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A Judge's Life

by Scott D. Makar

"CAN ONE EVER HAVE his or her fill of Richard Posner?"[1]

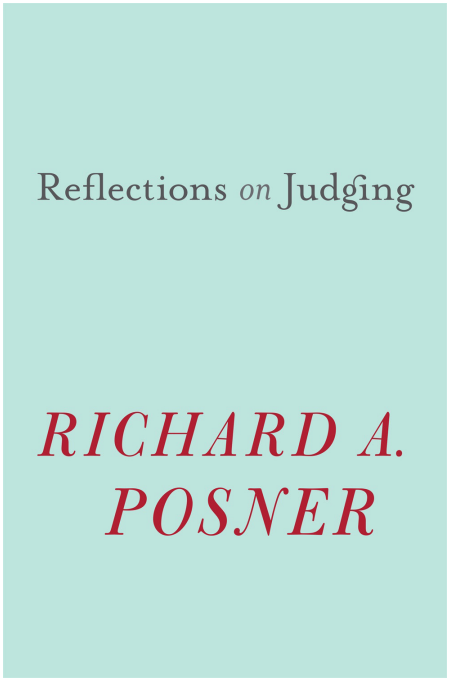
The answer to this question, for many, is "No." For those afflicted with "Posner-mania" — the incessant need to keep up with the writings of Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit — time scarcely exists to read his latest book, opinion, or op-ed, let alone the scholarship and critiques responding to his thought-provoking accounts of law and society as he sees them. And writing a review of a Posner book is a bit daunting because, besides the informational breadth to be digested in any one of his writings, by the time a review is published yet another book or article with some bearing on the topic reviewed appears. Some new offering is always on the horizon. Indeed, as this review goes to press, yet another book, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press), is scheduled for release in January 2016, which will be on the heels of the first detailed biography (and there will probably be others) of the man: *Richard Posner* by William Domnarski (Oxford University Press), to be released on New Year's Day.

Until then, *Reflections on Judging* provides much to mull and dissect,

REFLECTIONS ON JUDGING

By Richard A. Posner

Harvard University Press, 2013



giving readers the ruminations of one of the country's premier intellectuals, much like a friendly, but deeply thoughtful and literate, conversation with your favorite professor about the important issues of the day.[2]

Intertwined throughout is Judge Posner's central tenet that complexity is the bane of the modern federal judiciary, infiltrating from within the system (internal complexity) and overwhelming from without (external complexity).

With its overlay of internal/external complexity, and imbued throughout with Judge Posner's thematic advocacy that realism's rise in the judiciary is the solution for the complexification problem, *Reflections on Judging* is divided into ten chapters. The first — and perhaps the most intriguing to those fascinated with Judge Posner's path to becoming a judge — is autobiographical in nature. Indeed, what most distinguishes *Reflections on Judging* from other Posner books is its more personal reflections (introspections would be too strong a description) on what has driven and guided the career of Richard Posner from his childhood to his appointment to the federal bench, which is the focus of part I of this review. Part II focuses on the internal/external complexity division, and briefly highlights the remaining topics of the book, all of which should be of great interest and usefulness to those who labor in a judicial system.

PART I
BECOMING JUDGE POSNER: THE ACCIDENTAL JURIST

> "A curious feature of my career, rare today because job markets are far more competitive, is that, except when applying for law firm jobs when I was a law student and Supreme Court law clerk (jobs I never took), I've never really sought a job" (p. 22 n.5).

Which takes us to the beginning: who is Richard Allen Posner and how did he end up spending most of his career in the federal appellate judiciary? Chapter 1, entitled "The Road to 219 South Dearborn Street," gives us Judge Posner's summary account of his upbringing, education, and career path, leaving us with a better sense of what "makes him tick," to use an old cliché (unsurprisingly, cerebration and written exposition have always been his first loves). It answers some questions about how his world-views formed (he was a 1970s liberal turned 1980s conservative, now a 21st-century realist), leaving little doubt along the way that he has a wicked sense of humor (more to come) and a latent personal naïveté displaced by his unrelenting empiricism. Most striking is that the major building blocks of his future résumé (Supreme Court clerkship, professorship, and judgeship) were jobs he did not pursue (or have much interest in) and were offered to him unsolicited.

