ANNUAL SUPPLEMENT – 2005

VOLUME 4 RAPP – PART 2
PAGES i-lvi; 1461-1502

A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

covering the 2004 Term

and

previously unpublished or uncollected in chambers opinions from 1941, 1943, 1944, 1945, 1946, 1947, 1949, 1950, 1955, and 1965

with

cumulative, up-to-date Tables and Indexes for Volumes 1, 2, 3, and 4

Compiled by

Cynthia Rapp

and

Ross E. Davies

with an Introduction by

Ira Brad Matetsky

December 2005

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For sale by The Green Bag, Inc., 6600 Barnaby Street NW, Washington, DC 20015, www.greenbag.org.

Recommended citation form:

[case name], 4 RAPP [page number] ([date])

First Edition

Green Bag Press
6600 Barnaby Street NW
Washington, DC 20015

Green Bag Press is a division of
The Green Bag, Inc., publisher of the
Green Bag, Second Series,
an Entertaining Journal of Law.

For more information, please email
editors@greenbag.org or visit
http://www.greenbag.org.

ISBN 978-1-933658-01-8
Library of Congress Control Number 2005937477

GREEN BAG PRESS
WASHINGTON, DC
2005

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PREFACE

In the 2004 *Annual Supplement* to the *In Chambers Opinions* reporter, we published two of the 21 missing opinions listed in Cynthia Rapp's introduction to the first volume in this series, 1 Rapp v, v & n.2 (2004): Justice Felix Frankfurter's opinion in *Chin Gum v. United States*, 4 Rapp 1415 (1945), and Justice Harold Burton's opinion in *Ex parte Durant*, 4 Rapp 1416 (1946). Due in large part to the extraordinary resourcefulness and energy of Ira Brad Matetsky of New York City, this 2005 *Annual Supplement* contains eighteen of the nineteen other missing opinions mentioned by Ms. Rapp. The only one still in hiding is *Hooper v. Goldstein* (1929) (Van Devanter). In addition, of course, this volume contains the new in chambers opinions issued by members of the Supreme Court during the October Term 2004.

In other business, we will be publishing in a future *Supplement* the original version of the in chambers opinion to which Justice Samuel Nelson refers on page 1394 of his opinion in *Ex parte Kaine*, 4 Rapp 1393 (1853). The report at 14 F. Cas. 82 will have to do for at least one more year.

We follow the same conventions in this *Supplement* as we have in our other in chambers volumes: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) running heads are preserved where they appear in the originals, and added to originals that lack them; (3) a caption misdesignating the Term in which an opinion was issued is in the original; and (4) party designations ("applicant", "movant", "petitioner", "plaintiff", "respondent", "defendant", etc.) are sometimes used more loosely than is the Court's wont, but in each case the identity and posture of the parties are clear, and so they remain unchanged. Also bear in mind that those who would cite for its legal authority an opinion in *In Chambers Opinions* should check for the existence of a version in the *United States Reports*, and, if there is one, read it and cite to it as the primary authority, with a parallel citation if appropriate to the *In Chambers Opinions* version. The relevant *United States Reports* citation appears in a "Publisher's note" at the beginning of each such opinion in this *Supplement*.

The page numbers here are the same as they will be in the bound volume 4 of *In Chambers Opinions*, thus making the *permanent* citations available upon publication of this *Supplement*. If you find any errors — or any in chambers opinions that we have missed — please let us know at editors@greenbag.org. We will give credit where credit is due.

Thanks as always to Cynthia Rapp for performing such a useful public service by collecting and indexing the Justices' solo efforts; William Suter, Clerk of the Court, for his support of this project; the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; and Susan Davies. Thanks also to Amy Steacy and Kathy Smith. And, again, to Ira Matetsky, whose praises I expect to be singing here again next year when we publish more of his discoveries.

Ross E. Davies
December 19, 2005

INTRODUCTION

THE PUBLICATION AND LOCATION OF IN-CHAMBERS OPINIONS

Ira Brad Matetsky[1]

Cynthia Rapp, Deputy Clerk of the Supreme Court, recognized that the 418 opinions she collected in the initial three volumes of *In Chambers Opinions* were an incomplete set. In introducing the collection, she cited twenty-one additional "in chambers opinions that are referred to in articles, Court opinions, or other in chambers opinions" but had not yet been located.[2] Her publisher encouraged the legal community to find and share these opinions, as well as any others that might exist.[3] As the Preface to this *Supplement* notes, I accepted the invitation, and the resulting search for these opinions in various archives and manuscript collections has gone well. The search, however, has yielded not just all-but-one of the opinions identified by Rapp,[4] but perhaps several dozen more (just how many is not yet clear — see future *Supplements* for the results).

This Introduction is in part a bibliographical essay, discussing where these in-chambers opinions were originally located and how they are arranged in the archives and collections where they now reside. But the search for in-chambers opinions also raises preliminary historical questions. How did such potentially significant documents escape reporting to begin with? And why was the publication policy changed so that present-day in-chambers opinions are readily available? To address these questions requires a look back through the history of Supreme Court publication practices.

I. A HISTORY OF THE PUBLICATION OF IN-CHAMBERS OPINIONS

Justices of the Supreme Court have traditionally exercised the power to dispose of certain types of applications individually. During the nineteenth century, single-Justice matters included petitions for writs of error or appeal, applications for stays and supersedeas, and habeas corpus petitions. Then as now, the Justices did not usually write opinions when they disposed of such matters; a typical petition for leave to appeal, for example, might simply be endorsed "granted" or "denied" and signed.

Occasionally, however, a Justice would prepare a full-fledged opinion on an application presented to him individually. These opinions were not published in the *United States Reports*, which were dedicated to cases decided by the full Court. Rather, they were captioned in a United States Circuit Court and

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[1] Ira Brad Matetsky is a litigation partner at Ganfer & Shore, LLP, in New York. He thanks the numerous librarians and archivists who have ably assisted him in working with the manuscript and archival collections described below, particularly Dan Linke (Princeton) and Roger Hamperian (University of Kentucky), as well as Cynthia Rapp and Ross Davies for inspiring this entire effort.

[2] Cynthia Rapp, *Introduction*, 1 Rapp v, v & n.1 (2004).

[3] Ross E. Davies, *Preface*, 1 Rapp iv (2004).

[4] The last fugitive is *Hooper v. Goldstein* (Van Devanter, Circuit Justice 1929). Regarding the tantalizing search for this opinion, see *infra* note 56.

published, if at all, in a reporter containing decisions of one or more of the lower federal courts — consistent with the fact that the Justices then spent much of their time "riding circuit."[5] As a result, in some cases it is not clear whether a Justice was acting as a Supreme Court Justice or a Circuit Court Judge when granting a stay or supersedeas while "at chambers," even if the procedural posture of the case is detailed in the opinion.[6] This confusion was alleviated only in the late 1800s, when circuit-riding disappeared (and soon the old Circuit Courts themselves were no more).

The situation was even more muddled in habeas corpus cases. For much of the nineteenth century, the writ could be granted by the Supreme Court, the Circuit Court, the District Court, or by a Justice or Judge of any of them acting individually.[7] Therefore, when a Justice presided over a habeas corpus matter, it may have made little difference to anyone whether he was sitting as a Supreme Court Justice or a Circuit Court Judge (and hence whether an opinion handed down in the case would qualify as a Supreme Court "in-chambers opinion" by the standards of today).[8] What is clear, however, is that when these opinions were occasionally published (and many may not have been published at all), they, too, usually were captioned in the Circuit Court, not the Supreme Court, and were published in Circuit Court reports.[9] A seeming counter-example — *Ex parte Clark*, a one-paragraph 1888 habeas corpus opinion by Justice John Marshall Harlan — is in fact the exception that proves the rule. West's *Supreme Court Reporter* published this opinion under the mistaken impression that it was a decision of the full Court.[10]

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[5] *See* Sandra Day O'Connor, *Foreword: The Changing Role of the Circuit Justice*, 17 U. Tol. L. Rev. 521 (1986).

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

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

[8] Once in awhile it did matter. For example, it appears that Chief Justice Roger Taney felt quite strongly that he was sitting as a member of the Supreme Court rather than exercising his Circuit Court responsibilities when he granted the writ of habeas corpus in *Ex parte Merryman*, 4 Rapp 1400 (1861). *See* Hartnett, *supra* note 7, at 279-81 & n.126.

[9] *See, e.g., United States v. Patterson*, 29 Fed. 775 (C.C.D.N.J. 1887) (Bradley, J.); *Ex parte Geisler*, 50 Fed. 411 (C.C.N.D. Tex. 1882) (Woods, J.); *Ex parte Kaine*, 14 F. Cas. 82 (C.C.S.D.N.Y. 1852) (No. 7597A) (Nelson, J.), *dismissed*, 55 U.S. (14 How.) 103 (1852), *later opinion*, 14 F. Cas. 78, 4 Rapp 1393 (C.C.S.D.N.Y. 1853) (Nelson, J.).

[10] The *Supreme Court Reporter* indicates that "Mr. Justice HARLAN … delivered the opinion of the court" in *Ex parte Clark*, but the case was heard by Justice Harlan individually. The evidence includes (i) the date of the decision — August 7, 1888 — although the Court was in recess from May to October 1888 and no other opinions are dated in June, July, August, or September; (ii) Harlan's repeated use of the pronoun "I" to refer to the author of the opinion; and (iii) the headnote in the *Supreme Court Reporter*, which states that "Clark presented to Mr. Justice HARLAN, of the Supreme Court of the United States,

During the first part of the twentieth century, in-chambers opinions were still omitted from both the official and the unofficial reporters of Supreme Court decisions. A few opinions continued to appear in lower court reporters — by now, the *Federal Reporter* and *Federal Supplement* — and by the 1940s the *Supreme Court Reporter* was also beginning to publish an occasional in-chambers opinion. Once in a while, by design or chance, an in-chambers opinion was printed elsewhere, and still more occasionally an unpublished in-chambers opinion would somehow come to be cited in a treatise or law review article.[11]

For the most part, however, in-chambers opinions remained unpublished and unnoticed, except by litigants and their lawyers. This may have deterred some Justices from investing significant effort in preparing such opinions. For example, *In Chambers Opinions* contains no opinions by Justice Wiley B. Rutledge, who served from 1943 to 1949, but his papers at the Library of Congress contain at least four memoranda explaining his rulings on applications made to him as Circuit Justice.[12] These memoranda read like draft in-chambers opinions, setting forth the relevant facts and explaining the Justice's reasons for ruling as he did on each application. But he never finalized them, they never left his chambers, and they are not filed with the Court's records in the cases. In fact, when a lower-court judge whose decision had been overturned by Rutledge wrote to the Clerk of the Supreme Court requesting a copy of Rutledge's opinion, he was told that no opinion had been written — even though the Justice had written one of his extended, in-chambers-opinion-like memoranda on that very case.[13] I do not know whether Rutledge decided that there was no point in drafting formal in-chambers opinions because no one would see them but the litigants and lawyers in the particular case. It is worth noting, however, that one of his law clerks did

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at chambers, a petition praying for a writ of habeas corpus." 9 S. Ct. 2 (Harlan, Circuit Justice 1888). This opinion did not appear in the *United States Reports*. *Ex parte Clark* has a "parallel citation" of 128 U.S. 395, but the case actually reported at 128 U.S. 395 is *Clark v. Pennsylvania*, a different case arising from the same criminal conviction.

[11] For example, Justice Stanley Reed's two 1943 opinions in *Ex parte Seals*, printed in this *Supplement*, were cited in the first edition of the Hart & Wechsler treatise, *The Federal Courts and the Federal System* (1953), and the citations were then carried forward as late as the fourth edition (1996), although it is doubtful that one in a hundred readers of the treatise would have had any idea how to obtain copies of the cited opinions.

[12] *See* Memorandum in *Bisignano v. Municipal Court of Des Moines*, October 1946, Wiley B. 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, Nov. 3, 1948, Rutledge Papers, Box 176. *Rogers* and *Bary* were bail rulings, in cases that later came before the full Court, arising from contempt convictions of Communist Party figures who refused to testify before a Colorado grand jury, and Rutledge expended considerable time on these cases. *See* John M. Ferrin, *Salt of the Earth, Conscience of the Court* 406 (2004) (citing letter from Rutledge to W. Howard Mann, March 1, 1949, Rutledge Papers, Box 32).

[13] 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, both in case file, *Rogers v. United States*, O.T. 1950 No. 20, National Archives Supreme Court case files.

ask the Supreme Court's Reporter about publishing in-chambers opinions, and the response was that they were never published in the *United States Reports*.[14]

Unlike Rutledge, several other Justices had started to publish in-chambers opinions by the late 1940s or early 1950s. By 1951, four sitting Justices (William O. Douglas, Felix Frankfurter, Robert Jackson, and Stanley Reed) had published at least one such opinion in a West Publishing Company reporter (the *Supreme Court Reporter*, *Federal Reporter*, or *Federal Supplement*).[15] Increased ease of publication may have resulted from the establishment of a branch operation of the Government Printing Office in the basement of the Supreme Court Building, following the retirement of the Supreme Court's private printer in 1946. Soon after the print shop moved on-site, the Justices began utilizing it not only for their draft and final opinions for the Court, but also to print internal "Memorandum to the Conference"[16] communiques. It was a short step for Justices to start having their in-chambers opinions reproduced by the in-house print shop as well. *Williamson v. United States* by Justice Jackson in 1950 may have been the first in-chambers opinion to be set in type. By the early 1950s, several Justices were having occasional in-chambers opinions typeset and circulated to their fellow Justices for their information. This ready ability to print and distribute multiple copies of in-chambers opinions surely facilitated disseminating them to the legal publishers as well.[17]

Commentators soon noted the increasing number of these opinions. Before *Supreme Court Practice* by Stern and Gressman and Boskey's *West's Federal Forms, Supreme Court*, there was *Jurisdiction of the Supreme Court of the United States* by Robertson and Kirkham, which was reissued in a 1951 edition edited by Wolfson and Kurland. Appendix B to this 1951 edition of *Jurisdiction of the Supreme Court of the United States*, headed "Opinions of Supreme Court Justices Not in the United States Reports," addressed the fact that "[a]lthough today … all opinions delivered when the Court acts as a body are published in the United States Reports, there are other opinions of the Justices which are either not published or are to be found only by knowledge of their likely source or by diligent search into unlikely sources."[18] Most of Appendix B dealt with applications to a Supreme Court Justice acting individually — for bail, stays,

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[14] 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. This memorandum is discussed in more detail below, and is reprinted as an appendix to this Introduction. *See infra* note 26 and accompanying text.

