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A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

covering the 2007 and 2008 Terms

and

previously unpublished or uncollected in chambers opinions from 1854, 1887, 1891, 1906, 1909, 1910, 1912, 1913, 1914, and 1915

with

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

Compiled by

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with

Ira Brad Matetsky

February 2010

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PREFACE

As best we can tell, October Term 2007 was the first Term since 1989 in which no Justice issued an in chambers opinion. In the 2008 Term the in chambers opinion returned: *Conkright v. Frommert* by Justice Ruth Bader Ginsburg and *O'Brien v. O'Laughlin* by Justice Stephen Breyer. Was 2007 a step toward a smaller role for individual members of the Supreme Court, or was it an anomoly, with 2008 being a return to the longstanding, low but persistent writing of the Justices in chambers? We do not know about the future, but we continue to learn more about the past. The bulk of the new material in this addition to 4 Rapp consists of usual crop of discoveries from our ongoing archeological pursuits in the National Archives, the Library of Congress, and other repositories of judicial papers.

And we still need help with *Hooper v. Goldstein* (1929), the only opinion we have yet to track down from the 21 missing opinions listed in Cynthia Rapp's introduction to the first volume in this series.

We continue to follow the conventions we've used in the 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 those 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", 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 *U.S. Reports* citation appears in a "Publisher's note" above each opinion.

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; to William Suter, Clerk of the Court, for his support of this project; to the George Mason University School of Law and its Law & Economics Center for supporting the *Green Bag*; to Susan Birchler and Green Bag Fellow Rob Willey; and to the indefatigable Ira Matetsky, without whom our offerings would be leaner and our work less interesting.

Ross E. Davies
February 20, 2010

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[Publisher's note: Justice Grier's opinion is published before the arguments of counsel in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 422-23 (1856).]

In the Supreme Court of the United States.

THE STATE OF PENNSYLVANIA	)	
v.	)	In Equity.
THE WHEELING AND BELMONT BRIDGE COMPANY.	)	

Before the Honorable R.C. GRIER, one of the judges of the supreme court of the United States.

Whereas, on the 26th day of June, 1854, at the United States court-room in the city of Philadelphia, the State of Pennsylvania, by her attorney-general and counsel, exhibited before me, R.C. Grier, one of the justices of the supreme court of the United States, her bill of complaint in equity against the Wheeling and Belmont Bridge Company, setting forth, among other things, that the said Wheeling and Belmont Bridge Company is about to erect and construct a bridge over and across the eastern channel of the Ohio River at Wheeling, between Zane's Island and the main Virginia shore, at a less elevation than is prescribed by the decree of the supreme court of the United States heretofore rendered against said company on complaint of said State, whereby the navigation of the Ohio River by steamboats of the largest class will be obstructed, to the injury of the said State; and in the vacation of the supreme court the said complainant hath applied to me for an injunction as prayed for in said bill against the said Wheeling and Belmont Bridge Company, and its president, managers, officers, engineers, agents, contractors, and servants, to enjoin them from erecting and constructing a bridge at the place aforesaid at a less elevation than is prescribed by the decree aforesaid, and from doing any act or thing to obstruct the navigation of the Ohio River, as prayed in said bill:

And reasonable notice of said application having been given unto the said Wheeling and Belmont Bridge Company to appear before me, to resist said application, and the proofs and arguments of counsel being heard, it is considered and adjudged that an injunction, as prayed for in the said bill, be, and the same is hereby, allowed. And it is ordered that the writ of injunction of the United States of America be forthwith issued by the clerk of the supreme court of the United States, under the seal of the said court, against the said Wheeling and Belmont Bridge Company, its president, managers, officers, engineers, agents, contractors, and servants, and all persons acting by their instigation, authority, or procurement, or otherwise, commanding and requiring them, and every of them,

under the penalty of the law, that they do forthwith and absolutely desist and abstain from erecting and constructing, or causing to be erected or constructed, any bridge, structure, or device, in, over, or across the eastern channel of the Ohio River, at Wheeling, between Zane's Island and the main Virginia shore, at a less elevation than is prescribed by the decree aforesaid of the supreme court of the United States against said bridge company, entered at the adjourned term in May, 1852, and from stretching, suspending, or placing, or causing to be stretched, suspended, or placed, any iron cables, ropes, wires, or chains, or any timber, structure, material, or thing whatsoever, in, over, or across the said channel, at a less elevation than is prescribed by the decree aforesaid, and from keeping and maintaining any cable, rope, wire, chain, timber, or thing whatsoever, suspended in, over, or across the said channel, at a less elevation than is prescribed by the decree aforesaid, and from doing, or causing to be done, any act or thing to obstruct the free navigation of said channel of the Ohio River.

It is ordered that the marshal of the District of Columbia do forthwith serve said writ.

And the clerk of the supreme court of the United States is directed to file the bill of complainant [Publisher's note: "complainant" should be "complaint".] on which the aforesaid application and allowance are made, and enter this order and issue the writ of injunction above allowed; and also, that he issue the writ of subpoena in chancery, to be served by said marshal, requiring said Wheeling and Belmont Bridge Company to appear, plead, answer, or demur to said bill within ninety days from the service of said writ.