Raised in a New York City home with a "Tiger Mom," ("I must take this opportunity to thank my parents (now long deceased), especially my mother, for having pushed me, from my earliest youth, to excel academically, much as Asian American parents push their kids" (p. 19 n.1)), he skipped his senior year of high school to attend Yale College. He wanted to go to Harvard, and could have if he stayed for his last year of high school, but he "wanted to get on with [his] career" (p. 19). He majored in English, due to the influence of his mom, a high school English teacher who "started reading Homer and Shakespeare to me when I was three years old (maybe earlier)" (p. 19). At Yale, the New Critical approach was in its "heyday," and his senior thesis adviser was in its pantheon, resulting in Judge Posner's lifelong adherence to its principles, which "downplayed biographical and historical approaches to literature, treating the literary work as an autonomous aesthetic object, accessible to understanding and appreciation without the reader's having to know much at all about the author or the author's times" (p. 19). The movement "influenced [his] judicial approach" and made him "a better close reader than [he] otherwise would have been, able to interpret complicated texts" (p. 19).

He entered Harvard Law School with "no burning interest in law," noting that it was a "default career choice" that remains so in large measure. He was neither interested in writing about the law nor in a teaching career, choosing Harvard over Yale because the former "in all its brutishness" was the greater challenge ("it didn't baby the students, as Yale Law School did and does" (p. 20)). Despite the "cold, demanding, and at times nasty" HLS teachers, at the end of the first year he "had the strange feeling that I was markedly more intelligent than I had been a year earlier," developing a "respect for law," particularly "the common law, which dominated the first-year curriculum" (p. 20). His second and third years were less momentous in effect (he skipped classes in the second, causing his grades to decline), and he spent most of his time on and as president of the *Harvard Law Review*, then a "truly meritocratic institution" (p. 20).

Upon graduation, he wrote, "I had no interest in law teaching and [had] not thought of becoming a judge, though I recall dimly having thought that being a federal district judge might be fun. I had no idea how one became a judge if one wanted to be one" (p. 20). He assumed he'd begin the practice of law in New York, but HLS Professor Paul Freund asked him to clerk for Justice William Brennan, who had delegated the task of selecting his two law clerks to the professor. Reflecting on the 1962 Term of the Court, Judge Posner relates: "I have to say at the risk of blasphemy that I found the Supreme Court an unimpressive institution. I was stunned to discover that Supreme Court justices didn't write all their own judicial opinions" (p. 21). Before starting the clerkship, he studied many of Brennan's opinions; initially "impressed" by some of them, he later learned "that the best of them had been written by a former clerk," who was a "brilliant" HLS grad. He observed that the clerkship year was "slow" ("I worked less hard that year than any year since"), leaving time for reading a "great deal of literature," discovering that he "didn't (yet) have much interest in law," and pondering the pursuit of a graduate degree ("I even toyed with the idea (though I quickly abandoned it) of quitting law and getting a graduate degree in English" (p. 21)).

Shortly before he was to start as a law firm associate in a big New York firm, he was offered and accepted (but had not sought) a job as assistant to Federal Trade Commissioner Philip Elman (who had been a law clerk to Justice Felix Frankfurter and worked in the Solicitor General's Office), resulting in further development of his interest in antitrust (acquired by writing an opinion for Justice Brennan). During his time with the commissioner, he developed a "nascent interest in economics," the seed of which arose from his cite-checking an antitrust article by Prof. (later Dean) Derek Bok at HLS that involved the "economic theory of oligopoly" about which Posner was unfamiliar (p. 22).

The next step, one suggested by and "largely arranged" by Commissioner Elman, was an assignment in the Solicitor General's Office, where he