[15] The opinions and parallel citations to published sources can be found in the Tables and Indexes in this *Supplement*.

[16] Or "Memorandum to the Brethren," as they were sometimes captioned before 1981.

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

[18] Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* 943-47 (Richard F. Wolfson & Philip B. Kurland rev. ed. 1951).

extensions of time to petition for certiorari, and the like.[19] Wolfson and Kurland observed that "[o]f course, it is rare for a Supreme Court Justice to write a full opinion upon the various applications to come before him," and that (then as now) most of those applications were denied without opinion or with only a brief memorandum. The authors surveyed some of the significant opinions and dispositions by single Justices in then-recent years, noted that "[o]pinions of Supreme Court Justices, acting on their wide individual authority, generally are not available at all," and provided citations to those few opinions that they knew had been reported. They concluded that "[f]or the scholar and the practicing lawyer, the failure of any publisher or of the Supreme Court Reporter to collect the published and unpublished opinions of the Justices so that they may be easily found and read is a great handicap."[20]

In March 1951, Justice Frankfurter — who had recently asked the Clerk of the Supreme Court to forward an in-chambers opinion that limited an extension of a petitioner's time to the editors of the *American Bar Association Journal*, in an apparent effort to have his criteria for extension applications publicized[21] — read Wolfson and Kurland's Appendix B and discussed it with Walter Wyatt, the Supreme Court's Reporter of Decisions.[22] Wyatt then prepared a memorandum, apparently for his own use, on the possibility of publishing the Justices' in-chambers opinions in the *United States Reports*.[23] He also promised Frankfurter that he would raise the question with Chief Justice Fred Vinson.[24] In advance of that meeting, Wyatt prepared a handwritten list of "Questions to Be Discussed with The Chief Justice," which included the entry, "Publishing opinions of individual Justices, 'Orders in Chambers.'"[25] Vinson apparently requested at the meeting that Wyatt prepare a memorandum on the subject.

Wyatt then reworked his earlier memorandum into a more formal document for the Chief Justice.[26] The substance of this memorandum was that while it was unclear whether the statutes governing publication of the *United States Reports*

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[19] Wolfson and Kurland also discussed occasions when a Justice sat with a panel of a Court of Appeals or as a member of a three-judge district court — situations distinguishable from those giving rise to in-chambers opinions. *See id.* at 943-44.

[20] *Id*. at 947.

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

[22] I have found no evidence that any of Wyatt's predecessors considered this issue. For example, I saw no reference to in-chambers opinions in the papers of Ernest Knaebel, who served as Reporter from 1916 to 1944. *See* Knaebel Family Papers, Accession No. 9963, American Heritage Center, University of Wyoming, boxes 12-15. Incidentally, Wyatt's and his predecessors' official title was simply "Reporter" until it was changed to "Reporter of Decisions" at Wyatt's request in 1953. *See* Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26-1 J. Sup. Ct. Hist. 9, 16-17 (2001).

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

[24] *See id.* at 4.

[25] Wyatt Papers, Box 119.

[26] Memorandum from Walter Wyatt to Chief Justice Vinson, Aug. 27, 1951, *supra* note 14. The Wyatt memo is reproduced below as an appendix to this Introduction.

authorized publication of individual Justices' opinions, Wyatt would be glad to include in-chambers opinions in the *Reports* if the Court or the Chief Justice told him to. At the same time, Wyatt noted that copies of past in-chambers opinions had never been assembled anywhere, so that putting together a complete set for publication could be an expensive and time-consuming project. Wyatt offered a series of suggestions for including the opinions in the *Reports*, either beginning with current and future opinions or on a retrospective basis.

Vinson did nothing, however.[27] Several years later, after Earl Warren had succeeded Vinson as Chief Justice, Wyatt recorded that he had "never been informed of a decision [on the subject of his memo] and do not know whether it ever was considered by the Court."[28]

The *United States Reports* thus continued to omit in-chambers opinions. Some of the Justices continued, however, to send their in-chambers opinions to the *Supreme Court Reporter* and the *Lawyer's Edition*, which gladly printed them.[29] For example, in 1954, Wyatt sent Frankfurter's in-chambers opinion in *Albanese v. United States* to the *Lawyer's Edition*, noting that the *United States Reports* did not include such opinions but that "I know of no reason why you should not report this opinion in your Reports, if you consider it advisable to do so."[30]

In January 1955, Frankfurter again told Wyatt that he believed the *United States Reports* should include the Justices' in-chambers opinions. Wyatt then drafted a letter to advise new Chief Justice Warren of the issue.[31] While much of this draft recapitulated his 1951 memorandum, Wyatt updated his thoughts with the observation that:

> When [the 1951] memorandum was written, the undersigned had received the impression from Mr. Cropley, then Clerk of the Court, that there probably were a large number of memoranda and opinions of this character buried in the files of the Court and that an attempt to collect and publish all of those previously filed would be a hurculean [*sic*] task, involving an exhaustive search of the original papers in all cases previously filed in the Court, because no separate index or list of such individual opinions had been maintained. …

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[27] I did not find a copy of Wyatt's memorandum or any other documents concerning in-chambers opinions in the file of Vinson's correspondence with the Reporter of Decisions in the generally comprehensive Vinson Papers at the University of Kentucky, although the file contains correspondence on several other issues concerning the contents of the *United States Reports*. *See* Fred M. Vinson Papers, Public Policy Papers, Special Collections and Digital Programs, University of Kentucky, Lexington, Ky., Box 223, folder 5.

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

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

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

[31] Draft letter ("not sent"), *supra* note 28.

> An attempt to search the original papers in all cases previously filed in the Court in an effort to find and publish all such memoranda and opinions previously filed would be impractical; but a recent conversation with [Clerk of the Court Harold B.] Willey indicates that it would not be necessary. He advises that the practice of filing memoranda and opinions of this character is of recent origin, and he has maintained a loose-leaf file of such memoranda and opinions, though it may not be complete. His file contains 35 memoranda and opinions of this character aggregating 114 pages.
>
> Since this question was raised in 1951, this office also has been compiling a file of such memoranda and opinions sent to it by the authors, the Clerk, and the printers. It contains 12 memoranda and opinions aggregating 36 pages.[32]

Ultimately Wyatt did not send his letter to Warren, but suggested that Frankfurter present his proposal directly to his fellow Justices.[33] I do not know whether Frankfurter did so. If he did, the suggestion was rejected.

Around this time, Frederick Bernays Wiener entered the fray.[34] Wiener was well-known at the Supreme Court, as an advocate, as the author of numerous publications (including his recent treatise, *Effective Appellate Advocacy*), and as Reporter for a committee that had recently drafted revised Rules for the Court. He had been acknowledged by Wolfson and Kurland as the source of some of the citations they had used in their 1951 Appendix B, and was later described by Wyatt as having "shown more interest in the United States Reports than any other practicing lawyer that I know."[35] In 1956, Wiener published "Opinions of Justices Sitting in Chambers" in the *Law Library Journal*.[36] He began by noting that since 1951, when the Wolfson and Kurland revision of the Robertson and Kirkham treatise had been published,

> action on the various matters submitted to individual Justices in chambers has been accompanied by an increasing number of opinions written in connection therewith. The importance of such applications to counsel and to individual litigants — literally often of life-or-death significance to the latter — suggests that it would be helpful, at the very least, to have collected somewhere a complete list of such opinions.[37]

Wiener then appended a list of 58 in-chambers opinions known to him, "start[ing] with Kurland and Wolfson's compilation, but [also] based in large measure on the

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

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

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

[35] Letter from Wyatt to Chief Justice Warren, Mar. 1, 1963, at 2, Wyatt Papers, Box 122 (suggesting Wiener as one of four potential successors to Wyatt as Reporter of Decisions).

[36] 49 Law Lib. J. 2 (1956).

[37] *Id*. at 4.

collection maintained by Harold B. Willey, Esq., Clerk of the Supreme Court."[38] Of those 58 opinions, 25 were unreported. Although the Wiener article may have received some attention within the Court — Frankfurter appears to have read it in manuscript[39] — it too did not lead to any change in the Court's publication practices.

The issue arose again in 1960. This time, it was Justice Douglas who requested that his in-chambers opinion in *Bandy v. United States* be printed in the *United States Reports*. Wyatt (who had apparently overcome his earlier professed agnosticism on whether in-chambers opinions should be published) wrote to Douglas that he would be "delighted" to include *Bandy* and all other in-chambers opinions in the *United States Reports*, but that he could do so only if he received the Court's authorization. Wyatt added that he was "unhappy about the existing situation, especially since such opinions are now being reported in the Lawyer's Edition and the Supreme Court Reporter, and failure to include them makes the United States Reports less complete than those unofficial reports."[40]

Douglas then "sounded out the opinion around the building." He found "so much feeling against the [proposed] change in the practice that I thought I would not bring it up to Conference" and instead simply asked Wyatt to send the opinion to West Publishing Company.[41] Wyatt replied that the Clerk's Office already sent such opinions to the big private publishers automatically, suggesting that by this time, a Justice could readily have an in-chambers opinion published (albeit unofficially) whenever he chose to. Douglas did not disclose the other Justices' reasons for opposing the publication of in-chambers opinions in the *United States Reports*. However, when Wyatt forwarded his correspondence with Douglas to Warren,[42] the Chief Justice promptly "agree[d] that changes of this character should not be made by the Reporter without Conference authorization."[43]

There matters rested for another eight years,[44] well past Wyatt's retirement as Reporter of Decisions at the end of 1963. In 1964, a comprehensive law review survey of Supreme Court in-chambers practice observed:

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[38] *Id*. at 6. All the in-chambers opinions through 1955 published in this *Supplement* were included on Wiener's list.

[39] His papers include a manuscript of Wiener's article, with the notation "Read by F.F. 9/25/55." Felix Frankfurter Papers, Manuscript Division, Library of Congress, microfilm reel 67.

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

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

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

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

[44] *See* Letter from Walter Wyatt to Judge Simon E. Sobeloff, May 29, 1961, Wyatt Papers, Box 121 (explaining that in-chambers opinions were never published in the *United States Reports* and that "[d]uring the 15 years that I have been with the Court, the question whether such opinions of individual Justices 'in chambers' should be reported in the United States

> Having decided a bail or stay application, a Justice will often add a sentence or two, in his own handwriting, explaining his reasons or recommending further procedures to the applicant. Such scribblings are not officially reported. In the last decade, however, most "opinions" and "memoranda" filed by Justices on these matters have been reported in the Supreme Court Reporter and the Lawyers Edition. Otherwise, short memoranda and information on action taken on these applications are available to the lawyer only through the clerk's files in Washington. It would seem, unless the Justice indicates to the contrary, that all such memoranda should be printed in the official Supreme Court Reports. …[45]

On May 2, 1968, the Clerk of the Supreme Court, John F. Davis, and the Reporter of Decisions, Henry Putzel, Jr., addressed a memorandum to Warren concerning "several aspects of their respective procedures relating to the issuance and publication of opinions, orders and judgments of the Court."[46] Their first recommendation was headed "United States Reports — In-Chambers Opinions" and read:

> At the present time, in-chambers opinions by individual Justices are not printed in the United States Reports. Many of them are published in the Supreme Court Reporter and in the Lawyers Edition. It has been suggested that consideration be given to printing in the back of the preliminary prints and bound volumes such of these in-chambers opinions as have precedential value. Sometimes orders on extensions of time, bail, and stays are accompanied by short notations, most frequently handwritten, which ordinarily would not be of sufficient importance to justify publication. Probably all in-chambers opinions which are set in type would fall in the category of such opinions which would appear in the United States Reports. In addition, there will probably be others which a Justice will wish to have published.[47]

In July 1968, Warren circulated this memorandum to the Conference,[48] but the issue was not immediately resolved. It recurred in the summer of 1969, when Douglas requested publication of his opinion in *Levy v. Parker*, a bail case involving a soldier who had spoken out against American involvement in Vietnam. Douglas suggested that Putzel discuss the Conference's consideration of publishing in-chambers opinions with Justice William Brennan. Brennan did not recall a decision by the Conference, but "Mr. Justice Brennan authorized [Putzel]

Report[s] has been raised formally or informally two or three times and I have never been authorized to report them in the United States Reports").

[45] Frank Felleman & John C. Wright, Note, *The Powers of a Supreme Court Justice Acting in an Individual Capacity*, 112 U. Pa. L. Rev. 981, 987-88 (1964).

[46] Memorandum to the Chief Justice, May 2, 1968, Warren Papers, Box 417.

[47] *Id.* at 1.

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

to say that he feels strongly that these opinions should be published in the official Reports."[49]

Douglas and Brennan's view that in-chambers opinions should appear in the *United States Reports* soon carried the day. On December 1, 1969, Putzel wrote to the new Chief Justice, Warren Burger, to confirm "your advice that the Court in Conference has approved publication in the United States Reports of in-chambers opinions of individual Justices."[50] To be included in the *Reports* were "[a]ll in-chambers opinions … that are printed in the Court's Print Shop unless the author advises me of his desire not to have a given opinion published," as well as any other opinions that the authoring Justice requested be published.[51] It was, as two eminent practitioners said at the time, a "most welcome change" and "a long-overdue convenience for both the Court and the Bar."[52] Accordingly, the preliminary print of 396 U.S. Part 1 and subsequently the bound volume of 396 U.S. included the twelve in-chambers opinions that had been printed in the Court's Print Shop since the end of October Term 1968, and in-chambers opinions have been a regular feature of the *United States Reports* ever since.