Given under my hand, at Philadelphia, this 26th day of June, 1854.

R.C. GRIER,
Associate Justice Sup. Court U.S.

[Publisher's note: This case should be captioned *Spies v. Illinois*. It is one of the several phases of what is popularly known as "The Anarchists' Case." See 123 U.S. 131, 142 (1887), for the official version.]

MR. JUSTICE HARLAN, to whom the petition was presented on the 21st October, 1887, said, in Chambers:

This is an application for a writ of error to bring up for review, by the Supreme Court of the United States, a judgment of the Supreme Court of the State of Illinois, involving the liberty of one of the petitioners, and the lives of the others. The time fixed for executing the sentence of death is, I am informed, the 11th day of November.

Under the circumstances, it is my duty to facilitate an early decision of any question in the case of which the Supreme Court of the United States may properly take cognizance. If I should allow a writ of error, it is quite certain that counsel would have to repeat, before that court, the argument they propose now to make before me. On the other hand, if I should refuse the writ, the defendants would be at liberty to renew their application before any other Justice of the Supreme Court; and, as human life and liberty are involved, that Justice might feel obliged, notwithstanding a previous refusal of the writ, to look into the case and determine for himself whether a writ of error should be allowed. If he, also, refused, the defendants could take the papers to some other member of the court; and so on, until each Justice had been applied to, or until some Justice granted the writ. In this way, it is manifest that delays might occur that would be very embarrassing, in view of the short time intervening between this day and the date fixed for carrying into effect the judgment of the state court.

As the case is one of a very serious character in whatever aspect it may be regarded, I deem it proper to make an order, which I now do, that counsel present this application to the court, in open session, to the end that early and final action may be had upon the question whether that court has jurisdiction to review the judgment in this case. There is no reason why it may not be presented to the court at its session to-day. Counsel may state that the application is made to the court pursuant to my directions.

[Publisher's note: This case should be captioned *United States v. Cooper*. The original of this opinion was printed as an appendix to the Brief for Plaintiffs in Error, *Shoemaker v. United States*, No. 1197, OT 1892 (filed Oct. 17, 1892), pp. 93-101. The authors of the brief apparently italicized numerous passages to reinforce their arguments. Because the objective here is to reproduce just the work of the Justice, those italicizations have been removed. Another version of the opinion (with insubstantial, mostly typographical differences) was published in an unidentified newspaper, a clipping from which is in the papers of Justice John Marshall Harlan, with the following written in his hand on the back: "Opinion in U.S. vs Cooper &c. — S.C. Dist Col — Rock Creek case". *See* Papers of John Marshall Harlan, Reel 14, Manuscript Division, Library of Congress, Washington, DC; *see also Shoemaker v. United States*, 147 U.S. 282, 290 (1893) (statement by Shiras, J.).]

AT CHAMBERS, WASHINGTON, D.C., *August* 10, 1891.

This is an application upon notice for a writ of error in the case of the *United States* vs. *G.W. Cooper et al.*, pending in the supreme court of this District. The case arose under an act of Congress of September 27, 1890, entitled "An act authorizing the establishing of a public park in the District of Columbia," the first section of which directs that a tract of land lying on both sides of Rock creek, in this District, and within certain limits named in the act "shall be secured as hereinafter set out and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be know by the name of Rock Creek Park: *Provided, however*, That the whole tract so to be selected and condemned under the provisions of this act shall not exceed 2,000 acres nor the total cost thereof exceed the amount of money herein appropriated." (26 *Stat*., 492.)

By the second section a Commission consisting of the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, was created "to select the land for said park, of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said engineer commissioner of the District of Columbia in charge of the public highways, which said assistant shall also act as executive officer to the said Commission."

The third, fourth, and fifth sections of the act are as follows:

"SEC. 3. That the said Commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map

shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined by said Commission and approved by the President of the United States: Provided, That such compensation be accepted by the owner or owners of the several parcels of land.

"That if the said Commission shall be unable by agreement with the respective owners to purchase all of the land so selected and condemned within thirty days after such condemnation, at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

"Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such application, without delay, to notify the owners and occupants of the land, if known, by personal service, and, if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned by appointing three competent and disinterested Commissioners to appraise the value or values thereof and to return the appraisement to the court, and when the value or values of such land are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court upon depositing the appraised value in said court to the credit of such owner or owners respectively, the fee simple shall in like manner be vested in the United States.

"SEC. 4. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

"SEC. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the

part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the Commission."

The sixth section relates to the ascertainment of the cost of the land, including expenses, and the assessment of such cost upon the lands, lots, and blocks situated in the District, "specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate." This assessment being made, it became the duty of the Commission to apply to the court for the confirmation thereof, giving notice by publication of its application. The court, it is provided, "shall have power, after said notice shall have been duly given, to hear and determine all matters connected with said assessment, and may revise, correct, amend, and confirm said assessment, in whole or in part, or order a new assessment in whole or in part, with or without further notice or on such notice as it shall prescribe." The act prescribed the mode in which payment of the assessment for special benefits may be made after it is confirmed by the court and of enforcing such payment by sale.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto the sum of $1,200,000 was appropriated out of any money in the Treasury not otherwise appropriated, one-half of such sum, as well as one-half of any sum annually appropriated and expended for the maintenance and improvement of the park, being made a charge upon the revenues of the District.