stayed for slightly over two years, arguing "six cases in the Supreme Court"[3] and focusing on "antitrust and regulation," further strengthening his academic interest in the topics (p. 23). As invitations for academic positions came in, Judge Posner had to choose between teaching and the practice of law, selecting the former ("Practice held no appeal for me. I don't remember why, but my guess is that it was a combination of not wanting to continue working for others and not wanting to have to defend positions not my own, but a boss's or a client's" (p. 23)). So in 1968, he was off to Stanford, delayed one year because of his (unsolicited) "appointment to a presidential task force on telecommunications policy" (p. 23), for the start of his academic career, one sparked by a lunch with the law school's dean, a "brilliant and charismatic corporate lawyer named Bayless Manning" who made Posner "think that maybe law professors were more interesting people than other lawyers." ("When he tried to interest me in law teaching, I said that I didn't see myself writing academic articles. He said that didn't matter — law professors could contribute to the law in other ways. Anyone who said that to a law school faculty recruiter today would be instantly dismissed from consideration" (pp. 23-24)). After somewhat serendipitous connections made with Aaron Director and George Stigler, Chicago School economists of preeminence, he was off to the University of Chicago, where his scholarly work catapulted him into the vanguard of the law and economics movement.

As a point of reference, my first exposure to his work was in graduate courses in the early 1980s at the University of Florida (when it had a Ph.D. program in economics, and a good one at that). Much of the chatter at the time was about Posner's influence as an academic star who was setting much of the agenda for the future of the movement (not to mention antitrust policy). His 1973 book, *The Economic Analysis of Law*, was standard issue for a number of graduate and law courses during this time (the book is now in its 8th Edition). It was around this time, in June 1981, that Prof. Posner, also a consultant in the firm of Lexecon, Inc., had yet another providential calling made upon him, this time by William Baxter, a recent Reagan appointee heading the antitrust division of the Department of Justice and former Stanford colleague (the White House "wanted to appoint conservative law professors, believing they'd be more ideological than practicing lawyers" (p. 29)). As Judge Posner relates, "I never thought about becoming a judge" until Baxter called him "out of the blue and asked whether I'd be interested in being appointed to the Seventh Circuit. I said no, and he said that's what he'd thought I would say. But as he was about to hang up I said, Well let me think about it for twenty-four hours, and he said fine" (p. 25).

> "... He was "subjected to very effective cross-examination by a young lawyer," causing the client to be "very annoyed" for having been "yanked around" by the lawyer. "My reaction was, Who needs this? I want to be on the other side of the bench. I want to be the torturer rather than the victim."

That 24 hours turned into a week. What turned a probable and perfunctory No into a halting Maybe and then a Yes? Classic Posnerian logic. The significantly reduced income would be tolerable (his wife concurring) and free him from the boredom of consulting work, much of which "was taken up not with analysis but with pitching our services to clients, since I was the senior member of the firm." He predicted that, even with his new judicial responsibilities, he would have enough time left over to produce "about as much academic writing as I had been doing as a full-time academic" (p. 27). He explained:

> I also thought a federal appellate judgeship would be an interesting and challenging job because of the variety and importance of many federal cases, that I would have an opportunity both to apply economic analysis in a real-world setting and to employ rhetorical methods that would be out of place in academic writing, and that it would be fun to test myself against the great judges of the past. And all this has turned out to be true (p. 25).
>
> I also felt a sense of public duty pushing me to accept the judicial appointment. I was very conservative in the 1970s (after having been a liberal until the late 1960s), in part as a reaction to the disorder of the 1960s and in part under the influence of Chicago-style free-market economics. I had voted enthusiastically for Reagan and I felt that if his government wanted me as an official I shouldn't refuse (p. 26).

A final "petty" factor in his decision-making occurred the day before his visit to the Department of Justice to discuss his possible appointment when he was "subjected to very effective cross-examination by a young lawyer," causing the client to be "very annoyed" for having been "yanked around" by the lawyer (p. 25). "My reaction was, Who needs this? I want to be on the other side of the bench. I want to be the torturer rather than the victim" (p. 25).

The fun was just beginning, starting with an FBI background investigation, which caused a slight "hitch" in the process due to his mother's "check-