Wyatt and outside commentators had sometimes suggested that the United States Code, which directs the Reporter of Decisions to print opinions "of the Supreme Court" in the *United States Reports*, did not authorize including in-chambers opinions.[53] The Code sections that concerned them have not been amended since 1968, but no one has raised the question. On the other hand, the publishers of *In Chambers Opinions* have not received (or sought) "a special appropriation" from Congress to facilitate locating and printing the backlog of in-chambers opinions, as Wyatt also once suggested.[54] This too remains a task for future researchers.

II. LOCATING IN-CHAMBERS OPINIONS TODAY

In a collection like this one, comprehensiveness is a virtue. The task of locating all in-chambers opinions is far from over,[55] and there are several promising places to look for them.

Consider: After a Justice creates an in-chambers opinion, what would the Justice or the Court do with the document? To begin with, it would be transmitted to the lawyers or litigants in the case. However, with the exception of a few governmental and institutional litigants whose records are relatively well-preserved, this observation generally will not help much in tracking down an opinion. Second, some opinions were sent to legal publishers, but it appears that

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

[50] Letter from Henry Putzel, Jr. to Chief Justice Burger, Dec. 1, 1969, Douglas Papers, Box 1133.

[51] *Id.*

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

[53] Memorandum from Walter Wyatt to Chief Justice Vinson, *supra* note 14, at 2 (citing 28 U.S.C. §§ 411(a) and 673(c)); Robert E. Stern & Eugene Gressman, *Supreme Court Practice* 538-39 & n.4 (4th ed. 1969).

[54] Memorandum from Walter Wyatt to Chief Justice Vinson, *supra* note 14, at 6.

[55] This task is complicated by the fact that there is no settled definition of what counts as an in-chambers opinion — a problem to be addressed some other day.

the opinions printed in the various Supreme Court reporters have already been located and reprinted in *In Chambers Opinions* (which is not to say that more will not turn up in those reporters or, perhaps, in less prominent legal publications, newspapers, nineteenth-century reports, and the like).

If an opinion cannot be located via the lawyers, the litigants, or the law reports, then one must search for it in the archives of the Court or its Justices: (1) the case files of the Clerk of the Supreme Court at the National Archives and Records Administration, or (2) the case files of a lower court whose decision was under review, or (3) the private papers of the Justice who wrote the opinion, now housed at a manuscript library. My research in each of these locations yielded opinions published in this *Supplement*.[56]

First, if an in-chambers opinion was ever in the hands of the Clerk of the Court, then today it should be stored somewhere in the voluminous Records of the Supreme Court of the United States held by the National Archives and Records Administration, where they constitute Record Group 267. This collection includes the case files originally maintained by the Clerk's Office from the Court's early years almost through the present. For the nineteenth century, the volume of records dedicated specifically to in-chambers opinions is slight, consisting primarily of a folder containing documents from four habeas corpus cases.[57]

During the twentieth century, the record-keeping practices became more standardized. At least until 1971, the Clerk's Office filed papers concerning an in-

[56] The notes below, as well as the headnotes to the various opinions, indicate which sources I utilized to track down each in-chambers opinion published here. The one opinion on the original list that I still have not located is *Hooper v. Goldstein*, a 1929 case in which Justice Willis Van Devanter denied an application for leave to appeal, apparently on the ground that, under the 1925 legislation according the Justices greater discretion over their docket, the applicant should have petitioned for certiorari rather than sought leave to appeal. (Petitioner Hooper then took Van Devanter's advice to petition for certiorari, but his petition was denied. 281 U.S. 724 (1930).) What is especially exasperating about the inaccessibility of this particular opinion is that the *Hooper v. Goldstein* case file in the Supreme Court collection at the National Archives contains a letter from the Clerk's Office to Hooper, which "enclose[d] … the order entered by Mr. Justice Van Devanter" — and Van Devanter's papers at the Library of Congress contain *another* letter, this one from the Justice directly to Hooper, which *also* refers to "the enclosed copy of the order to that effect" — but in neither collection have we located a copy of the Justice's order or opinion itself. *See* Letter from Charles Elmore Cropley, Clerk, by HBW [Harold B. Willey], Assistant, to James H. Hooper, Dec. 19, 1927, in *Hooper v. Goldstein* case file, O.T. 1929 No. 565, Records of the Supreme Court (RG 267), National Archives and Records Administration, Washington, D.C.; Letter from Justice Willis Van Devanter to James H. Hooper, Dec. 26, 1929, in Willis Van Devanter Papers, Manuscript Division, Library of Congress, Box 15, Letter Book 42. The cert. petition and brief in opposition, which might conceivably have reprinted Van Devanter's opinion in whole or part, also have not been located; nor was a copy of Van Devanter's opinion contained in the Illinois Supreme Court's case file located at that state's archives. Any reader with further information or who can provide a copy of *Hooper* is implored to contact us.

[57] This series constitutes "Entry 28" of Record Group {"RG") 267. As described in the finding aid (Preliminary Inventory No. 139 (1973)), this series contains four inches of papers from four "habeas corpus cases heard at chambers [in] 1861, 1869, 1881, and 1882." These include opinions in *In re Guiteau*, 4 Rapp ix (Bradley, Circuit Justice 1882) (an opinion that was relocated from this series into the "Important Papers Room"), and *Ex parte Stevens* (Wayne, Circuit Justice 1861), as well as litigation papers in *Ex parte Johnson* (Waite, Circuit Justice 1881) and *Ex parte Anderson* (Chase, Circuit Justice 1869).

chambers application arising from a pending case as part of the records of that case.[58] So, too, if an application was filed shortly before the underlying dispute came before the Court (such as a bail application prefatory to a certiorari petition, or an application to extend the time to file a petition that was then filed), the application paperwork, including the decision, usually wound up in file of that case. Thus, if a researcher knows that a party to a given case applied for a stay, bail, or other single-Justice relief, then he or she should examine the case file to ascertain whether it includes an in-chambers opinion.[59] On the other hand, if one does not know that such relief was sought in a particular case, finding in-chambers opinions in the case files of Record Group 267, which presently contains more than *23,800 cubic feet* of records according to the National Archives web site, would be like seeking the proverbial needle in a haystack.

On the other hand, many applications for extensions of time, bail, stays, and the like did not relate to any underlying case that was ever filed with the Court. Say, for example, a litigant moved for an extension of time to file for certiorari, but never actually filed a petition; or a defendant's bail application was denied and the defendant did not pursue the case further; or a capital defendant unsuccessfully sought a stay of execution and was then executed. Beginning in the 1920s, as it became more common for applications to be processed through the Clerk's Office rather than presented directly to a Justice, the Clerk's Office created a series of "applications" files to house the papers relating to such orphaned applications, including the opinions and orders resolving them. These files, consolidated over the years, today constitute part of a record series designated as "Entry 30" within the Supreme Court collection.[60] Several of the in-chambers opinions included in this *Supplement* were located in this series.[61] Because almost every file under "Entry 30" contains an application that was ruled

[58] Depending on the nature of the underlying case, it might have been placed on the Original Docket (for the few cases within the Court's original jurisdiction, but including some habeas corpus cases), Appellate Docket (the majority of cases), or Miscellaneous Docket (all *in forma pauperis* cases and most petitions for extraordinary writs). The case number, including the name of the docket, is needed to locate the case in the Archives. In 1971, the Clerk's Office established a separate "applications docket" ("A" docket) on which all applications to the Court and its Justices are now placed.

[59] For example, Justice Harlan's short memorandum explaining his denial of bail in *Delli Paoli v. United States* (1955), printed in this *Supplement*, was found in the appellate case file for that case. Similarly, Justice Reed's opinion denying bail in *Klopp v. United States* (1944), was located in the case file of *Klopp v. Overlade*, a related case involving the same petitioner.

[60] Preliminary Inventory No. 139 (1973) to RG 267 describes Entry 30 as "Applications Denied. 1929-41. 1 f[oo]t. Applications, petitions, orders of the Court, and correspondence relating to applications that were denied by the Court, including applications for appeal, for a stay of action by a court or other authority, or for an extension of time to file papers." Since this inventory was prepared, the application files for all but the most recent Terms have also been transferred to the National Archives and accreted to the "Entry 30" series, which is now quite extensive.

[61] *Ewing v. Gill* (Stone, Circuit Justice 1945); *Overfield v. Pennroad Corp.* (Burton, Circuit Justice 1946); *United States v. Gates* (Jackson, Circuit Justice 1949); *Alabama Great Southern Railroad Company v. Railroad & Public Utilities Commission of Tennessee* (Reed, Circuit Justice 1950); and *Wise v. New Jersey* (Harlan, Burton, and Frankfurter, Circuit Justices 1955).

upon by one or more Justices in chambers, this series represents the most promising available resource for researchers.

Second, papers on an application to a Supreme Court Justice were often filed in a lower court such as a United States Court of Appeals, instead of the Supreme Court.[62] These files for federal cases will be at a regional facility of the National Archives and Records Administration; for state cases, records may remain with the state court itself or may have been transferred to a state archives or historical society.[63] However, while these resources may prove helpful in locating an in-chambers opinion whose existence is known or suspected, their volume, scattered across numerous locations all over the country, precludes utilizing them to seek out such opinions more generally.

Third, the papers of individual Justices contain copies of some in-chambers opinions and orders, together with correspondence concerning them. The Manuscript Division of the Library of Congress holds many of these collections, and there are others at Harvard (Frankfurter and Oliver Wendell Holmes, among others), Princeton (the second Justice Harlan), the University of Kentucky (Reed and Vinson), and other universities.[64] Collections of Justices' private papers may be a particularly promising source of in-chambers opinions before the 1950s, because papers relating to applications to Justices during the nineteenth and early twentieth centuries — including the Justices' opinions and orders, if they wrote any — were often never part of the Supreme Court's records at all, but were retained by the Justice himself.[65] For example, the Clerk's Office replied to a 1951 request for a copy of Justice Bradley's opinion in *In re Guiteau*[66] by stating:

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[62] This is particularly so in federal cases in earlier years, when the Circuit Justice's order was sometimes conceived of as an order entered "in" the Court of Appeals rather than in the Supreme Court; sometimes, indeed, the Justice's opinion or order is actually captioned in the Court of Appeals This proved true, for example, of Justice Cardozo's order granting a stay pending appeal in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) — a stay without which the *Erie* case would never have been brought to the Supreme Court. *See* Irving Younger, *What Happened in Erie*, 56 Tex. L. Rev. 1011, 1023-24 (1978) (also available as a videotaped or audiotaped lecture by the late Professor Younger). The document in which Justice Cardozo, after hearing oral argument at his home, granted a stay in *Erie* was located in the records of the United States Court of Appeals for the Second Circuit (RG 276) at the National Archives regional facility in New York City. Alas, it was a routine form of stay order, without an opinion.

[63] In this *Supplement*, Justice Jackson's order in *United States ex rel. Ludecke v. Watkins* (1947), was located in the Second Circuit records. In last year's *Supplement*, *Marks v. Davis*, 4 Rapp 1413 (1912), was found at the Kansas State Historical Society in Topeka, which houses the archives of the Kansas Supreme Court. *See* Ross E. Davies, *Faithless Electors of 1912*, 4 Green Bag 2d 179 (2001).

[64] Lists of manuscript collections (if any) for each Justice can be found in Lee Epstein *et al*., *The Supreme Court Compendium* 418-27 (Congressional Quarterly 3d ed. 2003); Alexandra K. Wigdor, *The Personal Papers of Supreme Court Justices: A Descriptive Guide* (Garland Publishing 1986); and Adrienne deVergie & Mary Kate Kell, *Location Guide to the Manuscripts of Supreme Court Justices* (Tarlton Law Library revised ed. 1981). Links to many of the increasing number of online finding aids to these collections can be found at http://tarlton.law.utexas.edu/vlibrary/spct/justices.html. *See also* Gerald Gunther, *The Writing of Supreme Court History: Some Reflections on Problems, Adventures and Surprises*, Stanford Lawyer 1 (Spring 1972).

[65] Several opinions published in this *Supplement* and last year's were located in these collections. *Simon v. United States* (Black, Circuit Justice 1941) (Hugo Black Papers at the Library of Congress); *Ex parte Seals* (Reed, Circuit Justice 1943) (two opinions) (Stanley F.

> I am unable to find any record in this office of the application referred to. Until recent years applications of this sort were presented to individual Justices directly rather than through [the Clerk's] office, and in turn the Justice would communicate his ruling direct to counsel, and it is probable that it was the custom of the Justices to retain the papers in their personal files.[67]

This practice continued through much of the twentieth century, a fact understandable in light of the communication and transportation conditions of earlier eras. Indeed, it was not until the 1954 revision that the Rules of the Court, previously silent about practice in chambers, provided that applications for relief from a Justice should "normally be submitted to the clerk."[68] Thus, for applications from that time forward, it is much more common to find papers in the Clerk's files.

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Walter Wyatt opined more than 50 years ago that searching for and publishing all of the Justices' in-chambers opinions "would necessitate a search of the huge mass of original papers, [which] would take years and would be costly; but the result might be worth what it would cost."[69] Here's hoping that it is, because we are doing it.

