admitted that she had been a member of the Communist Party in Denver and had been treasurer of the Denver Communist organization until the beginning of the year 1948. She also admitted that until that time she had had possession as treasurer of books and records of the party. She declined, however, to answer the question asked her concerning the identity of the person in possession of those books at the time of the grand jury hearing. Mr. Blau de-

clined to answer whether he was a member of or affiliated with the Communist Party, together with other questions relating to his possible connection with it, and also declined to answer the question asked of him concerning the whereabouts of his wife.

In refusing to answer, Mrs. Rogers and Miss Wertheimer declined on the ground that their answers would tend to incriminate them, contrary to the provision of the Fifth Amendment. Mr. Blau declined to disclose the whereabouts of his wife on the ground that his knowledge of his wife's whereabouts had been obtained as the result of a confidential communication between husband and wife under Colorado law, to which it was added that a disclosure of this fact by him might tend to incriminate Mrs. Blau. (The record is somewhat dubious upon his connection of the two bases, but the District Court apparently considered them both as having been joined in his objection and for present purposes I so consider the fact.)

At the hearing in the District Court counsel for the present applicants disclosed to the court the pendency of an indictment in a federal court in New York City against eleven persons pursuant to § 2 of the Act of June 28, 1940, 18 U. S. C. § 10, commonly known as the Smith Act. This charge was a charge of conspiracy to violate that Act. Counsel for the applicants also disclosed at that time the pendency of eleven indictments against the same persons named in the conspiracy indictment for violation of §§ 10 and 13 of Title 18, U. S. Code. None of the persons under either of these indictments included any of the present applicants. The conspiracy indictment shortly charged the defendants with unlawfully conspiring to organize the Communist Party of the United States, describing it as "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence." The substantive indictments charge in effect that the Communist Party has been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

In view of the pendency of these indictments and of the terms of the statute pursuant to which they were drawn, statutes which in essential substance now constitute 18 U. S. Code § 2385 (approved June 25, 1948, and effective September 1, 1948), the question is with reference to Miss Wertheimer and Mr. Blau whether their refusal to answer flat inquiries whether they are members of the Communist Party or have been gives

basis for reasonable belief that answering those questions affirmatively might incriminate them. In view of the same considerations the same question arises concerning Mrs. Rogers' refusal to identify the person or persons in possession of the books of the Communist Party to which she referred in her testimony. In view of the pendency or the indictments in New York and of the terms of the statutes pursuant to which they have been returned, I cannot honestly conclude that no substantial question would be presented in case an indictment or indictments or similar character should be returned either now or later and whether in Denver or elsewhere against Miss Wertheimer and Mr. Blau for alleged violation of the statutes. Nor can I conclude that they could have no possible or reasonable ground for fearing that such indictments might be returned in the event of their answering affirmatively the questions relating to their membership in the Communist Party and possible affiliation or other activities in connection with it. In consequence I cannot conclude that these applicants had no reasonable basis for fearing that their responses to the questions might incriminate them.

Upon the authorities the applicants are not the sole and final judges of whether their responses may have a tendency to incriminate them. That function is the courts' in the final analysis. On the other hand, the boundaries between the scope of the privilege against self-incrimination and that of the right of the Government to secure evidence from citizens are not sharply defined or precise. The test in my view is whether, on the particular circumstances presented, responding to the question may be regarded as reasonably having a tendency to incriminate the witness. It is not necessary that criminal or penal proceedings be presently pending against him. Nor is it necessary that upon the facts and disclosures available the answer be shown to be one which certainly would have a tendency to incriminate. It is enough, as I construe the authorities, that upon the total showing the answer might or might not incriminate. If the showing is not made in good faith and so found on sufficient evidence, the witness may be required to answer. There is no contention in this case that the claim of privilege is not advanced in good faith. Nor in my opinion is it frivolous. My conclusion in respect to the responses of these two applicants is the same as that reached by Judge David Pine, of the United States District Court for the District of Columbia, in the case of *In re Emil Costello* decided by him June 27, 1948. There is therefore conflict between Judge Pine's opinion in a substantial

sense and that of the judges who have preceded me in hearing applications for bail in this case. This furnishes an added ground for believing that a substantial question is presented by the appeal in this case.

