Judging in Chambers: The Powers of a Single Justice of the Supreme Court

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JUDGING IN CHAMBERS: THE POWERS OF A SINGLE
JUSTICE OF THE SUPREME COURT

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A relatively obscure power of individual federal judges, including Supreme Court Justices, is the power to grant interim relief to a litigant pending appellate review of a lower court’s judgment or order. Individual Justices routinely use this power, exercising virtually unfettered discretion to determine the interim outcome of cases during the months and years it can take for the appellate process to conclude. In some cases, an individual Justice has the power to decide if a case will be kept in a posture in which appellate review is even possible. This Article explores this power, largely focusing on the Supreme Court level, and offers a critical assessment of its use as a matter of both constitutional theory and sound judicial policy. Article III vests the judicial power of the United States in courts, not judges, and this Article traces this historical practice of judges ruling from chambers, rather than from the bench, to argue that the powers of a single judge are limited to emergency situations and quasi-administrative tasks. The Article then argues that the current procedures regarding applications for interim relief should be altered so that the decisions are generally made by multi-member courts rather than individual judges or Justices.

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I. Introduction

On a late-summer day in 1970, three men wearing business suits and carrying briefcases hiked six miles into the wilderness of central Washington State. As their appearance might have suggested, these were not ordinary hikers. The trio consisted of two civil-rights lawyers from Portland, Oregon, and their law clerk. They had set out into the woods that day to find Justice William O. Douglas and to apply to him for a temporary restraining order on behalf of their clients. The Supreme Court had ended its term months earlier, and Justice Douglas was in Washington on a ten-day camping trip near his summer home in Goose Prairie, more than ten miles from the nearest telephone. With assistance from U.S. Forest Rangers, who had spotted Justice Douglas’s campsite by plane, the lawyers were able to track down Justice Douglas and his party. They presented their case to the Justice in a fifteen-minute oral argument, and left a 1.5-inch thick petition for him to review. Justice Douglas indicated a particular tree stump and told the lawyers that they would find his decision there the next day. Only one of the original three was physically able to make the hike back the next day, but sure enough, a single sheet of paper was waiting for him on the designated stump. In a one-paragraph opinion, Justice Douglas denied the application.

This is a far cry from what most lawyers think of as Supreme Court litigation. The lush green wilderness of Washington State is quite distant, in more than one sense, from the imposing white-marble Supreme Court building in Washington, D.C. The common idea of what
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goes on in a case at the Supreme Court is this: the nine Justices read the parties’ briefs, sit together to hear oral arguments in open court, retreat to their private conference to deliberate, carefully draft and redraft their opinions, and, finally, return to the bench to announce their decision. Yet applications to individual Justices—like the application to Justice Douglas—are a substantial part of the Supreme Court’s business. These applications include requests for bail, writs of habeas corpus, injunctions, stays of execution of lower-court judgments, and extensions of time for filing a petition for a writ of certiorari.

While hiking into the woods to apply to a Justice for relief is unusual,10 litigants do submit applications to individual Justices on nearly a daily basis; the story of the Portland lawyers captures many of the issues that these individual applications raise. On the one hand, it seems that Justice Douglas may have reached the right outcome in this case, in the sense that he did what the full Supreme Court would have done—in spite of his personal views to the contrary—and thus saved the time and effort of the other eight Justices. The applicants sought a temporary restraining order against the local police in Portland on the grounds that violent police tactics to break up certain protests were chilling the protestors’ free speech rights.11 Justice Douglas noted in his opinion that “[u]nder Dombrowski v. Pfister,[12] applicants make out a strong case for federal protection of their First Amendment rights.”13 This did not settle the matter, however, because:

Dombrowski, a five-to-two decision decided in 1965, is up for reexamination in cases set for reargument this fall. If the present case were before the Conference, I am confident it would be held pending the cases to be reargued. Hence, as Circuit Justice, I do not feel warranted in

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10. These were not the last litigants to track down Justice Douglas at his summer home in Goose Prairie to obtain interim relief. Congresswoman Elizabeth Holtzman’s attorneys met with Justice Douglas in August 1973 in a local courtroom near Goose Prairie and argued that he should vacate a stay of a District Court’s order enjoining the U.S. military from bombing Cambodia. See JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 414–16 (1980). Although Justice Marshall had denied Holtzman’s application just a few days earlier, see Holtzman v. Schlesinger, 414 U.S. 1304 (1973) (Marshall, J., in chambers), Justice Douglas did vacate the stay on renewal of the application before him, see Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (Douglas, J., in chambers). Six hours later, Justice Marshall “overruled” Justice Douglas after individually conferring with the other Justices via telephone. See Schlesinger v. Holtzman, 414 U.S. 1321 (1973) (Marshall, J., in chambers); see also SIMON, supra, at 417. For additional discussion of the Holtzman litigation, see infra text accompanying notes 125–143.

11. Cogswell, supra note 1.


13. Dexter, 400 U.S. at 1207 (internal citation omitted). The Court had held in Dombrowski that the general rule that a federal court would not enjoin a state criminal prosecution would not apply in situations in which the prosecution would have a “chilling effect” on free expression. See Dombrowski, 380 U.S. at 486–87.
taking action contrary to what I feel the Conference would do.  

The cases up for reargument that Justice Douglas was referring to were \textit{Younger v. Harris}\textsuperscript{15} and \textit{Boyle v. Landry},\textsuperscript{16} and the Supreme Court did in fact end up overruling the relevant portion of \textit{Dombrowski} that might have entitled the applicants before Justice Douglas to the relief they sought.\textsuperscript{17} Justice Douglas wrote the lone dissent.\textsuperscript{18} Thus, in denying the application, Justice Douglas had used his insider’s knowledge of what was happening at the Court and applied that knowledge to decide the application as the full Court would have, even though his own views were quite to the contrary.\textsuperscript{19}

On the other hand, whether Justice Douglas should have even been ruling on this application is doubtful. His action in ruling on, rather than dismissing, the application raises questions about both process and jurisdiction. A single Justice’s opinion—in an ex parte proceeding, issued after reviewing a 1.5-inch thick petition and with only hours to reach a decision—does not comport with the idea of careful reasoning and group deliberation that the legal community expects from the Supreme Court. Justice Douglas did not have the opportunity to hear from the other party in the case, to consult with the other Justices or his law clerks, or to do any kind of legal research.

Furthermore, in the modern scheme of the federal judiciary, a Justice of the Supreme Court should not have the function, except in the most extreme of circumstances, of deciding whether or not to issue a temporary restraining order in a case pending before a lower federal court.\textsuperscript{20} The Supreme Court is devoted to settling important issues of federal law, not issuing temporary restraining orders. Nor is there a clear source of authority by which Justice Douglas could have issued a restraining order. Individual Justices of the Supreme Court have specific and narrowly circumscribed powers to grant interim relief in cases that are awaiting Supreme Court review. The Portland lawyers

\textsuperscript{14} \textit{Dexter}, 400 U.S. at 1207.
\textsuperscript{15} 401 U.S. 37 (1971).
\textsuperscript{16} 401 U.S. 77 (1971).
\textsuperscript{17} See \textit{Younger}, 401 U.S. at 53; see also \textit{Boyle}, 401 U.S. at 81 (citing \textit{Younger} and reiterating its holding).
\textsuperscript{18} See 401 U.S. at 58 (Douglas, J., dissenting in both \textit{Younger} and \textit{Boyle}).
\textsuperscript{19} Indeed, Justice Douglas’s reputation as a staunch defender of free speech rights, see L.A. Powe, Jr., \textit{Justice Douglas, the First Amendment, and the Protection of Rights, in “He Shall Not Pass This Way Again”: The Legacy of Justice William O. Douglas} 69, 69 (Stephen L. Wasby ed., 1990), along with his geographic proximity, is probably why the Portland lawyers made the difficult hike to seek him out, rather than attempt to track down a more accessible Justice.
\textsuperscript{20} As discussed in Part II.D infra, the Supreme Court should grant interim relief, including temporary restraining orders, to keep a case that is likely to review from becoming moot.
were not seeking Supreme Court review—in fact, they were still awaiting review in the court of appeals, which had agreed to expedite its review of their case but denied interim relief. Justice Douglas, in denying the application, implied that he had the power to grant it. This raises the serious question of why a single Justice should have the power to overrule the views of a multi-judge panel of a federal court of appeals—or perhaps even a court of appeals sitting en banc.

This Article explores the formal powers of Justices of the Supreme Court, not in their capacities as members of the Court, ruling from the bench, but rather in their individual capacities, ruling “in chambers.” The focus of this Article is on the power to grant interim relief because, under modern practice, this is the most interesting and significant way in which Justices act in their individual capacities. Justices have several other powers in their individual capacities that are of lesser practical importance. First, they may grant extensions of time for certain filings, but these applications are usually granted and the role of the Justice is quasi-administrative. Second, Justices may grant bail and writs of habeas corpus, but these powers are never exercised in modern practice. In contrast with these other powers, Justices frequently dispose of applications for stays and other interim relief in their individual capacities and, in doing so, they exercise considerable power with nearly unfettered discretion. Because appellate review of a case can take months or years, the effect of a lower court’s judgment while a case makes its way through the appellate process can have drastic implications for the parties. In some cases, where the full Court simply lacks the time to convene and decide a case on the merits before it would

22. A dismissal of the application would have been an acknowledgement of his lack of power to grant the requested relief.
24. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.5, at 399 (9th ed. 2007). Although, by statute, only a Justice can grant an extension of time for filing a petition of certiorari, the Supreme Court Clerk’s office is empowered to grant extensions of time for filing briefs on the merits, see SUP. CT. R. 30.4, illustrating the quasi-administrative nature of time extensions.
25. See STERN ET AL., supra note 24, § 17.15, at 884–85 (“[B]ail practice before individual Circuit Justices has become largely obsolete.”); id. at 885 n.64 (“[I]t is not clear that a Circuit Justice has ever granted an application for bail since the Bail Reform Act of 1984”); id. § 11.3, at 662 (noting that neither the Supreme Court nor an individual Justice has granted a writ of habeas corpus since 1925). But cf. Lewis v. Chia, No. 04A-400 (U.S. Nov. 12, 2004) (O’Connor, J., in chambers) (granting application to modify order of court of appeals granting bail to habeas petitioner). The power of a single Justice to grant a writ of habeas corpus is of theoretical importance in understanding the relationship between Congress’s power to abolish the lower federal courts, its power to limit the Supreme Court’s appellate jurisdiction, and the Suspension Clause of the Constitution. See Edward A. Hartnett, The Constitutional Puzzle of Habeas Corpus, 46 B.C. L. REV. 251 (2005) (discussing these issues).
become moot, the decision of a single Justice will have the same effect as a decision on the merits.\footnote{26. Justices will typically decline to grant interim relief when there is no prospect of Supreme Court review before a case will become moot, see, e.g., infra text accompanying notes 428-435 (discussing \textit{Marks v. Davis}), but there are a few instances in which Justices have issued interim relief in such cases. \textit{See, e.g.,} Western Airlines, Inc. v. Int’l Broth. of Teamsters, 480 U.S. 1301, 1309–10 (1987) (O’Connor, J., in chambers) (staying lower court’s injunction against corporate merger where completion of merger would moot claims on the merits); \textit{see also} Breswick & Co. v. United States, 75 S. Ct. 912, 915 (1955) (Harlan, J., in chambers) (“I do not see how I can properly escape the responsibility of weighing the competing equities and granting a stay if I find that on balance the scales are strongly tipped in that direction [even if granting a stay would moot the appeal].”). A single Justice may also rule on the merits of a case in deciding a stay application when a lower court’s order denying a stay is pending Supreme Court review. See, e.g., Griffin v. County Sch. Bd., No. 592 (U.S. Sept. 30, 1963) (order granting stay of judgment) (Brennan, J., in chambers); \textit{see also} Griffin v. County Sch. Bd., 375 U.S. 391, 392 (1964).}


The practice of granting interim relief raises several questions, which the remainder of this Article addresses. The Article proceeds as follows. Part II discusses in more detail the scope of the powers of the Supreme Court and individual Justices thereof to grant interim relief and how those powers are exercised in modern practice. This Part demonstrates that the Supreme Court Justices have assumed a broad power to grant interim relief in their individual capacities. The Justices generally act on applications for interim relief in chambers and only refer such applications to the full Court in a very limited set of circumstances. Part III discusses the appropriate standard for granting interim relief pending appellate review. Interim relief serves two different goals: keeping a case in a reviewable posture and minimizing the expected error costs of
the lower court’s judgment to the parties in the case. The appropriate standard will depend on which of these two interests the decision-maker will pursue. Although it is possible for a decision-maker to pursue both interests simultaneously, this Article argues that the structure of the federal judiciary makes it appropriate for lower courts to focus on minimizing expected costs while the Supreme Court should focus solely on keeping cases in a reviewable posture. This is consistent with both the statutory language authorizing the Supreme Court and the Justices thereof to grant interim relief and the role of the Supreme Court as an institution devoted to deciding important questions of federal law, not correcting errors in adjudication by lower courts.

Part IV addresses the role of individual Justices, arguing that the assumption of broad powers by individual Justices under modern practice is undesirable and perhaps unconstitutional. Multi-member courts serve as an important check on arbitrariness and abuse of power and there are constitutional limitations on the extent to which a single Justice or judge can act in lieu of a multi-member court. These constitutional limitations reflect an important safeguard against the potential for the arbitrary exercise of judicial power. The Constitution vests the judicial power in “courts,” not judges, and requires that there be only “one supreme Court.”

The constitutional text is unclear on when, if at all, a single judge or Justice, as opposed to a “court,” may act, but an examination of historical practice in Great Britain and the early United States demonstrates two types of situations in which such action is justified. First, because superior courts had very brief terms, single judges could act when the courts were in vacation to safeguard important liberty interests that would otherwise be unprotected, by granting bail or writs of habeas corpus. Second, to relieve the courts of a substantial administrative burden, single judges could act on certain quasi-administrative matters that required a minimum of judicial discretion, such as allowing appeals or amendments to pleadings.

Based on this analysis, this Article concludes that the Supreme Court’s current practice regarding applications for interim relief—generally ruling on them in chambers and referring to the full court in rare circumstances—is backwards. The Justices should almost always refer applications to the full Court and should act in chambers only when a true emergency prevents the full Court from being able to take action quickly enough for that action to be meaningful. The availability of advanced communications technology should make such emergencies rare. However, when an emergency does arise, for instance in the event

of a natural disaster or terrorist attack, individual Justices may certainly grant interim relief, as well as bail and writs of habeas corpus, and also may assume many of the powers reserved to the full Court.\footnote{33}

II. The Scope of the Powers of a Justice in Chambers to Grant Interim Relief

A. Sources of the Power

The most specific statutory source for the authority of individual Supreme Court Justices to grant interim relief is the power to stay the execution of a judgment under 28 U.S.C. § 2101(f).\footnote{34} This subsection authorizes individual Justices, as well as a judge on the court that issues a particular judgment, to stay the execution of the judgment “for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.”\footnote{35} The statute applies to judgments issued both by lower federal courts as well as state courts, so long as the judgment “is subject to review by the Supreme Court on writ of certiorari.”\footnote{36}

Section 2101(f) is, by its plain language, limited in several respects. First, it applies only to final judgments and thus does not allow the Court to issue a stay involving review of an interlocutory judgment or order.\footnote{37} Justices have occasionally gotten around this limitation, for instance, by interpreting liberally the term “final judgment” in First

\footnote{33. See generally Ross E. Davies, A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court, 90 MINN. L. REV. 678 (2006) (arguing that Congress has a broad power to act to preserve the Supreme Court’s continuity).
35. Id. The text of the subsection in full is:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Id.
36. Id.
37. The Justices have asserted the power to stay an interlocutory judgment or order, see STERN ET AL., supra note 24, § 17.7, at 857–59, but the source of this power is unclear, see id. at 858–59 (attempting to identify the source of the power to stay an interlocutory judgment or order).}
Amendment cases involving interlocutory orders that might amount to a prior restraint if the applicant was forced to wait for a final judgment.\footnote{38} Second, § 2101(f) only allows a Justice to grant a stay “for a reasonable time to enable the party aggrieved to obtain a writ of certiorari.”\footnote{39} This provision suggests both that a Justice may grant interim relief only for a limited duration of time, and also only for the limited purpose of preserving the Supreme Court’s ability to rule on the petition for certiorari and on the merits should the Court grant certiorari. Third, § 2101(f) applies only to cases that come to the Supreme Court on a writ of certiorari, not to cases on direct appeal.

Before 1948, a stay on appeal to the Supreme Court was available as of right, by way of supersedeas, in cases at law, and in the discretion of a federal court or judge in cases in equity.\footnote{40} The party seeking a stay had to give security covering the judgment and any damages or costs that would result from the stay should the judgment be affirmed.\footnote{41} The statutes authorizing stays on appeal were repealed when Congress revised the Judicial Code in 1948,\footnote{42} but the House Report accompanying the revising legislation indicates that Congress intended to leave the matter to be covered by the Supreme Court’s rules.\footnote{43} Those rules do not distinguish between cases on direct appeal or on certiorari, and with the virtual nonexistence of the Supreme Court’s appeal docket under current law,\footnote{44} any distinction that might exist is only of theoretical import.

A broader statutory grant of power to issue stays and injunctions comes from the All Writs Act, which authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”\footnote{45} Unlike § 2101(f), this section is broad enough to cover interlocutory judgments or orders,

\footnote{38} See, e.g., Nat’l Broad. Co. v. Niemi, 434 U.S. 1354 (1978) (Rehnquist, J., in chambers) (denying stay of order requiring broadcaster to stand trial for state-law tort claims arising from broadcast of a television drama, but assuming jurisdiction to grant); Neb. Press Ass’n v. Stuart, 423 U.S. 1327 (1975) (Blackmun, J., in chambers) (granting a stay on the grounds that state supreme court’s delay in reviewing lower court’s order restraining media coverage of a criminal trial rendered it a “final judgment”).

\footnote{39} 28 U.S.C. § 2101(f).

\footnote{40} See Reynolds Robertson & Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States § 411, at 825 (1936).

\footnote{41} See id. at 826.


\footnote{43} H.R. REP. NO. 80-308, at 520 tbl.6; see also Stern et al., supra note 24, § 17.45, at 854 & n.22; Recent Case, 62 Harv. L. Rev. 311, 312 (1948). Sup. Ct. R. 23 covers stays in cases under direct review as well as certiorari review.

\footnote{44} See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (eliminating nearly all of the Supreme Court’s mandatory jurisdiction).

as well as cases coming up to the Supreme Court on direct appeal. It authorizes not only a stay, but also other relief, such as an injunction, that may be necessary to preserve the Court’s jurisdiction. Some Justices have cautioned, however, that obtaining an injunction from a Justice in chambers requires a greater showing than does a stay sought pursuant to § 2101(f).

Although the power to issue extraordinary writs under § 1651 is granted to the Supreme Court itself, individual Justices have invoked this section to grant interim relief in chambers. Indeed, one Justice has said that the All Writs Act is the only statutory authorization for a single Justice, or the Supreme Court as a whole, to issue injunctive relief. Another view, however, is that § 2101(f) itself authorizes a single Justice to issue an injunction pending Supreme Court review in a case where there is nothing to stay (e.g., the judgment is in favor of a defendant and thus there is nothing to execute), but interim relief is still necessary to maintain the status quo pending appellate review—such as when an applicant is seeking review of a lower court’s decision to deny, dissolve, or modify an injunction.

A broad view of the power of individual Justices under § 1651 is dubious. The plain text of the statute strongly suggests that an individual judge or Justice in chambers may not exercise the extraordinary writ power vested in the federal courts qua courts. The statute grants powers to issue extraordinary writs to the “Supreme Court and all courts established by Act of Congress” in subsection (a). Single Justices and judges are mentioned separately in subsection (b), which grants them the power to issue an “alternative writ or rule nisi,” which demands a significantly higher justification than that described in the § 2101(f) stay cases cited by the applicant. (citations omitted). Additionally, the Supreme Court’s own rule, derived from the All Writs Act, does not authorize single Justices to issue injunctive relief.