Reed Papers at the University of Kentucky in Lexington, Ky.); *Hubbard v. Wayne County Elections Commission* (Reed, Circuit Justice 1955) (same); *MacKay v. Boyd* (Frankfurter, Circuit Justice 1955) (John Marshall Harlan Papers at the Seeley G. Mudd Manuscript Library at Princeton University); *Cooper v. New York* (Frankfurter, Circuit Justice 1955) (same); *Delli Paoli v. United States* (Harlan, Circuit Justice 1955) (preliminary order) (same); *City-Wide Committee for Integration v. Board of Education* (Harlan, Circuit Justice 1965) (same); *Chin Gum v. United States*, 4 Rapp 1415 (Frankfurter, Circuit Justice 1945) (Felix Frankfurter Papers at the Library of Congress); *Ex parte Durant*, 4 Rapp 1416 (Burton, Circuit Justice 1946) (Harold H. Burton Papers at the Library of Congress; Burton collection at Bowdoin University).

[66] 4 Rapp ix (Bradley, Circuit Justice 1882). This request came from Justice Bradley's grandson, who had located several handwritten drafts of the *Guiteau* opinion in Justice Bradley's papers, which he was donating to the New Jersey Historical Society. *See* Letter from Charles B. Bradley to Charles Elmore Cropley, Clerk, Supreme Court of the United States, Aug. 3, 1951, in Joseph P. Bradley Papers (manuscript group 26), New Jersey Historical Society, Newark, N.J. ("Bradley Papers"), Box 17.

[67] Letter from Cropley, by H.B. Willey, Deputy Clerk, to Charles B. Bradley, Aug. 7, 1951, Bradley Papers, Box 17. Ironically, although Willey's statement was correct as to most in-chambers applications before 1950, we now know it to have been inaccurate as to *In re Guiteau* itself, as a copy of the *Guiteau* opinion was located in the Clerk's Office when the Court began transferring old records to the National Archives in the late 1950s.

[68] *See* Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 67 (1954) (citing Sup. Ct. R. 50(1) (1954)).

[69] Memorandum from Walter Wyatt to Chief Justice Vinson, *supra* note 14, at 7.

APPENDIX

Dear Mr. Chief Justice:

Re: "*Opinions of Supreme Court Justices Not in the United States Reports*."

On March 30, 1951, Mr. Justice Frankfurter called to my attention an Appendix on the above subject in the new edition of Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (Matthew Bender & Co., 1951), edited by Richard F. Wolfson and Philip B. Kurland, p. 943.

This Appendix calls attention to the fact that opinions of individual Justices (not written in connection with decisions or orders of the Court but written in connection with orders of individual Justices "in chambers") are not reported in the United States Reports and that some of them are not published at all. It contains (p. 945) the following statement:

> "… For some reason — perhaps that the Reporter, Mr. Walter Wyatt, like his predecessors, regards it as his task only to print opinions of the Court when it acts as a body — the opinion does not appear in the official reports, nor has Lawyers' Edition taken cognizance of its existence."

The Appendix concludes with this paragraph (p. 947):

> "For the scholar and the practicing lawyer, the failure of any publisher or of the Supreme Court Reporter to collect the published and unpublished opinions of the Justices so that they may be easily found and read is a great handicap. The scholar is deprived of sources without which no study of the Court or of any individual Justice can be complete; the practitioner could often find guidance in such opinions through still unlighted procedural morasses. The plea of Richard Peters for dissemination of the 'knowledge of the labors and usefulness of this tribunal' is even in 1950 not inappropriate"

Mr. Justice Frankfurter apparently agrees with this view and feels that opinions of this kind ought to be reported in the United States Reports. I sympathize with his view but doubt my authority to report such opinions. I promised him that I would bring the matter to your attention this summer, with a view of obtaining directions from you or the Court as to what should be done about it.

STATUTORY PROVISIONS AND PRACTICE THEREUNDER.

So far as I know, the following are the only statutory provisions bearing on the question whether there is any authority for the reporting of individual opinions of this kind in the United States Reports:

28 U.S.C. § 411:

> "(a) The decisions *of the Supreme Court* shall be printed, bound, and issued as soon as practicable after rendition." (Emphasis added.)
>
> 28 U.S.C. § 673:
>
> "(c) The reporter shall, under the direction of the Court or the Chief Justice, prepare the decisions *of the Court* for publication in bound volumes and advance copies in pamphlet installments." (Emphasis added.)

Under this language, it is at least doubtful whether the Reporter has authority to publish in the United States Reports, at the expense of the taxpayers, anything other than the decisions and opinions of the Court, as such and the concurring opinions of the individual Justices announced in connection with decisions of the Court.

So far as I have been able to ascertain, the uniform practice of all of my predecessors in office has been not to publish in the United States Reports opinions of individual Justices of the kind discussed in the Appendix mentioned above.

In an Appendix to 131 U.S., Bancroft Davis published a number of decisions *of the Court* which had not been published previously. However, at that time the publication of the United States Reports was more or less private enterprise of the Reporter and his publishers, who derived a substantial private profit from the publication of the United States Reports. What they did is no precedent for what I could do; because the Reporter is now a salaried official of the United States, his duties fixed by law, and the expense of publishing the United States Reports is borne by the taxpayers out of appropriated funds.

In these circumstances, I feel that I could not change this long-established practice without authorization from the Court or the Chief Justice.

DISCUSSION.

No opinions of this kind have ever been sent to me for publication in the United States Reports; and I had never seen any of the opinions specifically mentioned in the Appendix to the book quoted above except the opinion of Mr. Justice Jackson in *Williamson* v. *United States*, 184 F. 2d 280. A copy of that opinion was sent to me by the printer, because it happened to be set in the Court's print shop. I noticed that it was plainly labeled as an opinion by Mr. Justice Jackson "as Circuit Justice of the Second Circuit"; and I ascertained that it would be reported in the Federal Reporter among the decisions of that court. Therefore, in accordance with the long-established practice, I did not report it in the United States Reports. Recently, I have obtained copies of several opinions of this kind; but I am holding them pending a decision on this question.

No other question about the publication of opinions of this kind has ever been raised with me except that, on one occasion, a law clerk to the late Mr. Justice Rutledge asked me whether such 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 under the sections of the United States Code quoted above.

However, I felt that it was unfortunate that such opinions were not published; and I conferred with Mr. Cropley on the question whether it would be possible to locate all such opinions which had been filed in the past and arrange for their publication either in the United States Reports or in some set of private reports. Mr. Cropley told me that it would be an enormous undertaking to locate opinions of this kind which have been filed in the past; because no separate list or index of them is made and that they could be found only by searching through the original papers in the Clerk's Office.

If the Court issues an order directing me to do so, I shall be glad to publish in the United States Reports opinions of this kind filed in the future; but, in view of the questions that have been raised by the House Appropriations Committee as to the expense of publishing the Court's slip opinions and the United States Reports, it might be wiser to obtain an amendment to the law clearly authorizing it or, at least, to bring it to the attention of the Appropriations Committee.

If opinions of this kind filed in the future are to be published, it would seem to me that the Court ought to direct the Clerk's Office to send to the Reporter several copies of each such opinion filed with the Clerk. Otherwise, the Reporter's Office will not know about them, as it has not known about them in the past.

If the Court desires to have opinions of individual Justices of this Court filed in the past collected and published, it might be desirable to obtain a special appropriation for that purpose. The Court might obtain an appropriation to publish one extra volume of the United States Reports containing such opinions; and, if it is found that there are more than enough to fill one volume, the Court could later obtain appropriations to publish additional volumes. If this is undertaken, it would seem that the Court ought to direct the Clerk's Office to search its records, find the opinions and furnish copies to the Reporter.

PRACTICAL CONSIDERATIONS.

If opinions of individual Justices of the kind here under discussion are to be reported in the United States Reports, it is believed that the most satisfactory course would be to report *all* of them filed after a certain date, regardless of whether they are reported or are to be reported elsewhere, and regardless of whether they are filed in the Justice's capacity as a Justice of the Supreme Court or in his capacity as a Circuit Justice.

As to the effective date of such a new practice, it would seem that:

1. The *easiest* (but not necessarily the most satisfactory) way to begin the new practice would be to make it apply only to opinions filed after the beginning of the next Term; because arrangements could easily be made to have copies of all such opinions hereafter filed furnished to the Reporter, either by the authors or by the Clerk.

2. It would be almost as easy, and more satisfactory, to begin by collecting and reporting in an appendix to the next volume of the United States Reports all such opinions filed since the beginning of the October, 1949 Term, when the Court was first constituted as it is now; because copies of all such opinions presumably could be obtained easily from the files of the Justices now on the Court.

3. To try to collect and report opinions of this kind filed before the Court was constituted as it is now would be more difficult, because of the problem of finding

all of those filed by Justices now deceased. The further back we attempt to go the more difficult this problem would become.

4. To attempt to collect and publish all such opinions of individual Justices filed since the first Term of the Court in February, 1790, would be an impossible task, because some of the records have been destroyed and no index or list of such individual opinions has been kept. Even to find all those now remaining in the files of the Court would be a momentous task, because it would necessitate a search of the huge mass of original papers. This would take years and would be costly; but the result might be worth what it would cost. This task could not be performed by the staff of the Reporter's Office. If undertaken, it is believed that the task of finding all such opinions of individual Justices could best be performed by the Clerk's Office, which probably would have to employ and supervise a staff of researchers especially organized for the purpose.

If none of the above courses appeals to the Court as being both satisfactory and feasible, a compromise course might be worked out along the following lines:

(a) Starting with the beginning of the next Term, report currently in appendices to the United States Reports all opinions of individual Justices hereafter filed — copies to be furnished to the Reporter by the authors or by the Clerk.

(b) Report from time to time in appendices to the United States Reports opinions heretofore filed by individual Justices now on the Court who furnish copies to the Reporter.

(c) Report from time to time either in appendices or in special volumes of the United States Reports opinions heretofore filed by Justices now retired or deceased, as authentic copies are furnished to the Reporter by retired Justices or by their families, former secretaries, former law clerks, and biographies of deceased Justices, or as copies are obtained from other reliable sources. These, of course, would have to be checked against the originals in the files of the Court.

CONCLUSION.

If the court should decide that it desires to have any opinions of this kind published in the United States Reports, I shall need instructions on some details; but it would seem best to let them await a decision on the main question.

Sincerely,
Walter Wyatt, Reporter.

Honorable Fred M. Vinson,
Chief Justice of the United States.

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Bustop, Inc. v. Board of Ed. of Los Angeles
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CUMULATIVE INDEX OF CASES BY TOPIC

[Publisher's note: This opinion was typed on plain sheets of paper. A note attached to this opinion and dated "8/27/68" and signed "ltl" reads as follows: "Frances — The original has been returned to the Library. I made this copy for you as Mr. Justice Black said he wanted it filed in a special place." From Box 403, Hugo Black Papers, Manuscript Division, Library of Congress. This opinion was cited by Justice William O. Douglas in *D'Aquino v. United States*, 1 Rapp 33 (1950).]

FOR THE UNITED STATES CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT

S.M.E. SIMON, PETITIONER

vs.

UNITED STATES OF AMERICA

UPON MOTION FOR BAIL PENDING APPEAL PRESENTED TO HUGO L. BLACK, ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT, SITTING AS CIRCUIT JUSTICE.

July 22, 1941

Petitioner applied to me in my capacity as Circuit Justice of the Fourth Circuit Court of Appeals, to grant him bail pending appeal from a judgment of conviction on seven counts of an indictment charging concealment of assets and false swearing in violation of Title II, [Publisher's note: "Title II" should be "Title 11."] U.S. Code, Section 52(b). He was sentenced to pay fines aggregating $3,000.00 and to serve a period of three years on each of the seven counts, the sentences to run concurrently. June 13, 1941, upon the ground that he found no substantial question for review, the District Judge denied petitioner's application for bail pending appeal to the Circuit Court of Appeals. June 18, 1941, the Circuit Court of Appeals denied appellant's application for bail pending appeal upon the same ground. The Circuit Court of Appeals for the Fourth Circuit is not now in session. Appellant has filed before me, as Circuit Justice, an application for bail pending appeal. He relies upon Rule 6 of the Criminal Appeals Rules of the Supreme Court of the United States, which provides as follows:

"The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial

judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the Circuit Justice.

"Bail shall not be allowed pending appeal unless it appears that the record involves a substantial question which should be determined by the appellate court." (Italics supplied). [Publisher's note: No italics in the original.]

It is the government's contention that since the Circuit Court of Appeals while in session denied bail this judgment has such finality that I do not, as a single Circuit Justice, have authority to grant bail at this time. But the government says that if a session of the Fourth Circuit should be convened, it would interpose no objection to, but in fact would consent that the petitioner might be released on bail pending appeal.

The Supreme Court Rules for criminal cases appear to me to adopt that traditional flexibility under which an appellate court has continuing power to grant or deny, or reduce or increase bail pending final disposition of an appeal in order to meet the exceptional circumstances and conditions which may invoke court action. That such was the purpose of the Rules seems to me to be shown by Rule 4 which in part says:

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The appellate court may at any time, upon five (5) days notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

In order that the continuing power recognized by Rule 4 may be exercised without delay to meet exigencies that may arise from time to time, Rule 6 gives to the individual Circuit Judges or the Circuit Justice power to pass upon bail when the Circuit Court is not in session. It is my opinion therefore that while careful consideration should be accorded to the action of the court in denying the previous application for bail pending appeal, nevertheless the rule requires that I consider the present application upon its merits. It cannot be assumed that the rules contemplate that under the circumstances here, no judicial action whatever can be invoked during the period in which the court is not in session.