It is true that Mr. Blau was committed in the face of a dual claim of privilege for refusing to answer questions, some which in my opinion he reasonably regarded as tending to incriminate him, and others on the ground of confidential communication between husband and wife, coupled with the suggestion that his disclosure of her whereabouts would tend to incriminate her. It is not necessary in this application for me to decide whether the latter ground alone would be sufficient. As I understand the record, the single sentence of six months was imposed upon Mr. Blau for refusing to answer both types of question and as against the claim of both types of privilege. In short, the sentence is indivisible and in my judgment the claim of privilege against self-incrimination was sufficient in the circumstances of the case to raise a substantial question requiring his release on bail pending outcome of the appeal.

The case of Mrs. Rogers is somewhat more doubtful. It is not claimed that she is now in possession of the books. Even if she were, it would seem that her privilege against self-incrimination would not be good. *United States* v. *White*, 322 U. S. 694. On the other hand, she does not refuse to surrender books of the organization in her possession. She merely declines to disclose who presently has possession of them. The White case does not squarely rule such a situation. It is entirely possible that, although she is willing to admit affiliation with or membership in the Communist Party, she may also know that the books will contain further evidence of activities by her of an illegal sort which, if produced, would incriminate her. Although I regard the ground she asserts for her privilege under the facts as weaker than that claimed by the other two applicants, I feel also that her claim as made presents more than a merely frivolous contention and there is no finding that it is not put forward in good faith. Accordingly, I have concluded that in all three applications bail should be granted pending determination of the appeals by the United States Court of Appeals for the Tenth Circuit.

[October 20, 1948]

5 Rapp App. no. 4 (1948)

BARY V. UNITED STATES

Arthur Bary vs. United States
Paul Meir Kleinbord vs. United States

Applications for Bail Pending Appeal

These applications arise out of the same grand jury proceedings as those which produced the applications of Rogers, Wertheimer and Blau, in which bail recently was granted by myself pending appeal.

Bary is the chairman of the Commist [Publisher's note: "Commist" should be "Communist"] Party in Colorado and Kleinbord is a district organizer. There cases are somewhat different from those involved in the other three applications. The applications of Bary and Kleinbord relate to commitments for *civil contempt*, whereas the other three applications related to commitments for criminal contempt. Bary and Kleinbord have been committed to bail [Publisher's note: "bail" should be "jail"] for refusal to answer questions concerning their connections with their activities in the Communist Party until such time as they may purge themselves by obeying the District Court's order to answer the questions. Moreover, the present cases are unlike those of Wertheimer and Blau in that each of the present applicants voluntarily admitted that he was a member of the Communist Party, an officer in it, and each testified voluntarily to numerous questions relating to these activities and connections. Their cases therefore are more nearly like the case of Mrs. Rogers, than those of Miss Wertheimer and Mr. Blau.

Notwithstanding their admissions of membership and holding office, as well as their answers to other questions, Bary and Kleinbord each declined to answer a large number of questions going into details concerning their activities in the party; the identity of other members and officers; the number of clubs, cells or subdivisions of the Party in Colorado; the officers of each club, cell or subdivision; the names of members who collect dues; the names of individuals known to be members who can furnish information about the collection of dues; the witness's attendance at meetings of the Communist Party during the years 1947 and 1948.

At one point in the record before the District Court and before the Court of Appeals (which I have had an opportunity to read in full) Klein-

bord refused to answer questions relating to the identity of other members and officers on the ground that he did not wish to incriminate them. However, prior to his commitment and obviously acting under the advice of counsel, he grounded his refusal on the basis that to discloses [Publisher's note: "discloses" should be "disclose"] these names would tend to incriminate himself. There is no finding specifically made by the District Court that this claim was made in bad faith.