For most of U.S. history, individual Justices explicitly had statutory

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48. See, e.g., Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n, 479 U.S. 1312, 1312 (Scalia, J., in chambers) (“A Circuit Justice’s issuance of . . . a writ [of injunction]— which, unlike a § 2101(f) stay, does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts—demands a significantly higher justification than that described in the § 2101(f) stay cases cited by the applicant.” (citations omitted)).
51. See ROBERTSON & KIRKHAM, supra note 40, § 414, at 835–36.
53. See id. § 1651(a) (“An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.”).
54. See SUP. CT. R. 20; see also STERN ET AL., supra note 24, § 17.4, at 854.
authority to issue injunctions (and writs of ne exeat) “in cases where they might be granted by the Supreme Court.”55 This statute was originally enacted as Section 5 of the Judiciary Act of 1793.56 It was repealed on the grounds that the Rules of Civil Procedure addressed the issue,57 although those rules have never provided for the issuance of an injunction by a single Justice.58 Rule 62(g) only states that the Rules do not limit any such existing powers.59 The Rules instead expressly grant the power to grant interim relief pending appeal to the district courts.60 The Reviser’s Notes to § 1651, the All Writs Act, indicate that “the powers of a justice or judge in issuing writs of ne exeat were changed and made the basis of subsection (b)” of that section.61 The Notes make no mention, however, of the former power of a Justice to issue an injunction.

The conclusion from this history, to the extent one can be made, is that the power of individual Justices to issue injunctive relief may exist, but it must have a source other than § 1651 on its own.62 Beginning in 1954, the Supreme Court’s own rules did include a provision with language similar to that of the former Section 5 of the Judiciary Act of 1793,63 but this rule was omitted from the 1990 revision to the rules.64 Whether this change was intended to affect the scope of the power of a single Justice to issue an injunction, however, is unclear.65

Furthermore, Section 5 of the Judiciary Act may have been enacted only to empower a single Justice to act when the full Supreme Court was

59. FED. R. CIV. P. 62(g) (“The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”); see also ROBERTSON & KIRKHAM, supra note 58, § 438, at 893 n.10.
60. See FED. R. CIV. P. 62(c).
62. See STERN ET AL., supra note 24, § 17.4, at 854 (“[I]t would be wise to clarify the injunctive power of the individual Circuit Justices by restoring the pre-1990 language [to the Supreme Court Rules].”)
64. See STERN ET AL., supra note 24, § 17.4, at 853; id. § 17.7, at 858–59. The Justices themselves have not suggested that any of these developments have reduced their powers to grant interim injunctions. See id. § 17.4, at 853.
65. See id. § 17.4, at 853–54; ROBERTSON & KIRKHAM, supra note 58, § 438, at 893 n.10.
in vacation or otherwise unable to act.\textsuperscript{66} Otherwise, the Section might very well be unconstitutional.\textsuperscript{67}

The full scope of the powers granted in subsection (b) to issue an alternative writ or rule nisi is unclear. Although some, including Professor James William Moore, have argued that subsection (b) is an independent source of authority for an individual Justice to issue a stay, pending either appeal or certiorari,\textsuperscript{68} the more accurate reading of the statute, given the historical background of these types of writs, may be that § 1651 “contemplates a two-step procedure,” in which a single Justice may issue a show-cause order requiring a response from the nonapplicant party under § 1651(b), but only the Court as a whole may decide on the merits in issuing any writ under § 1651(a).\textsuperscript{69}

A case cited by Professor Moore for the proposition that § 1651(b) authorizes a Justice to issue interim relief actually supports the “show cause” theory. In that case, \textit{Pennsylvania v. Wheeling & Belmont Bridge Co.}, the Court was reviewing an order by Justice Grier, in chambers, enjoining the reconstruction of a bridge.\textsuperscript{70} Justice Grier had done so, however, only after the Bridge company had failed to respond to the notice of the application for an injunction.\textsuperscript{71} Without any response, Justice Grier had little reason not to grant the injunction. Furthermore, the application for an injunction was made while the Supreme Court was in vacation,\textsuperscript{72} and the inability of the Court to act provided further support for Justice Grier’s order. Several of the Justices questioned whether or not Justice Grier had the power to issue the injunction, although the full Court did not reach the issue.\textsuperscript{73} If Justice Grier’s injunction was valid, it was due to Section 5 of the Judiciary Act of 1793,\textsuperscript{74} a provision which is technically not still in force.\textsuperscript{75}


\textsuperscript{67} See infra Part IV.

\textsuperscript{68} See JAMES WM. MOORE, MOORE’S JUDICIAL CODE ¶ 0.03(53), at 603 (1949) (“By virtue of [§ 1651(b)] an individual Justice of the Supreme Court can give interim relief pending action by the full Court, as by granting or staying an injunction.” (footnotes omitted)); Recent Case, supra note 43, at 312; see also ROBERTSON & KIRKHAM, supra note 58, § 438, at 893 n.10.


\textsuperscript{70} 59 U.S. (18 How.) 421 (1855).

\textsuperscript{71} Id. at 436.

\textsuperscript{72} Id.

\textsuperscript{73} Id. (“Some of the judges also entertain doubts as to the regularity of the proceedings in pursuance of which the injunction was issued.”).

\textsuperscript{74} Compare id. at 452–54 (Daniel, J., concurring) (arguing that this provision did not authorize Justice Grier’s order), with id. at 449 (McLean, J., dissenting) (arguing that it did).
An additional source of power for individual Justices to issue stays applies in the context of federal habeas corpus review of state prisoners. A Justice or judge may, under 28 U.S.C. § 2251, order a stay of any state “proceeding,” including the execution of a death sentence, against a state prisoner whose federal habeas petition is pending. The habeas petition must be pending before the Justice or judge issuing the stay, which would presumably prevent a Justice from issuing a stay under § 2251 (but not under another statute) when a lower court has yet to rule on the habeas petition.

In addition to the statutory authorizations, there may be some basis for federal courts, inherent in the nature of the judicial power Article III confers on them, to grant interim relief to preserve their jurisdiction. Federal courts certainly possess at least some powers that are “inherent in the concept of a court.” The most widely accepted example of such an inherent power is the contempt power. Another, more controversial, example is the inherent power to issue writs of habeas corpus. The “power of federal appellate courts to keep a case in

75. See supra text accompanying notes 55–61.
78. See Degen v. United States, 517 U.S. 820, 823 (1996) (“Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.”); Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (“It has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” (alteration in original) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812))); 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2904, at 500 (2d ed. 1995) (discussing the “inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment”); Felleman & Wright, supra note 66, at 1001; cf. James E. Pfander, Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals, 78 TEX. L. REV. 1433, 1451–59 (2000) (arguing that the Constitution requires supremacy of the Supreme Court over other federal courts and that this supremacy requirement implies the Court’s supervisory power to issue prerogative writs of mandamus, prohibition, certiorari, and habeas corpus). But see Edward A. Hartnett, Not the King’s Bench, 20 CONST. COMMENT. 283 (2003).
79. Note, supra note 69, at 324 n.2; see also sources cited supra note 78.
80. See RONALD L. GOLDFARB, THE CONTEMPT POWER 23 (1963); see also Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (disclaiming all jurisdiction not affirmatively granted to the federal courts but explaining that “[t]his opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions”)
“reviewable posture” may be another such inherent power, although this is a controversial view that currently has little support in judicial or academic commentary.

B. Current Practice

1. In General

The Supreme Court receives each Term somewhere between approximately 1,000 and 1,200 applications addressed to individual Justices. This number has been remarkably stable over the past few decades, even as the number of petitions for certiorari filed each year has ballooned. In the early 1980s, the number of applications to individual Justices was around 1,200 per term, within the range of the past few years. The number of such applications was much lower in the 1960s, however.

The vast majority of these applications—almost 80%—are applications for extensions of time, mostly time to file petitions for certiorari. Of the remaining 20% of applications, most are applications for stays or similar interim relief, although there are also several dozen applications for bail and some for original writs of habeas corpus.

By Supreme Court Rule, an application for a stay must be made to the Circuit Justice responsible for the Circuit covering the geographic territory in which the lower court is located. If the appropriate Circuit Justice is unavailable, the Rules provide that the application will be “distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior

82. Note, supra note 69, at 324 n.2.
83. E-mail from Danny Bickell, Staff Attorney, U.S. Supreme Court, to author (May 15, 2007, 16:21:11 EDT) (on file with author). In recent years, the number of applications per term has ranged from 1,006 in October Term 2001 to 1,236 in October Term 2005. Id.
86. See Felleman & Wright, supra note 66, app. B at 1021–24. There were 532 total applications in October Term 1960. Id.
87. E-mail, supra note 83.
88. A statute requires each circuit to have one Justice designated as the Circuit Justice for that Circuit. See 28 U.S.C. § 42 (2000). The U.S. Code does not specify that stay applications must go to the Circuit Justice (nor does the statute specify any particular role for a Circuit Justice)—that is purely a requirement of the Supreme Court’s own rules.
89. SUP. CT. R. 22.3.
Justice.”

These rules are mainly intended to prevent litigants from filing an application with whichever Justice they think will be most likely to rule favorably on their application—a practice referred to as “Justice shopping.”

Before an applicant seeks relief from the Supreme Court or a Justice in chambers, the applicant generally must attempt to obtain the requested relief from a lower court. Once an application is properly before a Justice, one of the Justice’s clerks is typically assigned to the application. The clerk will review the papers, and usually write a brief memo to the Justice with a recommended disposition of the application. Most applications do not take much time to review—only a matter of minutes. Deference to the decision of a lower court or judge is high, resulting in the denial of most applications. Applications in high-profile or complex cases take up more time, perhaps a full day. Even with these more time-consuming applications, the Justices, and the full Court if the application is referred to it, are often able to act within no more than a day.

A Justice has the power to grant or deny the application, or the Justice may refer the application to the full court. Referrals are not the norm, however. A Justice will refer an application only if the application raises “important or complex questions.” A Justice may be especially reluctant to refer an application to the full Court during the summer months or at other times of the year when the Justices are traveling.

90. Id.
91. See id. R. 23.3 (“Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.”). For an example of a situation in which a Justice granted relief despite the failure of the applicant to seek relief from a lower court first, see Western Airlines, Inc. v. International Brotherhood of Teamsters, 480 U.S. 1301 (1987) (O’Connor, J., in chambers). Justice O’Connor stayed an order by the court of appeals enjoining a merger that was scheduled to occur only twelve hours after the order was issued. Under the circumstances, she concluded that seeking relief from the court of appeals would have been “both virtually impossible and legally futile.” Id. at 1304.
92. See Edward Lazarus, Closed Chambers 28–29, 119 (1998). Some of the information in this subpart is based on interviews with current and former Supreme Court staff. The procedures will vary somewhat from chambers to chambers.
93. See Scali, supra note 85, at 1023.
95. See Stern et al., supra note 24, § 17.2, at 850 (“Justices often deny applications within 24 hours after they are filed.”). The Supreme Court has gained a special competence in managing stay applications in capital cases. The Court has staff members monitor all pending death penalty sentences and has much of the information the Justices might need ready to go in case there is a last minute stay application. See Lazarus, supra note 92, at 119–23.
96. Sup. Ct. R. 22.5.
97. Stern et al., supra note 24, § 17.12, at 868.
The Supreme Court has developed special procedures for stay applications in capital cases due to the fact that human life is at stake, and due to the great potential for controversy and disagreement among the Justices as well as the public. A Circuit Justice will automatically grant a stay in any capital case coming up on direct review. In a capital case coming up on collateral review, the Circuit Justice will refer the application to the full Court for disposition whenever possible.103

The practice of referring applications in capital cases appears to have developed sometime in the late 1970s shortly after the Court upheld the constitutionality of the death penalty in Gregg v. Georgia.104 In the 1960s, Justices rarely referred a stay application in a capital case to the full Court.105 However, research by Professor Ross Davies has suggested that the Justices would confer on capital stays, even if the disposition was officially made by an individual Justice in chambers.106

("Because several of my colleagues are out of the country, I have decided to rule on the matter myself rather than refer it to the Conference.").

100. See, e.g., Scali, supra note 85, at 1042.
101. See Meredith v. Fair, 83 S. Ct. 10 (1962) (Black, J., in chambers). Justice Black asserted that he had “the power to act alone,” but he reported that he had consulted with each of the other Justices and they had agreed both that he had the power to act in his individual capacity and that the stay should be vacated. Id. at 11.
102. STERN ET AL., supra note 24, § 18.3, at 900; see also, e.g., Cole v. Texas, 499 U.S. 1301 (1991) (Scalia, J., in chambers) (“I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari.”).
103. Telephone Interview with Troy Cahill, Former Staff Attorney, U.S. Supreme Court (Feb. 15, 2007). For a discussion of the processing of stay applications in capital cases, see LAZARUS, supra note 92, at 119–29.
105. In October Term 1960, the Justices referred only 4 out of 29 stay applications in capital cases to the full Court. Felleman & Wright, supra note 66, app. B at 1022.
106. See Ross E. Davies, Preface to the First Edition of 4 A COLLECTION OF IN CHAMBERS
The Justices have occasionally alluded to engaging in this sort of procedure in high-profile or complex cases.\(^{107}\) It remains unclear how regular this practice of informal consultation was in capital cases. In any event, the practice was largely unknown to the public as the applications were officially disposed of in chambers. By 1976, however, capital punishment had become a much more controversial issue on the Court and in American society,\(^{108}\) and this led to a need for different procedures.

The *Gregg* litigation itself demonstrated the potential for stay applications in capital cases to be a divisive force among the Justices. The prisoners who had lost in *Gregg* and its companion cases sought from Justice Powell a stay of the Supreme Court’s mandate pending the disposition of their petition for rehearing.\(^{109}\) Both the stay application and the petition for rehearing were filed during the summer months when the Court was in vacation.\(^{110}\) Although the Supreme Court almost never grants a petition for rehearing,\(^{111}\) Justice Powell granted the stay in order to give the full Court a chance to consider the petition.\(^{112}\) Before Justice Powell granted the stay, Chief Justice Burger had threatened to intervene by calling a special session of the Supreme Court just to vacate any stay Justice Powell might order.\(^{113}\) Given that the petition for rehearing would almost certainly be denied, Chief Justice Burger saw no reason to grant the stay.\(^{114}\) He did not follow up on his
threat to hold a special session, however,\textsuperscript{115} and eventually the Supreme Court began its new Term, denied the petition for rehearing, and vacated the stay in order to give effect to its judgment.\textsuperscript{116}

The \textit{Gregg} stay demonstrated the potential for problems that could arise if the Justices handled capital stays in chambers. The battle lines over the death penalty were drawn quickly post-\textit{Gregg}. Justices Marshall and Brennan would always vote in favor of prisoners on death row, and some of the conservative Justices virtually always voted against them.\textsuperscript{117} If stay applications were left to individual Justices in chambers, one Justice might dispose of a capital stay application only to see another Justice effectively overrule that decision on a reapplication.\textsuperscript{118}

To minimize needless conflicts among the Justices, to avoid the appearance of arbitrariness or bias, and to discourage frequent reapplications, the practice of referring capital applications to the full Court whenever possible is wise. Even when the Court considers these applications in conference, there has been a significant amount of internal dispute and dissension,\textsuperscript{119} which further demonstrates the need for the Justices to work out their differences as a deliberative body.

2. Renewal, Vacatur, and Review.

If a Justice denies an application, the applicant may renew the

\textsuperscript{115} Id.

\textsuperscript{116} See \textit{Gregg}, 429 U.S. 875.


\textsuperscript{118} A recent illustration of the potential for divisiveness to arise over capital stays is presented by the Sixth Circuit’s handling of the case of Sedley Alley. On June 27, 2006, after two public defenders came to his home, Judge Merrit issued a last-minute stay of Alley’s death sentence. See Alley v. Bell, No. 06-5861 (6th Cir. June 27, 2006) (Merrit, J.), available at http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/06272006/AlleyStay6th.pdf; see also Lawrence Buser, \textit{Quietly, Death for Alley—Meanwhile, Legal Scramble Buys Time for Another Inmate}, MEMPHIS COM. APPEAL, June 29, 2006, at A1. Just hours later, Chief Judge Boggs and Judge Ryan issued an order vacating the stay, while “[p]assing over the question of the seemliness of a single circuit judge” acting on such an application. Alley v. Bell, No. 06-5861 (6th Cir. June 28, 2006), available at http://www.tncourts.gov/OPINIONS/TSC/CapCases/Alley/06272006/AlleyVacateStayOrd.pdf. For more on the Alley case and divisions among the judges of the Sixth Circuit over the death penalty, see, for example, Posting of Jonathan Adler to The Volokh Conspiracy, http://volokh.com/posts/1153144938.shtml (July 17, 2006, 10:02 EST).

application, i.e., reapply to any other Justice. Renewals are “not favored” and are referred to the full Court whenever possible, which is virtually always. The purpose of referring renewals to the full Court is both to prevent Justice shopping and also to avoid the potentially awkward situation of having one Justice effectively overrule the decision of another Justice. The full Court will virtually never grant a renewed application unless there has been some significant change in circumstances, such as if the Court has granted certiorari in the case after a Justice had previously denied the application for a stay.

The substantial deference the Court affords to its members is understandable, but it seems unwarranted given that a single Justice is supposed to disregard personal views and instead act as a surrogate for the Court, attempting to predict and to do what the full Court would do. Although, in many contexts, deference to the view of another Justice or judge is often appropriate, it is hard to see why nine Justices should feel obliged to defer to one Justice’s prediction of what they themselves would do. Nevertheless, almost without exception, the Court will not disturb an individual Justice’s decision on interim relief.

If a Justice grants an application, the power of another Justice to vacate or modify the stay is unclear. The issue has come up in only one case that, depending on how you look at it, involved two Justices overruling each other, no Justices overruling each other, or one Justice overruling another only to be overruled in turn by the full Supreme Court. The case started as a suit brought by Congresswoman Elizabeth Holtzman in federal district court seeking to enjoin the United States from bombing Cambodia on the grounds that the Constitution required congressional authorization for such military action. The district court issued the injunction, but the Second Circuit, “acting with traditional judicial caution in foreign policy issues,” stayed the injunction pending appeal. Holtzman applied to Justice Marshall to vacate the stay. Justice Marshall, noting “the complexity and

120. See SUP. CT. R. 22.4.
121. Id.
122. See STERN ET AL., supra note 24, § 17.10, at 865.
123. See Holtzman v. Schlesinger, 414 U.S. 1316, 1316 (1973) (Douglas, J., in chambers) (noting that referrals of renewed applications to the full Court “is the desirable practice to discourage ‘shopping around.’”). While the Court’s rules channel original applications to a specific Justice, no rules govern which Justice an applicant should reapply to.
126. Id.
importance of the issues involved and the absence of authoritative precedent,” declined to vacate the stay on the grounds that “it would be inappropriate . . . , acting as a single Circuit Justice, to vacate the [stay] of the Court of Appeals.”

After Justice Marshall denied the application, Holtzman took advantage of her ability to renew the application before another Justice of her choice by seeking out Justice Douglas, who was vacationing at his summer home in Washington State at the time. Justice Douglas noted in his decision that he normally would have referred the renewed application to the full Court, but the summer recess made doing so “impossible.” He also noted that “while the judgment of my brother Marshall is not binding on me, it is one to which I pay the greatest deference.” Justice Douglas treated the case as a capital case because “denial of the application . . . would catapult our airmen as well as Cambodian peasants into the death zone.” He then granted the application—vacating the Second Circuit’s stay and reinstating the district court’s injunction—on the grounds that stays are liberally granted in capital cases.