The Commission provided for in the second section of the act caused a map of the lands proposed to be taken for the park to be made, filed, and recorded in the public records of the District. Being unable to agree with some of the owners as to price, application was made by it to the supreme court of the District, by petition, in the name of the United States, for the appraisement of the values of such lands as it had been unable to purchase. The court, May 20, 1891, directed the petition to be filed in general term, and ordered that the persons named as defendants or respondents, and all others interested or claiming to be interested in the lands described in the above map, or any part thereof, as occupants or otherwise, to appear in court on or before June 15, 1891, and show cause why the prayer of the petition should not be granted, and why the court should not proceed at that time as directed by the said act of Congress; the order to be published and served upon such of the named defendants as should be found in the District at least seven days before the date above specified.

Certain respondents appeared in court June 15, 1891, and moved that the petition be dismissed upon various grounds, each one of which impeached the constitutionality of the act of Congress and the validity of any proceedings under it. These motions were overruled, the opinion of the court being delivered by Mr. Justice Hagner (*Washington Law Reporter*, *July* 23, 1891). Subsequently the same parties applied for leave to file a demurrer to the petition. This application was denied. Thereupon they prayed in open court the allowance of a writ of error, returnable to the Supreme Court of the United States, to review the judgment of the general term overruling the motion to dismiss the petition. This application was denied. Some of the respondents prayed an appeal from the same order, and that application was also denied.

The court then made an order appointing James L. Norris, N.W. Burchell, and George J. Seufferts (whom it adjudged to be competent and disinterested) as Commissioners to appraise the values of the lands, selected for the park, with directions to return the appraisement into court and perform such other duties as were imposed upon them by the act of September 27, 1890.

This is the case as disclosed by the record upon which the present application for a writ of error is based.

I have no occasion upon this hearing to consider whether the act of September 27, 1890, is in whole or in part unconstitutional and void. If the order denying the motion to dismiss the petition filed by the Commission is final within the meaning of the statute authorizing the reexamination by the Supreme Court of the United States of the final judgments or decrees of the supreme court of the District of Columbia, the respondents making the present application are entitled, of right, to a writ of error and to be heard in the former court upon all questions involving the constitutionality of the act of September 27, 1890, and the validity of that order. The only question, therefore, for me to consider, the value of the matter in dispute being sufficient for the jurisdiction of the Supreme Court of the United States, is whether the order complained of is "a final judgment" of the court below. And this question depends upon the extent of the authority which the supreme court of the District has under that act over the appraisement of the values of the land condemned for the park.

It was suggested in argument that that order involved the substantial rights of the parties as much as any that the court could make in the case; for that order, it is argued, necessarily proceeded upon the ground that the lands in question had been legally condemned to the use of the United States, and that nothing remained, so far as respondents or the court below were concerned, except to ascertain values, provide for the payment thereof, and make an assessment for special benefits. This, it was suggested, must be so if the appraisement of values when returned to the

court and approved by the President be conclusive against respondents without action thereon by the court other than to receive it from the hands of the appraisers.

It is unnecessary to consider whether a writ of error would lie to review the order in question if the act had vested the title in the United States upon the mere return of the appraisement to the court and the approval of it as reasonable by the President; for the act cannot be so construed without ignoring altogether the provisions of another act that must be read with the act of September 27, 1890, for the purpose of ascertaining the intention of Congress in respect to the matters involved in this case. I here refer to the sundry civil appropriation act of August 30, 1890, by the second section of which a board, consisting of certain officers, was constituted with authority to acquire, by purchase or condemnation proceedings, as in that act provided, the land necessary for the Government printing office and the needed storage and distributing warehouses in connection with it. (26 *Stat*., 371, 412.)

The third section of that act is as follows:

"SEC. 3. That in the event it shall be necessary, in order to carry out the purpose of the foregoing section, for the board, as above constituted, to acquire land, said board is empowered and directed to acquire the same by negotiation, where any such land may and can be so acquired and title secured at a price not above a fair relative value as to other lands which have been sold in the immediate vicinity; or if the said board hereby created shall be unable to purchase said land by agreement with any one or more of the respective owners at a reasonable price within sixty days after the passage of this act they are authorized and directed to make application to the supreme court of the District of Columbia, at any general or special term thereof, by petition for the condemnation of such land not so purchased, and for the ascertainment of its value. Such petition shall contain a particular description of the property not so purchased, and selected for the purpose aforesaid, with the name of the owner or owners thereof and their residences, so far as the same may be ascertained together with a plan of the land proposed to be taken; and thereupon the said court is authorized and required to cite all such owners and all other persons interested to appear in said court at a time to be fixed by such court, on reasonable notice to answer the said petition; and if it shall appear to the court that there are any owners or other persons interested who are under disability the court shall give public notice of the time at which the said court will proceed with the matter of condemnation; and at such time if it shall appear that there are any persons under disability either who have appeared or who have not appeared, the court shall appoint guardians ad litem for each such persons, and the court shall thereupon proceed to appoint three capable and disinterested Commissioners to appraise the value