The short of the situation, therefore, is that each of the present applicants has admitted his membership in the Communist Party of Colorado, has admitted being an officer, and has testified in further detail concerning a considerable number of his activities in these connections.

However, each has, after going thus far, refused to testify to numerous other questions relating to the identities of other members and officers, to their own attendance at Communist meetings, and to other activities which the witness in each instance felt or claimed might tend to incriminate him.

On this record, as stated above, the District Court committed both Bary and Kleinbord to jail until they should purge themselves by answering the questions they had declined to answer. The District Court at the same time denied bail pending appeal. I am also informed that the Court of Appeals for the Tenth Circuit has refused to allow bail pending appeal. The application therefore comes to me as Circuit Justice after refusal of the two inferior courts to grant the relief sought. It may be added also that the record in the present case discloses what was not shown by the record in the three prior applications, namely, that the general subject of the grand jury's investigation is to ascertain whether federal employees, presumably in the Rocky Mountain region, have violated their loyalty oaths prescribed by 60 Stat. 480 [Publisher's note: the citation "5 U. S. C. § 16" is struck through and "60 Stat. 480" substituted] the apparent authority or basis of the investigation being that some of these employees whose identity is not disclosed by the record either are or have been members of the Communist Party at the time of taking their loyalty oaths and thus have violated the statute requiring the administration of those oaths.

I have had all the difficulties in these cases which I found in the case of Mrs. Rogers. Indeed, they have been somewhat magnified, both by virtue of the fact that these are civil rather than criminal contempt cases and by the fact that these applicants perhaps have gone farther both in answering

inquiries and in refusing to answer them than did Mrs. Rogers. On the other hand, the questions which Bary and Kleinbord refused to answer covered a considerably wider field than those which Mrs. Rogers declined to answer. So in my judgment the question presented by these applications comes down in shortened form to this: If we assume, as I felt in the other cases, that, until further clarification of the law by this Court and in view of the circumstances set out in my memorandum relating to Wertheimer and Blau, the present applicants might have claimed their privilege against self-incrimination by refusing to answer at the threshold of inquiry the question whether they were Communists and therefore all others which would tend to indicate that they were, does their admission that they are Communists and their responses made to other questions as shown by this record constitute a waiver of their privilege in toto so that they were precluded by such a waiver from asserting the privilege as to the questions they refused to answer and for which refusal they were committed to jail? There is also a preliminary question whether Rule 46 (a) (2) of the Federal Rules of Criminal procedure, which was applicable to the applications of Rogers, Wertheimer and Blau, is likewise applicable in these applications to authorize myself as Circuit Justice to grant bail pending appeal.

The latter question is discussed in the memorandum which has been prepared for my use in these cases. Although there may be some question concerning this, I have come to the conclusion that, notwithstanding the technical differences between civil and criminal contempts (whatever they may be), they are not such as ought to preclude the granting of bail under Rule 46 (a) (2) by any of the officers or tribunals authorized by that section to grant bail, merely because the committing court chooses to send the person to jail in the one instance for a fixed term and in the other for a term coextensive with the witness's continuance of refusal to answer. In both cases the citizen is imprisoned, being deprived his liberty. In the one he cannot escape continuance of the imprisonment during the fixed period of the sentence even if he should change his mind and indicate his willingness to answer. It is beyond his power to end the period of his incarceration by his own action. In the other situation it is true that he can recant and terminate the period of imprisonment by answering the questions. On the other hand, if his claim of constitutional privilege is well grounded he cannot terminate his imprisonment except by surrendering that claim. That is a price which in my opinion it was not intended to require of the

citizen if he should be improperly committed. Accordingly, for the purposes of applying Rule 46 (a) (2) my present opinion is that it applies insofar as jurisdiction to grant bail is concerned to both civil and criminal contempt.

In this view I am forced to answer for myself the question whether under the circumstances of the present commitments I think a substantial federal question has been presented by the appeals from the District Court's commitments, in which event it becomes my duty to grant bail pending the determination of those appeals. Resolution of this question in the present circumstances again turns on whether, by responding to the questions which the applicants have answered, they have waived their privilege and their right to stand upon it with reference to the questions which they have refused to answer.