Hours after Justice Douglas issued his order, the U.S. Solicitor General went back to Justice Marshall and applied for a new stay of the district court’s order, an application which in effect would overrule Justice Douglas’s order (which had in turn effectively overruled Justice Marshall’s decision). Justice Marshall granted the stay, but he sought to characterize his action in two ways that avoided creating a situation in which one Justice overruled another. First, he indicated that he had contacted the other seven Justices and reported that they all agreed that he should grant the stay. The opinion might therefore be characterized as an opinion of the full Supreme Court. Justice Marshall suggested this in the way he phrased the order: “the order of the District Court

130. Id. at 1317.
131. Id. at 1320.
132. By vacating the stay, Justice Douglas was overruling Justice Marshall in effect, but not in form. Technically, Justice Douglas was ruling on a reapplication, not the original application. This distinction, however, is purely a formal one.
133. See id.
134. See Simon, supra note 10, at 417.
135. As noted above, see supra note 132, Justice Douglas did not formally overrule Justice Marshall because he was ruling on a reapplication, not the original application to Justice Marshall.
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Court...is hereby stayed pending further order by this Court.” The fact that Justice Douglas issued a “dissenting” opinion also suggests that this was the action of the full Court, since one Justice cannot formally dissent from a decision of an individual Justice in chambers.

As Justice Douglas convincingly points out, however, Justice Marshall’s opinion cannot be considered to be an opinion of the Supreme Court because of the statutory quorum requirement. Although Justice Marshall had consulted with seven other Justices individually, “[s]eriatim telephone calls cannot, with all respect, be a lawful substitute” for a quorum of the Supreme Court. The argument that Justice Marshall could not act for the Court due to the absence of a quorum is not merely about putting form over substance. Justice Douglas emphasized the deliberation that goes on among the Justices at conference. He also questioned whether the Justices could have had time to review his opinion vacating the stay, which had contained a lengthy argument justifying the validity of the district court’s injunction.

Justice Marshall also claimed that he had not vacated Justice Douglas’s order (which in turn had vacated the Second Circuit’s stay) at all, but rather he had acted only on the district court’s order by granting a new stay of that order. He stated that “the only order extant in this case is the order of the District Court.” Justice Marshall’s reliance on the fact that he was staying the district court’s order rather than vacating Justice Douglas’s order (which itself was an order of vacatur) is extremely technical, but leaves in some theoretical doubt the question of whether one Justice could vacate or reverse the order of another Justice.

137. Id. (emphasis added).
138. See id. at 1322 (Douglas, J., dissenting).
139. See 28 U.S.C. § 1 (2000) (setting a quorum at six Justices). This provision was in force at the time of the Holtzman litigation.
140. Holtzman, 414 U.S. at 1323; see also id. at 1324 (“A Gallup Poll type of inquiry of widely scattered Justices is, I think, a subversion of the regime under which I thought we lived.”). The Court’s current practice is to use a conference call, and this would seem to satisfy the quorum requirement if at least six Justices are participating. See Stern et al., supra note 24, § 17.12, at 871 n.48. In a conference call, the Justices can all hear and respond to statements by the others just as if they were in the same room.
142. Id. at 1324.
143. Id. at 1321–22. The District Court order he was referring to was the order enjoining the bombing of Cambodia.
144. Justice Douglas’s decision to vacate the Second Circuit’s stay, after Justice Marshall had previously declined to do so, is probably a better example of one Justice overruling the decision of another. But it too fails on a technicality. See supra note 132. There has never been an unambiguous situation of one Justice overruling another, which would arise, for instance, if one Justice vacated a stay
Although much more widely accepted, the full Court’s power to vacate the order of a single Justice is also less than crystal clear. The Court has purported to do so only once, in *Rosenberg v. United States*.* 145 That case involved the legality of the death sentences of Julius and Ethel Rosenberg, who had been convicted of treason for transmitting secret information about nuclear weapons to the Soviet Union in what the press called at the time the “trial of the century.”* 146 Justice Douglas, once again at the center of the controversy, had issued a last minute stay of the death sentences due to what he considered a “substantial” question as to legality of the death sentences under the Atomic Energy Act of 1946, 147 an argument raised for the first time in a habeas corpus proceeding filed just three days before the scheduled execution. 148

Chief Justice Vinson called a special session of the Supreme Court, which was in vacation at the time of Justice Douglas’s order, to consider the U.S. Attorney General’s application to vacate the stay issued by Justice Douglas. 149 The Court’s opinion in *Rosenberg* recognizes that it had never before vacated an individual Justice’s order, but it concludes that this “does not prove the nonexistence of the power.”* 150 The Court claimed its power to vacate the stay “derives from this Court’s role as the final forum to render the ultimate answer to the question which was preserved by the stay.”* 151

Only Justice Black questioned whether the Court had the power to vacate Justice Douglas’s stay, arguing that there was no statutory basis for such a power. 152 The Attorney General had cited two statutes, 28 U.S.C. § 2106 and § 1651, but Justice Black concluded that neither was adequate. 153 Section 2106, which authorizes the Supreme Court to “affirm, modify, vacate, set aside or reverse any judgment, decree, or order issued by another Justice.”* 154

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145. 346 U.S. 273 (1953). The Court has sometimes summarily denied motions to vacate a stay issued by a Justice in chambers. See, e.g., *Chabad v. Cincinnati*, 537 U.S. 1085 (2002). The fact that it denies these motions, rather than dismissing them for lack of jurisdiction, suggests either that the Court has determined it has the power to overrule the decision of a single Justice or that the Court has never considered the issue.


150. *Id.* at 286.

151. *Id.*

152. See *id.* at 297 (Black, J., dissenting).

153. See *id.*
order of a court"\textsuperscript{154} was not applicable, in Justice Black’s view, to an order of a Justice in chambers.\textsuperscript{155} Section 1651, the All Writs Act, was inapplicable because it “says nothing about dissolution of a stay order.”\textsuperscript{156}

Whether Rosenberg really does set a precedent for the proposition that the full Supreme Court may vacate the stay order of a single Justice in chambers is doubtful. The Court actually reached the merits of the “substantial” question that Justice Douglas had sought to preserve for review when he issued the stay, and it held in favor of the government.\textsuperscript{157} Justice Douglas had issued the stay only to give the full Court a chance to address this issue,\textsuperscript{158} and once the Supreme Court had done so, it had the power under the All Writs Act to vacate the stay to give effect to its judgment. Although Justice Douglas had envisioned the issue being litigated first in the lower federal courts, the Supreme Court unquestionably had jurisdiction to decide the issue itself.\textsuperscript{159} Chief Justice Vinson’s opinion for the Court justifies its action on the grounds that by reaching the merits of the habeas petition, Justice Douglas’s order had served its function:

Mr. Justice Douglas, in issuing the stay . . . simply acted to protect jurisdiction over the case, to maintain the status quo until a conclusive answer could be given to the question which had been urged in the defendants’ behalf. In the exercise of our jurisdiction to decide the question which was preserved for decision, it lay within our power to bring the new claim before us and examine its merits without further delay. In considering this question, the Court carried out the limited purpose for which Mr. Justice Douglas issued the stay.\textsuperscript{160}

Thus, although Rosenberg is commonly cited for the proposition that the full Supreme Court may vacate a stay order of a single Justice,\textsuperscript{161} it really only establishes that the Court may do so to give effect to its own judgment on the merits of a case. This is a rather uncontroversial principle, given that interim relief is, by definition, limited in its duration

\textsuperscript{155} Rosenberg, 346 U.S. at 297 n.*.
\textsuperscript{156} Id.
\textsuperscript{157} See id. at 288–89 (per curiam).
\textsuperscript{158} See Rosenberg v. United States (Jun. 17, 1953) (Douglas, J., in chambers), reprinted in 346 U.S. 313, 321 (“I will grant a stay effective until the question of the applicability of the penal provisions of § 10 of the Atomic Energy Act to this case can be determined by the District Court and the Court of Appeals . . . .”).
\textsuperscript{159} The Supreme Court may issue an “original” writ of habeas corpus in some circumstances. See infra text accompany notes 368–379.
\textsuperscript{160} Rosenberg, 346 U.S. at 286 (emphasis added).
\textsuperscript{161} See, e.g., STERN ET AL., supra note 24, § 17.11, at 866.
to extend only so long as necessary for some future judicial action to be taken. *Rosenberg* does not clearly establish that the Court may vacate a Justice’s order simply because a majority of the Court disagrees with the Justice on the appropriate interim posture of the case pending appellate review. Nevertheless, because a Justice in chambers is properly understood to be acting for the Supreme Court, it follows that the Supreme Court should have the power to overrule or alter an in-chambers order.

III. THE APPROPRIATE STANDARD FOR GRANTING INTERIM RELIEF

A. The Purposes of Interim Relief Pending Appellate Review

Determining the proper standard for awarding interim relief pending appellate review depends on the purposes such relief serves. Broadly speaking, there are two purposes of interim relief pending appeal. First, such relief may be necessary to preserve an appellate court’s jurisdiction if execution of the judgment (or the absence of an injunction) would render the case moot. An obvious example of a situation in which the execution of a judgment renders a case moot is a death sentence. Other examples of situations in which a stay is necessary to prevent mootness include the issuance of an injunction barring a candidate from being listed on an election ballot when the ballots are scheduled to be printed before any appeal could be heard, a court order to immediately release certain documents that the government wishes to keep secret, the imposition of a very short prison sentence that would be fully served before any appeal could be heard, and an extradition order that would be executed before the adjudication of claims that the extradition would be illegal. Second, interim relief may be necessary to prevent the risk that the losing party would suffer some irreparable harm should the

164. See, e.g., *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers) (granting stay of commitment where applicant would probably serve maximum term of commitment before obtaining appellate review); *Conforte v. Hanna*, No. 268 (U.S. June 24, 1960) (Douglas, J., in chambers) (granting stay of sentence of 25 days imprisonment). Although the completion of a sentence often does not moot a challenge to the conviction, it does generally moot a challenge to the legality of the sentence itself. See, e.g., *Lane v. Williams*, 455 U.S. 624, 631 (1982) (“Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.”).
The first reason reflects the interests of the judicial system in developing uniform federal law through the appellate review process; the second reason reflects the interests of the parties to the case, or, put another way, the interest in minimizing the expected error costs of the lower court judgment.167

With these two justifications in mind, two separate questions pertain to the practice of granting stays. The first question is what should the standard be for granting a stay? The second question is who should be deciding whether or not to grant a stay? The answers to these two questions are related, but this Part focuses on the first question.

B. The Goldberg Standard

There is virtual consensus among the Supreme Court Justices regarding what the appropriate factors to consider are when ruling on a stay application.168 The most commonly cited source for these factors is Justice Brennan’s opinion as Circuit Justice in Rostker v. Goldberg,169 but the Supreme Court identified most of the principles in the earlier case of Magnum Import Co. v. Coty.170

Justices consider the following factors in determining whether to grant a stay: first, the likelihood that the Supreme Court will grant a writ of certiorari (or if a direct appeal lies, will note probable jurisdiction) in the case;171 second, the likelihood that the Supreme Court will reverse the judgment on the merits;172 third, the degree of irreparable harm that the applicant for a stay will suffer if the stay is denied;173 and Justice Brennan also identified a fourth factor, which requires the Justice “in a close case . . . to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.”174 Generally, the Justices apply only the first three factors, and

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166. If the judgment is affirmed, then whatever the losing party suffers is not something the legal system recognizes as harm for the purposes of balancing the equities.

167. These are the costs that an erroneous judgment will be enforced until it is reversed and the costs that a correct judgment will erroneously be unenforced until it is affirmed.


170. 262 U.S. 159 (1923); see id. at 163–64. The Court cited the All Writs Act for its power to issue a stay, but held that a stay in that case was unwarranted. See id. at 162–63, 164.

171. Goldberg, 448 U.S. at 1308.

172. Id.

173. Id.

174. Id.
any balancing of the equities is subsumed under the irreparable harm factor, which is then applied to both parties in the case.175

If the goal to be served by the availability of interim relief pending appeal is to minimize the sum of expected error costs, then the Goldberg test is appropriate. Proper application of the Goldberg test will minimize the expected costs of two potential errors: first, that the judgment may be executed and subsequently reversed or vacated; and second, that the execution of the judgment is delayed by a stay and subsequently affirmed. If \( P_C \) is the probability that the Supreme Court will grant certiorari, \( P_R \) is the probability that the Supreme Court will reverse the judgment on the merits, \( H_A \) is the harm that the applicant will incur if the judgment is executed, and \( H_N \) is the harm that the nonapplicant will incur if the judgment is not executed, then a stay should be granted if:

\[
P_C \times P_R \times H_A > (1 - P_C \times P_R) \times H_N
\]

As the equation indicates, the stay should be granted if the expected harm to the applicant is greater than the expected harm to the nonapplicant.176

The Goldberg standard, as applied by the Justices, clearly implements this formula as fully as one could expect given the difficulty of estimating any of these values with much certainty.177 The formula also explains what may seem like, at first glance, odd results in certain cases. For example, the Justices have granted stays in cases where the applicant solely seeks to avoid payment of a judgment for money damages.178 In such cases, the magnitude of any harm to the stay applicant is relatively small, consisting of interest and the cost of an extra transaction, and it is

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176 The word “harm” includes only those costs that a party incurs on account of a divergence between the interim posture of the judgment and the outcome on appeal—the harm to the applicant of having (what turns out to be) an erroneous judgment enforced against him and the harm to the nonapplicant of having (what turns out to be) a correct judgment temporarily unenforceable. See supra note 166.

177 As Chief Justice Rehnquist observed, ruling on a stay application “requires that a Justice cultivate some skill in the reading of tea leaves” to determine whether four Justices would vote to grant cert.” Bd. of Educ. v. Superior Court, 448 U.S. 1343, 1347 (1980).

178 See, e.g., Am. Mfrs. Mutual Ins. Co. v. Am. Broad.-Paramount Theatres, Inc., 87 S. Ct. 1, 3 (1966) (Harlan, J.). Justice Harlan granted the stay of a state-court judgment awarding damages in a breach of contract suit on the grounds that a stay of a money judgment is available as a matter of right on the condition of the applicant posting a bond, and he saw “no substantial countervailing reason why at the certiorari stage this federal policy should not be applied to state cases presenting arguably substantial federal questions.” Id.
certainly reparable. A stay in such a case may be justified, however, if the probability of the Supreme Court granting certiorari and reversing the judgment is extremely high. Justices have also granted stays in cases where the chances of the Supreme Court granting certiorari were extremely low, but the harm to the applicant would have been large and irreparable.\textsuperscript{179} Indeed, the view of some of the current Justices in death penalty cases is that, because of the risk of irreparable harm, stays should be granted liberally even when a case is not particularly worthy of certiorari.\textsuperscript{180}

\section*{C. Problems with the Goldberg Standard}

Although the \textit{Goldberg} standard is the correct standard for minimizing error costs, a straightforward application of the standard can lead to what many consider to be absurd results. The most striking example of this is \textit{Herrera v. Collins}.\textsuperscript{181} \textit{Herrera} involved the claims of a death row prisoner who sought a writ of habeas corpus in federal court.\textsuperscript{182} The Supreme Court granted certiorari, but Herrera’s execution was scheduled to occur before the Court would hear the case on the merits.\textsuperscript{183} Herrera applied for a stay of his execution pending the Court’s decision on the merits, but the full Court denied the stay.\textsuperscript{184} Procedurally, this outcome was possible because it takes only four Justices to grant certiorari, but it takes five Justices to issue a stay (when the Court is sitting en banc).\textsuperscript{185} The Court had developed an informal rule that when a stay was necessary to preserve jurisdiction over a case but only the minimum of four Justices had voted to grant certiorari, a fifth Justice would “switch” his vote to issue a stay.\textsuperscript{186} In \textit{Herrera}, this informal rule broke down.

The idea that the Supreme Court would decide to hear a death row prisoner’s claims, but allow him to be put to death before doing so seems, superficially at least, outrageous. According to one commentator, the \textit{Herrera} decision suggested “a near-callousness

\begin{footnotesize}
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\item 181. 502 U.S. 1085 (1992) (per curiam).
\item 182. See id.
\item 183. See id.
\item 184. Id.
\item 186. See Autry v. Estelle, 464 U.S. 1, 2 (1983) (per curiam) (“Had appellant convinced four members of the Court that certiorari would be granted on any of his claims, a stay would issue.”)
\end{itemize}
\end{footnotesize}
toward death row petitioners’ final pleas.” Some of the Justices themselves had earlier observed the harshness of denying a stay under similar circumstances. As Justice Blackmun put it, “[t]he Court as an institution would surely appear intellectually and morally bankrupt if we were to announce that a petitioner’s claims are worthy of review but that we would abandon our responsibility to perform such review if the state chooses to execute in the meantime.”

Even the Texas Court of Criminal Appeals, which had previously rejected Herrera’s claims on four separate occasions, was moved enough by this “dilemma” to grant a stay, allowing the Supreme Court to decide the case on the merits. The Texas court found that “it would be improper for this Court to allow applicant’s execution to be carried out before his petition for writ of certiorari is fully reviewed by the Supreme Court.”

Despite this criticism, the Justices who voted to deny Herrera’s application for a stay may have been justified in doing so under the Goldberg standard. Since the Court had already granted certiorari, the first factor of the Goldberg test was not in any doubt. And certainly the harm that Herrera would suffer was of tremendous magnitude and completely irreparable—his life was at stake. But if the probability that Herrera would win on the merits was low enough, then the Goldberg formula could have dictated a denial of the stay. After all, Texas would have suffered irreparable harm had the Supreme Court granted a stay—it would have incurred the cost of incarcerating Herrera for the time between his scheduled execution and the issuance of the Court’s judgment, not to mention the temporary loss of any deterrent effect Herrera’s execution might have. Certainly, the magnitude of these harms is negligible when compared to the harm Herrera faced. Still, the Goldberg formula can yield an outcome in which a stay should be denied based on an extremely low probability of reversal. If the five Justices who voted to deny the stay were certain that they would vote to affirm, and that no amount of briefing, argument, or deliberation would change their mind, then, under Goldberg, they made the correct decision. Indeed, when the Court eventually reached the merits of Herrera’s claim, he lost in a five to four decision, with the same five


190. Id. (emphasis added).
Justices who voted to deny the stay in the majority.\textsuperscript{191}

\textit{D. The Appropriate Standard at the Supreme Court Level}

The reason that the result in \textit{Herrera} seems absurd is not because, as some might think, five Justices manipulated the standard for granting interim relief to deny a death row prisoner a final chance to press his legal claims, but rather because the standard the Supreme Court was using is wrong. As discussed above, the \textit{Goldberg} standard is the correct standard for implementing the purpose of minimizing error costs. It is not, however, the correct standard to serve the other broad purpose of interim relief—keeping a case in a posture in which it may be reviewed by an appellate court. For this purpose, the likelihood of reversal should not factor in at all. Rather, the only factors that should be considered are the likelihood of granting certiorari and the possibility of the case becoming moot if the Court does not grant interim relief.\textsuperscript{192}

The statutory authority for the Supreme Court to issue interim relief strongly indicates that the Court, and the individual Justices, should grant interim relief only to keep cases in a reviewable posture. The All Writs Act explicitly speaks to the limitation on interim relief in authorizing the federal courts to “issue all writs necessary or appropriate \textit{in aid of their respective jurisdictions}.”\textsuperscript{193} Section 2101(f) also makes it clear that judges or Justices may grant a stay “for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.”\textsuperscript{194} This language clearly indicates that the Supreme Court’s powers are limited to instances where interim relief is necessary to maintain its jurisdiction over the case if execution of the judgment—or the absence of a temporary injunction to preserve the status quo—would render the case moot before the Court will have an opportunity to determine whether to hear the case and then issue a decision on the merits.

