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A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

covering the 2009 Term

and

previously unpublished or uncollected in chambers opinions from 1887, 1892, 1896, 1906, 1914, 1956, 1957, 1958, 1959, 1960, and 1961

with

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

Compiled by

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and

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with

Ira Brad Matetsky

January 2011

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CONTENTS — VOLUME 4, PART 6

Preface v
Cumulative Tables and Indexes
Cumulative Table of Cases Reported vii
Cumulative Table of Cases by Date xvi
Cumulative Table of Cases by Justice xxi
Cumulative Table of Cases Orally Argued xxvi
Cumulative Index of Cases by Disposition xxviii
Cumulative Index of Cases by Topic xxxiii
In Chambers Opinions
United States v. Patterson (1887) 1593
In re Heath (1892) 1599
In re Richardson (1896) 1600
Haack v. Brooklyn Labor Lyceum Association (1906) 1602
Fairbanks Steam Shovel Co. v. Wills (1914) 1603
Stanley v. United States (1956) 1605
United States v. Portell (1956) 1606
Oerlikon Machine Tool Works Buehrle & Co. v. United States (1957) 1608
Pabon v. Board of Personnel of Puerto Rico (1958) 1609
County School Board of Arlington v. Deskins (1959) 1610
Shelton v. McKinley (1959) 1612
Keith v. New York (1959) 1613
Deere v. United States (1959) 1614
Eveleigh v. United States (1960) 1615
In re Harvey (1960) 1616
Long Island R.R. Co. v. New York Central R.R. (1960) 1617
Hirsch v. United States Court of Appeals for the Second Circuit (1960) 1618
Local 1545, United Brotherhood of Carpenters v. Vincent (1961) 1619
October Term 2009
Jackson v. District of Columbia Board of Elections & Ethics (2010) 1620
Philip Morris USA Inc. v. Scott (2010) 1622
Lux v. Rodrigues (2010) 1626

PREFACE

Surely the year will come when we will not stumble across a single old and previously unpublished in-chambers opinion. Based on our experience so far, however, I am inclined to suspect that our first barren year may still be pretty far in the future. This volume, for example, includes both (a) *In re Heath*, the first opinion we have seen from Chief Justice Melville W. Fuller, and (b) *In re Richardson*, a strikingly blunt, even brutal, rejection by the first Justice John Marshall Harlan of an early attempt by a habeas corpus applicant to challenge the validity of his murder conviction on grounds related to the racial composition of the convicting jury. And members of the current Court continue to opine in chambers. During the 2009 Term, Chief Justice John G. Roberts issued two opinions, and Justice Antonin Scalia issued one.

And, unfortunately, we must continue our longstanding appeal for help with *Hooper v. Goldstein* (1929). It is the only opinion we have yet to track down — not for lack of trying — from the 21 missing opinions listed in Cynthia Rapp's introduction to the first volume in this series.

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

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

Thanks as always to Cynthia Rapp for performing such a useful public service by collecting and indexing the Justices' solo efforts; to William Suter, Clerk of the Court, for his support of this project; to the George Mason University School of Law and its Law & Economics Center for supporting the *Green Bag*; to Green Bag Fellow Liz Heaps; and to the indefatigable Ira Matetsky.