In view of the number and variety of these questions, it may be that responding to some of them would have no tendency to incriminate the witnesses. However, the commitments in both of the present applications were not for refusal simply to answer some of the questions which the applicants declined to answer. They were committed to remain until they had purged themselves by answering all of the questions which they refused to answer. In this case, therefore, the civil commitments were in this respect like the criminal sentences imposed in the three prior cases, namely, a single commitment for refusal to answer numerous questions rather than merely some. As I understand the District Court's order, neither of the present applicants could purge himself unless he should answer all of the inquiries which he declined to answer before the jury and special hearing in court.

Upon the question of waiver, I find no case exactly in point. I do find cases bearing on the problem which indicate to me that there is a large degree of indetermination concerning how far a witness may go toward incriminating himself and still have the right to refuse to answer further incriminating inquiries. The cases bearing most directly on the problem which have come to my attention are *Arndstein* v. *McCarthy*, 254 U. S. 71, and *McCarthy* v. *Arndstein*, 262 U. S. 355, together with *United States* v. *St. Pierre*, 132 F. 2d 837 (CCA 2). As I read the Arndstein cases, they stand for the proposition that a witness before a grand jury does not waive or forfeit his privilege against self-incrimination merely by refusing to assert it at the threshold of inquiry. The bankrupt called for examination before the grand

jury had declined to answer numerous inquiries about his assets. He did this, asserting his constitutional privilege. The District Court upheld the privilege and denied a motion to punish for contempt. Thereafter under the court's direction the bankrupt filed schedules under oath purporting to show his assets and liabilities. The schedule showed only a single item of assets. When interrogated concerning his assets he again set up his constitutional privilege and refused to answer many questions about them. Thereupon he was committed to jail. As stated by this Court, per McReynolds, J.,

"The writ [of habeas corpus] was refused upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege and could not thereafter refuse to reply when questioned in respect of them. This view of the law we think is erroneous. The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. [Citations.] It is impossible to say that mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. The writ should have issued." 254 U. S. 71, 72.

The cause was remanded for further proceedings to the District Court. On remand that court vacated its former order and issued the writ of habeas corpus. To this the marshal made return exhibiting the transcript of the entire proceedings before the commissioner. This disclosed that the bankrupt before refusing to answer the questions in issue "had … testified of his own accord, without invoking any privilege, to the very matters with which these questions were concerned, thereby waiving his privilege upon further examination concerning them." *McCarthy* v. *Arndstein*, 262 U. S. 355, 357.

Upon hearing, the report states "the District Court was of opinion that … the conclusion to be drawn from the decision of this Court in reference to the schedules was that his denials or partial disclosures as a witness did not terminate his privilege so as to deprive him of the right to refuse to testify further about his property, and that he was at liberty to cease disclosures, even though some had been made, whenever there was just ground to believe the answers might tend to incriminate him; …." Accordingly, the Court sustained the writ and discharged the petitioner from cus-

tody. The marshal appealed again to this Court. It affirmed the order sustaining the writ and discharging Arndstein. The Court repeated the language quoted above from the first *Arndstein* opinion. It also referred to state cases and the English case of *Regina* v. *Garbett* and then said "since we find that none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing of guilt, we are of opinion that he was entitled to decline to answer further questions when so to do might tend to incriminate him." 262 U. S. 355, 359-360. "In short, it is apparent not only from the language of the former opinion, but from its citations, that this Court applied to the non-incriminating schedules the rule in the cases cited, namely, that where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him." 262 U. S. at 359.

Both the *Arndstein* opinions are very short and neither is too clear in the scope of the ruling made. The second opinion, by Sanford, does refer to "the non-incriminating schedules" (p. 359) but previously it states (p. 358) that "the sworn schedules were, impliedly at least, assimilated to evidence given by the bankrupt as a witness …" and the Court repeated the statement of the first *Arndstein* opinion by McReynolds that "the schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime."That opinion had also stated, as quoted above, it is" impossible to say that mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity."