Based on this statutory language, the standard that the Supreme Court should use for determining whether to grant a stay should consist of only two factors. The first factor is the likelihood that the Court will grant certiorari (or note probable jurisdiction), which is already one of the \textit{Goldberg} factors. The second factor is that a stay should be granted if execution of the judgment would render the case moot before the Supreme Court can vote on whether to grant certiorari (or note probable

\textsuperscript{192} See Revesz & Karlan, supra note 185, at 1074–81.
\textsuperscript{194} Id. § 2101(f) (emphasis added).
jurisdiction) and, if necessary, decide the case on the merits.\(^{195}\)

This standard differs from the \textit{Goldberg} standard in two ways. First, the issue of “irreparable harm” is simplified since the sole criterion is whether the case would become moot in the absence of a stay. Second, the likelihood of whether the Court will reverse the judgment below is irrelevant to the stay determination. This reflects the fact that the stay is a jurisdictional aid. The purpose of the stay is to allow the Court to exercise its jurisdiction over a case on its merits, and whatever the ultimate outcome may be simply should not matter. Should the Court stay a death sentence so that it may consider the prisoner’s legal claims and ultimately affirm the judgment below, the stay has still served its function of allowing the Court to review the case. The Court generates precedent ensuring the supremacy and uniformity of federal law through its affirmances as well as its reversals, but it cannot generate precedent if its cases become moot.\(^{196}\) Under this two-factor standard, the stay in \textit{Herrera} should have been granted. The Court had already granted certiorari and it was clear that without the stay the case would have become moot once Herrera was put to death.\(^{197}\)

Although this standard for a stay reflects the statutory language and serves the function of keeping cases in a reviewable posture, it sacrifices the purpose of protecting the interests of the parties in the case by minimizing the expected error costs of the judgment. Crafting a test that serves both purposes would certainly be possible. If an applicant satisfied either the \textit{Goldberg} standard or the two-factor test proposed above, then a stay would be granted and both purposes of stays—minimizing error costs and keeping the case in a reviewable posture—would be served.

Another possibility is to allocate responsibility over these two purposes to different decision makers. The Supreme Court should grant interim relief solely when necessary to preserve its own jurisdiction or, perhaps, when the issue is one of extreme national importance. Granting interim relief as a matter of balancing the equities and protecting the

\(^{195}\) If the Court denies certiorari, then the lower court’s judgment becomes the final say, and the stay should obviously terminate. If the Court grants certiorari, then the stay should continue if necessary to prevent the case from becoming moot. Many stays are worded in such a way that they automatically terminate if the Court grants certiorari, and automatically continue if the Court grants certiorari until the Court issues its mandate.

\(^{196}\) Herrera’s case did generate a precedentially significant opinion from the Supreme Court. After the Texas Court of Criminal Appeals stayed Herrera’s execution, the Supreme Court heard his case on the merits. The Court held that Herrera’s claims of “actual innocence” did not entitle him to a writ of habeas corpus. See Herrera v. Collins, 506 U.S. 390, 393 (1993).

\(^{197}\) See Hamilton v. Texas, 498 U.S. 908, 911 (1990) (Stevens & Blackmun, JJ., concurring) (agreeing that certiorari was properly denied because petitioner’s claim had been mooted by his execution).
interests of the parties is properly the function of the lower federal courts.

Not only is this allocation consistent with the statutory language empowering the Supreme Court and individual Justices to grant interim relief, but it is also consistent with the role of the Supreme Court in the modern American judicial system. The Supreme Court is not a “court of errors,” but rather an institution devoted to ensuring the uniformity and supremacy of federal law and deciding legal questions of national importance. 198 The Supreme Court focuses less on the individual interests of the parties and more on developing rules of law that will guide the lower courts. 199 If the Supreme Court declines to review cases on the merits even when a party has suffered a gross injustice on the grounds that the interests of the parties are adequately protected by review at the courts of appeals (or state supreme courts), then it follows that neither the Court nor its Justices should spend time on applications for interim relief where the sole issues at stake are the interests of the parties. 200

Furthermore, the lower federal courts will generally have a greater competency than the Supreme Court to balance the equities due to their greater familiarity with the merits of the cases. A lower court will generally have completed review of the merits at the time an applicant is seeking interim relief, while a Supreme Court Justice will first need to become familiar with the relevant facts and legal issues. The Justices have recognized the comparative advantage of lower courts by affording great deference to lower-court decisions regarding interim relief. 201

198. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 300 (1928) (“[T]he Supreme Court is now confined in its adjudications to questions of constitutionality and like problems of essentially national importance.”). As former Chief Justice Vinson put it, “The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.” Fred Vinson, WORK OF THE FEDERAL COURTS, in WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS 54, 55 (1961). Chief Justice Vinson may have been wrong about the very early Supreme Court. Before Chief Justice Marshall arrived on the Supreme Court in 1801, the Court decided very few cases involving important questions of public law, and mostly handled “routine, private law cases.” Del Dickson, A BRIEF HISTORY OF THE CONFERENCE: JOHN JAY THROUGH MORRISON WHITE (1789–1888), in THE SUPREME COURT IN CONFERENCE (1940–1985), at 22, 22 (Del Dickson ed., 2001); see also infra text accompanying notes 203–06.

199. REHNQUIST, supra note 4, at 235–36 (observing that the Supreme Court no longer plays the role of “mak[ing] sure that justice is done to every litigant”).

200. Cf. Tushnet, supra note 117, at 171 (“It became more difficult to see the [Supreme] Court’s role as resolving large questions of constitutional law when the justices had to think about what to do in every case where a murderer faced execution.”).

201. See STERN ET AL., supra note 24, § 17.13(c), at 880 (“The action of the court or judge below is likely to be accorded significant weight by the individual Circuit Justice.”); see also, e.g., Breswick & Co. v. United States, 75 S. Ct. 912, 915 n.* (1955) (Harlan, J., in chambers) (noting that deference to lower court decisions on stay applications is warranted due to their greater familiarity with the case).
E. The Legislative History of § 2101(f)

As discussed in the preceding subpart, the plain language of Section 2101(f) clearly grants powers to the Supreme Court and individual Justices only to keep cases in a reviewable posture. This interpretation seems consistent with the role of the Supreme Court in modern American society. An examination of the legislative history and context of the enactment of this section also supports this interpretation.

Congress first expressly authorized individual Supreme Court Justices to grant stays of lower court judgments in the “Judges’ Bill” of 1925. The Bill got its nickname from the fact that a committee of Supreme Court Justices had drafted it under the initiative of Chief Justice William H. Taft.

The provision regarding stays was a relatively minor feature of the Judges’ Bill. The chief effect of the Bill was to revolutionize the Supreme Court’s docket by reducing the number of cases that came up to the Court as mandatory appeals and increasing the class of cases in which the Court could exercise its discretionary review under the statutory writ of certiorari. The result was to give the Supreme Court much greater control over which cases it heard.

The Judges’ Bill was proposed at a time when there was a strong feeling among many judges, legal academics, and litigants that the Supreme Court’s docket had gotten out of hand. The Justices expressed the view that the Supreme Court was required to function as a court of error in far too many cases and that this was inhibiting the Court from exercising its proper role in deciding important questions of federal law. As Professor Alpheus Mason put it, “When Taft took his seat as Chief Justice of the United States, the august tribunal over which he presided had some of the attributes of a small-claims court.”

203. FRANKFURTER & LANDIS, supra note 198, at 260.
204. See 66 CONG. REC. 2752 (1925) (statement of Sen. Cummins) (“The Supreme Court is now 15 or 18 months behind in its work. . . . It is a denial of justice to those who desire their cases promptly submitted and decided to oblige them to wait for a period of anywhere from 15 to 18 months before reaching the case for argument and submission.”). Senator Cummins was the sponsor of the Senate bill. FRANKFURTER & LANDIS, supra note 198, at 274 n.60.
205. See Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing Before the H. Comm. on the Judiciary, 68th Cong. 24 (1924) [hereinafter Jurisdiction Hearing] (statement of J. Sutherland, U.S. Supreme Court) (“We have in the United States nine circuit courts of appeal. . . . Each of them is a strong court, . . . and in the ordinary run of cases there is no reason why the consideration of an appeal by one of those . . . courts . . . should not end the matter unless it is a case that presents such questions . . . that warrant the supreme court in reviewing the case.”).
Judges’ Bill changed all that by shifting most of the Court’s docket from obligatory review to discretionary review, allowing the Court to avoid cases that involved the mere correction of errors.\textsuperscript{207}

The Bill’s purpose of changing the Supreme Court from a court of errors into an institution devoted to settling important issues of federal law suggests a fairly narrow reading of § 8(d), the provision in the Bill that would be codified as § 2101(f) governing stays pending certiorari. Of the two purposes served by stays—keeping a case in a reviewable posture and minimizing the parties’ expected error costs—it seems clear that only the first purpose is consistent with the goals of the Judges’ Bill as a whole. It would be odd for Congress (and the Justices who drafted the Bill) to seek to end the Supreme Court’s role in correcting errors in cases on the merits only to embroil the Court in balancing the equities in individual cases to decide if interim relief is warranted. In contrast, the purpose of keeping cases in a reviewable posture is entirely consistent with the goals of the Judges’ Bill, as it allows the Supreme Court to decide important questions of law in cases that might otherwise become moot.

Aside from illuminating the overall purposes of the Judges’ Bill, the legislative history does not add very much to an inquiry into the scope of individual Justices’ powers to grant stays. The hearings, committee reports, and floor debates that led to the enactment of the Judges’ Bill include virtually no discussion of § 8(d). Professors Frankfurter and Landis’s influential book on the Supreme Court devoted an entire chapter to the Judges’ Bill, but it mentions § 8(d) only once in a single footnote.\textsuperscript{208}

The original Bill, introduced in both the House and the Senate in 1922, did not include any provisions authorizing stays of judgment or other interim relief. The provision regarding stays was added as § 8(d) of the Bill at some point before the Judiciary Committee in the House held its second hearing on the Bill—almost two years after the original Bill was introduced in Congress. There is no record of who proposed the amendment or why. Justice Van Devanter, testifying before the Committee, briefly described this provision, but did not discuss its origins or even mention that it was not in the original Bill.\textsuperscript{209} The entirety of Justice Van Devanter’s statement was a simple explanation of


\textsuperscript{208} See Frankfurter & Landis, supra note 198, at 279 n.88 (“An amendment was also added permitting a judge to stay the enforcement of such judgments as were subject to review by the Supreme Court on certiorari.”)

\textsuperscript{209} Jurisdiction Hearing, supra note 205, at 16 (statement of J. Willis Van Devanter, U.S. Supreme Court).
the text of the Bill: “Section 8(d) prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending the presentation and consideration of an application to the Supreme Court for a review on certiorari.” 210 The text of the Bill reprinted along with the published transcript of this hearing does not even include § 8(d). 211

Although the identity of § 8(d)’s author is unclear, it is possible to speculate that the Justices themselves proposed it in order to eliminate the asymmetry between appeals and certiorari when it came to the enforceability of lower court judgments pending Supreme Court review. When a case came up on appeal, there was clear statutory authority (at the time 212) for an appellant to obtain a supersedeas. 213 There was no corresponding provision in force at the time that would have allowed a single Justice to stay a judgment when a case came up via certiorari, although the full Court could have issued a stay under the All Writs Act. A vague reference by Senator Cummins, one of the Bill’s sponsors, when he introduced § 8(d) as an amendment to the Senate version of the Bill supports the notion that the Justices were the source: “[These] are amendments which have grown out of correspondence sent to me, and sent to the Chief Justice, and sent to the chairman of the Judiciary Committee of the House with respect to certain formal matters, matters which are really formal.” 214

Section 8(d) was added to the Senate version of the Bill in a floor amendment just before the Senate voted. 215 There was some discussion of the amendment at that time, but it only went so far as to resolve some confusion about its effect. Senator Reed appeared to believe that the amendment would require a litigant to post a bond in order to petition for certiorari, and he felt this was unfair because of the uncertainty regarding whether the Court would grant certiorari in any given case. 216 Senator Cummins explained that the amendment would not require a litigant to post a bond as a condition of petitioning for certiorari. Rather it would require a bond as a condition of obtaining a stay of judgment pending certiorari and, even then, only if the Justice considering the stay

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210. Id.
211. See id. at 5.
212. See supra text accompanying notes 40–44
213. See REV. STAT. §§ 1000, 1007 (1873).
214. 66 CONG. REC. 2918 (1925).
215. See id.
216. Id. (statement of Sen. Reed) (“Is it not true that under the language of the proposed amendment a man might desire to apply for a writ, and might make his application, and at that time the court might require him, under the amendment, to give a bond conditioned in heavy penalty that he will pay all damages provided the writ is refused?”).
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application so required.\textsuperscript{217} With this clarification (and a rereading of the amendment), Senator Reed indicated that it was “unobjectionable” and the amendment was agreed to.\textsuperscript{218}

The legislative history thus does not indicate that Congress intended the power to grant stays to be broader than what the text and general purposes of the Bill suggest—the power extends to situations in which a petition for certiorari has been filed or will be filed shortly and a stay is necessary to keep the case in a reviewable posture while the Supreme Court considers whether or not to grant certiorari. Although the legislative history does not explain what the precise purpose of the stay provision is, the background and context of the Judges’ Bill suggest it was limited to keeping cases reviewable.

IV. THE CONSTITUTIONAL LIMITS ON THE POWERS OF AN INDIVIDUAL JUSTICE

There are two dimensions along which the authority to grant interim relief pending appellate review can be allocated. The first dimension is the level of the judicial system at which the decision regarding interim relief is made—in the federal system, this generally means the district courts, courts of appeals, or Supreme Court. The second dimension is the number of individual judges at a given level that should be involved—a single judge or Justice, a panel of judges or Justices, or the full court sitting en banc. Part III of this Article addressed this first dimension and argued for a bifurcated system: at the Supreme Court level, the only relevant issue should be whether interim relief is necessary to keep a case in a reviewable posture; the lower courts should balance the equities to determine if interim relief is warranted in order to protect the interests of a litigant. This Part explores what the appropriate allocation of power at the Supreme Court level is along this second dimension—that is, whether one or more Justices or the Supreme Court itself should make decisions regarding interim relief.\textsuperscript{219}

\textsuperscript{217} The relevant text of § 8(d) provides that a “stay . . . may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefore, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.” Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 940–41. The statute currently in force, 28 U.S.C. § 2101(f) (2000), retains substantially the same text.

\textsuperscript{218} 66 Cong. Rec. 2919.

\textsuperscript{219} Although this Part focuses on the Supreme Court level, much of the conclusions regarding when an individual Justice can legitimately act apply to the courts of appeals as well. In general, an individual court of appeals judge should act only in the limited situations in which a single judge has historically acted in lieu of a multi-member court.
There is an obvious difference between a judge and a court. “Judge” is, with all due respect, simply a job title. A “court” is a governmental institution that has one or more judges. There is a distinction between a judge and a court even when the court is a single-member court.\textsuperscript{220} Justice Story, riding circuit, explained the distinction as follows:

The district judge is not the district court, though he is the presiding officer thereof. A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law. The officers exist independent of the exercise of such appointed jurisdiction; though the court may not, in general, be holden independent of its officers. . . . It is not true, therefore, that every act done by the district judge is, in point of law, the act of the district court. In some instances, powers are confided to him, which he may exercise either in court, or, by virtue of office, out of court. In other instances, powers are given to him in one capacity, which are denied in the other.\textsuperscript{221}

This distinction between “judge” and “court” is not merely formal. A judge exercising the judicial power when not constituted as a court—that is, when not “sitting on the bench”—may do so ex parte, without a set of formal and widely circulated rules of procedure, and without providing access to the public or the press.\textsuperscript{222}

The distinction between a judge and a court is more crucial when the

\textsuperscript{220} For instance, in In re United States, 194 U.S. 194 (1904), the Supreme Court addressed whether a statute that allowed an appeal of certain decisions made by a “a commissioner of a United States court” to be made to a district court judge was actually an appeal to the district court. Id. at 196. Although the Court concluded that Congress had meant the terms “judge” and “court” to be used interchangeably, the Court noted contrary authority, see id. at 198, and “admitted that the proper construction of [the statute] is not free from difficulty,” id. at 200. For other opinions addressing the distinction between a “court” and a “judge,” see, for example, Lo Duca v. United States, 93 F.3d 1100, 1107 (2d Cir. 1996) (“We note that, traditionally, it is ‘courts’ and not ‘judges’ that exercise Article III power.”), Chow Loy v. United States, 112 F. 354 (1st Cir. 1901), and Bennett v. Bennett, 3 F. Cas. 212, 219 (D. Or. 1867) (No. 1,318) (addressing the issue of whether a judge of a single-judge district court may grant a writ of habeas corpus in chambers). For a contrary view, see, for example, Foote v. Silsby, 9 F. Cas. 383, 384 (Nelson, Circuit Justice, C.C.N.D.N.Y. 1850) (No. 4,917) (“A judge sitting at chambers is a court, in the proper and usual sense of the term . . . .”).

\textsuperscript{221} United States v. Clark, 25 F. Cas. 441, 442 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,804).

\textsuperscript{222} Cynthia Rapp, a Deputy Clerk at the Supreme Court, has written with respect to oral arguments in connection with stay applications that “[t]here is no evidence that the arguments were open to the public, and there is some evidence that they were closed to the press.” Rapp, supra note 1, at viii. Justice Marshall did at one point promise to invite the press to any future in-chambers oral arguments he conducted in response to a request from journalists, but he never held another argument. Id. It appears that no Justice has heard oral argument on a stay application since 1980. See STERN ET AL., supra note 24, § 17.2, at 850 & n.14.
court contains multiple members because multi-member courts are a crucial check against the abuse of judicial power. Distribution of the task of adjudication among more than one person is a safeguard against arbitrariness and injustice. For the adjudication of facts, the jury system is the mechanism the American judicial system uses to distribute adjudicative power.\footnote{223} For questions of law, however, a single trial judge generally makes the initial ruling. This distinguishes the Anglo-American system from many European judicial systems, in which a collegial bench tries cases in the first instance.\footnote{224} Throughout American history, however, parties that lose at trial have always had the right to an appeal to a multi-member court—at first, directly to the Supreme Court, and beginning in 1891, to the courts of appeals. The use of multi-member courts to review questions of law was well established in England going all the way back to at least the fourteenth century.\footnote{225}

The value of multi-member courts comes from their deliberative nature.\footnote{226} Multi-member courts promote optimal decision making because “arbitrary decision making in collegial bodies will be reduced by the moderating influence of alternative points of view.”\footnote{227} Deliberation is an important part of the Supreme Court’s decision-making process. Justice Frankfurter referred to the Justices’ deliberations as the “fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions.”\footnote{228} Justice Douglas cited the absence of deliberation as a reason why Justice Marshall’s order in the Holtzman case could not truly be an opinion of the full Supreme Court.\footnote{229} Although it may be rare for Justices to change their minds during the formal discussion of the cases at conference,\footnote{230} the circulation of memos

\footnote{223. John H. Langbein, \textit{Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources}, 50 U. CHI. L. REV. 1, 35 (1983) (“[T]he jury system served as [a] safeguard against judicial excesses, since it divided the adjudicative power and allocated much of it away from the bench.”).}

\footnote{224. \textit{Id.} at 31 (“In the nineteenth century when the Continental codes were shaping the contours of the modern courts systems, collegiality was thought to be an important safeguard against judicial caprice or corruption.”).}

\footnote{225. D.R. Bentley, \textit{Introduction to SELECT CASES FROM THE TWELVE JUDGES’ NOTEBOOKS} 1, 9 (D.R. Bentley ed., 1997).}

\footnote{226. \textit{See, e.g.}, \textit{Salve Regina Coll. v. Russell}, 499 U.S. 225, 232 (1991) (“Courts of appeals, [rather than district courts], are structurally suited to the collaborative juridical process that promotes decisional accuracy. . . . Perhaps most important, courts of appeals employ multijudge panels that permit reflective dialogue and collective judgment.” (citations omitted)).}

\footnote{227. \textit{VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIATE COURT} 1 (2006); \textit{see also} Lewis A. Kornhauser & Lawrence G. Sager, \textit{Unpacking the Court}, 96 YALE L.J. 82, 82 (1986).}

\footnote{228. \textit{Dick v. N.Y. Life Ins. Co.}, 359 U.S. 437, 459 (1959) (Frankfurter, J., dissenting).}

\footnote{229. \textit{See supra} text accompanying notes 139–142.}

\footnote{230. \textit{See REHNQUIST, supra note 4, at 258 (“[M]y years on the Court have convinced me that the true purpose of the conference discussion of argued cases is not to persuade one’s colleagues through}}
and draft opinions has caused Justices to change their views in a large number of cases, and this in turn has changed the outcome in some cases.\textsuperscript{231} Even in the absence of deliberation, the decision making of a multi-member court will be better than the decision making of a single judge due to the Condorcet jury theorem.\textsuperscript{232} This theorem states that if there is a correct solution to a problem and each member of a group is more than 50\% likely to determine the correct solution, then taking the majority vote of the entire group will be more likely to yield the correct solution than the vote of a subset of the group.