of the respective interests of all persons concerned in such lands, under such regulations as to notice and hearing as to the court shall seem meet. Such Commissioners shall thereupon, after being duly sworn for the proper performance of their duties, examine the premises and hear the persons in interest who may appear before them, and return their appraisement of the value of the interests of all persons, respectively, in such land; and when such report shall have been confirmed by the court the President of the United States shall, if he thinks the public interest requires it, cause payment to be made to the respective persons entitled according to the judgment of the court, and in case any of such persons are under disability or cannot be found, or neglect to receive payment, the money to be paid to any of them shall be deposited in the Treasury to their credit, unless there shall be some person lawfully authorized to receive the same under the direction of the court, and when such payments are so made, or the amounts belonging to persons to whom payment shall not be made are so deposited, the said lands shall be deemed to be condemned and taken by the United States for the public use. And hereafter, in all cases of the taking of property in the District of Columbia for public use, whether herein, heretofore, or hereafter authorized, the foregoing provisions, as it respects the application by the proper officer to the supreme court of the District of Columbia and the proceedings therein shall be as in the foregoing provisions declared."

It is clear that this section must be read into the act of September 27, 1890, so far as it is not inconsistent with the latter act. I perceive no difficulty in giving full effect to every provision in the act of September 27, 1890, after importing into it so much, at least, of the third section of the act of August 30, 1890, as makes the confirmation by the court of the appraisement of values a condition precedent to the vesting of title in the United States. It cannot be assumed that Congress, when it passed the last act, entirely overlooked the express provision in the act of August 30, 1890, that "hereafter, in all cases of the taking of property in the District of Columbia for public use, whether herein, heretofore, or hereafter authorized," its provisions, "as it respects the application by the proper officer to the supreme court of the District of Columbia and the proceedings therein, shall be" as indicated in the third section of that act. On the contrary, it should be assumed that the act of September 27, 1890, was passed intelligently, and therefore in full view of the third section of the act of August 30, 1890, prescribing a general rule applicable by its terms in all cases of the taking of lands in this District for public uses. I am of opinion that the title to the lands condemned for the park will not vest in the United States, nor can possession thereof be lawfully taken by the Government before, at least, the formal confirmation by the court of the appraisement of values.

Independently of the act of August 30, 1890, there is much in that of September 27, 1890, taken alone, showing that Congress did not intend to invest the appraisers with absolute power to determine the values of the land condemned, subject simply to the approval of the President. The act expressly declares that the court below shall have power to hear and determine all matters connected with the assessments for special benefits, and to revise, correct, amend, and confirm such assessment, in whole or in part, and to order a new assessment, in whole or in part; and the provisions relating to the appraisement of values by persons appointed by the court, to the payment of such values through the court to the proper persons, and to the taking of possession under the order of the court tend to show that there was no purpose upon the part of Congress to withhold from the owners of the lands thus condemned for public use all judicial protection whatever in respect to the appraisement of their property. The act makes it the duty of the court "to ascertain and assess the value of the land selected and condemned." It is true that the value is to be ascertained by means of appraisers. But their duty is "to return the appraisement to the court." This appraisement, being so returned, is only a basis of the assessment which the court itself is required to make. The value of the lands cannot be properly said to be assessed until the court confirms the appraisement. Without expressing any opinion as to whether Congress could, consistently with the Constitution, commit to appraisers the whole question of "just compensation" for lands taken for public use, with no power in the court which appointed them or in any other court, by reviewing their action, to keep them within the bounds of the law, it is sufficient to say that the act of September 27, 1890, is not of that character.

Construing, then, the act of Congress as requiring the confirmation by the court of the appraisement of values before title can vest in the United States, I am of opinion that the respondents are not entitled to a writ of error to review the order denying the motion to dismiss the petition filed by the Commission. It is not a final judgment that will sustain a writ of error. It is true that by force of the act of Congress the lands in question were condemned for public use when the map of the lands selected for the park was filed in the proper office. But that result was not produced by any order of the court below. The order allowing the petition to be filed, the order overruling the motion to dismiss that petition, and the order appointing appraisers have not divested the title of the owners nor disturbed their actual possession. The title cannot, under the act, pass from them to the United States until (among other steps required to be taken) the appraisement is returned to and confirmed by the court. Without such confirmation the merits of the case as to the respondents will not be determined, for until then it cannot be said that the value of the lands condemned have been ascertained and assessed. The order now sought to

be re-examined upon writ of error is, therefore, not final, "because it does not dispose of the entire controversy between the parties," (*Keystone Iron Co.* vs. *Marlin* [Publisher's note: "*Marlin*" should be "*Martin*".], 132 *U.S.*, 91, 93; *Lewisburg Bank* vs. *Shuffey* [Publisher's note: "*Shuffey*" should be "*Sheffey*".], 140 *U.S.*, 445). What has been done is interlocutory only, and there can be no final judgment within the meaning of the statute until that is done which, under the act, divests the respondents of their title.

The application for the writ of error is, consequently, denied.