ON THE MERITS it appears that this case was in process of trial before the District Judge for a period of eight days. Much evidence was offered and many objections appear throughout the record. At the time petitioner applied for bail before the Circuit Court, that Court was without the benefit of the full record. The record had not been prepared at that time and the hearing before the court was largely on oral statements of

counsel. The entire record has been before me. Rule 6 certainly contemplates that bail shall not be allowed where it is apparent that an appeal is frivolous and merely for delay. Cf. United States v. Motlow, 10 Fed. (2d) 657, 662. And other circumstances might justify a denial of bail, such as the immediate prospect of flight by a defendant. Here, however, there are no such circumstances. The government does not deny that the appeal is bona fide nor that the case is an appropriate one for bail. From a study of the record, which was not available to the Circuit Court when it passed upon the previous application, I am of the opinion that petitioner is entitled to have the questions he presents determined by the appellate court and that he is therefore entitled to bail. Cf. Hudson v. Parker, 156 U.S. 277, 285.

[Publisher's note: Here are the order and bail bond that accompanied Justice Black's opinion.]

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1941.

S.M.E. Simon, Petitioner,

v.

The United States of America.

ORDER.

UPON CONSIDERATION of the application of the petitioner, S.M.E. Simon for his release from custody on bail pending his appeal from the District Court of the United States for the Southern District of West Virginia to the United States Circuit Court of Appeals for the Fourth Circuit;

IT IS ORDERED that the petitioner, S.M.E. Simon, be released from custody and admitted to bail pending his appeal from the District Court of the United States for the Southern District of West Virginia to the United States Circuit Court of Appeals for the Fourth Circuit and pending the final determination of his appeal by the United States Circuit Court of Appeals for the Fourth Circuit. PROVIDED, however, that the petitioner shall execute and file with the Clerk of the Supreme Court of the United States a good and sufficient surety in the sum of Five Thousand Dollars

($5,000) conditioned that he will fully and promptly abide by the decision of the United States Circuit Court of Appeals for tje Fourth Circuit., The said bond shall run to the United States of America and shall be subject to approval by the undersigned Justice of the Supreme Court of the United States. When the said bond is so approved and is filed with the Clerk of the Supreme Court of the United States, but not before, the petitioner, S.M.E. Simon, shall be enlarged on the bail so given.

(Sgd) HUGO L. BLACK
Associate Justice of the Supreme Court of the
United States.

Dated this 22nd day of July, 1941.

Bond in the sum of Five Thousand Dollars ($5,000) conditioned in accordance with the terms of the above order and approved by the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, filed in the office of the Clerk of the Supreme Court of the United States this _____ day of July, 1941.

_____
Clerk

THE SUPREME COURT OF THE UNITED STATES

S.M.E. SIMON, PETITIONER,

v.

THE UNITED STATES OF AMERICA, RESPONDENT

BAIL BOND ON APPEAL

The United States of America, Southern District of West Virginia, ss.

Know all men by these presents that we, S.M.E. Simon, as principal and Hartford Accident and Indemnity Co. as surety hereby acknowledge ourselves to owe and be indebted to the United States of America in the sum of $5,000 (five thousand dollars) to be levied of our goods and chattels, lands and tenements, to the use of the United States of America, but to be void if the said principal shall fully and promptly abide by the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the disposition of his appeal in Cause No. 4828 in that court entitled S.M.E. Simon, Appellant, v. the United States of America, Appellee.

(Sgd) S.M.E. SIMON
HARTFORD ACCIDENT & INDEMNITY CO.
Surety by W.C. SMITH
Its agent and attorney in fact.

The above and foregoing bond is approved this July 24th, 1941

(Sgd) HUGO L. BLACK
Associate Justice of the
Supreme Court of the United States.

[Publisher's note: This opinion was typed on plain sheets of paper. From Box 78, Stanley F. Reed Papers, Public Policy Archives, Special Collections and Digital Programs, University of Kentucky Libraries.]

SUPREME COURT OF THE UNITED STATES

	)	Before Stanley Reed,
Ex parte Taylor Seals	)	Associate Justice of the Supreme
	)	Court of the United States.

September 4, 1943

A petition for a writ of habeas corpus has been presented to me by the applicant, Taylor Seals. I am asked to grant the writ by virtue of the power conferred by R.S. § 752, as amended, 28 U.S.C. § 452.[1]

The petitioner incorporates as part of his present petition a petition for habeas corpus titled in the United States District Court in and for the District of Kansas, First Division, H.C. No. 832. This earlier document states the only grounds upon which relief is sought. The writ was denied by Judge Phillips of the Tenth Circuit, acting as a circuit judge in accordance with 28 U.S.C. § 452, on July 21, 1943.

As I look upon the petition submitted to me as entirely lacking in merit, I am entering an order denying the petition without referring it to the Court. Cf. United States v. Guiteau, 12 District of Columbia Reports 498, 560; Ex parte Clarke, 100 U.S. 399, 403; Ex parte Curtis, 106 U.S. 371; Ex parte Clark, 9 Sup. Ct. Rep. 2.

The papers before me by petitioner consist of the petition, the return to the order to show cause filed in the proceedings before Judge Phillips and petitioner's traverse to that return. There are also petitioner's written arguments for the granting of the writ. As stated before, the grounds for the writ here are limited to those set out in the earlier petition. That petition states that the petitioner was arraigned in the District Court for the Eastern District of Tennessee, on May 29, 1935, jointly with one Laymance on an indictment, No. 12487, charging counterfeiting. On June 5 Laymance was tried and petitioner was subpoened as a government witness and carried by force to the place of trial. On that day, the jury was unable to agree in Laymance's case. On July 20, 1935, the petitioner was

[1] § 452. Power of judges; place of entering order of circuit judge. The several judges of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

sentenced to an aggregate of more than six years on several counts. Without any further pleading, it is clear that petitioner is not entitled to a writ of habeas corpus for claimed violation of his right against self-incrimination, guaranteed by the Fifth Amendment to the Constitution. There is no suggestion in the facts alleged that the petitioner claimed the protection of the privilege. United States ex rel Vajtauer v. Commissioner, 273 U.S. 103, 113.

Furthermore, the return made before Judge Phillips shows the petitioner pleaded guilty on May 29, 1935, and was placed on probation for five years at the time of his sentence, July 20, 1935. He was committed later for violation of his probation. Petitioner had also been sentenced on July 20, 1935, on another indictment to a term of seven and one-half years to run consecutively after the expiration of the sentence in case No. 12487. He was committed to the same institution under this sentence. The return points out that the alleged enforced testimony of which petitioner complains took place after the pleas of guilty. The pleas of guilty and not the testimony are the basis of the conviction. The petitioner's traverse of the return left these facts uncontested.

The application for a writ of habeas corpus is refused on the face of the papers.

[Publisher's note: This opinion was typed on plain sheets of paper. From Box 78, Stanley F. Reed Papers, Public Policy Archives, Special Collections and Digital Programs, University of Kentucky Libraries.]

SUPREME COURT OF THE UNITED STATES

	)	Before Stanley Reed,
Ex parte Taylor Seals	)	Associate Justice of the Supreme
	)	Court of the United States.

November 23, 1943.

This is an application for a writ of habeas corpus, setting forth grounds which are, with one exception, similar to those considered in a previous application which was dismissed on September 4, 1943. It is now asserted that the pleas of guilty pursuant to which the petitioner stands committed were procured by the false promises of the United States attorney. This allegation is only a conclusion, and the facts set out to support it are as follows:

The petitioner states that his pleas of guilty were the result of a bargain with the United States attorney by which the petitioner undertook to testify against a co-defendant in exchange for his own "immunity." As there is no authority in a court, in exchange for the testimony concerning counterfeiting, to dismiss the charges against one who has pleaded guilty, the petitioner was given the only advantage which either side could possibly have intended; execution of sentence was suspended and he was placed on probation. He remained on probation from July 20, 1935 to August 29, 1936. The revocation of his probation at the latter date is not alleged to be a breach of faith on the part of the United States attorney. From the return to a former petition in the United States District Court for Kansas, First Division, No. 832, H.C., which the Government incorporates in its motion to dismiss, it appears that prior to August 29, 1936, the petitioner was convicted of uttering a forged instrument after a trial in the Criminal Court for Morgan County, Tennessee. There is in these facts no room for the conclusion that the United States attorney acted in bad faith, and the petitioner's charge of fraud must be regarded as unsupported by the factual allegations of his petition.

For these reasons, and for the reasons set out in the opinion of September 4, 1943, dismissing the previous petition, the Government's motion to dismiss the instant petition must be granted.

[Publisher's note: This opinion of Justice Stanley Reed is reproduced at pages 49-52 of the Transcript of Record in the case file of the related case of *Klopp v. Overlade*, O.T. 1947, No. 254, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration.]

United States Circuit Court of Appeals
for the Sixth Circuit

No. 9803

United States of America
Plaintiff-Appellee
v.
William Thomas Klopp
Defendant-Appellant

Appellant was indicted, tried and convicted in the United States District Court for the Southern District of Ohio for an alleged violation of Section 11 of the Selective Training and Service Act of 1940, as amended.

After assignment by Selective Service Board No. "4" of Middletown, Ohio, to classification 4-E, which covers conscientious objectors who are available for work of national importance, appellant Klopp was ordered to report to the Board for assignment to a civilian public service camp for work of national importance under civilian direction. The indictment charged that he willfully evaded service by failing to report in accordance with the notice.

Appellant's substantial defense was and is that the Board arbitrarily, without statutory authority and contrary to the Act and Regulations, failed to classify him as a minister of religion, 4-D, who is exempt from selective service. Appellant contends that on an indictment for failure to comply with the Board's order, he is entitled to "a judicial inquiry as to whether he was a minister of religion," which judicial inquiry must be determined by a jury or by the court if the evidence did not justify submission to the jury.

At the trial, the Court refused to permit the introduction of any evidence as to the ministerial status of appellant. The Court was of the view that it had no authority to go behind the findings of the draft board. A proffer of the excluded evidence was made from which it appears that appellant is a Jehovah's witness; that in June, 1940, he began "preaching the gospel by going from house to house." Later he conducted a "home study class" in the Bible. In February, 1942, the appellant became, by appointment of the Watchtower Bible and Tract Society, Back-Call

Servant and Book Study Conductor. His duties were to supervise following up calls of witnesses upon non-witnesses, where interest in Jehovah's witnesses developed, and to conduct a Bible study class one evening each week at the Middletown Kingdom Hall. In October, 1942, appellant became assistant company servant for the Middletown Company, the position which he now holds. As assistant he aids the Company Servant by keeping records, sending in subscriptions to religious periodicals, supervising other workers and in the absence of the Company Servant by taking over his duties for short periods of time. The Company Servant is the presiding minister of the local company of witnesses. Appellant is licensed to perform the marriage ceremony. Appellant's religious duties as instructor, supervisor, assistant company servant and otherwise occupy ninety hours per month of his time, a considerable portion of which is served in the evenings, Saturdays and Sundays. He receives no compensation for this work. Appellant is regularly employed in a secular occupation.

The local board gave appellant a hearing as to his classification. No objection is made as to the manner in which that hearing was conducted. Appellant asked and received procedurally proper administrative review of his classification from the board of appeal and the State Director of Selective Service. Both upheld the action. He has had final physical examination and has been accepted by the army as physically fit for general military service. I assume from this record that he has exhausted his administrative remedies.

The Supreme Court has not yet decided whether a selectee is entitled to show, on an indictment for violation of an order of a local board under the Selective Service Act and after the exhaustion of administrative remedies by the selectee, that the classification upon which the order rests is arbitrary and beyond the statutory power of the local board. *Falbo* v. *United States*, 320 U.S. 549; *Billings* v. *Truesdell*, 321 U.S. 542. For action upon this motion for bail, it is unnecessary for me to reach a conclusion upon that point. Certainly the local board must decide whether a registrant is a minister. This it has done. Conclusions as to status upon evidence and at a hearing, such as we have by this local board, are procedurally fair. I see no difference between a conclusion as to whether a registrant is within the fixed age group or whether he is a minister. For courts to review such a decision would give a statutory review of administrative action. This is not provided by the Selective Service Act.

Appellant recognizes this situation and bases his contention on the arbitrary character of the action of the local board and the lack of any evidence to support the board's conclusion of non-exemption. There are many gradations of religious activity. The precise point where the layman passes from the group of devoted religious workers to the status of an ecclesiastic or minister cannot be fixed by definition or formula. From the

evidence offered and refused at the trial, however, it is clear to me that the local board was justified in concluding that appellant was not a minister within the terms of the Selective Service Act. By far the greater part of his time was given to secular work. His responsibilities for Bible teaching, magazine subscriptions, back-calls and acting as substitute for the Company-Servant may be said to correspond more closely to that of lay readers, Sunday School teachers, deaconesses or other church helpers in the more orthodox religious sects. Nothing which has been called to my attention justifies in my view a conclusion that the classification by the local board was arbitrary or beyond their statutory power.

Bail is refused.

July 17, 1944

[Publisher's note: This October Term 1944 opinion of Chief Justice Harlan Fiske Stone was typed on plain sheets of paper. From O.T. 1944, Entry 30, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration. It was issued on June 20, 1945. Frederick Bernays Wiener, *Opinions of Justices Sitting in Chambers*, 49 LAW LIB. J. 2, 7 (1956).]

SUPREME COURT OF THE UNITED STATES

ORMAN W. EWING, Petitioner)
)
vs.)
)
HOWARD B. GILL, Superintendent)
of Penal Institutions for the)
District of Columbia, Respondent)

MEMORANDUM

The petition for writ of habeas corpus, returnable before the United States District Court for the Southern District of New York, is denied, without prejudice to renewal of the petition for a writ to any other judge or to a district court of proper venue.

So far as the petition rests upon the asserted inability to secure a fair trial of the issues sought to be raised by the petition, either in the District Court for the District of Columbia, or in the District Court for Virginia, that assertion is not supported. The refusal by the judges of the District of Columbia to entertain the petition for the writ and the order prohibiting the taking of depositions, if erroneous, were reviewable upon resort to the appropriate appellate procedure. Any judge shown to be prejudiced may be disqualified and an unprejudiced judge designated to sit in his stead by pursuing the proper procedure.