The benefits of having the full Supreme Court rule on applications for interim relief are especially strong because the standard for granting relief requires a single Justice to make a prediction as to whether four Justices will vote to grant certiorari.\textsuperscript{233} When all nine Justices are making the decision, this frees a Justice from having to count votes and speculate as to probabilities, a task at which the evidence suggests they are not particularly skilled.\textsuperscript{234} Instead, Justices can focus on their own willingness to grant certiorari in the case, which should be much easier to predict.\textsuperscript{235}

There are, however, good reasons for a single judge to act instead of a

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\textsuperscript{231} See Bernard Schwartz, Decision: How the Supreme Court Decides Cases 178–79 (1996) (providing statistics that more than half of the Supreme Court’s cases under Chief Justices Stone, Vinson, and Warren involved a vote switch). Professor Schwartz provides numerous accounts of vote switches in particular cases. See id. at 178–206.


\textsuperscript{233} See supra text accompanying note 171. The Goldberg standard also requires the Justice to predict whether at least five Justices will vote to reverse the judgment below. As discussed above, this element of the Goldberg standard is an inappropriate consideration in light of the proper understanding of the Supreme Court’s function in granting interim relief. See supra text accompanying note 192. For a discussion of the jurisprudential difficulties in predicting Justices’ votes in ruling on stay applications, see Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 690–95 (1995). Predicting whether the Court will grant certiorari in any case is often very difficult, since doing so is a “subjective decision, made up in part of intuition and in part of legal judgment.” REHNQUIST, supra note 4, at 234.

\textsuperscript{234} Justice Douglas’s accurate prediction making in Dexter v. Schrunk, 400 U.S. 1207 (1970), is probably not the norm. One review of a sample of in chambers opinions on applications for stays indicated that the Justices are often wrong in their predictions. See Scali, supra note 85, at 1043–46.

\textsuperscript{235} There would still be some element of prediction because Justices might change their views on granting certiorari with the benefits of additional briefing and time to deliberate that are available in ruling on a petition for certiorari but are not available in ruling on a stay application. Still, it would be easier for Justices to predict their own vote on certiorari at this stage than the votes of other Justices. For an interesting example of a case in which the full Court got the prediction wrong, see California v. Ramos, 455 U.S. 1011 (1982) (mem.). The full Court denied a stay application pending certiorari. The Court later granted certiorari in the case. California v. Ramos, 459 U.S. 821 (1982). Justice Rehnquist, acting as Circuit Justice, then granted a stay upon reapplication to him. See California v. Ramos, 459 U.S. 1301 (1982) (Rehnquist, J., in chambers). See Scali, supra note 85, at 1045 n.154, for a discussion of the Ramos litigation.
full court en banc. One clear benefit to empowering a single judge to act
is that one judge will typically be able to act more quickly than multiple
judges, especially when the judges are geographically dispersed.
Another benefit is that the judiciary will be less burdened with work to
the extent that it can divide cases among as few judges as possible. This
will allow the courts to decide cases more quickly, to the befit of
litigants and society as a whole.

Despite the benefits of action by single judges, the Constitution places
limits on how much of the power of a federal court a single judge of that
court may exercise. Although Article III of the Constitution provides
few explicit restrictions as to how the federal judicial system should be
structured, one thing it does do is vest the judicial power of the United
States in “one Supreme Court” and “inferior courts.”236 A literal
reading of Article III suggests that a judge may not exercise any judicial
power unless the judge is sitting on a properly constituted court (with,
for instance, a quorum of its members).237 It also suggests that Congress
may not delegate the power of the Supreme Court in any way that would
result in there being more than “one Supreme Court.” The constitutional
text, however, neither indicates what the extent of the “judicial power”
is238 nor how much delegation of the Supreme Court’s powers would go
too far.

To give content to the limitations of Article III on the exercise of the
judicial power, this Part examines the historical practices in Great
Britain and the early United States. Those practices reflect what the
Framers understood to be the judicial power and how that power should
be exercised. Looking to British practice to understand the U.S.
Constitution is a widely accepted methodological tool.239 The Supreme
Court often looks to English practice to interpret the Constitution,240 and

236. U.S. CONST. art. III, § 1 (emphasis added).
237. See Lo Duca v. United States, 93 F.3d 1100, 1107 (2d Cir. 1996) (“We note that,
traditionally, it is ‘courts’ and not ‘judges’ that exercise Article III power.”).
238. Determining the extent of judicial, legislative, and executive power is one of the thorniest
issues in constitutional law and political theory. See, e.g., Steven G. Calabresi, The Vesting
Clauses as Power Grants, 88 NW. U. L. REV. 1377, 1390 n.47 (1994); Richard W. Murphy,
Separation of Powers and the Horizontal Force of Precedent, 78 NOTRE DAME L. REV. 1075,
1115 (2003); Peter L. Strauss, The Place of Agencies in Government: Separation of
Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 603 (1984); see also Clinton v. New
714, 749 (1986) (Stevens, J., concurring in judgment).
(“In several contexts the [Supreme] Court has determined that the scope of a constitutional
dright, or the scope of jurisdiction of the federal courts established by Article III, must be
determined by ascertaining what would have happened in England at the time the Constitution
was formulated and ratified.”).
century practice in English Parliament to determine the power of the House of Representatives
to exclude one of its members under Art. I, § 5); Marshall v. Gordon, 243 U.S. 521, 538–41 (1917)
specifically to determine the powers of federal courts.\textsuperscript{241} The appropriateness of looking to English practice is supported by one of the Supreme Court’s earliest rules, adopted just a few years after the Constitution was ratified, which explicitly declared that the Supreme Court would “consider the practice of the Courts of King’s Bench and of Chancery in England as affording outlines for the practice of this Court.”\textsuperscript{242}

An examination of British practice, as well as early practice in the federal courts, indicates a fairly clear outline of the boundaries of a single judge’s powers to act in chambers. Broadly speaking, there were two types of situations in which a single judge was empowered to act in lieu of a full court. First, if the full court was unable to act quickly enough to protect an important liberty interest at stake in a case, a single judge could act to protect that interest. Second, individual judges could deal with certain quasi-administrative matters in chambers that involved a bare minimum of judicial discretion and would otherwise have consumed far too much of the court’s resources. Before turning to a more detailed account of this historical practice, the next subpart proposes a constitutional framework for assessing the issues involved in the current practice of individual Supreme Court Justices awarding interim relief pending appellate review.

\textit{A. Constitutional Framework}

Although the Framers of the Constitution were undoubtedly influenced by British practice in developing their ideas about how to design the U.S. judiciary, the system they designed is in many ways a substantial departure from those practices.\textsuperscript{243} One of the crucial departures the Framers made in designing the federal judiciary was creating a much more hierarchical structure, with some courts devoted to

\begin{footnotesize}

\textsuperscript{242} 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 203 (Maeva Marcus & James R. Perry eds., 1985); \textit{see also} Rule, 2 U.S. (2 Dall.) 411, 413–14 (1792).

\textsuperscript{243} See WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 35 (Wythe Holt & L.H. LaRue eds., 1990) (“[C]ontrary to what may be generally thought, the national judiciary was not modeled on the then-existing judicial systems of the states, or of England, but represents a new departure from established systems.”).
\end{footnotesize}
conducting trials and the others largely engaged in appellate review. In contrast, the English system and those in the individual states in the eighteenth century were more horizontal: although there were inferior and superior courts, all the courts were chiefly trial courts.

The departure that the Framers made from the English judicial system is evident in Article III of the Constitution, which states that there “shall be . . . one supreme Court.” Some commentators have discussed the “oneness” requirement that follows from this language. The oneness requirement is essential if the Supreme Court is to fulfill its function of achieving uniformity in federal law.

The oneness requirement is related to the broader constitutional principle of nondelegation. The Supreme Court has held, for instance, that Article III bars Congress from delegating the function of adjudicating private rights to non-Article III tribunals if doing so encroaches too far into the traditional jurisdiction and powers of Article III courts. The exercise of judicial power by a single Justice of the Supreme Court does not involve a delegation of Article III judicial power to a non-Article III actor, but rather a delegation of power from the primary Article III institution (the Supreme Court) to a component of that institution (a Justice).

In the context of the legislative power, the Supreme Court has addressed the constitutional validity of such intra-branch delegation. In INS v. Chadha, the Court held that delegation of the power that the Constitution vests in Congress to one of Congress’s components is unconstitutional. Thus, Congress cannot delegate its lawmaking powers to one of the two houses alone.

244. See id. at 35, 41.
245. See id. at 35.
246. U.S. CONST. art. III, § 1. The Framers explicitly rejected proposals that would have allowed for more than one supreme tribunal. See SERN ET AL., supra note 24, § 1.1, at 2 n.1–2.
247. See, e.g., Davies, supra note 33, at 684–87. The precise term “oneness” appears to have been coined by the authors of Supreme Court Practice. See SERN ET AL., supra note 24, § 1.1, at 2 (“By the plain language of Article III, the Court is endowed with a ‘oneness.’”).
252. See id. at 956. Some scholars have also argued against the use of legislative history as a tool in statutory interpretation on the grounds that this amounts to an unconstitutional delegation of legislative power from Congress to its internal committees. See, e.g., John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673 (1997).
apply to Article III’s vesting of the judicial power.

The notion that Chadha might apply to the delegation of judicial power from the Supreme Court to a single Justice is undercut by the fact that the Chadha Court’s reasoning relied heavily on the specific procedures laid out for legislative action in Article I, Section 7. Article III contains no such specificity, and instead it gives Congress great leeway in determining the structure of the federal judiciary. Chadha remains relevant, however, by analogy: just as the Constitution limits delegation of the legislative power to a component of Congress, the Constitution limits delegation of the judicial power to a component (i.e., an individual Justice) of the Supreme Court.

In the absence of specific textual limitations in Article III on the delegation of the Supreme Court’s powers to an individual Justice, the practice of English courts during the eighteenth century in regards to the powers of judges to act in chambers reflects what the Framers had in mind when they vested the judicial power in “courts” rather than judges. English practice recognized that only a properly constituted court could exercise judicial power. Yet, the courts recognized that certain circumstances called for individual judges to act in chambers in place of courts. These exceptions were widely accepted, but also extremely narrow. Thus, the extent of the powers of judges in chambers historically should furnish the appropriate limitations on intra-Article III delegation of judicial power. Through this lens, the “oneness” requirement of the Supreme Court is simply a corollary to this broader nondelegation principle: Congress cannot delegate the powers of the Supreme Court to any individual or institution other than the Supreme Court, including another entity within Article III that would act in any way as a second Supreme Court.

Justice Daniel, concurring in a Pennsylvania v. Wheeling & Belmont Bridge Co., issued the only opinion applying these constitutional principles to the practice of a single Justice granting interim relief:

253. See id. at 948–51.

254. The traditional view is that Congress has plenary power over the lower federal courts, see U.S. Const. art. III, § 1, and can also regulate the appellate jurisdiction of the Supreme Court, see id. § 2, cl. 2. See generally Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 330–37 (5th ed. 2003).

255. Cf. Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary, 67th Cong. 18 (1922) [hereinafter H.R. 10479 Hearing] (statement of James M. Beck, Solicitor Gen. of the United States) (“[T]he judicial branch of the Government may not, as has the legislative branch, divide up and attempt to cover a greater field of activity.”).

256. 59 U.S. (18 How.) 421 (1856); see also supra text accompanying notes 70–75 for a discussion of Wheeling & Belmont Bridge.
According to my interpretation of the constitution of the United States, the supreme court is a distinct, aggregate, collective body—one which can act collectively, and in term or in united session only. It cannot delegate its functions, nor can it impose its duties upon any number of the body less than a quorum, constituted of a majority of its members. Much less can a single judge be clothed with its joint powers, to be wielded by him at any time or in any place, or to any extent to which his individual discretion may point. Yet, in the case before us, we have a proceeding begun, prosecuted, and consummated in the name of the supreme court—nay, denominated their proper act, when eight of the nine judges constituting this tribunal had no participation in that proceeding, perhaps never even suspected its existence.  

Justice Daniel took a broad view of the constitutional limits that applied to any action by a Justice acting in an individual capacity. He invoked both the oneness concept and the nondelegation principle. Justice Daniel argued that a Supreme Court Justice could act in an individual capacity only when exercising the power of a circuit court, but not when exercising the power of the Supreme Court.

Although Justice Daniel is the only Justice to have publicly addressed the constitutionality of a single Justice granting interim relief in a published opinion, numerous Justices have addressed the constitutional limitations on the delegation of the Supreme Court’s powers. For instance, Justices have questioned the constitutionality of various proposals to split the Court into panels or to create other federal tribunals that would do some of the work of the Supreme Court. Justice Strong, for instance, writing in 1881 after he had already retired from the Supreme Court, came out squarely against a proposal to increase the number of Justices on the Court and then split them into separate panels. He speculated that such a scheme would be unconstitutional: “If not an infraction of the Constitution, which vests the judicial power in one Supreme Court (contemplating but one), and in such inferior

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258. See also id. at 454 (“The supreme court . . . is the creature of the constitution. By this instrument its powers and jurisdiction, original and appellate, are conferred and defined; these are peculiar and exclusive, and by no legislation can they . . . either in whole or in part, be delegated to other tribunals or officers of any grade or description.”).

259. Id. at 454–55 (“I am clearly of the opinion, therefore, that by the 5th section of the act of 1793, no power to exercise authority or jurisdiction appertaining to the supreme court was, or could have been, conferred either upon the circuit courts or upon the judges thereof; but that this section must be understood as simply conferring upon the judges a power previously confined to the courts alone—namely, the power to grant injunctions, and this subject to every limitation by which the circuit courts were controlled.”).

courts as the Congress may from time to time ordain and establish, it is marvelously like an evasion of it.” 261 A special committee of the American Bar Association came out against a similar proposal. 262 The committee expressed “the gravest doubt whether such legislation would not be in violation of . . . Article III.” 263 The committee emphasized not only the need for uniformity, but also argued that Article III requires that the Supreme Court act as a deliberative body with a collegial bench: “[T]he Supreme Court . . . is and shall be one body, acting as such, and that each suitor appearing before it is entitled to the benefit of the judgment of each one if its members, upon the merits of his case.” 264

Chief Justice Taft, appearing before the House Committee on the Judiciary in connection with the Judges’ Bill, 265 testified that a solution to the excessive workload of the Supreme Court could not be to split the Court into two “because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the Supreme Court up into two parts.” 266 Solicitor General James M. Beck also discussed the constitutionality of splitting the Supreme Court into sections in his testimony before the Committee, noting that “a very serious doubt has been entertained by the members of [the Supreme Court] as to whether [Article III, § 1] would admit of any subdivision.” 267

Justice Field, writing in 1890, observed that “[n]o case in the Supreme Court is ever referred to any one Justice, or to several of the Justices, to decide and report to the others. Every suitor, however humble, is entitled to and receives the judgment of every Justice upon his case.” 268 Several decades later, Chief Justice Hughes declared, “The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.” 269 As Justice Harlan put it, “[A]nything less than action [by the Court] as a unit would be foreign to the ways in which the

261. Id. at 443.
263. Id. at 11.
264. Id.
265. See supra Part III.E for a discussion of the Judges’ Bill.
266. H.R. 10479 Hearing, supra note 255, at 3 (statement of C.J. William Howard Taft, U.S. Supreme Court).
Court has always functioned, and is hardly compatible with the proper discharge of its responsibilities as the Nation’s highest judicial tribunal.”

Chief Justice Hughes wrote that “[t]he Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.”

Justice Brennan put the idea in simple, unambiguous terms: “[The Constitution] does not permit Supreme Court action by committees, panels, or sections.”

Constitutional debate has also arisen from suggestions to divide or delegate only the Supreme Court’s function of considering petitions for certiorari. The issue came up in the 1970s after a special committee appointed by Chief Justice Burger—known unofficially as the Freund committee—issued a proposal to create a “National Court of Appeals,” which would have taken over most of the work in reviewing petitions for certiorari. Several Justices expressed their disapproval of the proposal, noting that it raised serious constitutional questions. Chief Justice Warren, then retired, declined “to deliver a postjudicial advisory opinion” on the matter, but strongly suggested his view was that Article III required that the Supreme Court (as a full court) exercise the entirety of its functions.

Justice Goldberg, also then retired, argued with more certainty that the proposal was unconstitutional: “[I]t is inconsistent with the constitutional requirement that there be ‘one Supreme Court’ to delegate to another court the responsibility of determining which cases the Supreme Court shall hear. The power to decide cases presupposes the power to determine what cases will be decided.”

Other Justices who publicly opposed the Freund committee’s proposal on a variety of grounds were Justices Brennan, Douglas, and Stewart.

The issue of dividing up the Supreme Court’s screening of cases also

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273. The committee was named for its chairman, the late Professor Paul A. Freund of Harvard Law School.
arose, and was rejected, during the congressional debates on the Judges’ Bill in the 1920s. During the consideration of the Bill, which greatly expanded the Supreme Court’s power to exercise discretionary review via writ of certiorari, its supporters had to address concerns among the bar and members of Congress that arose from their mistaken belief that the Justices divided up petitions for certiorari among themselves and disposed of them individually, rather than considering them jointly. The Justices testifying before the congressional committees, as well as the Bill’s supporters in the floor debates, were quick to dispel this erroneous belief and highlighted that all of the Justices considered each petition for certiorari jointly.

Solicitor General Beck, testifying before the House Committee on the Judiciary, expressed the view that allowing one Justice to hear an oral argument on a petition of certiorari would be inappropriate, even if the petition were still decided by the full Court in conference. The idea arose because some members of Congress were concerned with the certiorari process and questioned Beck on the possibility of allowing litigants to give oral arguments in support of certiorari petitions. After Beck rejected this idea as impractical, some of the committee members pressed the idea that if oral argument before the full Court on each petition for certiorari would take up too much of the Court’s time, it might be possible to have oral argument before just a single Justice, who could take the points raised at argument back to the full Court at conference.

278. See 66 Cong. Rec. 2752 (1925) (statement of Sen. Harrel) (“Another complaint that I have . . . is that when [cases] come to the Supreme Court of the United States by writ of certiorari under the present law the matter is passed on by one judge only. Some of the judges simply marks it ‘Denied,’ and they can not get it before the other judges or before the court.”); H.R. 10479 Hearing, supra note 255, at 18 (statement of James M. Beck, Solicitor Gen. of the United States) (“Let me correct, if it be necessary, the impression very prevalent among the bar that writs of certiorari are treated in a perfunctory way, namely, that they are divided up among the nine justices . . . .”); Jurisdiction Hearing, supra note 205, at 8 (statement of J. Willis Van Devanter, U.S. Supreme Court) (“[I]t seems to be thought outside that the cases are referred to particular judges, as, for instance, that those coming from a particular circuit are referred to the justice assigned to that circuit, and that he reports on them, and the others accept his report.”).

279. See 66 Cong. Rec. 2753 (statement of Sen. Cummins) (“[A petition for a writ of certiorari] is not passed upon by a single judge. On the contrary, it is passed upon by a majority of the members of the Supreme Court.”); H.R. 10479 Hearing, supra note 255, at 19 (statement of James M. Beck, Solicitor General of the United States) (“[T]he nine justices, every one of them, are responsible on their consciences for a careful study of each application for a certiorari; that they then vote in consultation . . . .”).