ered past. My parents, but especially my mother, were very left wing, and indeed admirers of Joseph Stalin — the day he died was a day of mourning in my home" (p. 27). His mother, a part of a "sinister cabal of middle-aged upper-middle-class suburban women," had been summoned to testify in 1962 to the House Un-American Activities Committee due to her advocacy of nuclear disarmament; she took the Fifth Amendment when "asked whether she had been a member of the Communist Party USA" in the early 1950s (p. 27). The press derided the "investigation of these harmless women" and the Committee soon shut down. By 1981, when the matter was presented to the Justice Department, "it was indifferent" (p. 28). Investigators with the Senate Judiciary Committee, chaired by Sen. Strom Thurmond of South Carolina, raised the issue, asking two questions about his mom: (1) do you agree with her views? and (2) is the Communist Party an "ordinary party like the Democratic or Republican Parties" (p. 28)? Answers of "No" to each cleared the way, with Sen. Thurmond providing assurance that "I would not be asked at my confirmation hearing about my eighty-one-year-old mother, in order to spare her embarrassment. That was very considerate of Senator Thurmond. But I smile when I think about his wishing to spare the feelings of someone he must have regarded as little better than a traitor" (p. 28).

His Senate confirmation hearing, by Judge Posner's account, had its farcical moments. He tells of the opposition of Illinois Sen. Charles Percy, who "had his own choice for the vacancy on the Seventh Circuit and it wasn't me" (p. 28). Sen. Percy could have blocked Judge Posner's confirmation but was assured by the White House that his next candidate would get the next open seat. The Senator called Judge Posner, explaining that his policy was to oppose nominees other than current district court judges, excepting Judge John Paul Stevens, who had been Percy's roommate. ("It did strike me, in my naïveté, as being odd that being one's college roommate was considered a substitute for being a federal district judge as a qualification for an appointment to a court of appeals." (p. 29)). Having never met the Senator, and not knowing what he looked like other than a dated picture, Judge Posner remembers his first encounter:

> We were trundled off to the Hill and there led into the audience section of a hearing room. Shortly after we arrived, a man entered the room who vaguely resembled what I thought Senator Percy looked like, only much older . . . . What struck me was that he entered with his right hand thrust forward and immediately people rose and started shaking it, from which I inferred that he was a politician. Thinking slowly, I decided that a politician who looked like Senator Percy and was where Senator Percy was supposed to be, since he'd agreed to introduce me at my hearing, probably *was* Senator Percy rather than his father, so I went up and introduced myself (p. 30).

Judge Posner is clearly enjoying himself. Sen. Percy's introduction, which is cringe-worthy in today's Borkian world, started off by saying that "[Posner] has written so many articles on so many subjects that he could be hanged for almost any of his views" (p. 30). In his understated manner, Judge Posner notes that "[s]uch praise would today be more than enough to disqualify a judicial candidate" (p. 30). Another chuckle-worthy moment is when Judge Posner realizes that other judicial candidates have brought family members to the hearing (ostensibly to provide verification of their domestic stability), but "it had never occurred to me to invite members of my family to the hearing; apparently it is customary but the Justice Department had neglected to tell me this (for which I am thankful)." (p. 31). When asked by Chairman Thurmond whether he'd brought family, "I answered . . . by saying, 'I am afraid they were not able to come with me.' (I confess I wasn't being honest, as I had never asked them to come, and my wife, at least, could have come.) Thurmond frowned at me and said, a little suspiciously I thought, 'I believe you have two children, Mr. Posner,' which I confirmed" (p. 31). After a few "predictable" questions he had been told beforehand, which was "like being given the answers to the questions on an exam," he was excused. From start to finish, the confirmation of an über-published, "controversial" law professor with "no political backing" and only a "qualified" rating from the ABA took six months.

The latter part of chapter 1 has advice for newly appointed judges, Judge Posner emphasizing that his training in transition to the bench was marked by a two-day seminar with "little content" but much discussion of over "how to designate sections and subsections" of opinions ("I have avoided having to grapple with this profound issue by never dividing my opinions into sections" (p. 32)). He emphasizes the critical decisions that face new judges: whether to write one's own opinions or delegate them to law clerks; how to decide which law clerks to hire; what opinion-writing style to choose; the role of establishing collegiality; and the importance of having experience in conducting trials, if only on an occasional basis. Beyond these basic foundational decisions, *Reflections on Judging* provides new appellate judges with Judge Posner's take on most of the major judicial administration issues of the day, beginning and ending with the challenge of complexity.

PART II
COMPLEXIFICATION

"With the rise of complexity, both technological and institutional, both external and internal (the two types interacting,

magnifying the overall problem), the educational needs of federal judges have grown" (p. 357).