Attention of counsel is called to Rutowski v. Johnston, 52 [Publisher's note: The "5" in "52" here is written above an obliterated "4".] Fed. Supp. 430, holding under 28 U.S.C. § 455 that the return to the petition for the writ must be acted upon by the judge who entertains the petition, and see Burall v. Johnston, 146 F.2d 230.

H.F.S.

[Publisher's note: This opinion was typed on a form with "Supreme Court of the United States" centered at the top of the page and blanks below it following "No." (for the case number) and "October Term, 19" (for the date). From O.T. 1946, Entry 30, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration.]

SUPREME COURT OF THE UNITED STATES

No. ----------, *October Term, 19*46.

Ione M. Overfield, Grace Stein Weigle, et al., Petitioners,

vs.

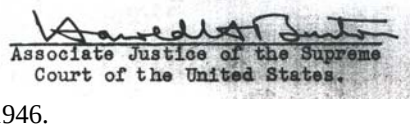
The Pennroad Corporation, a Corporation of the State of Delaware, et al.

ORDER VACATING ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

UPON CONSIDERATION of the motion of The Pennroad Corporation to vacate the order signed by Mr. Justice Burton, September 4, 1946, extending the time within which Julia A. Perrine may file petition for certiorari, and the presentation of oral arguments by counsel on behalf of The Pennroad Corporation, The Pennsylvania Railroad Company and Julia A. Perrine, and it appearing that the final judgment of the Circuit Court of Appeals for the Third Circuit in this cause was entered earlier than June 4, 1946, to wit, on May 31, 1946, and that, therefore, the condition upon which the extension of time for filing petition for certiorari was ordered has not been fulfilled;

IT IS ORDERED that the order signed by Mr. Justice Burton, September 4, 1946, extending the time within which Julia A. Perrine may file petition for certiorari in this cause, is vacated and the application for such extension of time filed with this Court on September 4, 1946, on behalf of Julia A. Perrine is denied as untimely. (§ 8(a), Act of February 13, 1925, 43 Stat. 940, 28 U.S.C. § 350.)

Such order of September 4, 1946, having been vacated on the foregoing grounds, it is unnecessary to pass upon the motion filed in this cause by the Pennsylvania Railroad Company seeking its vacation upon other grounds.



Dated this 18th day of September, 1946.

[Publisher's note: Here is the order to which Justice Burton refers in his opinion. It is typed on the same kind of form.]

SUPREME COURT OF THE UNITED STATES

No. ----------, *October Term,* 1946.

Ione M. Overfield, Grace Stein Weigle, et al.,
Petitioners,

vs.

The Pennroad Corporation, a Corporation of the State of Delaware, et al.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to an including November 4, 1946.

This extension, however, is conditioned upon it appearing that final judgment of the Circuit Court of Appeals shall have been entered in this cause not earlier than June 4, 1946, it appearing from the application for this extension that the mandate from that court was issued June 5, 1946, without any representation, however, as to when final judgment had been entered.

Harold H. Burton
Associate Justice of the Supreme
Court of the United States.

Dated this 4th day of September, 1946.

[Publisher's note: This opinion was typed on a form with "Supreme Court of the United States" centered at the top of the page and blanks below it following "No." (for the case number) and "October Term, 19" (for the date). From Docket no. 20572, RG 276, Records of the United States Court of Appeals, National Archives and Records Administration, Northeast Regional Branch, New York, N.Y.]

SUPREME COURT OF THE UNITED STATES

*No. ----------, October Term, 19*47.

UNITED STATES OF AMERICA, EX REL. KURT G.W. LUDECKE,
Petitioner,

vs.

W. FRANK WATKINS, Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said Kurt G.W. Ludecke in custody.

_____

ORDER

It appearing doubtful whether a review is pending, within the meaning of Rule 45 of the Rules of this Court, until a writ of certiorari is granted, the application of the petitioner for a stay of the mandate of the Circuit Court of Appeals in the above entitled cause is granted and the mandate is stayed pending the consideration and disposition of a petition for a writ of certiorari to be filed herein provided the same is filed within the time provided by law.

(Signed) Robert H. Jackson
Associate Justice of the Supreme
Court of the United States.

Dated this fourth day of September, 1947.

[Publisher's note: This opinion was typed on plain sheets of paper. From O.T. 1948, Entry 30, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration.]

SUPREME COURT OF THE UNITED STATES

United States of America	)	
	)	
v.	)	Application for Bail.
	)	
John Gates	)	

Gates applies for admission to bail, pending appeal from judgment of contempt. His appeal already has been argued and awaits decision in the Court of Appeals. While under consideration there, it would not be fitting to intimate any view as to the merits or appropriateness for review by this Court of any questions involved.

The only grounds I now consider are the allegations that he already has served one-third of his sentence and he "fears that the decision of said Circuit Court upon his appeal may not be rendered until after he has completed the service of his sentence, thus making an appeal to this [Supreme] Court a moot question." He urges that bail is necessary to protect our jurisdiction against loss in this contingency.

No reason is stated to support petitioner's fears that the Court of Appeals will so delay his case that it will become moot. It has moved with expedition. The appeal was argued ten days after judgment by the District Court. This showing does not warrant the assumption that there is need for a Circuit Justice to intervene in order to protect the possible jurisdiction against loss by delays in the court below.

Application denied.

Robert H. Jackson
Associate Justice of the Supreme
Court of the United States.

June 16, 1949

[Publisher's note: This opinion was typed on plain sheets of paper. From O.T. 1949, Entry 30, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration.]

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1949

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, Plaintiff	)
vs.	)
RAILROAD & PUBLIC UTILITIES COMMISSION OF TENNESSEE, HON. JOHN C. HAMMER, Chairman, HON. HAMMOND FOWLER and HON. J.B. AVERY, SR., Members of the Railroad & public Utilities Commission of the State of Tennessee; and HON. ROY H. BEELER, Attorney General of the State of Tennessee, Defendants	)

ORDER ALLOWING APPEAL AND DENYING APPLICATION FOR REINSTATEMENT OF TEMPORARY INJUNCTION

The Alabama Great Southern Railroad Company has applied to me as a Justice of the Supreme Court for allowance of an appeal from a judgment of a three-judge district court dismissing for want of jurisdiction its complaint against the Railroad and Public Utilities Commission of Tennessee. The complaint sought on constitutional grounds a declaration of rights and an injunction against certification of a state tax assessment and collection of the tax based on that assessment. The Railroad Company has applied also for reinstatement of a temporary injunction, pending appeal to this Court.

The district court appears to have dismissed the complaint on two grounds. The first was that it was deprived of jurisdiction to issue an injunction by the Johnson Act (28 U.S.C. § 1341):

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The court noted that the Railroad Company had applied for and had been granted a writ of certiorari by the state court to review the assessment. It found that this procedure provided a "plain, speedy and efficient remedy." The second ground was that as a matter of discretion, a declaration of rights should not be given in this state tax controversy. Great Lakes v. Huffman, 319 U.S. 293, 300.

While I have the power to reinstate the temporary injunction, this power should be exercised only in cases presenting substantial questions, lest the usefulness of the Johnson Act be impaired. As shown by appellant's affidavit, the presiding judge of the three-judge court indicated informally that he would not sign an extension of the temporary injunction. Even if I should treat this as a formal refusal by the district court to grant a reinstatement of the injunction.[1] [Publisher's note: The period after "injunction" probably should be a comma.] I do not think this case presents a question sufficiently substantial to warrant my issuing an injunction. The applicable Tennessee statute provides for refund of illegally exacted taxes in the following terms:

> "Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the State of Tennessee, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceeding that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the State of Tennessee, the counties and municipalities, and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the State of Tennessee, or any county, municipality, road district, school district, or any other taxing district authorized by law to levy taxes." Tenn. Code Ann., § 1535 (Williams 1934).

[1] See Rule 62(c), Federal Rules of Civil Procedure; Cumberland Telephone & Telegraph Co. v. Louisiana Pub. Serv. Comm., 260 U.S. 212.

Taking a view of the Tennessee statute most favorable to the position of the Railroad Company — that the state agencies, and not the railroad, may choose whether to credit the illegal taxes against future taxes or to refund them at once — the likelihood that the payments cannot be recouped, with interest, is so slight as to be illusory. The state remedy for the alleged illegal tax is plain, speedy and efficient.

Rule 36 of this Court empowers me to allow the appeal prayed. Since the district court had power to give the declaration of rights, it may be that the appellant can persuade this Court that the declaration should have been made. As the appellant desires the appeal, it may think that such declaration might have legal consequences concerning the tax issue. The appeal is allowed on execution of a bond for costs of $200.

The application for reinstatement of a temporary injunction is denied.

Stanley Reed
Associate Justice
Supreme Court of the United States.

This 18th day of May, 1950.

[Publisher's note: This opinion of Justice Stanley Reed was typed on plain sheets of paper. From Box 157, Stanley Reed Papers, Public Policy Archives, Special Collections and Digital Programs, University of Kentucky. It was issued on March 14, 1955. Frederick Bernays Wiener, *Opinions of Justices Sitting in Chambers*, 49 LAW LIB. J. 2, 9 (1956).]

SUPREME COURT OF THE UNITED STATES

Orville L. Hubbard, Petitioner,	)	
Pettitioner	)	On Application of Orville L.
	)	Hubbard for Restraining Order or
v.	)	or Temporary Injunction Pending
	)	Filing of Application
The Wayne County Election	)	for Appeal or Certiorari.
Commission, et al.	)	
Respondents.	)	

ORDER

Petitioner, Orville L. Hubbard, filed a complaint in the Circuit Court of the County of Wayne, Michigan, in chancery against the Wayne County Election Commission et al., seeking to prevent the respondents from printing ballots for the election of circuit judges in Wayne County in accordance with Michigan law.

The ground was the alleged invalidity of this provision of the Michigan law:

> "There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office."

Its constitutionality under the Fourteenth Amendment and its validity under the law of Michigan were attacked on the ground that those holding judicial office who had not been elected but only appointed to fill vacancies were given an unfair advantage over other nominees. This was alleged to be the situation in the present case.

The complaint was dismissed by the Circuit Court for the County of Wayne, Michigan, for failure to state a cause of action, and leave to appeal to the Michigan Supreme Court was denied. No stay was granted by either court.

In my view no substantial federal question is presented for interference with the election process in Michigan. The application is denied.

_____

ASSOCIATE JUSTICE
Supreme Court of the United States.

[Publisher's note: This opinion was typed on a plain sheet of paper. From Box 17, "chamber practice" folder, John Marshall Harlan Papers, Seeley G. Mudd Manuscript Library. Published with permission of Princeton University Library. The original of this opinion was hand-written on the "Application for Extension of Time Within Which to File Petition for a Writ of Certiorari." By today's standards, this opinion probably is not sufficiently substantial to pass muster as an in chambers opinion. We publish it here because Wiener included it on his list. Frederick Bernays Wiener, *Opinions of Justices Sitting in Chambers*, 49 LAW LIB. J. 2, 9 (1956).]

SUPREME COURT OF THE UNITED STATES

COPY

RE: MacKay v. Boyd

"Considering the requirement [Publisher's note: There probably should be an "s" after "requirement."] for a petition for certiorari, the twenty days that remain should be ample time for the preparation — or, at the lowest the eighteen days, allowing for air-mail transmission of a petition in type script. I find no warrant for granting an extension.

Justice Frankfurter

July 5, 1955"

[Publisher's note: This opinion was typed on plain sheets of paper. From Box 17, "chamber practice" folder, John Marshall Harlan Papers, Seeley G. Mudd Manuscript Library. Published with permission of Princeton University Library. For Justice John Marshall Harlan's earlier in chambers opinion in this case, see 1 Rapp 137 (1955).]

SUPREME COURT OF THE UNITED STATES

Washington, D.C.

Chambers of
Justice Felix Frankfurter

Cooper et al. v New York

On careful consideration of the moving papers, in light of the previous proceedings in the case, as recorded in the New York Reports, the Federal Reporter and the Reports of this Court, and after due deliberation, I am compelled to deny the application to me for a stay of the executions. In view of the full recital of the course of the argument before Mr. Justice Harlan, in the context of those circuit documents, it will not serve the course of justice to call for a repetition of the argument orally before me. In denying the stay I have duly considered the "additional [Publisher's note: The "al" in "additional" is a handwritten insert.] argument" now formulated and not put before Mr. Justice Harlan. I find that, too, wholly without merit.

The application of the motion for a stay of execution is denied.

/S/ Felix Frankfurter
Associate Justice

July 8, 1955

[Publisher's note: This opinion is an example of what might be called a "marginal" in chambers opinion. Justice John M. Harlan scribbled his decision on the Petitioner's proposed order. See next page. His handwritten opinion is reproduced below. The proposed order is not. From O.T. 1954, Entry 30, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration.]

IN THE
SUPREME COURT OF THE UNITED STATES

C 145-214

ORLANDO DELLI PAOLI PETITIONER	)	
AGAINST	)	ORDER ADMITTING TO BAIL PENDING APPEAL TO CIRCUIT COURT OF APPEAL
THE UNITED STATES OF AMERICA RESPONDENT	)	

The petitioner's appeal to the Court of Appeals, Second Circuit, appears to involve simply a question of the credibility of the witnesses who testified on the issue of whether the petitioner's plea of guilty was coerced. Having examined the record I conclude that I would not be justified in granting bail, which was denied by the District Court and twice by the Court of Appeals.

The application for bail is denied.

John M. Harlan,
As Circuit Justice.

July 13/55
Weston, Conn.