JOHN M. HARLAN,
Associate Justice Supreme Court United States

[Publisher's note: This case should be captioned *New England Water Works Co. v. Farmers' Loan and Trust Co*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

February 5, 1906.

Hon. James Hamilton Lewis,
Law Department,
City of Chicago.

Dear Sir:

I have your favor of the 31st. ult., enclosing petition for appeal by the New England Water Works Company and International Trust Company, in the case of New England Water Works Company et. al. v. Farmers' Loan and Trust Company et.al., decided by the Circuit Court of Appeals, Seventh Circuit, on February, 7, 1904, as stated in your petition.

I am not aware of any statute giving a right of appeal to the Supreme Court of the United States, in cases of this kind, from a Court of Appeals except under the act of March 3, 1891, 26 Stat. 828 vol. 1, U.S. Comp. Stat. (1901), 549, in which appeals and writs of error from the Circuit Court of Appeals to the Supreme Court are required to be sued out within one year after the entry of the order, judgment or decree sought to be reviewed. As your petition shows that the judgment of the Circuit Court of Appeals was entered February 7, 1904, time for granting a writ of error or appeal seems to have expired. If there is any other or different statute, I would be glad to consider it upon my attention being called thereto.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *New England Water Works Co. v. Farmers' Loan and Trust Co*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

February 20, 1906.

Honorable James Hamilton Lewis,
Department of Law,
Chicago.

Dear Mr. Lewis:

Referring to your petition for an appeal to this court on the question of jurisdiction in the cause of New England Water Company v. Farmers' Loan and Trust Company et. al., decided in the Circuit Court of Appeals for the Seventh Circuit: having examined the same, I have reached the conclusion that no appeal lies from the Circuit Court of Appeals to this court, and I think the case of Cochran and the Fidelity and Deposit Company v. Montgomery County, 199 U.S., 260, is decisive of the matter. In that case, while it was held that the cause was originally improperly removed from the State court and that the Circuit Court should not have entertained jurisdiction, it was nevertheless held that the jurisdiction of the Circuit Court as exercised was dependent entirely upon diversity of citizenship, and therefore the judgment of the Circuit Court of Appeals was final and the writ of error could not be maintained. Thereupon this court, deeming the question involved in that case of sufficient importance, granted a writ of certiorari. If you are right that there was no separable controversy in your case, the case should not have been removed. But it is equally true as in the Cochran case, that the jurisdiction of the Circuit Court upon the removal and "as exercised" in that court was dependent entirely upon diversity of citizenship. It is therefore not a case in which under the Circuit Court of Appeals act an appeal lies to this court from the Court of Appeals. I think there is another objection necessarily fatal to your right of appeal. The appeal from the Circuit Court to the Circuit Court of Appeals was upon the whole case, including jurisdiction. That court did not certify the jurisdictional question to this court, but passed upon the whole case, merits and jurisdiction. In such case, I am of opinion that no appeal lies from a decree of the Circuit Court of Appeals. Robinson v. Caldwell, 165 U.S., 359.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Thomas v. South Side Elevated Railroad Co*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

March 5, 1906.

Mr. George W. Thomas,
4039 Lake Avenue,
Chicago.

My dear Sir:

The Chief Justice has referred to me your application for a petition for the allowance of a writ of error to the Supreme Court of Illinois, in the case of Thomas v. South Side Elevated Railroad Company decided in the Supreme Court of Illinois, October 1905. As per the opinion of Mr. Justice Boggs, printed copy of which is enclosed with your communication. The matter comes to my attention because of the fact that the case arises in the seventh circuit, to which I am assigned as a Justice of the Supreme Court.

I am compelled to disallow your application as the point upon which the case was decided in the Supreme Court of Illinois presents no federal question. Whether a corporation has forfeited its charter by reason of a failure to construct its road in the time limited in the statutes and otherwise failed to comply with the requirements of its charter, your Supreme Court holds, can only be determined by a direct proceeding on the part of the State. This holding deprives you of the federal right as such questions are wholly within the jurisdiction and determination of the State. The record presents no attempt to take private property without compensation, or other deprivation of right as covered by the Fourteenth Amendment to the Constitution of the United States. In this view of the matter, the petition for writ of error must be denied.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Roller v. Murray*. The original of this opinion (in two parts) was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

Nov., 17, 1909.

General John E. Roller,
Harrisonburg, Va.,

My dear General Roller :-

I have examined the petition for writ of error and the record and other papers which you left with me this morning in the case of John E. Roller v. Mary E. Murray et al., decided in the Supreme Court of Appeals of Virginia. I am unable to find that any Federal right was specially set up and denied in the course of the proceedings in the State court as is required by Section 709 of the Revised Statutes of the United States in order to lay a foundation for a writ of error from the Supreme Court of the United States. The question of the validity of the contract was a question of State law. The denial of the right to amend your bill was not set up as a violation of rights secured by the Federal Constitution, nor, in my opinion, was the refusal to permit the amendment a denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States. Entertaining these views, I am constrained to deny the application for a writ of error.

I have returned your papers to the clerk of the court here, and no doubt he will hold them subject to your order.

With personal regard,
I am,
Very truly yours,
/s/ William R. Day

Nov. 19, 1909.