281. See id. (statement of James M. Beck, Solicitor Gen. of the United States).

282. See id. at 26 (statement of Rep. Walsh) (“Would it be practicable to permit a brief hearing before a single justice in support of the application which he files for a writ of certiorari?”); see also id. at 28 (statement of Rep. Reavis).
Beck, while declining to take a definitive position on the idea of an oral argument before one Justice, suggested “that it would not work” and noted several objections to this proposal. First, he noted that the Justices have a “manifest difference in temperament between them,” and thus would be more or less receptive to granting certiorari in different cases. Even if the full Court ruled on the petition in conference, “the natural result . . . would be that the court would insensibly slide into the practice that the judge who heard the oral argument should decide it.” The proposal would thus remove “[t]he advantage of taking the composite mind of the court upon whether the case is of sufficient importance to be one of the favored cases to be heard by that court.”

Even the Supreme Court’s current practice in processing petitions for certiorari, known as the “cert pool,” has raised constitutional questions among some of the Justices. Four Justices—Justices Douglas, Stewart, Brennan, and Marshall—initially refused to participate in the cert pool. Justice Douglas, for instance, felt that it amounted to a “Junior Supreme Court” made up of the Justices’ law clerks. Such a Junior Supreme Court would violate the oneness requirement of Article III. Although the cert pool is now an accepted practice, the fact that several Justices have objected to it demonstrates how important the constitutional principles of oneness and nondelegation are.

The possibility of having the full Court review the actions of a single Justice or a panel of judges does not eliminate these constitutional problems. This is because en banc review would involve deference to the decision of the single Justice or panel. The deference the full
Court gives to the decision of a single Justice on an application for interim relief is substantial, as demonstrated by the fact that there are at most only two instances in which the full Court (or a single Justice acting informally on behalf of the full Court) has overruled the decision of a single Justice. Justice Stevens, stating what appears to be the general view of the Justices, observed that the “Circuit Justice’s decision should not be disturbed simply because the other members of the Court would have declined to grant the stay as an original matter.” Nevertheless, the only alternative to abandoning some form of deference would be to have de novo review by the full Court, which would eliminate any efficiencies from dividing up the work among panels or individual Justices (and would instead create more work).

None of this firmly establishes that the delegation of the power to grant interim relief pending appellate review to individual Justices is unconstitutional. One reason why such delegation might be legitimate is that it does not empower Justices to decide cases on the merits. Instead, it is preliminary, ancillary, and temporary. As the authors of *Supreme Court Practice* put it:

This “oneness” concept, of course, does not mean that individual Justices cannot act on motions or applications that are addressed to them in their capacity as Circuit Justices. *Granting or denying such motions or applications is not the action of the Court* and is not a final resolution of the merits of any case or controversy pending before the Court. They are merely preliminary steps toward invoking the ultimate power of the “one supreme Court” to resolve a case or controversy that is properly before the Court for final disposition.

The argument that granting interim relief is not a “final resolution of the merits” of a case is unsatisfactory because the same can be said about the decision to grant or deny a petition for certiorari, and there is a consensus that delegating review of certiorari petitions to any individual or institution other than the Supreme Court as a unit would be unconstitutional. The functional reason that the Supreme Court itself must process petitions for certiorari itself is, as Justice Goldberg put it, “[t]he power to decide cases presupposes the power to determine what

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294. See supra Part II.B (discussing Rosenberg v. United States and Holtzman v. Schlesinger). For a discussion of why the Rosenberg decision might not count as an instance of the Court overruling the decision of a Justice, see supra text accompanying notes 157–161.

295. Heckler v. Lopez, 464 U.S. 879, 880 (Stevens, J., dissenting) (dissenting from denial of application to vacate stay).

296. See AM. BAR ASS’N, supra note 262, at 13; Gressman, supra note 277.

297. STERN ET AL., supra note 24, § 1.1, at 3 (emphasis added).
cases will be decided.\textsuperscript{298} Congress gave the Court power to control its own docket with the understanding, expressed in the debates on the Judges’ Bill, that the full Court would carefully consider the petitions for certiorari to ensure that important cases would get a hearing at the Supreme Court level. Justices of the Supreme Court have recognized the crucial nature of the certiorari stage toward ensuring that the Supreme Court exercises its proper role as a national institution devoted to deciding important issues of federal law.\textsuperscript{299}

While the decision to grant interim relief may not be as crucial to the Court’s effective functioning as the certiorari decision, interim relief is an important aspect of the Court’s powers for two reasons. First, stays and other interim relief are substantive, rather than procedural—they give, albeit temporarily, to the applicant exactly what the applicant would get with a full victory on the merits; in cases of extreme urgency, the decision on interim relief may end up being the final decision that can be made before the case becomes moot. Second, the Court’s powers to grant interim relief are necessary in many cases to preserve its jurisdiction by keeping cases in a reviewable posture. Indeed, as this Article argues, keeping cases from becoming moot is generally the only appropriate reason for the Supreme Court (or a Justice) to grant interim relief.\textsuperscript{300} To paraphrase Justice Goldberg, the power to decide cases presupposes the power to keep those cases in a posture to be decided. It follows from this that the power to grant interim relief cannot constitutionally be delegated to a single Justice.\textsuperscript{301}

Another possible argument in favor of the constitutionality of individual Justices ruling on interim relief is that the decision to grant interim relief is not the action of the Supreme Court, but rather is the action of a “Circuit Justice” as a separate Article III institution. According to this argument, the Justices serve dual roles, acting as both members of the Supreme Court, and also as nine separate Circuit Justices, which can be thought of as single-member “courts” having limited jurisdiction over procedural matters.

\textsuperscript{298} Goldberg, supra note 276, at 14.

\textsuperscript{299} See John R. Schmidhauser, The Supreme Court: Its Politics, Personalities, and Procedures 132 (1960) (“Some members of the Court . . . have stressed the importance of the sifting process to the maintenance of the operating efficiency of the Court as a national institution.”); id. (“[I]t is clear that the broad exercise of discretionary power to weed out the unimportant cases is the crucial stage for most federal litigation.”).

\textsuperscript{300} Lower courts may appropriately grant interim relief for other reasons, such as balancing the equities.

\textsuperscript{301} The fact that a lower court or a judge thereof may grant interim relief pending review does not mean that the Supreme Court’s power has been delegated to the lower courts. A lower court has power to control the effect of its own judgment and plays a role in balancing the equities that the Supreme Court itself cannot.
There are at least three reasons, however, why the action of an individual Justice in chambers is properly treated as the action of the Supreme Court itself. First, the Justices’ in-chambers opinions emphasize that the role of a Circuit Justice is to act as a “surrogate for the entire Court.” The concept of the Justice acting as a surrogate for the Court suggests a delegation of the Court’s authority, not some exercise of authority as a “Circuit Justice” independent of the authority of the Supreme Court. Second, the Justices have the power to overrule lower federal courts, even multi-member courts of appeals, in their individual capacities. While it is uncontroversial that the Supreme Court itself may overrule the decision of a lower federal court, the views of a single “Circuit Justice,” separated from the institutional supremacy of the Supreme Court itself, should not have greater force than the views of a three-judge panel (or a court of appeals en banc). Finally, if a Justice ruling in chambers is really acting as an Article III institution distinct from the Supreme Court, then Justice Black’s view in Rosenberg—that the Supreme Court lacked jurisdiction to review Justice Douglas’s order—should have prevailed; there would be no jurisdictional basis for the full Supreme Court to overrule the decision of a Circuit Justice. It is true that for the Supreme Court’s entire history, the Justices have been assigned to a particular geographic circuit, and for much of the eighteenth and nineteenth centuries, the Justices frequently served as judges on the circuit courts as well as the Supreme Court. Indeed, much of the powers the Justices exercised in their individual capacities


303. It is fairly uncontroversial that a single Justice in chambers may vacate a stay granted by a lower court. See, e.g., Western Airlines, Inc. v. Int’l Broth. of Teamsters, 480 U.S. 1301, 1305 (1987) (O’Connor, J., in chambers); see also STERN ET AL., supra note 24, § 17.11, at 866 (“An individual Justice . . . can either grant a stay denied below or vacate or amend a stay granted below.”).

304. See supra notes 151–55 and accompanying text.

305. See Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313–14 (1810) (construing Acts of Congress granting the Supreme Court appellate jurisdiction as impliedly excepting all other cases); cf. In re Metzger, 46 U.S. (5 How.) 176, 191 (1947) (“This court can exercise no power, in an appellate form, over decisions made at his chambers by a justice of this court, or a judge of the District Court.” (emphasis added)); Hartnett, supra note 25, at 283 n.140 (“Metzger also might be read to reflect a view that the Supreme Court lacked statutory authorization to review in-chamber decisions. . . . Metzger also might stand for the proposition that because appellate jurisdiction involves the revision of another court’s judgment and an individual judge in chambers is not holding court, an in-chambers decision itself cannot be, as a constitutional matter, the predicate for the exercise of the Supreme Court’s appellate jurisdiction.”).

during the eighteenth and nineteenth centuries flowed from their roles on the circuit courts rather than on the Supreme Court.\footnote{307}

The statute governing allocation of Supreme Court Justices to circuits is still on the books,\footnote{308} but the statute itself gives no guidance as to what the duties and responsibilities of a "Circuit Justice" are.\footnote{309} The connection between the allocation of Justices to the individual circuits and the powers of Justices in their individual capacities is simply a matter of custom dating back to when the Justices actually granted stays and supersedeas in their roles on the circuit courts.\footnote{310} This custom is useful today as a convenient basis to allocate applications among the Justices in a way that prevents litigants from Justice shopping.\footnote{311} But no statute connects the role of Circuit Justice and the powers of an individual Justice to grant interim relief—it is purely a matter of the Supreme Court’s own rules.\footnote{312}

Even if Congress, exercising its power to create inferior federal courts, explicitly instituted the role of a Circuit Justice as a separate “court” solely empowered to grant interim relief pending appellate review, the scheme would still raise Constitutional questions. First, as this Part has argued, to the extent that granting interim relief affects the Supreme Court’s power to keep cases in a reviewable posture, the Court itself must exercise that power. Second, although the Supreme Court upheld the constitutionality of circuit riding—the practice of Supreme Court Justices serving as judges on the lower federal courts—in \textit{Stuart v. Laird}, it did so in a single paragraph and relied exclusively on the fact that it had been practiced since the first Judiciary Act (then only fourteen years old) rather than any arguments based on the text or purposes of the Constitution.\footnote{313} In fact, having Supreme Court Justices play dual roles within the federal bench raises serious and unresolved constitutional

\footnote{307. See supra Part IV.C.}
\footnote{308. See 28 U.S.C. § 42 (2000).}
\footnote{309. A Circuit Justice may sit by designation on a panel of the court of appeals, see 28 U.S.C. § 43(b), and Justice Thomas did when he was first elevated from the D.C. Circuit to the Supreme Court. See Redden v. ICC, 956 F.2d 302 (Thomas, Circuit Justice, D.C. Cir. 1992); Am. Library Ass’n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992).}
\footnote{310. See ROBERTSON & KIRKHAM, supra note 40, § 437, at 889 n.5.}
\footnote{311. See Felleman & Wright, supra note 66, at 984 ("[T]he distinction between decision as circuit justice and as an individual member of the Court is largely theoretical."); see also id. at 986 (discussing the problems with allowing litigants to shop around); Comment, supra note 94, at 460 (observing that "the legal nexus [between the justices and the circuits] is now illusory since Supreme Court justices no longer sit on circuit court of appeals panels" and recommending that applications be assigned to a Justice according to a confidential sequence in order to assure equitable distribution of applications).}
\footnote{312. See SUP. CT. R. 23.3.}
\footnote{313. 5 U.S. (1 Cranch) 299, 309 (1803); see also Joshua Glick, Comment, \textit{On the Road: The Supreme Court and the History of Circuit Riding}, 24 \textit{CARDOZO L. REV.} 1753, 1755 (2003).}
questions. The constitutional argument most relevant here is that the practice might run afoul of the Appointments Clause by allowing Congress to appoint a Supreme Court Justice to a lower federal court without going through the Constitutional procedures for appointing Article III judges.

Although the unconstitutionality of having Supreme Court Justices function essentially as a lower federal court in their individual capacities is debatable, the canon of constitutional avoidance suggests that the powers of Supreme Court Justices in their individual capacities should be understood to be narrow. The statutory authorizations should be understood to confer only the narrow powers that have historically been exercised by a single judge in chambers. The next few subparts discuss this practice in British and early American history.

**B. Historical Practice in Great Britain**

In seventeenth and eighteenth century Britain, the exercise of judicial power by a single judge of a multi-member court in lieu of the full court itself was largely limited to two situations: first, situations in which the full court could not act in time to preserve an important legal interest, generally because it was in vacation and the judges were geographically dispersed, and second, situations in which a single judge could individually perform certain acts of a quasi-administrative nature that required a minimal amount of judicial discretion. Lord Mansfield

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314. See Glick, supra note 313, at 1831–42.


316. See David P. Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. CHI. L. REV. 646, 663–64 (1982). According to Professor Currie, "[t]his contention was not at all frivolous. Although not every addition to a court’s jurisdiction should be held to require a new appointment, some limit on congressional reassignment of the functions of incumbent officers seems implicit if the President’s authority is not to be circumvented." Id.; see also Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 475 n.151 (1989) ("[C]onceptualizing Supreme Court Justices as dual office holders raises serious constitutional problems of its own, not the least of which implicates the Appointments Clause."). The Supreme Court’s decision in Weiss v. United States, 510 U.S. 163 (1994), suggests the relevant inquiry. Congress may not “both create an office and also select a particular individual to fill the office.” Id. at 174. Thus, the Weiss Court suggested, in dicta, that if Congress gives to an existing officer additional duties that are not germane to the office, a second appointment must be made. See id.; see also Shoemaker v. United States, 147 U.S. 282, 300–01 (1893). It is unclear how this standard might apply to a congressional decision to give Supreme Court Justices duties on some lower federal “court” empowered to grant interim relief. However, it has long been understood that an Article III judge on a lower court cannot be elevated to a higher court without a new nomination and confirmation, and presumably this understanding applies in the reverse direction.

317. Under one statement of this canon, a statute should be interpreted in a way that avoids constitutional problems if fairly possible. See, e.g., NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 505 (1979).
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summarized the English practice as follows: “[A] great deal that may be done in Court, is done by Judges at chambers, in term-time: in vacation, a great deal more is done by them at chambers; because it can be done no where else.”

English courts sat only during designated terms. The English superior courts at Westminster—the Courts of Kings’ Bench, Common Pleas, and Chancery—had four terms of three weeks each, and the courts did no business during the vacation time between terms, which generally corresponded to Christian festivals and the harvest season. For the majority of the year then, the Westminster courts were not in session. Instead, the twelve judges of the Westminster courts went on assize and rotated through sittings at the Old Bailey, London’s main criminal court.

One power that the individual judges of the Westminster courts did not historically exercise was granting interim relief pending appellate review. However, the modern idea of appellate review did not exist in England until the twentieth century. There were, however, procedures through which a superior court could correct errors in an inferior court proceeding. The King’s Bench could reverse inferior court judgments for error “on the face of the record” via a writ of error. In criminal cases, another procedure was that of the “reserved case,” through which a trial judge could solicit the advice of the twelve judges of the Westminster courts on an issue of law that became apparent after conviction. When the legal question was apparent before conviction, the trial judge could direct a special verdict, by which the jurors found the facts and the twelve judges would confer as to questions of law, or allow the jury to convict generally, subject to the judges’ opinion. In

319. See 3 WILLIAM BLACKSTONE, COMMENTARIES *274–77 (providing a detailed account of the historical origins and development of the terms of court in England). The four terms were Michaelmas (November and December), Hilary (January and February), Easter (April and May), and Trinity (June and July). OLDHAM, supra note 239, at 42–43.
320. This was when the judges of the Westminster courts would leave London to conduct trials throughout England. See OLDHAM, supra note 239, at 50–51. This is similar to the practice of “riding Circuit” that the early U.S. Supreme Court Justices engaged in.
321. Id. at 39–40, 43.
323. See id. at 45–46. Some judgments could be falsified, reversed, or voided without a writ of error if the error was not apparent on the face of the record, such as when a person was convicted by a person without a valid commission. See 4 BLACKSTONE, supra note 319, at *383–84.
324. See Baker, supra note 322, at 47.
325. See id.
the last resort, a pardon was available from the King. Pardons were often the only mechanism available for preventing the punishment of acts committed in self-defense or by accident.

Under any of these “appellate” procedures, the practice was for the trial judge to grant a reprieve, which operated like a stay in that it delayed the execution of a judgment for a time. At a time when capital punishment was frequent, the reprieve was necessary to prevent irreparable harm, although it was not strictly necessary to preserve jurisdiction. The reprieve would be granted by the trial judge, in his discretion, to allow for time to obtain a pardon, or for the twelve judges to review any legal questions that might result in them setting aside the conviction or recommending a pardon. The trial judge was obligated to grant a reprieve as a matter of law whenever the convict was pregnant or insane. Similarly, a stay of judgment pending appellate review was available as of right in civil cases.

Thus, the English practice in eighteenth century was for reprieves to be granted in order to preserve the life of a convict so that the reviewing judges had time to consider any legal issues relating to the conviction or so the King could determine whether or not to grant a pardon. The trial judge made the decision on a reprieve, presumably because he was the most familiar with the case and was often the one invoking review by either the twelve judges or the King. Translating this into the modern U.S. judicial system, the English practice supports the idea that stays should generally be available for the purpose of keeping a case in a reviewable posture. It also supports the idea that the stay decision should generally be left to the lower court, not the reviewing authority.

European jurists were uniformly wary of the dangers involved in the grant of power to a single judge, especially in criminal matters. While the solution on the continent was to have a collegial bench adjudicate criminal cases, the English solution was somewhat different: Rather

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326. See 4 BLACKSTONE, supra note 319, at *391–93.
327. Id. at *393.
328. Sir William Blackstone describes how a convict himself could rarely have time to complete the necessary procedures to bring a writ of error before being put to death, but the writ “may be brought by his heir, or executor, after his death, in more favourable times; which may be some consolation to his family.” 4 BLACKSTONE, supra note 319, at *385.
329. See id. at *387; OLDHAM, supra note 239, at 55; Baker, supra note 322, at 47–48.
330. 4 BLACKSTONE, supra note 319, at *387–89.
332. See Langbein, supra note 223, at 31.
333. Id. (“In the nineteenth century when the Continental codes were shaping the contours of the modern courts systems, collegiality was thought to be an important safeguard against judicial caprice or corruption.”)
than having a collegial bench at the trial level, “the jury system served as an alternative safeguard against judicial excesses, since it divided the adjudicative power and allocated much of it away from the bench.”

After trial, the twelve judges of the Westminster courts conducted review of any legal issues. Thus, at all stages of litigation, the full judicial power was kept out of the hands of a single judge.

Although the judicial system developed to favor keeping reviewing power in the hands of multi-member courts rather than single judges, the fact that the reviewing courts were in session for limited amounts of time led to the recognition of the need for a single judge to be empowered to act for the full court in certain situations. The most widely recognized need for empowering a single judge was in granting writs of habeas corpus. Initially, only the King’s Bench was authorized to grant a writ of habeas corpus, but by the mid-seventeenth century the judges had developed a practice of issuing the writs individually in chambers during the vacation.

The legality of the practice was unclear, but the English Parliament responded by specifically incorporating it into the Habeas Corpus Act of 1679. The justification for this emergency power was clear: “[T]he king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.”

This fundamental principle of English justice accounts for the unusual authorization of a single judge to grant a writ of habeas corpus. An important limit on this power is that a single judge could act only during the vacation. Should a term of court commence while a habeas proceeding was pending, jurisdiction would shift from the single judge

334. Id. at 35.

335. W.A. Stokes & E. Ingersoll, Note, in 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 149c (Philadelphia, R.H. Small 1847); see also 3 BLACKSTONE, supra note 319, at *131 (“[Habeas Corpus] is a high prerogative writ, and therefore by the common law issuing out of the court of king’s bench not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges . . . .”). Sir Edward Coke, writing in the early seventeenth century, stated that the Court of Chancery could also grant a writ of habeas corpus in order to fill the void left when the King’s Bench was not in session. See 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 81 (London, W. Clarke & Sons 1817). Blackstone, however, observed that there was in fact no precedent for this practice. See BLACKSTONE, supra note 319, at *132.