IN THE
SUPREME COURT OF THE UNITED STATES

ORLANDO DELLI PAOLI

PETITIONER

AGAINST

THE UNITED STATES OF AMERICA

RESPONDENT

C 145-214

ORDER ADMITTING TO BAIL PENDING APPEAL TO CIRCUIT COURT OF APPEAL

Upon the annexed affidavits of JAMES J. HANRAHAN, Esq. and ORLANDO DELLI PAOLI the above captioned defendant duly verified the 21st day of June 1955 and the affidavit of ABRAHAM SOLOMON, Esq. duly verified the 24th day of June 1955 and the defendant ORLANDO DELLI PAOLI having duly filed and served a notice of appeal from a denial of a motion to vacate judgment of conviction and a notice electing not to enter upon the service of his sentence pending appeal from the judgment of conviction rendered herein and from the sentence imposed herein on the 23rd day of February 1955

ORDERED that the defendant ORLANDO DELLI PAOLI be set at liberty upon furnishing a bond in the sum enumerated as follows. . . . .

$ . . . .

during dependence of said appeal in said Circuit Court of Appeals in the SECOND CIRCUIT and until the Mandate of said Circuit Court shall be issued and filed on said appeal and an order entered thereon.

DATED: June 1955

HONORABLE CHIEF JUSTICE OF SECOND CIRCUIT: HON. JOHN M. HARLAN

The petitioner's appeal to the Court of Appeals, Second Circuit, appears to involve simply a question of the credibility of the witnesses who testified on the issue of whether the petitioner's plea of guilty was coerced. Having examined the record I conclude that I would not be justified in granting bail, which was denied by the District Court and twice by the Court of Appeals.

The application for bail is denied.

John M. Harlan,
As Circuit Justice.

July 13/55
Weston, Conn.

[Justice Harlan also issued a "Memorandum" rejecting the original submission of papers in the case. It is typed on his official letterhead. From Box 17, "chamber practice" folder, John Marshall Harlan Papers, Seeley G. Mudd Manuscript Library. Published with permission of Princeton University Library.]

Paoli v. United States (C145-214)

Application for bail pending appeal to the
Court of Appeals for the Second Circuit.

Memorandum.

The papers on this application were left at my summer residence on June 25, 1955. I see no reason why the application should not have been made in accordance with the Rules, namely, by submitting the papers to the Clerk, with proof of service upon the United States Attorney for the Southern District of New York. See Rule 50. The papers are for that reason returned to the attorney for the petitioner. If the application is properly renewed I think that both parties should address themselves to the question of my power to grant bail in the premises, apart from the other questions presented by the application.

John M. Harlan
Associate Justice.

Weston, Conn.
June 27, 1955

[Publisher's note: This opinion was typed on plain sheets of paper. Box 17, "chamber practice" folder, John Marshall Harlan Papers, Seeley G. Mudd Manuscript Library. Published with permission of Princeton University Library.]

UNITED STATES SUPREME COURT

COPY

CHARLES MARCELLO,
Petitioner

vs.

HERBERT BROWNELL, JR.,
Attorney General of the
United States

PETITION FOR A STAY

Loath as I am to interfere with denial of a motion for a stay by a Court of Appeals, in this case I am constrained to determine that since that Court left the appeal before it still to be decided, such a denial for [Publisher's note: "for" probably should be "of."] a stay as was here entered may indirectly frustrate the disposition of the appeal on the merits by allowing the administrative authorities to deport Marcello before the appeal is adjudicated. Counsel agree to bring this view before the Court of Appeals.

/s/ Frankfurter, J.

Aug. 19, 1955

[Publisher's note: Each of the three individual opinions in the *Wise* case was scribbled in the margin of one of the Petitioners' filings. Those handwritten opinions are reproduced below. The filings are not. From O.T. 1954, Entry 30, RG 267, Records of the Supreme Court of the United States, National Archives and Records Administration.]

SUPREME COURT OF THE UNITED STATES

ALBERT WISE, HARRY WISE, and ALFRED STOKES)
)
Petitioners)
vs.)
THE STATE OF NEW JERSEY)
)
Respondent)

No such substantial federal question has been presented as would justify me in interfering with the course set by the Courts of New Jersey. The applications for stays of execution of the sentences of death imposed on the petitioners are denied.

John M. Harlan, Associate Justice

Weston, Conn.
8/25/1955

Upon consideration of the opinions rendered in the Supreme Court of New Jersey, the application for stay of execution, the respondents' answer to them and an oral statement by counsel for the applicants, each of the applications is denied.

Harold Burton, Associate Justice

September 2, 1955

Counsel for petitioners rightly center on the admission of the confessions by the petitioners as the basis of the claim that due process was denied them. After the most indulgent consideration of the claim, I am bound to conclude that the issue turns on an allowable judgment on conflicting evidence which trial court and jury decided against the petitioners and cannot be independently resolved by me. Therefore there was no denial of due process and I must deny the stay.

Frankfurter, J.

September 2, 1955

[Publisher's note: Justice John M. Harlan cited "Memorandum of MR. JUSTICE HARLAN denying a stay of remand order, *City-Wide Comm. for Integration* v. *Board of Education of New York*, March 8, 1965" in his opinions in *Hutchinson v. New York*, 1 Rapp 372 (1965), and *Chestnut v. New York*, 1 Rapp 375 (1966). This presents an interesting question: Was he referring only to the telegraphic memorandum opinion (reproduced on this page), or did he mean to include the thorough "Memorandum to the Conference" he had circulated a week before (reproduced beginning on the next page)? From Box 240, "chamber practice" folder, John Marshall Harlan Papers, Seeley G. Mudd Manuscript Library. Published with permission of Princeton University Library.]

SUPREME COURT OF THE UNITED STATES

Memorandum of MR. JUSTICE HARLAN.

The application for a stay of the remand order is denied. Granting such a stay in this and any further similar cases would result in an unwarranted and intolerable paralysis of state and federal judicial law enforcement. If the questions raised by this case are considered substantial by the Court, they may be treated by reviewing People v. Galamison, ___ F.2d ___, in which the identical legal issues are presented and have been preserved by a stay order issued by the Court of Appeals.

March 8, 1965

CITY-WIDE COMM. FOR INTEGRATION *v.* BOARD OF EDUCATION OF NEW YORK

SUPREME COURT OF THE UNITED STATES

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Goldberg

From: Harlan, J.

Circulated: Mar. 1, 1965
Recirculated: _____

City-Wide Committee for Integration v. *Board of Education of New York.*

Memorandum to the Conference from MR. JUSTICE HARLAN.

I have before me as Circuit Justice an application for a stay, pending certiorari, of the effectuation of a judgment of the Court of Appeals for the Second Circuit remanding to the New York courts a "civil rights" action commenced there by the Board of Education of New York City against the applicant and by the latter removed to the Eastern District Federal Court under § 28 U.S. §1443 (2) (quoted on p. 3, *infra*).

Because of the unusual problems presented by the application, I deem it appropriate to seek the views of my Brethren before acting on it, although my views are pretty clear as to what should be done. For reasons that follow, I think that I should deny the application.

May I ask you to consider this memorandum with a view to discussing the matter at next Friday's Conference.

I.
THE CIRCUMSTANCES OF THE APPLICATION.

The applicant styles itself the "City-Wide Committee for Integration." It is made up of a number of active civil rights organizations in New York City and is led by Milton Galamison. On January 19, 1965, a complaint was filed in a New York court by the Board of Education of New York City seeking to enjoin the City-Wide Committee from proceeding with its planned boycott of New York City's public schools. The particular targets of the boycott were to be the so-called "600"

schools to which unmanageable students are sent for special guidance. The boycott was to be patterned after the one and two-day boycotts, also under Galamison's leadership, in February and September 1964, but the new effort was to last until the Board of Education acceded to the demands of the City-Wide Committee. Plans for the boycott received substantial publicity in New York City and caused much consternation because of the nature of the substandard student body at "600" schools and the apparent lack of responsibility in inducing such students to demonstrate. Public school attendance is compulsory in New York City; the Education Law provides that "no person shall induce a minor to absent himself from attendance upon required instruction … ." The state court issued a temporary restraining order, but on January 21, before the court had heard the merits of the case, the City-Wide Committee removed the case to the District Court for the Eastern District of New York. On January 26, the district judge heard argument on the propriety of the removal, and on January 29 ordered the case remanded to the state court. He did so on the authority of *People* v. *Galamison*, a case handed down by the Second Circuit just three days before, which arose out of Galamison's activities designed to tie up traffic to the World's Fair and which involved the same removal problems as are presented by the *City-Wide Committee* case.

The City-Wide Committee appealed from the remand order. The Second Circuit affirmed *per curiam* on February 18, but stayed the remand to permit an appplication to me for a further stay on the possibility that certiorari would be granted either in this case or in *People* v. *Galamison*. Although the court had itself stayed the remand in *People* v. *Galamison* pending action on the petition for certiorari to be filed in that case, it indicated its view that an extended stay should not be granted in this instance, since extended stays in all cases raising the same removal issues would paralyze law enforcement against civil rights demonstrators in New York until this Court disposes of *People* v. *Galamison*.

The application for further extending the stay of remand in the *City-Wide Committee* case came to me on February 23 and reply papers have since been filed. The temporary stay now in effect will continue until action is taken upon this application.

II.
COURT OF APPEALS' OPINION IN THE GALAMISON CASE.

Galamison and nearly fifty others were named as defendants in prosecutions in Queens County, New York, for various acts which disrupted highway and subway traffic to the New York World's Fair in order to publicize their grievances over what Galamison's removal

petition characterized as "the denial of equal protection of the laws to Negroes in the City, State and Nation with reference to housing, education, employment, police action and other areas of local and national life too numerous to mention." Two others were arrested in Bronx County after passing out leaflets at a public school urging a protest against lack of integration. Eight more were being prosecuted in New York County for staging a sit-in at City Hall in the course of a protest on the same subject. All sought to remove to the federal district court under 28 U.S.C. § 1443(2), which provides:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> • • • • •
>
> "(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

It was appellants' contention that their protests were "under color of authority" derived from the First and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983, all laws, in appellants' view, "providing for equal rights" within the meaning of the statute.

Oversimplifying somewhat, the opinions below suggest three possible views of the statute: (a) The section covers only acts of government officers and those persons assisting them or acting in some way on behalf of the government: (b) acts of private persons may be covered if taken in furtherance of their own personal civil rights: (c) any acts taken in furtherance of civil rights in general or in protest to denials of civil rights to others may be covered. Adoption of the last interpretation would result in reversal of these cases.

Judge Friendly, in a comprehensive opinion, traced the history of § 1443 from its origin in 1866. He indicated, but did not definitively decide, that § 1443 (2) covers only government officers and those persons assisting them or acting in some way on behalf of government. In his view even if acts "under color of authority" include the acts of private citizens seeking to further civil rights by self-help, the phrase would not encompass appellants' acts. To fall within the statutory coverage a person

> "must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional

> provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him.
>
> • • • • •
>
> "Although alleged denial of equal protection in schools and other respects afforded the motivation and was the subject of appellants' acts, neither the equal protection clause nor § 1981 confers 'color of authority' to perform acts which a state alleges to be in violation of laws of general application intended to preserve the peace from disturbance by anyone. The constitutional provision and the statute are addressed to preventing inequality in the treatment of conduct, and to that great purpose alone. They give no constitutional defense, let alone 'authority,' for disregard of laws providing for the equal punishment of disturbers of the peace simply because the disturbances were in the course of protests over alleged denial of equality in schools, housing, or economic opportunity — any more than the Second Amendment bestows 'authority' to disturb the peace in the course of a protest over an alleged denial of the right to keep arms or the Fourth Amendment does so with respect to a protest over police methods."

Judge Friendly goes on to say that a different case would be presented if an act complained of was performed in furtherance of a right to use public accommodations such as is singled out for federal protection by the Civil Rights Act of 1964. He similarly does not prejudge such cases as would be presented if a Negro used self-help to register at a state university or if he picketed in protest over his refusal.

> "But even if such cases should ultimately be held within § 1443(2) — an issue on which we express no opinion, such a construction would not go beyond protests by those, or parents of those, attending or seeking to attend the particular school where the protest took place. None of the petitions here save the two Bronx County cases concerned protests at a school, and there is nothing to suggest that either of these persons was a child or the parent of a child at that school."

Finally, the court ruled that the statutory phrase "any law providing for equal rights" refers to laws "couched in terms of equality, such as the historic and recent equal rights statutes." On this view the right of free

speech, the right to bear arms, and the other provisions of the Bill of Rights which provide for equal rights in the sense that they give all people the same rights, are not laws providing for equal rights as used in the statute.

Judge Marshall dissented on the grounds that (1) the removal petitions were so vague and inartistically drawn that they did not reveal clearly whether appellants fall within the majority's interpretation; and (2) the court was wrong in its view that the Fourteenth Amendment could not provide "color of authority" for some activities.

Judge Friendly, however, did not completely exclude the Fourteenth Amendment as a source of "color of authority." As I read his opinion he leaves open the question whether a person asserting his own personal civil rights — e.g., his right to attend a state university — could use the removal statute, and decides only that the appellants, who were protesting general acts of discrimination against others rather than specific acts of discrimination against themselves, could not make use of the removal statute.

The case now at hand is not distinguishable from *People* v. *Galamison*. None of the people involved in either case appears to have been protesting any personal denial of equal rights, and all asserted the same arguments in favor of removal.

III.
"CERTWORTHINESS" OF THE GALAMISON AND CITY-WIDE COMMITTEE CASES.

In my judgment, based on the opinions and briefs in *Galamison*, neither of these cases should be reviewed. Although there are clearly important questions of interpretation to be resolved in connection with § 1443(2) — e.g., the scope of "color of authority" and whether the section applies only to persons acting for the government — I see no acceptable interpretation which would change the result in either of these cases. At its broadest the statutory coverage should be limited to those who assert their own civil right to equality, and under that view removal in *Galamison* and the present case is not permissible. If Galamison and his confederates could remove, then every suit connected with a civil rights demonstration is removable. Such a substantial shift of authority and workload to the federal courts — let alone impairment of state court jurisdiction in a vital area of state police power — should not be brought about by judicial construction of a century-old statute. It is the kind of matter that should be left for explicit congressional action.