General John E. Roller,
Harrisonburg,
Virginia.

Dear General Roller:-

I have your favor of the 18th inst. I am at a loss to know why you did not receive my letter written on the afternoon of the day of your call upon me, and in which I stated the grounds upon which I was constrained to

deny your application for a writ of error in the case of Roller v. Murray et al. I had examined the case of Hovey v. Elliott, 167 U.S., as that case was referred to in your application.

I am entirely familiar with the cases to which you refer in your letter of the 18th instant. I remain of the same opinion, as I stated to you in my letter of the 17th, that no Federal question was made in the case and properly set up, as is required by section 709 of the Revised Statutes of the United States.

For fear that my letter of the 17 inst., may not have reached you – I enclose herewith a copy thereof, and remain,

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Day v. Louisiana Western Railroad Co*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

Jan., 25, 1910.

Mr. Paul A. Sompayrac,
Sompayrac & Westerfield,
610 Hennen Building,
New Orleans, La.,

My dear Sir :-

I have your favor of the 18th inst., concerning the case of Mrs. Annie Day vs. Louisiana Western Railroad Company. On yesterday I received the papers by express, and have examined the record and assignment of errors in the case.

I am of the opinion that the record does not present a Federal question upon which a writ of error can be allowed from this court to the Supreme Court of Louisiana under section 709 of the Revised Statutes of the United States. A perusal of the opinion delivered in the Supreme Court of Louisiana shows that the judgment of the court rests upon a ground ample to sustain the judgment not involving any Federal question. Under such circumstances it is well settled that a writ of error will not lie from the Supreme Court of the United States to the State court.

I have this day forwarded to you the package of papers, by express, which you sent to me several days ago.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Roller v. Murray*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

January 31, 1912.

General John E. Roller,
Harrisonburg, Virginia.

My dear General:

I have your letters of the 19th and 23rd inst., also the papers in the application for a writ of error to the Supreme Court of Appeals of Virginia in the case of Roller versus Murray.

I have carefully examined the same and am unable to find a question decided against you which will permit the Supreme Court of the United States to allow a writ of error to the Virginia Court. In deciding that you were not entitled to recover upon a quantum meruit for services rendered in the litigation described, the Virginia court decided a question of general law in accordance with its own view. In so doing, it did not violate any provision of the constitution of the United States. Note, in this connection, Pennsylvania Railroad Company versus Hughes, 191 U. S., 477, 486.

In refusing to permit the amendment asked for, there was no denial of federal right such as lays the foundation for review here.

In short, I am not able to discover in the record that you bring yourself within the provisions of Section 709 of the Revised Statutes of the United States, giving the right of the Supreme Court of the United States to review the highest court of a state, where rights of Federal creation are especially set up and denied.

I return herewith the papers and application, which you sent me.

Permit me to thank you for your kind message of sympathy.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Roller v. Murray*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

Dec. 3, 1913.

My dear General:

I have your favor of the 29th ult., and also the records and brief in your case against Murrary [Publisher's note: "Murrary" should be "Murray".] et al., application for writ of error to the Supreme Court of Appeals of West Virginia.

I have given the records careful examination and consideration, and am unable to find that the Supreme Court of Appeals in reaching its decision denied any Federal right set up by you, giving you the right of review, under section 237 of the Judicial Code, by this court.

I have handed the papers to the Clerk of the Supreme Court, who will hold them subject to your order.

Very truly yours,
/s/ William R. Day

General John E. Roller,
Harrisonburg, Virginia.

[Publisher's note: This case should be captioned *Chesapeake Western Co. v. Murray*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC.]

Dec. 15, 1913.

General John E. Roller,
Harrisonburg, Virginia.

My dear General Roller:

I have examined the additional matters to which you called my attention with reference to your application for a writ of error to the Court of Appeals of the State of West Virginia.

I am of the opinion that the decision upon the dissolution of the injunction in the Virginia court in the case of The Chesapeake Western Company vs. Mary H. Murray, dissolving the injunction theretofore granted, was not an adjudication final in its character, so that the West Virginia court erred in refusing to give the effect to it for which you contended. It is true that you set up this decision and brought it to the attention of the West Virginia court, but I am of opinion that the West Virginia court in refusing to give it the effect desired by you did not deny a federal right in the sense in which it is required to lay the foundation for judicial review in this court. In view of the state of the litigation in the Virginia courts at the time I think it is obvious that the Circuit Court of Rockingham County, in dissolving the injunction, did not thereby intend to adjudge or in fact adjudge the merits of the controversy in your favor, and I think the decision of the West Virginia Court of Appeals was so clearly right upon this record as not to make a substantial ground for review in this court.

I say this without prejudice to your right to apply to any other judge of the court, if you see fit to do so, and have left the papers with the Clerk of the court, subject to your order. I return herewith your memoranda and citation of authorities.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Sulzer v. Sohmer*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 4, Manuscript Division, Library of Congress, Washington, DC.]

November 24th, 1914.

Honorable Wade H. Ellis,
Southern Building,
Washington, D.C.