336. 31 Car. 2, c. 2 (Eng.). There is some dispute as to whether or not the practice actually predated the statute. See Stokes & Ingersoll, supra note 335, at 149a, 149c. However, Professors Paul D. Halliday and G. Edward White have found records of “hundreds of writs used during vacations throughout the sixteenth and seventeenth centuries.” Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 VA. L. REV. 575, 611 n.92 (2008).

337. 3 BLACKSTONE, supra note 319, at *131.
to the full court.\textsuperscript{338} Moreover, a single judge had no power to enforce the writ; only the full court could do so.\textsuperscript{339}

Just as the individual liberty interest justified the practice of an individual judge granting a writ of habeas corpus, it also justified the practice of an individual judge of the King’s Bench granting bail in place of the full court. Although for most crimes, the equivalent of a trial judge could grant bail, only the King’s Bench could bail for the crimes of treason and murder.\textsuperscript{340} When the court was in vacation, this power shifted to the individual judges.\textsuperscript{341} As with habeas, this unusual authorization was due to the important liberty interest at stake.\textsuperscript{342} If an individual judge could not grant bail during the court’s vacations, then many individuals would have had to spend weeks or months imprisoned before the King’s Bench began its next term.

Thus, the authorizations for individual judges to grant writs of habeas corpus and bail reflected the fact that without such powers, the liberty interests at stake would be defeated simply due to the inability of the full court to act during much of the time. The powers of the judges to act in their individual capacities in these instances were thus properly limited to the vacation.\textsuperscript{343} Even if a collegial bench is an important safeguard against the abuse of judicial power, certain harms should not go without redress just because that safeguard is unavailable.

Other instances in which the individual judges could act in lieu of the full court were justified as a matter of administrative convenience, rather than the sheer necessity that justified their powers to grant habeas and bail. As with habeas and bail, the limited amount of time during which

\textsuperscript{338} See \textit{id.} ("If [the writ of habeas corpus] issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term should intervene, and then it may be returned in court.").

\textsuperscript{339} See Stokes & Ingersoll, \textit{supra} note 335, at 149d.

\textsuperscript{340} 4 \textit{BLACKSTONE}, \textit{supra} note 319, at *293, *296.

\textsuperscript{341} \textit{Id.} at *296 ("[I]t is agreed that the court of king’s bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder, or any other offense, according to the circumstances of the case.").

\textsuperscript{342} See \textit{id.} at *294 ("[T]o refuse or delay bail to any person bailable, is an offence against the liberty of the subject . . . .").

\textsuperscript{343} The limited nature of the powers of individual judges to act in place of a full court is evident from the statements of English jurists of the time in other contexts. Sir Edward Coke, who served as Chief Justice of the King’s Bench, in describing the issuance of writs of prohibition to the Court of Admiralty, observed, “[W]e have granted none in the time of vacation, nor in the term time in any of our chambers, nor in the court in the terme time \textit{ex officio}, but upon motion made in open court.” 4 \textit{COKE}, \textit{supra} note 335, at 136 (emphasis added). It was also a rule that a single judge could act to prevent defendants from pleading dilatory or frivolous pleas by ordering the defendant to be bound by his plea or else plead a new plea immediately, but only in vacation—in term-time, this was the court’s power. 1 \textit{TIDDR}, \textit{supra} note 331, at 614; \textit{see also} Foster v. Snow, 97 Eng. Rep. 560 (K.B. 1759) (upholding such an order made in vacation by a single judge of King’s Bench).
the courts were in session created strains on the judges as well as the litigants, but here the empowerment of single judges was not based on true necessity or emergency and was instead more about convenience and administrability. Still, without the practice, the resulting delays in the judicial process might have reached the point of inhibiting the effectiveness of the English courts. Thus, these instances of individual judges acting for the court were justified by a weaker form of necessity—that of keeping the machinery of justice functioning in an acceptable manner.

Although administrative convenience could justify a single judge acting for the court, this practice was only allowed when the judge’s action involved a minimum of judicial discretion and was more of a quasi-administrative function. For example, it was a general rule in civil cases that amendments to pleadings were to be allowed as a matter of course and could be granted by either the court or a judge in chambers.\(^\text{344}\) Similarly, the practice developed that a single judge could allow an amendment to a criminal information, even in term-time.\(^\text{345}\) When one criminal defendant sought to obtain a new trial on the grounds that this practice exceeded the powers of a single judge, the King’s Bench, in *Rex v. Wilkes*, unanimously upheld the practice.\(^\text{346}\) The Court’s reasoning\(^\text{347}\) emphasized that this was a longstanding practice that had attained a legal status as custom or tradition, and also that the practice was necessary in order to avoid delays in litigation:

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\text{[I]t seems to have been exercised time out of mind; and that the business of the Court could not be done without it. The business done at chambers is the most irksome part of the office of a Judge; but it is greatly for the benefit of the subject, and tends to the advancement and expedition of justice. It arises from the overflowing of the business of the Court; which can not be all transacted in Court.}\(^\text{348}\)
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The Court also emphasized that amendments to informations were allowed almost as a matter of course, and thus the single judge’s

\(^{344}\) 1 Tidd, *supra* note 331, at 652.


\(^{346}\) See *id*. at 353.

\(^{347}\) The English practice was and is for each judge to issue an independent opinion seriatim rather than to produce an opinion of the Court. The opinions in this case indicate that the judges were in substantial agreement on this issue, so for convenience the Article refers to this as the reasoning of the Court.

\(^{348}\) *Wilkes*, 98 Eng. Rep. at 352 (Yates, J.) (emphasis added); see also *id*. at 353 (Aston, J.) (“[T]he practice of the Court has been always [for a single Judge at chambers to allow an amendment to an information]. The business done at chambers is become an immense load upon the Judges, and is exceedingly troublesome to them: but it is the practice, the custom of the Court; and therefore, the law of the land.” (emphasis added)).
decision involved a minimum of judicial discretion. 349 As a practical matter, there was no reason for a court not to allow an amendment because, if the court did not do so, then the prosecutor could simply withdraw the existing information and bring a new one—“[a]nd this would have been more inconvenient to the defendant, and have harassed him more: he would have no benefit, and more vexation.” 350 Since the court would allow the amendment almost automatically, it made none of the parties worse off by allowing a single judge to do so. In any case, the defendant could appeal the judge’s order to the court, which had the power to set it aside. 351

As in England, jurists in Scotland also recognized that, in an emergency, a single judge should be able to act for a multi-member court. For example, Scotland’s highest criminal court, the High Court of Justiciary, was charged with implementing a royal pardon by issuing an order to the proper officer commanding him not to carry out the sentence. 352 David Hume, one of eighteenth-century Scotland’s leading jurists, 353 observed that “[i]n a case of necessity, this seems to be one of those acts, which lie within the province even of a single Judge; as it is not to be imagined . . . the royal mercy is to be disappointed, and the life or person of a fellow creature to be thrown away.” 354 Not only the necessity of the situation, but also the quasi-administrative nature of the act justified a single judge taking action: “[the] business is of so plain a nature, and one in which there is so little room for the exercise of judgment or discretion.” 355 In Scotland (as in England), a woman’s pregnancy was grounds for an automatic stay of her execution. Hume cites the case of one such woman, whose execution was stayed by two judges of the High Court of Justiciary, who happened to be the only two judges in the city at that time: “their deliverance bears, that as no quorum of the Court could be got, they therefore proceeded on the necessity of the case.” 356

There were some instances in Scotland in which the individual judges of the High Court of Justiciary could act even without this type of necessity. A single judge could stay a sentence short of death or

349. See id. at 352 (observing the “general rule” to allow amendments to an information at any time before trial); see also id. (Yates, J.) (noting that the amendment in this case was not very material).
350. Id. at 351 (Mansfield, L.J.).
351. See id. at 352 (Yates, J.).
352. See 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND 391 (Edinburgh, Bell & Bradfute, 1800).
353. Hume was the nephew of the famous philosopher of the same name.
354. Id. (citing the case of John Pott, June 21, 1748) (emphasis added).
355. Id. (emphasis added).
356. Id. at 343 (citing the case of May Langlands, Nov. 17, 1785) (emphasis added).
dismemberment for thirty days. This practice may have arisen to allow convicts time to attempt to obtain a royal pardon because by statute, in the absence of a stay, these sentences were carried out either eight or twelve days after judgment.

C. Early Practice in the Federal Courts

The structure of the federal judiciary was substantially different from its current form for much of U.S. history. The old circuit courts—the chief trial courts of the federal system for its first century—did not have a permanent group of circuit judges. Instead the circuit court bench consisted of the Supreme Court Justices “riding circuit,” as well as the district court judges. As a result, the Justices split their time between the capital and the rest of the nation. The Supreme Court itself sat for only two brief sessions each year. On the day of the Supreme Court’s very first scheduled session, the three Justices who showed up were forced to adjourn due to the lack of a quorum.

Because the Justices and judges of the federal courts were splitting their time in different courts in different parts of the country, the courts were often not in session during the late eighteenth and nineteenth centuries. As a result, “[a] very great deal of the work of the early federal judiciary was done by judges acting in their individual capacities, in chambers or during vacation, not while sitting on courts formally assembled during regularly stated terms with a full quorum.” Of course, a single Justice or judge could not decide cases on the merits in lieu of a multi-member court, but there were certain tasks that Justices and judges regularly handled in chambers. As was the practice in eighteenth century Britain, these tasks were generally justified by either

357. Id. at 346.
358. Id. at 345–46.
359. The district courts were also trial courts whose jurisdiction “was limited to minor civil and criminal matters,” as well as “exclusive jurisdiction over admiralty and revenue cases.” ERWIN C. SURRENY, HISTORY OF THE FEDERAL COURTS 65 (2d ed. 2002).
360. Until 1802, a circuit court could not be in session without at least one Justice sitting. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75 (providing that a district judge and one Justice, or two Justices, would constitute a quorum); Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333–34 (providing that a single Justice would constitute a quorum). In 1802, Congress passed a statute allowing for a single district judge to constitute a quorum of the circuit court. See Act of Apr. 29, 1802, ch. 21, § 4, 2 Stat. 156.
361. Dickson, supra note 198, at 22.
362. Id.
363. The Circuit Court for the District of Maryland, for example, sat as a court for only fifty-nine days between 1789 and 1802. ERIC M. FREEDMAN, HABEAS CORPUS 33 (2001).
364. Id.
the necessity of acting when the courts were in vacation, or by the quasi-
administrative nature of the task.

1. Writs of Habeas Corpus

The power of a single Supreme Court Justice to issue a writ of habeas corpus is a “power granted from 1789 to the present.”365 Section 14 of the Judiciary Act of 1789 empowered “the justices of the supreme court, as well as judges of the district courts . . . to grant writs of habeas corpus.”366 Congress likely modeled this provision on the English Habeas Corpus Act of 1679, which had explicitly authorized single judges of the King’s Bench to grant writs of habeas corpus.367 The Habeas Corpus Act was widely known and admired in the American colonies.368 The same concern with the difficulty in obtaining habeas corpus relief when the courts were not in session that motivated the English Parliament to empower single judges was relevant in the early United States, given the limited times during which the federal courts sat.369 Chief Justice Marshall, writing for the Court in Ex parte Bollman, presumed that this was Congress’s purpose in granting the habeas power to individual Justices (and judges): “as [the] courts are not always in session, [Section 14] vests [the power] in every justice or judge of the United States.”370

In fact, there was controversy in Bollman as to whether the federal courts actually did have power to grant writs of habeas corpus, or whether only Justices and judges in their individual capacities could do so. The second sentence of Section 14, authorizing the issuance of writs of habeas corpus, only applies to Justices and judges, not courts. The first sentence of Section 14 is the predecessor of 28 U.S.C. § 1651 (a), the All Writs Act. It grants to the federal courts the power to issue all writs, including habeas corpus, but contains the proviso that the courts could issue only those writs “which may be necessary for the exercise of their respective jurisdictions.”371 This proviso would seemingly prevent a federal court, but not an individual judge or Justice, from issuing an original writ of habeas corpus, unless doing so was in aid of the court’s

365. FALLON ET AL., supra note 254, at 314 n.4.
366. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.
367. FREEDMAN, supra note 363, at 32; see also supra text accompanying notes 336–339 for a discussion of the Habeas Corpus Act of 1679.
368. FREEDMAN, supra note 363, at 32.
369. Id. at 32.
370. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 96 (1807) (emphasis added).
jurisdiction in a case already before it.\textsuperscript{372}

Chief Justice Marshall’s opinion concluded that the first sentence of Section 14 conferred the power to grant an original writ of habeas corpus on federal courts, not just Justices and judges. A major factor supporting this conclusion was that it would be anomalous for a judge to have power in an individual capacity that the court of which the judge was a member did not have.\textsuperscript{373} He explained that:

\begin{quote}
It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.\textsuperscript{374}
\end{quote}

In contrast, Justice Johnson’s dissent in \textit{Bollman} argued that the Supreme Court lacked the power to issue the writ of habeas corpus, unless necessary for the exercise of its jurisdiction, but that a single Justice might have the power, and apparently saw no serious problem with the disparity in power between the court and a Justice.\textsuperscript{375}

Although the reason individual Justices were given powers in habeas cases was to ensure that habeas would be available year round, in the nineteenth century, the practice appears to have developed that the Justices would deal with habeas petitions in chambers even when the full Supreme Court was available and empowered to act on them, unless the legal issues were important and unclear. The Court once stated that “\textit{if the justice who issued the writ found the questions involved to be of great moment and difficulty}, and could postpone the case here for consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course.”\textsuperscript{376} Justice Bradley, considering a habeas petition in chambers, observed that referrals to the full Court are “\textit{not the usual course, and [are] not to be followed if it can well be avoided}.”\textsuperscript{377} He referred to a Justice’s “right”

\begin{footnotes}
\textsuperscript{373}. See id. at 175–76. \textit{But cf. In re Mackin}, 668 F.2d 122, 137 (2d Cir. 1981) (holding that courts of appeals lack original jurisdiction over habeas petitions despite statutory grant of such jurisdiction to “any circuit judge” (quoting 28 U.S.C. § 2241) (emphasis added)).
\textsuperscript{374}. \textit{Bollman}, 8 U.S. (4 Cranch) at 96 (emphasis added).
\textsuperscript{375}. \textit{Id.} at 75 n.1.
\textsuperscript{376}. \textit{Ex parte Clarke}, 100 U.S. 399, 403 (1879) (emphasis added).
\textsuperscript{377}. \textit{In re Guiteau} (U.S. June 19, 1882) (Bradley, J., in chambers), \textit{reprinted in 1 IN CHAMBERS OPINIONS, supra} note 1, at xiv, xv (emphasis added).
\end{footnotes}
and “duty to decide an application . . . if he can do so with reasonable confidence in his own conclusion.”

As a policy matter, Justice Bradley maintained that action by a Justice was preferable to ensure the “[p]rompt action . . . due both to the prisoner and to the administration of justice.” Notably, the petitioner before Justice Bradley was President Garfield’s assassin. That such a high-profile prisoner was involved might have warranted a referral to the full Court, so Justice Bradley’s handling the matter himself indicates how infrequent referrals of habeas petitions were at this time.

Although Supreme Court Justices in the nineteenth century assumed broad powers to grant habeas petitions both while the Court was in session and while it was in vacation, their doing so did not necessarily violate the oneness requirement of the Supreme Court. This is because their in-chambers rulings were not considered to be surrogate rulings for the Supreme Court itself. Notably, for much of the nineteenth century, an appeal from an individual Justice’s decision in a habeas case went to the circuit court rather than the Supreme Court. This illustrates that an individual Justice’s action in chambers was not an act of the Supreme Court: the Justice was exercising the powers granted to all Article III judges to ensure the protections of habeas corpus would be available even when the federal courts were not in session. If the decisions of individual Justices were regarded as decisions of the Supreme Court itself, then this practice would have meant that lower federal courts sat in review of the decisions of the Supreme Court. The Supreme Court could then review the lower court’s decision reviewing the Supreme Court’s initial action—such a circular path of review would turn the idea of having one supreme court on its head.

That a Justice in chambers granting a writ of habeas corpus was not acting for the Supreme Court is further supported by the Supreme

378. Id. (emphasis added).
379. Id.
380. Id. at xiv.
381. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (“From the final decision of any . . . justice . . . an appeal may be taken to the circuit court . . . .”); Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539 (“[F]rom any decision of such justice or judge an appeal may be taken to the circuit court . . . .”). This appellate jurisdiction of the circuit courts was wiped out when Congress created the Courts of Appeals in 1891. See Act of Mar. 3, 1891, ch. 517, § 4, 26 Stat. 826; see also Hartnett, supra note 25, at 273 n.103. At one point, the Supreme Court held that it lacked the power to exercise appellate review “over decisions made at his chambers by a justice of this court, or a judge of the District Court.” In re Metzger, 46 U.S. (6 How.) 176, 191 (1847). Metzger involved a judge’s decision to allow a person to be extradited, and is sometimes read to be limited to the extradition context. See Hartnett, supra note 25, at 283 n.140. However, it is also possible to read Metzger as a disclaimer of statutory or even constitutional power of the Supreme Court to review in-chambers decisions. See id.; see also supra note 305.
Justice” to decide a habeas petition.  

In sum, the habeas power of individual Justices was inspired by the English experience and the need for habeas relief to be available when the federal courts were not in session. Congress did not grant this power to the Justices so that they might act in lieu of the Supreme Court. In fact, the Justices could act in certain situations when the full Court could not have done so. The Justices’ habeas powers flowed from their identity as Article III judges, all of whom were empowered to grant habeas relief. Although the practice developed for Justices to dispose of habeas cases in chambers even when access to the courts was available, this practice did not last into the twentieth century. The current practice is that a Justice will act on a habeas petition in chambers only in exceptional circumstances.

2. Allowing Appeals

For much of the Supreme Court’s history, its entire appellate docket consisted of cases in which its review was mandatory. Although these appeals were available as “a matter of right in proper cases, [they were not] . . . allowed as of course.” The appellant had to apply to either a judge of the lower court or a Justice of the Supreme Court who would determine if the case met the statutory requirements for an appeal. This requirement was based on a construction of Sections 22 and 25 of the Judiciary Act of 1789, which required a judge or Justice to sign a citation on a writ of error.

390. United States ex rel. Norris v. Swope, 72 S. Ct. 1020, 1021 (1952) (Douglas, J., in chambers). In 1961, Justice Black denied a habeas petition in chambers, but he did so during the Supreme Court’s summer recess and noted in his opinion that “Mr. Justice Clark, who is the only other Justice available at this time for consideration of this motion[,] concurs in this denial.” In re Wyckoff (Black, J., in chambers) (U.S. July 26, 1961), reprinted in 4 IN CHAMBERS OPINIONS, supra note 105, at 1561, 1561 (emphasis added). In that case, the petitioner was scheduled to be released from prison within a few weeks, and well before the Supreme Court would reconvene in October. See Black Denies Writ to Release Rider, N.Y. TIMES, July 27, 1961, at 31. This case thus illustrates the proper role of a Justice ruling in chambers—acting when the full Court could not do so in time.


392. ROBERTSON & KIRKHAM, supra note 58, § 377, at 756.

393. Id. §§ 378, 398. The requirement of having a judge allow an appeal was abolished by the Supreme Court’s amendments to its rules in 1954. See Frederick Bernays Wiener, The Supreme Court’s New Rules, 68 HARV. L. REV. 20, 46–50 (1954).

394. ch. 20, 1 Stat. 73.