The latter statement seems to me inconsistent with McReynold's [Publisher's note: "McReynold's" should be "McReynolds'"] rationalization and disposition of *Mason* v. *United States*, 244 U. S. 362, and if the quoted language is to be taken as specifying the test it leads me to the conclusions in the present circumstances, first, that by testifying to facts which may not be wholly incriminatory but may have some tendency in that direction when connected with other facts, the witness may stop short of going forward to testify to such other facts; second, that in the circumstances of the present application it cannot be said with certainty that answering the questions which the applicants refused to answer could have been done in the light of all the circumstances with entire impunity.

Even though the witnesses admitted their Communist affiliations both as members and as officers, and even went further to relate some of their activities in connection with the party, it does not follow that answering the questions which they refused to answer would have no further or greater tendency to incriminate them. It is difficult of course to see how answering such further questions could have any greater tendency toward proving that they were members or officers of the Party, but it would almost certainly tend to prove particular types of activity both by the Part and by themselves and to tie them more tightly into the web of any criminal activities which the Party or others belonging to it may have engaged in. Moreover, to identify the other persons asked about conceivably could furnish evidence or links in the chain of evidence which might be used either to tie the present applicants into such criminal activities or indeed into proving beyond the mere charge of belonging to and being an officer in the Communist Party that they had advocated the overthrow of the Government by force, contrary to the Smith Act.

The ramifications of the possible application of that statute, broad as are its terms; the presumption which usually applies in favor of the validity of congressional enactments; the tendency of admissions of membership in the Communist Party to form a link in the chain of proof of violation of the statute; the possible tendency of answering the questions refused by the applicants to connect them individually and beyond mere membership in the Party to violations of the statute; all combine to make me feel that the questions posed by the witnesses' refusal in this case are not merely frivolous and without substance. There is no finding, as stated above, that these claims were made in bad faith. I do not consider it my function in this application to make such a finding in the absence of one by the District Court or the Court of Appeals. It may be that the applicants were simply or primarily seeking to protect their comrades from disclosure. On the other hand, it may be that they were also seeking to protect themselves from disclosures tending to incriminate them which might be made by those comrades once their identity and activities had been drawn out.

I have also given careful attention in considering these problems to the majority and dissenting opinions of the Court of Appeals for the Second Circuit in United States v. St. Pierre, supra. Although the majority there ruled that when St. Pierre admitted that he had embezzled funds and later transported them in interstate commerce he could not stand on his privi-

lege to decline to identify the name of the person from whom the funds were taken. There was a vigorous dissent by Judge Frank which seems to me clearly to show that the question the court determined was not an insubstantial one. It is perhaps as close to the present case as any I have seen, though not of course directly in point. The majority does not assert that in all cases where a witness gives testimony which may have some tendency to incriminate himself go further and disclose all of his knowledge which would complete the chain of incrimination.

It seems to me, therefore, that beyond the questions which I considered substantial in the cases of Miss Wertheimer and Mr. Blau this case presents additional substantial questions involving what constitutes a waiver of the privilege, whether testifying to facts disclosing some links in a possible chain of criminality outs off the privilege to refuse to testify to others, and more especially the application of those questions to the larger problems presented by the circumstances of this case. Accordingly, until these issues are determined by this Court I feel that the questions presented concerning the waiver of the privilege are in themselves sufficiently substantial to require the granting of bail pending the determination of the appeal.

I may add that the manner in which I have read the *Arndstein* decisions, as well as the consideration which I have given to the problem presented by the *St. Pierre* case, seemed to me to be in line in a general way with this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547. This is not so much on the problem of waiver but in the aspect of the general problem that forcing a witness to answer questions which would draw out clues, that is, not only evidence tending to incriminate, but evidence which would supply sources for securing incriminating evidence, would be in violation of the constitutional privilege.

[November 3, 1948]