My dear Mr. Ellis:

I have your favor of the 23rd instant, inclosing copy of the opinion of the Court of Appeals of New York in the Sulzer case. I also note your observations concerning the matter, and have examined the record and briefs sufficiently to enable me to reach a conclusion in the matter of the two applications for a writ of error from the Supreme Court of the United States.

First, as to the proposed review of the judgment of the impeachment court in New York, as you are aware, the Supreme Court does not review judgments except when rendered in the exercise of judicial power, and where this court has the power to compel the lower court to execute a judgment rendered upon appeal or writ of error. The decisions to this import are numerous. I am not aware of any means by which, should the Supreme Court reverse the judgment of the impeachment court, it could make such judgment effectual by any writ or process. Without enlarging upon this, I think there is no authority to review the judgment of the court of impeachment.

Second, as to the proposed writ of error to the Supreme Court of New York which was entered upon the remittitur from the New York Court of Appeals, an examination of the opinion of the Court of Appeals shows that it rests upon non-Federal grounds adequate to support the judgment. I cannot agree that these grounds are so frivolous that they should be disregarded. I therefore reach the conclusion that the application for the writ of error to the New York Supreme Court should be denied.

I return herewith the papers and documents which you left with me.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Burgess v. Pere Marquette Railroad Co*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 4, Manuscript Division, Library of Congress, Washington, DC.]

May 28th, 1915.

Mr. John Gibson Hale,
Attorney and Counsellor,
Marquette Building,
Chicago, Illinois.

Dear Sir:-

I have your favor of the 26th instant, with accompanying papers in the matter of your application to me for the allowance of a writ of error, in the case of Burgess v. Pere Marquette Railroad Company. I have examined the record, and have given consideration to the suggestions which you made in the oral application and in the brief which accompanies your letter received today.

I am of opinion that the Supreme Court of Michigan, in the various rulings dismissing the case for want of compliance with its rules, and in refusing to reinstate the same upon your application, did not, in view of the facts disclosed in the record, deny to your client the due process of law secured by the 14th Amendment to the Constitution of the United States, and that this is so clear that it will not justify the allowance of a writ of error to bring the record and judgment of the Supreme Court of Michigan to the Supreme Court of the United States.

I have lodged the papers with the Clerk of the Supreme Court here, and he holds them subject to your further order.

Very truly yours,
/s/ William R. Day

[Publisher's note: This case should be captioned *Burgess v. Pere Marquette Railroad Co*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 4, Manuscript Division, Library of Congress, Washington, DC.]

May 31st, 1915.

Mr. John Gibson Hale,
Attorney and Counsellor,
Marquette Building,
Chicago, Illinois.

Dear Sir:-

I have your favors of the 28th and 29th instant, and have given the same consideration.

I see no reason to change the conclusion which I announced to you in my telegram of the 28th, as to the propriety of allowing writ of error in the case of John J. Burgess vs. Pere Marquette Railroad Company; nor do I think the case one of that character in which I should ask the entire court to consider the question of allowance of the writ of error.

Very truly yours,
/s/ William R. Day

[Publisher's note: The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 4, Manuscript Division, Library of Congress, Washington, DC.]

SUPREME COURT OF THE UNITED STATES.

The State of Ohio, ex rel.
George D. Hile, a tax-payer,
Plaintiff in-error,

-vs-

Newton D. Baker, Mayor of the
City of Cleveland, Ohio, a
municipal corporation, Thomas
Coughlin and W. F. Thompson.

This petition for allowance of writ of error is denied. There is no reference in the petition to the Constitution of the United States, except the allegation that Section No. 121 of the Cleveland charter is in contravention of the Constitution of the United States. This general reference is insufficient to raise a Federal question. Farney v. Towle, 1 Black, 350; O'Neill v. Vermont, 144 U.S. 323, 335; Harding v. Illinois, 196 U.S. 78, 83.

Reference to constitutional questions for the first time in the assignment of errors will not afford a basis for bringing the case to this court. Cleveland and Pittsburgh Railroad Company v. City of Cleveland, Ohio, 235 U.S. 50.

/s/ William R. Day,
Associate Justice
U.S. Supreme Court

December 15th, 1915.

[Publisher's note: See 556 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 08-810 (08A884)

SALLY J. CONKRIGHT ET AL. *v.* PAUL J. FROMMERT ET AL.

ON APPLICATION FOR STAY

[April 30, 2009]

JUSTICE GINSBURG, Circuit Justice.

Sally L. Conkright, Administrator of the Xerox Corporation Pension Plan, et al., have reapplied for a stay of the mandate of the United States Court of Appeals for the Second Circuit. In their initial application, filed October 16, 2008, the applicants sought a stay pending the filing and disposition of their petition for certiorari. The Second Circuit's decision in their case, 535 F.3d 111 (2008), they asserted, was erroneous, created a Circuit conflict, and would cause irreparable harm if given effect. Without a stay, the applicants explained, they would be required to make additional payments to dozens of pension plan beneficiaries — money that could prove difficult to recoup if this Court were to grant certiorari and rule in their favor.

Acting in my capacity as Circuit Justice, I denied the stay application on October 20, 2008. Denial of such in chambers stay applications is the norm; relief is granted only in "extraordinary cases." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Specifically, the applicant must demonstrate (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm [will] result from the denial of a stay." *Ibid*. In addition, "in a close case it may be appropriate to 'balance the equities' — to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Ibid*. I earlier determined, taking account of the Second Circuit's evaluation, that this case did not meet the above-stated criteria.

