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

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

INTRODUCTION

IN-CHAMBERS OPINIONS – HISTORY AND MYSTERIES

Ira Brad Matetsky[†]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[26] *See* Memorandum in *Bisignano v. Municipal Court of Des Moines* (Oct. 1946), Wiley Rutledge Papers, Manuscript Division, Library of Congress ("Rutledge Papers"), Box 154; Memorandum in *Ex parte Standard Oil Co.* ("dictated March 18, 1947"), Rutledge Papers, Box 154; Memorandum in *Rogers v. United States* and two related cases, Rutledge Papers, Box 176 (Oct. 20, 1948); Memorandum in *Bary v. United States* and a related case, Rutledge Papers, Box 176 (Nov. 3, 1948).

[27] Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions,* 6 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (1 J. IN-CHAMBERS PRAC.) 19, 22 (2016) (citing Letter from Judge J. Foster Symes to Charles Elmore Cropley, Clerk of the Supreme Court, November 16, 1948, and letter from Mr. Cropley, by E.P. Cullinan, Assistant Clerk, to Judge Symes, November 18, 1948, in case file, *Rogers v. United States,* O.T. 1950 No. 20, National Archives Supreme Court case files, R.G. 267).

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

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

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

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

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

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Letter/memorandum from Walter Wyatt, Reporter, to Chief Justice Vinson, Aug. 27, 1951, Walter Wyatt Papers, Manuscript Group 10278-b, Albert & Shirley Smalls Special Collection Library, University of Virginia, Charlottesville, Va. ("Wyatt Papers"), Box 119, *reprinted in* 4 Rapp supp. 2, at xx, xxi.

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

[32] *See* JOHN M. FERRIN, SALT OF THE EARTH, CONSCIENCE OF THE COURT 406 (2004) (citing letter from Justice Rutledge to W. Howard Mann, March 1, 1949, Rutledge Papers, Box 32).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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