395. Id. §§ 22, 25. The writ of error was initially the mechanism by which the Supreme Court exercised appellate review. See ROBERTSON & KIRKHAM, supra note 40, § 407, at 820. Later the term “appeal” came to be used as well, but the distinction is irrelevant for present purposes.
The Supreme Court’s Rules explicitly empowered a Justice to allow an appeal either “in term time or in vacation.”\textsuperscript{396} The power was thus not based on the necessity that would arise in situations when the Court was in vacation or a quorum was otherwise unavailable. Instead, the practice was rooted in keeping the docket flowing and easing the burdens on the full court. This practice was justified by the fact that allowing an appeal involved little or no discretion. According to one commentator, judges on the lower federal courts saw the allowance of an appeal as a formality rather than occasion for exercising judicial discretion: “In actual practice, with only an occasional exception, the judge of a federal court from which an appeal was taken never looked at the papers and only asked counsel where to sign.”\textsuperscript{397} Indeed, the Supreme Court itself referred to the allowance of an appeal as “but a ministerial act which might be performed by any member of the court.”\textsuperscript{398} The standard for reviewing an application for an appeal from a state court was only slightly more intensive: “The appeal papers were always studied, and many appeals were not allowed; but if there was a federal question of any kind in the record, the individual Justice normally preferred to let the entire Court pass on its substance.”\textsuperscript{399}

The power of the Supreme Court Justices to allow appeals was thus akin to the quasi-administrative powers exercised by individual judges of the King’s Bench, such as the power to allow an amendment to an information discussed in \textit{Rex v. Wilkes}.\textsuperscript{400} Both types of decisions involved a minimum of judicial discretion and were really quasi-administrative tasks. Like an amendment, an appeal was available as of right, and the only role a Justice had was to determine if the statutory requirements were present. The practice of allowing a single Justice to act rather than the full court was based on the pointlessness of burdening the full Court with these applications since there was little or no benefit from having more than one person process them.

3. Supersedeas and Stays of Execution

A supersedeas is “a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of

\textsuperscript{397} Wiener, supra note 393, at 43 (footnote omitted).
\textsuperscript{399} Wiener, supra note 393, at 44.
\textsuperscript{400} See supra text accompanying notes 345–351.
appeal against the execution of the writ. It thus serves a function similar to a stay of execution, although the two are distinct terms and had different applications historically. Generally, however, the two terms are functionally equivalent and the current Supreme Court Rules simply allow for stays, and uses the term “supersedeas” only to refer to the bond that a Justice may require as a condition for granting a stay.

Since the Judiciary Act of 1789 first established the federal courts, a single Supreme Court Justice had the power to grant a supersedeas, but as with allowing an appeal, the role of the Justice was only to determine if the appellant had met the statutory requirements. Congress adopted the English rule that an appeal would automatically act as a supersedeas and bar execution of the judgment until the Supreme Court issued its judgment so long as the appellant followed appropriate procedures of procuring an allowance of an appeal within the statutory time limit and also posted a bond that would cover damages and costs if the appellant did not win.

Beginning with the Slaughter House Cases in 1870, the Supreme Court developed the rule that a supersedeas would not be available as a matter of right in cases in equity, and an appellant would instead need

402. See ROBERTSON & KIRKHAM, supra note 40, § 409, at 822–23.
403. See STERN ET AL., supra note 24, § 17.3, at 851 n.16 (noting that Supreme Court rules no longer distinguish between a stay and a supersedeas).
404. See SUP. CT. R. 23.4 (“A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties.”).
405. See In re Claassen, 140 U.S. 200, 208 (1891) (“We are of opinion . . . that a justice of this court had authority not only to allow the writ of error, but also to grant the supersedeas.”). The Court in In re Claassen cited REV. STAT. § 1007 (later codified as 28 U.S.C. § 874, and confined to the federal rules after 1948, see FED. R. CIV. P. 62(d)), as the source of this power, and that section was the contemporary version of Section 23 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85. See ROBERTSON & KIRKHAM, supra note 40, § 407, at 818–19.
407. See Judiciary Act of 1789, ch. 20, § 23, 1 Stat. 73, 85; ROBERTSON & KIRKHAM, supra note 40, § 411, at 825–26; Walker, supra note 30, at 829–30 (noting that a stay or supersedeas pending Supreme Court review was virtually automatic for much of the eighteenth and nineteenth centuries).
408. 77 U.S. 273 (1870).
409. See Hovey v. McDonald, 109 U.S. 150, 160 (1883) (“The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy.”); Slaughter House, 77 U.S. at 297 (“[A] writ of error to a State court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court, and it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.”); see also
to obtain a stay in order to prevent execution and enforcement of the judgment in such cases.\textsuperscript{410} The Supreme Court borrowed this rule from one developed by the House of Lords in England in 1807, which was that the court of chancery would determine whether an appeal would suspend the operation of an injunction.\textsuperscript{411} The basis for the Supreme Court’s rule is in the discretionary nature of equitable relief. Supersedeas, being “of right upon compliance with formal statutory conditions, is inappropriate to the case of an injunction, the granting, continuing or refusal of which rests in the sound discretion of the court of equity.”\textsuperscript{412} Similarly, supersedeas was ineffective in cases in which a court had denied, dissolved, or modified an injunction because “there is nothing to supersede: no decree in favor of the complainants upon which execution can issue.”\textsuperscript{413} In such cases, interim injunctive relief might be appropriate to preserve the status quo pending appellate review.

After the Supreme Court had recognized and firmly established the discretionary nature of interim relief in equitable cases, the Court seems to have assumed that a single Justice could nevertheless continue to award such relief in chambers. In \textit{Covington Stock-Yards Co. v. Keith}, an 1887 case, the Court denied a motion for supersedeas in case in equity, but observed that “Mr. Justice Matthews, the justice of this court assigned to the Sixth circuit, has power, under section 1007 of the Revised Statutes, to grant, in his discretion, a further stay of execution, if application to him for that purpose is made.”\textsuperscript{414} The power of a single Justice under section 1007, the contemporary codification of Section 25 of the Judiciary Act of 1789, had always been understood to involve the quasi-administrative task of determining whether the statutory requirements for supersedeas were met and fixing the amount of the supersedeas bond.\textsuperscript{415} The Court had seemingly assumed that this power

\textsuperscript{410}. See ROBERTSON \& KIRKHAM, supra note 40, § 411, at 825.

\textsuperscript{411}. \textit{Hovey}, 109 U.S. at 160. Throughout much of the eighteenth century, an appeal from a decree or order by the chancellor did function as an automatic stay. \textit{Id}.  

\textsuperscript{412}. ROBERTSON \& KIRKHAM, supra note 40, § 410, at 824. Supersedeas was available as of right in some cases in equity where the equitable remedy made supersedeas appropriate, such as where the equity court ordered the payment of money. See \textit{id}. § 409, at 822–23.

\textsuperscript{413}. \textit{id}. § 409, at 824.

\textsuperscript{414}. 121 U.S. 248, 250 (1887).

\textsuperscript{415}. See supra text accompanying notes 405–406.
would extend to the wholly different task of determining whether or not to grant interim relief pending appellate review as a matter of judicial discretion.

The discretionary power of an individual Justice to grant a supersedeas in cases involving most forms equitable relief (as opposed to the supersedeas available as of right in cases involving money damages or similar relief) was never seriously questioned, but unfortunately it is very difficult to determine how frequently or under what circumstances individual Justices actually exercised the power. Opinions by individual Justices in chambers were not included in the official U.S. Reports until 1969.416 Before 1969, in chambers opinions were either unpublished or only published in unofficial reports or other sources.417 The opinions, however, represent a small minority of total applications. In most cases, an individual Justice would resolve an application by simply writing “granted” or “denied” on the application along with the Justice’s signature.418 The Justices wrote in-chambers opinions to explain their dispositions of applications in the eighteenth and nineteenth centuries much less often than they do currently.419 Even today, the dispositions of applications to Justices in chambers without opinion are not listed in the Supreme Court’s orders list, the Journal of Proceedings, or the U.S. Reports.420

Furthermore, the Supreme Court’s own records are not a substantial source of information on the early practice of the Justices in chambers because until the 1920s, applications to individual Justices were submitted directly to the Justice and did not go through the Supreme Court Clerk’s office.421 Also, the practice throughout most of the nineteenth century was for a Justice to address applications explicitly in their capacity as a Justice sitting on the circuit court, rather than as a

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417. For a comprehensive account of the history of the publication of in-chambers opinions by Supreme Court Justices, see Ira Brad Matetsky, Introduction to 4 A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, at vi (Cynthia Rapp & Ross E. Davies eds., Supp. 2005). In-chambers opinions are now easily accessible in the multi-volume A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States.
418. Id. at vi.
419. See Frederick Bernays Wiener, Opinions of Justices Sitting in Chambers, 49 LAW LIBR. J. 3, 3 (1956) (observing the “marked increase” of in-chambers opinions beginning in the 1950s).
420. STERN ET AL., supra note 24, § 17.1, at 848. The easiest way to find information on the disposition of these cases is to consult the Supreme Court’s docket, which is available online at http://www.supremecourtus.gov/docket/docket.html. Applications are denoted with an “A” following the 2-digit year, e.g. “06A1” (this was an application for a preliminary injunction denied by Justice Souter).
421. Matetsky, supra note 417, at xvii.
Justice of the Supreme Court. This persisted until the old circuit courts were replaced by the Courts of Appeals in 1891. Whatever records might remain are thus scattered among the various collections of the Justices’ papers or in the records belonging to lower federal courts or even state courts.

There are reasons to think that, while the power of a single Justice to issue a stay or other interim relief was accepted in the abstract by the late nineteenth century, the Justices rarely exercised this power other than in their capacities as Circuit Justices sitting on the old Circuit Courts. In 1879, the Supreme Court promulgated a rule of equity governing the availability of interim relief to an appellant in cases involving injunctive relief:

> When an appeal from a final decree in an equity suit, granting or 
> dissolving an injunction, is allowed by a justice or judge who took part in 
> the decision of the cause, he may, in his discretion, at the time of such 
> allowance, make an order suspending or modifying an injunction during 
> the pendency of the appeal, upon such terms as to bond or otherwise as he 
> may consider proper for the security of the rights of the opposite party.

The Supreme Court promulgated this rule while noting its own power as a court to issue this kind of interim relief, but reasoned that the determination would “oftentimes involve an examination of the whole case, and necessarily take much time,” and it would be more efficient to have the judges or Justices trying cases below handle these decisions. The rule clearly contemplates that the “justice or judge who took part in the decision of the cause” will make the decision on interim relief at the time that Justice or judge allows an appeal. Thus, the Court empowered individual Justices to grant interim relief in cases involving injunctive relief not in the Justices’ capacities as members of the Supreme Court, but rather in their capacities as Circuit Justices sitting on the circuit courts and trying cases in the first instance. It was the familiarity with

422. Id. at vi–vii (noting that in-chambers opinions in the nineteenth century were “captioned in a United States Circuit Court and published, if at all, in a reporter containing decisions of one or more of the lower federal courts”).

423. See id. at vii.

424. Id. at xviii–xix.


426. Indeed, at the same the Court promulgated Equity Rule 93, it also amended its own rules to allow the Court itself to entertain applications for interim relief pending appeal. See Sup. Ct. R. 30, 97 U.S. v (1879). This rule was omitted from the Court’s rules in 1884, see 108 U.S. 573 (1884).

the facts of a case that a Justice would possess in their roles as trial judges, rather than the need for the Supreme Court to delegate its own supervisory powers to its individual members, that justified having an individual Justice rule on applications for interim relief.

The earliest known opinion involving interim relief pending appeal by a Supreme Court Justice explicitly in that capacity appears to be the 1912 opinion *Marks v. Davis*. This opinion has the unique distinction of being signed by two Justices. This is because the appropriate Circuit Justice, Justice Van Devanter, was initially on vacation and unreachable, and so Justice Pitney initially scheduled a hearing to consider the application. Justice Van Devanter made it to the hearing, and so the two Justices decided the application jointly.

The Justices granted the applicants’ request for a writ of error, allowing their case to be heard by the full Court on the merits, but denied their application for “an order like unto a supersedeas,” which was a request for the Justices to order a candidate’s name to be removed from the ballot in a primary election. The Supreme Court would never get to hear the case on the merits, however, since the primary election was scheduled to happen five days after the Justices issued their opinion; once the election was over any request for injunctive relief would have been moot. Justices Van Devanter and Pitney were undoubtedly aware of this, but chose not to grant interim relief because, no matter what they did, they would be deciding the issue with finality. The only way that they could keep the case in a reviewable posture would have been to order that the primary election be postponed until the full Supreme Court decided the case, but this would have been a serious intrusion into the electoral process and was probably beyond the scope of their powers as individual Justices even in the broadest understanding of those powers.

The *Marks v. Davis* opinion is notable for its lack of any discussion of

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429. *Id.*

430. *Id.* at 1413–14.

431. *Id.* at 1413.

432. *Id.* at 1413.

433. Neither party in *Marks v. Davis* had sought to delay the election in the lower courts. It is one thing for a Justice to stay the execution of a judgment, or to temporarily grant the injunctive relief a lower court has denied, but it is another thing altogether to issue an injunction, entirely unrelated to the relief either party had sought below simply to keep the case from becoming moot.
the practice of individual Justices granting stays. On the one hand, this suggests that the practice was ordinary, and thus unremarkable. On the other hand, it could have been that the urgency of the situation led the Justices to focus their short, partly handwritten opinion, handed down the same day as the hearing, on deciding the substantive issue rather than justifying their own authority to act, which may have seemed apparent from the urgency of the circumstances. The case involved a situation in which a decision had to be made quickly or not at all, and there was no time for the full Supreme Court to act. The Court was not in session at the time, and the Justices were geographically scattered. Obviously, communications technology in 1912 was limited—it was the inability of the litigants to reach Justice Van Devanter initially that forced Justice Pitney to get involved. The situation was similar to those in which the English courts had recognized the power of single judges of a multi-member court to act in lieu of the full court. Unfortunately, it is difficult to say whether or not this was the unspoken justification for the Justices entertaining the application, or if the Justices were following the relatively ordinary practice, and only chose to write an opinion due to the importance of the decision.

The in-chambers opinion of \textit{Marks v. Davis} signifies the emerging practice of individual Supreme Court Justices granting discretionary stays in their capacities as Supreme Court Justices, as opposed to their roles riding circuit. The development of the principle that a supersedeas was not available as of right in cases involving injunctions had led to the need for judges to exercise considerable discretion in determining whether to grant interim relief. Justices of the Supreme Court, sitting on the lower federal courts, had been called upon to exercise this power. Congress had abolished the circuit courts in 1891 by creating the new courts of appeals, and this largely ended the practice of Supreme Court Justices sitting on the lower federal courts. The Justices continued to

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\item[434.] Mauro, \textit{supra} note 428.
\item[435.] A publisher’s note in the published opinion questions whether the opinion by two Justices falls under the definition of an in-chambers opinion. See 4 IN CHAMBERS OPINIONS 2004, \textit{supra} note 428, at 1413. In a functional sense, however, the opinion is an in-chambers one.
\item[436.] The practice of Supreme Court Justices sitting on a court of appeals did continue in some scattered instances until the 1950s. See Rapp, \textit{supra} note 1, at vii. The Second Circuit appears to be the only circuit to have been graced with the presence of two Supreme Court Justices on the same panel. The circumstances that give rise to this unique occurrence were no source of pride to the Second Circuit. Martin Manton, a former circuit judge, had been convicted of conspiracy to obstruct the administration of justice and to defraud the United States. Because the charges were brought in the District Court for the Southern District of New York, the appeal of the conviction went to the Second Circuit. Rather than have Manton’s former colleagues hear his appeal, a special panel of the Second Circuit was assembled, consisting of retired Supreme Court Justice George Sutherland, Supreme Court Justice Harlan Fiske Stone, and newly appointed Second Circuit Judge Charles E. Clark. The panel
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exercise discretionary power in granting interim relief in the early
twentieth century, culminating with the explicit statutory authorization
for this activity in the Judges' Bill of 1925.437

This review of American practice demonstrates that individual
Justices and judges were initially empowered to act for the same reasons
individual English judges were—to protect important liberty interests
when the courts were in vacation and to deal with quasi-administrative
matters. Over time, the justifications for allowing action by Justices in
chambers were lost amidst changes in the federal judicial structure.
Justices began to rule on habeas petitions even when the Court was in
session. And they began to grant interim relief even when doing so
became discretionary rather than automatic. Ultimately, however, the
developments of in-chambers practice are consistent with the notion that
Article III, properly understood, limits the power of individual Justices
in two ways—they may not ordinarily exercise the judicial power vested
in courts and they may not act in such a way as to create more than one
Supreme Court. The fact that individual Justices did act on substantial
matters even when the Supreme Court was in session undercuts the
principle that judges, in general, may not act in lieu of courts. However,
for much of the nineteenth century, individual Justices acted in their
capacity as circuit court judges, not Supreme Court Justices. This is
fully consistent with the notion that the “oneness” requirement of Article
III prohibits delegation of Supreme Court power to individual Justices
other than those situations in which individual judges have historically
been allowed to act: to protect important liberty interests when a full
court was unable to act and to deal with certain quasi-administrative
matters that would be overly burdensome if considered by all the
members of a court.

V. CONCLUSION

The existence of multi-member courts has always been an important
safeguard against arbitrary judicial action. Although empowering

affirmed the conviction. See United States v. Manton, 107 F.2d 834, 850 (2d Cir. 1939). There are a
handful of instances of Supreme Court Justices sitting on the courts of appeals in more recent years.
Justice Thomas sat on the D.C. Circuit shortly after he became a Supreme Court Justice. See supra note
306. The First Circuit has the distinction of having had a Supreme Court Justice sit on one of its panels
most recently, in 2008, when Justice O'Connor sat on the court after her retirement from the Supreme
Justice O'Connor also sat on the Second Circuit in 2006. See, e.g., Arbor Hill Concerned Citizens
Neighborhood Ass'n v. County of Albany, 522 F.3d 182, (2d Cir. 2008).

437. See supra Part III.E.
individual judges to act allows the judicial system to operate more rapidly, it comes at the cost of losing this safeguard. Granting interim relief, like other exercises of judicial power, can have important and substantial effects on both litigants and the nation as whole. Because of this, it should be subject to the ordinary judicial safeguards. The importance of these safeguards is reflected in the constitutional scheme of Article III. Although the text of the Article is not very specific, it places clear limits on the extent to which Congress can empower a single judge to act in lieu of a multi-member court, especially the Supreme Court.

This does not mean that a single Justice can never act. There is a long history of judges acting in their individual capacities in an emergency situation in which the full court could not act or when the judicial act required only a minimum of judicial discretion. Article III read in light of this historical practice leads to the conclusion that Supreme Court Justices have a very limited power to grant interim relief. The decision to grant interim relief involves a substantial amount of judicial discretion, and thus an individual Justice may exercise this power only in the rare situation when the full Court cannot act in time to protect its jurisdiction by keeping the case in a reviewable posture.

This is in sharp contrast with the Supreme Court’s current practice, which is for an individual Justice to refer applications to the full Court only in cases of unusual complexity or importance. Furthermore, the Justices often become embroiled with issues of “balancing the equities,” issues that are better left to the lower courts. By leaving these issues to the lower courts and focusing only on whether a stay is necessary to keep a case in a reviewable posture, the Supreme Court can consider applications for interim relief as a body without significantly increasing its workload.

A typical application for interim relief should end at the court of appeals level. The Supreme Court may act if necessary to keep a case in a reviewable posture, but not simply to correct an error made by the court of appeals in balancing the equities. In a rare case where the full Supreme Court cannot act, a single Justice of the Supreme Court may grant relief. Only a situation of true necessity justifies a departure from the longstanding principle that judicial power is vested in courts, not judges—and in one Supreme Court, not Justices.

438. In the federal courts of appeals, which, like the Supreme Court, are multi-member courts, motions for stays will generally be ruled on by a panel of the court. Only “in an exceptional case in which time requirements make that procedure impracticable, [will] the motion . . . be made to and considered by a single judge.” Fed. R. App. P. 8(a)(2)(D) (emphases added).