The applicants seek reconsideration based on a change in circumstances. Specifically, after I denied their initial application, the applicants filed their petition for certiorari, and, on March 2, 2009, the Court called

for the views of the Solicitor General (CVSG). The Solicitor General has yet to respond. According to the applicants, a stay is now in order because the Court's invitation to the Solicitor General — a step taken in only a small fraction of cases — establishes a "reasonable probability" that certiorari will be granted.

Our request for the Solicitor General's view, although relevant to the "reasonable probability" analysis, is hardly dispositive of an application to block implementation of a Court of Appeals' judgment. CVSG'd petitions, it is true, are granted at a far higher rate than other petitions. But it is also true that the Court denies certiorari in such cases more often than not. Consideration of the guiding criteria in the context of the particular case remains appropriate.

A "reasonable probability" of a grant is only one of the hurdles an applicant must clear. Relief is not warranted unless the other factors also counsel in favor of a stay. The Court's invitation to the Solicitor General does not lead me to depart from my previous assessment of those factors. With respect to irreparable harm, the applicants urge that, should they prevail in this Court, they may have trouble recouping any funds they disburse to beneficiaries. But they do not establish that recoupment will be impossible; nor do they suggest that the outlays at issue will place the plan itself in jeopardy. Cf. *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim ofirreparable harm" (internal quotation marks omitted)).

Accordingly, the request for a stay is denied.

It is so ordered.

[Publisher's note: See 557 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

Nos. 09A194

STEVEN O'BRIEN, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER *v.* MICHAEL O'LAUGHLIN

ON APPLICATION FOR STAY

[August 26, 2009]

JUSTICE BREYER, Circuit Justice.

This case arises on an application made to me in my capacity as Circuit Justice. The Commonwealth of Massachusetts seeks a stay of the mandate or, in the alternative, imposition of bail and other conditions on the release of respondent. Respondent was convicted in state court for burglary and assault offenses arising from the severe beating of a woman in her home. On appeal, his convictions were reversed for insufficient evidence by the intermediate appellate court and then reinstated by the Supreme Judicial Court. Respondent then filed a petition for a writ of habeas corpus in the District Court. The District Court denied the petition. The Court of Appeals reversed the District Court, granted respondent's habeas petition, and ordered respondent's immediate and unconditional release. 568 F.3d 287 (CA1 2009). The Court of Appeals denied the Commonwealth's motion for a stay of the mandate or, in the alternative, for the imposition of bail and eight other conditions of release.

The Commonwealth now applies to me for the same relief. Respondent opposes the application for a stay.With respect to bail and the other eight proposed conditions of release, respondent opposes only the Commonwealth's request for $100,000 in bail. Respondent asserts that his family and friends will be able to raise only$10,000 on his behalf.

There is a presumption of release pending appeal where a petitioner has been granted habeas relief. See *Hilton* v. *Braunskill*, 481 U.S. 770, 774 (1987); Fed. Rule App. Proc. 23(c); this Court's Rule 36.3(b). However, this presumption can be overcome if the traditional factors regulating the issuance of a stay weigh in favor of granting a stay. These factors are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, which, in this context, means that it is reasonably likely that four Justices of this Court will vote to grant the

petition for writ of certiorari, and that, if they do so vote, there is a fair prospect that a majority of the Court willconclude that the decision below was erroneous; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton*, *supra*, at 776; *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

With respect to the first factor, the Commonwealth has not yet filed a petition for certiorari, but has indicated what its arguments will be when it does file a petition. Having examined the Commonwealth's tentative arguments, I do not find it reasonably likely that four Justices of this Court would vote to grant a petition for certiorari to decide this case, or that there is a fair prospect that this Court will reverse the decision below. The remaining factors weigh respondent's liberty interest in release against the Commonwealth's interests in continuing custody and preventing respondent's flight, as well as the interest in preventing danger to the public. The Commonwealth's interest in continuing custody is strong given that respondent has a lengthy remaining sentence extending to 2050. However, the Commonwealth has made no showing that he poses an especial flight risk or danger to the public. Respondent's liberty interest in release is particularly substantial given that it is not reasonably likely that this Court would grant a petition for certiorari filed by the Commonwealth. In sum, principally because of the unlikelihood that certiorari will be granted in this case, I do not find that the presumption in favor of release is overcome by the traditional stay factors. I will therefore deny the Commonwealth's application for a stay.

I will, however, order imposition of bail and other conditions of release to be determined by the District Court. As I have said, the parties agree as to eight of the Commonwealth's proposed conditions of release. The bail imposed must be a practicable amount that respondent can reasonably be expected to raise. Absent further order from this Court or the undersigned, the conditions and bail determined by the District Court shall remain in effect until the deadline for filing a petition for certiorari has passed or, if such a petition is filed, until final resolution of the case by this Court. See this Court's Rule 36.4.

Accordingly, the application for a stay is denied. The stay issued on August 24, 2009, is hereby vacated.

It is so ordered.

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