A central theme in *Reflections on Judging* is the complexification of the judicial process with particular focus on the federal judiciary. As appellate judges and court administrators face increased complexity as ever larger caseloads are processed, they must adopt coping mechanisms and apply managerial principles that, by choice, are undergirded by a philosophical view of how appellate judging is to be done. Throughout *Reflections on Judging*, Judge Posner makes the case for a "renewal of legal realism" (p. 14), and against other approaches, particularly legal formalism. In laying the groundwork for his thesis of realism renewal, he draws a distinction between external and internal complexity, the former involving the burgeoning and empirically driven fields of science (e.g., biochemistry, economics, engineering, neuroscience, physics, statistics, and the like) as they apply to fields of law (e.g., antitrust, criminal law, evidence, intellectual property, torts, and so on). External complexities affect the work of judges by dramatically expanding the substantive knowledge required to comprehend, and ultimately decide, modern-day legal questions. Whether the source of complexity be an economic, political, scientific, or technological system, the judge and her staff are disadvantaged because of the increasing gap between legal doctrine, which generally evolves slowly, and the fields of math, science, and technology, whose growth has been exponential.

To deal with challenges that external complications present, *Reflections on Judging* posits that "judicial escape routes" have developed, which allow judges to avoid complex issues or simply to process them in ways that avoid fully understanding their nuances and real-life impacts. One way is to defer a decision by delegating away decision-making authority to trial courts, juries, or administrative officials in executive branch agencies. Another is to employ formalist approaches to judging (ones "premised on the belief that all legal issues can be resolved by logic, text, or precedent, without a judge's personality, values, ideological leanings, background and culture, or real-world experience playing any role" (p. 1)). Yet another is the creation of multifactor tests that increase uncertainty and complexity in expected outcomes. Using specialized jargon, or speaking in a pretentious judicial dialect that obscures public understanding, are also judicial coping tools when a case's complexity outpaces the judiciary's ability to fully comprehend and adjudicate it.

Internal complexity, in contrast, is self-generated within a profession, oftentimes to increase status by creating the perception that what its members "know and do" is complex, if not mysteriously difficult or impossible to comprehend by the laity (p. 4). Judges are not immune; they too "want their calling to be a mystery, and one way to make it so is to complexify what they do" (p. 13). The sources of internal complexity in the judiciary are many, as Judge Posner recounts from his decades on the appellate bench. A litany of topics — such as the size of appellate courts, the increased role of judicial law clerks and other court staff, the quality and content of judicial opinions and the style in which they are written, and judicial decision-making philosophies — fall prey to critique as manifestations of judicial systems driven by self-imposed internal complexification. Much of *Reflections on Judging* deconstructs and decries the institutional responses to increased appellate caseloads and external complexity. For example, why have written judicial opinions proliferated, many being verbose, vague, and poorly written? Why do federal district judges, whose caseloads are enormous, get four staff slots (typically used for three law clerks and a secretary) when federal circuit judges and United States Supreme Court justices — whose docket size has been in free-fall for many years — get five staff slots (typically used for four law clerks and a secretary)? Why is so much time spent on useless formalisms such as citation format and fixated on oftentimes contradictory canons of textual construction?

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Chapters 2 and 3 describe that evolution of size and structure of the federal judiciary over the past 50 years and how caseload, technology, and other sources of external/internal complexity have arisen and been addressed (or avoided). The institutionalization of judicial bureaucracy is a "general feature of the modern American legal system," one that "conduces to hypertrophy, or metastasis, colorfully illustrated by the mindless growth of the *Bluebook* citation manual" (p. 13).

Next, chapter 4 is a robust discussion of the formalist versus realist approaches to judging, including a section entitled "Advice to New Appellate Judges." Judge Posner's advice to appellate judges, new or otherwise, does not end there; instead, the next five chapters (chs. 5–10) can be viewed as primers for how appel-

late judges should adapt to changes that inevitably are being thrust upon the judicial branch, such as Internet research and the use of maps, photographs, and other audio/visual evidence in the appellate process (ch. 5); this chapter, the "Inadequate Appellate Record," is a personal favorite because it highlights the systemic failure of appellate records (and thereby briefs and ultimately judicial opinions) to present contextual facts that are significant when judges decide cases (e.g., "the realist judge wants to know such things as the height, occupancy, density, and proximity of surrounding buildings, the time of day or night, and pedestrian density within the range of the bullet" in a case involving "reckless endangerment by firing a gun in the air" (p. 131)).