In addition, while *Galamison* is the only recent case construing § 1443, the petitioner indicates that similar litigation is now bubbling in a

number of circuits. Because the "color of authorty" language is obviously difficult of precise definition, and because interpretation of the section can have a large practical effect on the allocation of functions between state and federal judiciaries, I think it wise, if this Court eventually is to deal with the matter, to allow the problems to be explored as fully as possible in the circuits before this Court takes a final position.

IV.
DISPOSITION OF THE STAY APPLICATION.

1. If the Court is ready to accept the view that certiorari should not be granted in either of these cases, the requested stay should of course be denied.

2. If the Court is not prepared, however, to cross that bridge at this stage, I would nonetheless deny the stay, at the same time recognizing that the pros and cons are close.

Weighing in favor of a stay is the possible unfairness in staying the state proceedings in *Galamison* but not here. Furthermore, if the state proceedings are allowed to go ahead in the instant case, prior case-law indicates that the removability question will be foreclosed on direct review of the state decision. See *Metropolitan Casualty Co.* v. *Stevens*, 312 U.S. 563.

Nonetheless, very strong practical considerations seem to me to militate against granting a stay. As the Second Circuit pointed out, if all proceedings against civil rights demonstrators in New York must be stayed until this Court decides the underlying issue either in *Galamison* or the present case, the effect will be an extended paralysis of both state and federal judicial enforcement. While the applicant states in its moving papers that it intends to make "immediate" filings for certiorari in this Court, the authorized time for filing in *Galamison* will not expire until April 25. With another 30 days for the Board's response, the petition for certiorari might not be ripe for consideration until late in May. The petition for certiorari in *City-Wide Committee* would not, in normal course, be ripe for consideration this Term. And if either case were taken, a decision, again in normal course, would not be possible until next Term. Thus, to grant an unconditional stay would entail a "paralysis" of intolerable proportions.

3. Another course would be to grant a stay on conditions that would make it possible to hear and decide the case this Term. This would require setting the case for argument during our April sessions, or on a special day thereafter.

My own view is that, all things considered, the best course is for me to deny the stay. While this might moot the *City-Wide Committee* case, it would preserve the removability issue on the *Galamison* case, if taken, which is really a companion case to this one. Moreover, there is no real unfairness in such a denial, since there is no discriminatory enforcement of state law, no reason to believe there will be any fundamental unfairness in the state proceedings, and this Court will of course be open for review of any constitutional flaws. Further paralysis of state proceedings can thus be avoided, without any true prejudice to anyone.

If any member of the Conference wishes to see the papers on which this application is based, they can be procured from my office.

J. M. H.

March 1, 1965.

[Publisher's note: See 543 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

Nos. 04A360 AND 04A364

MARIAN SPENCER, ET AL. *v.* CLARA PUGH, ET AL.

SUMMIT COUNTY DEMOCRATIC CENTRAL AND EXECUTIVE COMMITTEE, ET AL. *v.* MATTHEW HEIDER, ET AL.

ON APPLICATIONS TO VACATE STAYS

[November 2, 2004]

JUSTICE STEVENS, Circuit Justice.

In two suits brought in the federal District Courts of Ohio, plaintiffs allege that Ohio Republicans plan to send hundreds of challengers into predominantly African-American neighborhoods to mount indiscriminate challenges at polling places, which they claim will cause voter intimidation and inordinate delays in voting.

After taking evidence, the District Courts granted partial relief, reasoning that the "severe burden" that these challengers would place on the rights of voters was not justified by the state's interest in preventing fraud. The courts, however, refused to enjoin the challenge process completely, but, consistently with a memorandum issued by the Secretary of State, ordered challengers to stay out of polling places or (under the other court's order) to remain in the polling places only as witnesses.

While the Secretary of State — the official charged with administering the state's election code — did not appeal the District Courts' orders, various Republican voters, who intervened in the district court proceedings, sought relief from the Sixth Circuit Court of Appeals. Over a dissent, the Court of Appeals granted their motions for an emergency stay. With just several hours left before the first voters will make their way to the polls, the plaintiffs have applied to me in my capacity as Circuit Justice to enter an order reinstating the district courts' injunctions. While I have the power to grant the relief requested, I decline to do so for prudential reasons. Cf. *Socialist Labor Party* v. *Rhoades*, 89 S. Ct. 3, 21 L. Ed. 2d 72 (1968) (Stewart, J., in chambers).

Although the hour is late and time is short, I have reviewed the District Court opinions and the opinions of the Circuit Judges. That

reasonable judges can disagree about the issues is clear enough.

The allegations of abuse made by the plaintiffs are undoubtedly serious — the threat of voter intimidation is not new to our electoral system — but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs' claims.

Practical considerations, such as the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties' submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary type of relief requested here. Moreover, I have faith that the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.

Because of the importance of providing the parties with a prompt decision, I am simply denying the applications to vacate stays without referring them to the full Court.

[Publisher's note: See 543 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 04A378

DEMOCRATIC NATIONAL COMMITTEE ET AL. *v.*
REPUBLICAN NATIONAL COMMITTEE ET AL.

EBONY MALONE, INTERVENOR

ON APPLICATION TO VACATE STAY

[November 2, 2004]

JUSTICE SOUTER, Circuit Justice.

The individual Ohio voter who intervened in this case claimed that the Republican National Committee threatened to violate a consent decree, by challenging Ohio voters named on a list of 35,000 individual names compiled by Republican officials in Ohio in cooperation with the Republican National Committee. She alleged that her right to vote and that of other minority voters would be jeopardized by the anticipated challenges from the Republican side. Yesterday, the District Court found such a threatened violation and issued the injunction requested, a stay of which was denied by a divided panel of the Court of Appeals for the Third Circuit late last night. Following the action that was subject to JUSTICE STEVENS's order in Chambers earlier today in *Spencer* v. *Pugh*, 543 U.S. ___ (2004), the Republican National Committee moved forrehearing or rehearing *en banc*, the latter of which was granted this afternoon by order staying the injunction. The intervenor alone has now applied to me in my capacity as Circuit Justice for the Third Circuit for a stay of the *en banc* order itself, which would effectively reinstate the injunction. Since making the application, she has filed a further pleading disclosing that she has already voted without challenge. Under the circumstances, I have decided against referring the application to the full Court and now deny it.

[Publisher's note: See 544 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 04A773

MULTIMEDIA HOLDINGS CORPORATION, DBA FIRST COAST NEWS *v.* CIRCUIT COURT OF FLORIDA, ST. JOHNS COUNTY

ON APPLICATION FOR STAY

[April 15, 2005]

JUSTICE KENNEDY, Circuit Justice.

This is an application for a stay of orders of the Seventh Judicial Circuit Court of St. Johns County, Florida. The applicant, First Coast News, alleges the orders restrict its publication of the contents of transcripts of grand jury proceedings held in a criminal prosecution for murder. First Coast News is a local television network that has been covering the prosecution. For reasons to be discussed, the application is denied.

I

Two orders are at issue. The first was entered July 30, 2004. It states the court had discovered that copies of the transcript of certain testimony before the grand jury had been released to members of the press as well as to investigators from the St. Johns County Sheriff's office, in apparent violation of Fla. Stat. § 905.27 (2003). Section 905.27 generally prohibits the disclosure of grand jury testimony, with certain exceptions. As relevant here, the order directs that "[n]o party shall further disclose the contents of the transcript of testimony before the Grand Jury to any person not authorized by F.S. 905.27(2)." Order Sealing Transcript, etc., in No. 04001748 CF (Fla. Cir. Ct., July 30, 2004), p. 2, App. in Support of Stay Application, Tab 5 (hereinafter July 30 Order). It further provides that "[a]ll persons who have obtained a copy of the transcript are placed on notice that any broadcast, publication, disclosure or communication of the contents of this transcript is a violation of F.S. 905.27, punishable as a misdemeanor in addition to constituting grounds for Criminal Contempt of Court." *Ibid*. Applicant alleges it received a copy of this order from the court. See Application to Stay Prior Restraint Order 3.

Applicant moved to intervene and set aside the July 30 Order as an unconstitutional prior restraint. This appears to have prompted the trial court to enter a second order. The order, entered August 9, 2004, notes that "[a]t no point in the Court's [July 30 Order] is [applicant] precluded or restrained from publishing matters which are public record, nor is [applicant] enjoined or restrained from broadcasting matters in this case. The [July 30 Order] clearly provides that the parties to this action are enjoined from further disclosing the contents of the transcript of testimony before the Grand Jury to any person not authorized by F.S. 905.27(2). The parties to this action are the State of Florida … and defense counsel." Order on Motion to Intervene, etc., in No. CF04–1478 (Fla. Cir. Ct., Aug. 9, 2004), pp. 1–2, App. in Support of Stay Application, Tab 10 (hereinafter Aug. 9 Order). The court declined to hold a hearing on applicant's motion because "the Court's order does not enjoin the [applicant] from publishing or broadcasting materials that it wishes to publish or broadcast, but rather solely points out that so to do might constitute further violations of criminal law." *Id*., at 2. The court denied applicant's motion to intervene and its motion to set aside the July 30 Order.

Applicant sought review in the Fifth District Court of Appeal of Florida, which denied, without comment, applicant's "Emergency Petition for Writ of Certiorari." On the basis that the Fifth District Court of Appeal's denial is not appealable to the Florida Supreme Court, see Fla. Rule App. Proc. 9.030(a)(2)(A)(ii) (2005), applicant filed with me as Circuit Justice an application for a stay of the orders, urging that they operate as a prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. The application for a stay is denied. It is not sufficiently established on this record that applicant is enjoined by or otherwise subject to the orders in question or that any threat to it is real or substantial; hence it is unlikely that, despite indications that a prior restraint may have been imposed at the time of the first order, four Members of the Court would vote to grant certiorari.

II

Applicant argues that the orders operate as a prior restraint because they threaten prosecution for future disclosures of the transcript and for contempt of court for any future publication. Specifically, the July 30 Order, at 2, places "[a]ll persons who have obtained a copy of the transcript … on notice that any broadcast, publication, disclosure or communication of the contents of this transcript is a violation of F.S. 905.27, punishable as a misdemeanor in addition to constituting grounds for Criminal Contempt of Court." This would apply to applicant, as it fell

within the class of persons who had obtained a copy of the transcript. A threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability. The court's first order was not accompanied by notice or hearing or any other of the usual safeguards of the judicial process. It bears many of the marks of a prior restraint. See *Bantam Books, Inc*. v. *Sullivan*, 372 U.S. 58 (1963).

The first order is of further concern because it singles out this applicant and could be interpreted to place it on notice that publication of grand jury testimony in the underlying case could subject it to prosecution or place it in contempt of court. Assuming that order constituted a prior restraint, however, any chilling effect it had on speech was substantially diminished by the court's second order.

That second order indicates that the court was directing its order only to the conduct of those who are parties to the underlying action. Applicant is not a party. See Aug. 9 Order, at 1 ("The Court's order clearly provides that the parties to this action are enjoined …"); *id*., at 2 ("[T]he Court's order does not enjoin the movant [applicant] in this case …"). In this respect the orders themselves, by their terms, do not prohibit speech by this applicant.

In addition, the second order forecloses interpreting the first order to put applicant on notice that future publication would place it in contempt. It notes that "the Court's order does not enjoin [applicant] from publishing or broadcasting materials that it wishes to … but rather solely points out that so to do might constitute further violations of criminal law." *Ibid*.

To the extent the court's orders might suggest a particular animus toward applicant, that, too, has abated by virtue of the fact that the judge who entered them has retired from judicial service.

Applicant argues that aside from the possibility of being held in contempt, it fears prosecution by virtue of the orders. Although it is true that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings," *Bantam Books*, *supra*, at 68, there is no suggestion that the judge who entered the orders here could institute such a proceeding. In Florida, it does not appear that the court may itself institute a prosecution for a violation of Fla. Stat. § 905.27 (2003). The decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to do so. See *State* v. *Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (citing Fla. Const., Art. II, § 3). See also *State* v. *Johns*, 651 So. 2d 1227, 1228 (Fla. Dist. Ct. App. 1995) ("The decision of whether to prosecute for a criminal offense is a function of the executive authority, not the trial

court"). The court's orders are thus not a prerequisite to prosecution, nor does the application demonstrate that prosecution is any more likely because of them. If prosecutors deemed applicant's future publication to constitute a violation of Fla. Stat. § 905.27 (2003), they would be free to prosecute applicant with or without the court's orders. The court recognized as much when it stated in its Aug. 9 Order, at 2, that "[t]he question of whether the publication or broadcast of this information is a crime, is one which must be left up to further investigation and proper prosecution."

Although the State has not guaranteed applicant immunity from prosecution for future publication of the transcript, it has suggested that further publication will not be prosecuted. See State's Response to Application to Stay Prior Restraint Order 4–5 ("Because the State Attorney did not believe that Petitioner violated the grand jury secrecy statute … further publication of the grand jury transcript would not have resulted in prosecution").

True, informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint. See *Bantam Books*, *supra*. Warnings from a court have added weight, and this too has a bearing on whether there is a prior restraint. If it were to be shown that even the second order might give a reporter or television station singled out earlier any real cause for concern, the case for intervention would be stronger. It appears, however, that any threat once implicit in the court's first order is much diminished. The two orders, issued by a judge no longer in office, appear to have been isolated phenomena, not a regular or customary practice. Cf. *Bantam Books*, *supra*. Under these circumstances, in my view, there is no reasonable probability this Court would grant a writ of certiorari. See *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (POWELL, J., in chambers). [Publisher's note: Normally, references to former members of the Supreme Court are in ordinary roman type, not small caps.] The application for a stay of the orders pending the filing of a petition for a writ of certiorari is denied.

It is so ordered.