In the next two chapters, both dealing with "coping strategies for appellate judges," Judge Posner apprizes the rise and fall of judicial restraint (chapter 6), followed by his critique of the major interpretative methods of the day (ch. 7). It is in this latter chapter that Judge Posner's goal is to discredit both the "dead constitution" approach of Supreme Court Justice Antonin Scalia and Bryan Garner as well as the "living constitutionalism" of Yale Law Professor Akil Amar as a means of highlighting the virtues of the realist approach, which he endorses. It is in this chapter, the book's longest at 58 pages, that Judge Posner takes the most "gloves-off" approach in laying bare why his call to realism is most convincing. Chapter 8, entitled "Make It Simple, Make It New: Opinion Writing and Appellate Advocacy," is a candid guide of the dos, don'ts, and best practices in the craft of judicial opinion writing; it also has a short, but eminently useful, section on tips for appellate lawyers ("short because the subject has recently been exhaustively, and very sensibly, addressed in another book by Justice Scalia and Mr. Garner") (p. 269)).[4] The penultimate chapter (ch. 9) discusses Judge Posner's experience sitting as a trial judge in the district courts; like the rest of the book, it is an enlightening and entertaining romp through the judicial world as Judge Posner has experienced it.

The last chapter, which is followed by a conclusion, provides suggestive reforms beyond those discussed elsewhere in the book. Judge Posner, understandably, sees the need for a more technologically sophisticated federal judiciary, which would include federal judges who are both numerate as well as literate. Short of that, law clerk and staff attorney selection should include technical proficiency so that at least some of the judicial staff are able to assist judges in complex cases. More initial training for new judges, and continued judicial education thereafter, for managing the judicial office and staff is discussed. The relationship between the legal academy and the judiciary, each increasingly divorced from the other by specialization and the decline of academic importance on legal practice (such scholarship is "ever more remote from the culture of legal practice and judicial decision-making" (p. 358)), could be reengineered to provide judicial education on not only technical topics but on basic managerial principles to help judges deal with complexity and bureaucratization, respectively. He concludes by saying, "Judges struggle on one front to manage growing staff, on another to cope with the growing complexity of the activities that give rise to the cases they must decide, and on a third to integrate the two fronts. Many still think they can finesse the need for an empirical understanding of an increasingly complex world by embracing some version of formalist analysis. But that will not work. The path forward is the path of realism" (p. 366). If readers didn't get Judge Posner's message in the first 379 pages, they'll get it at the end: Realism, Baby!

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[1] Ronald K.L. Collins, *Posner Mania — Two New Books Coming this January: One by Posner, the other on Posner*, Concurring Opinions, (Apr. 14, 2015), http://concurringopinions.com/archives/2015/04/posner-mania-two-new-books-coming-this-january-one-by-posner-the-other-on-posner.html (last visited Apr. 27, 2015).

[2] Since *Reflections on Judging* was published, a detailed series of 12 blog posts, called "Posner on Posner," was released, providing a revealing portrait of Judge Posner, based in part on e-mails from him answering questions from the blog's author. *See* Ronald K.L. Collins, *The Complete Posner on Posner Series,* Concurring Opinions, (Jan. 9, 2015), http://concurringopinions.com/archives/2015/01/the-complete-posner-on-posner-series-2.html (last visited May 6, 2015).

[3] The "Posner on Posner" series identified 10 arguments by Posner, nine during the time he was with the Solicitor General's Office and one in 1978. Ronald K.L. Collins, *The Maverick—A Biographical Sketch of Richard Posner: Part I*, Concurring Opinions, (Nov. 24, 2014), http://concurringopinions.com/archives/2014/11/the-maverick-a-biographical-sketch-of-judge-richard-posner-part-i.html (last visited May 6, 2015). Interestingly, moments before his first argument in the Court, he was moved into admission before the Court, his name being mispronounced by his sponsor and the Chief Justice. *See* Oral Argument, *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966) (No. 63), *available at* http://www.oyez.org/cases/1960-1969/1965/1965_63.

[4] Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008).