Ross E. Davies
January 24, 2011

CUMULATIVE TABLE OF CASES REPORTED

TITLE	PAGE	OTHER CITATION
A.B. Chance Co. v. Atlantic City Elec. Co.	1 Rapp 320 (1963)	83 S. Ct. 964
Aberdeen & Rockfish R. Co. v. SCRAP	2 Rapp 533 (1972)	409 U.S. 1207
Akel v. New York	1 Rapp 251 (1960)	81 S. Ct. 25
Alabama G.S.R. Co. v. R.R. & P.U.C. of Tennessee	4 Rapp 1477 (1950)	none
Albanese v. United States	1 Rapp 121 (1954)	75 S. Ct. 211
Alexander v. Holmes Cty. Board of Education	2 Rapp 440 (1969)	396 U.S. 1218
Alexis I. Du Pont School Dist. v. Evans	2 Rapp 874 (1978)	439 U.S. 1375
American Mfrs. Mut. Ins. v. Am. Broadcasting	1 Rapp 381 (1966)	87 S. Ct. 1
American Trading & Prod. Corp. v. Railroad Comm'n.	4 Rapp 1560 (1959)	none
American Trucking Assn., Inc. v. Gray	3 Rapp 1280 (1987)	483 U.S. 1306
Appalachian Power Co. v. AICPA	1 Rapp 219 (1959)	80 S. Ct. 16
Araneta v. United States	3 Rapp 1243 (1986)	478 U.S. 1301
Aronson v. May	1 Rapp 346 (1964)	85 S. Ct. 3
Arrow Transportation Co. v. Southern Ry.	1 Rapp 307 (1962)	83 S. Ct. 1
Arrow Transportation Co. v. Southern Ry.	1 Rapp 314 (1962)	83 S. Ct. 3
Associated Gas & Electric Co., In re	4 Rapp 1527 (1936)	none
Associated Press v. District Court	4 Rapp 1455 (2004)	542 U.S. 1301
Atiyeh v. Capps	3 Rapp 1027 (1981)	449 U.S. 1312
Atlantic Coast Line R.R. v. BLE	2 Rapp 423 (1969)	396 U.S. 1201
Autry v. Estelle	3 Rapp 1157 (1983)	464 U.S. 1301
Bagley v. Byrd	4 Rapp 1430 (2001)	534 U.S. 1301
Baltimore City Dept. of Soc. Servs. v. Bouknight	3 Rapp 1294 (1988)	488 U.S. 1301
Bandy v. United States	1 Rapp 252 (1960)	81 S. Ct. 25
Bandy v. United States	1 Rapp 253 (1960)	81 S. Ct. 197
Bandy v. United States	1 Rapp 261 (1961)	82 S. Ct. 11
Barnes v. E-Systems, Inc.	3 Rapp 1325 (1991)	501 U.S. 1301
Barnstone v. University of Houston	3 Rapp 961 (1980)	446 U.S. 1318
Bart, In re	1 Rapp 286 (1962)	82 S. Ct. 675
Barthuli v. Board of Trustees of Jefferson Sch. Dist.	2 Rapp 776 (1977)	434 U.S. 1337
Bartlett v. Stephenson	4 Rapp 1432 (2002)	535 U.S. 1301
Bateman v. Arizona	2 Rapp 699 (1976)	429 U.S. 1302
Baytops v. New Jersey	1 Rapp 391 (1967)	88 S. Ct. 8
Beame v. Friends of the Earth	2 Rapp 753 (1977)	434 U.S. 1310
Becker v. United States	3 Rapp 1045 (1981)	451 U.S. 1306
Bellotti v. Latino Political Action Comm.	3 Rapp 1131 (1983)	463 U.S. 1319
Beltran v. Smith	3 Rapp 1089 (1982)	458 U.S. 1303
Berg, In re	2 Rapp 579 (1972)	409 U.S. 1238
Beyer v. United States	2 Rapp 457 (1970)	396 U.S. 1235
Bidwell v. United States	1 Rapp 311 (1962)	none
Birtcher Corp. v. Diapulse Corp.	1 Rapp 387 (1966)	87 S. Ct. 6
Bletterman v. United States	1 Rapp 208 (1958)	none
Block v. North Side Lumber Co.	3 Rapp 1217 (1985)	473 U.S. 1307
Blodgett v. Campbell	3 Rapp 1339 (1993)	508 U.S. 1301
Bloeth v. New York	1 Rapp 288 (1962)	82 S. Ct. 661
Blum v. Caldwell	3 Rapp 954 (1980)	446 U.S. 1311
Board of Ed. of L.A. v. Superior Court of Cal.	3 Rapp 1010 (1980)	448 U.S. 1343
Board of Education v. Taylor	1 Rapp 265 (1961)	82 S. Ct. 10
Board of School Comm'rs v. Davis	1 Rapp 332 (1963)	84 S. Ct. 10
Bonura v. CBS Inc.	3 Rapp 1106 (1983)	459 U.S. 1313
Boston v. Anderson	2 Rapp 880 (1978)	439 U.S. 1389
Boumediene v. Bush	4 Rapp 1563 (2007)	550 U.S. 1301
Bowen v. Kendrick	3 Rapp 1278 (1987)	483 U.S. 1304
Bowman v. United States	1 Rapp 359 (1964)	85 S. Ct. 232
Bracy v. United States	2 Rapp 795 (1978)	435 U.S. 1301
Bradley v. Lunding	2 Rapp 692 (1976)	424 U.S. 1309
Brennan v. United States Postal Service	2 Rapp 848 (1978)	439 U.S. 1345
Breswick & Co. v. United States	1 Rapp 144 (1955)	75 S. Ct. 912
Brody v. United States	1 Rapp 198 (1957)	77 S. Ct. 910

TITLE	PAGE	OTHER CITATION
Brotherhood of R.R. Signalmen v. S.E. Pa. Trans. Auth.	3 Rapp 1309 (1989)	489 U.S. 1301
Brown v. Gilmore	4 Rapp 1426 (2001)	533 U.S. 1301
Brussel v. United States	2 Rapp 451 (1969)	396 U.S. 1229
Buchanan v. Evans	2 Rapp 864 (1978)	439 U.S. 1360
Bureau of Economic Analysis v. Long	3 Rapp 1038 (1981)	450 U.S. 1301
Burgess v. Pere Marquette Railroad Co.	4 Rapp 1586 (1915)	none
Burgess v. Pere Marquette Railroad Co.	4 Rapp 1587 (1915)	none
Burwell v. California	1 Rapp 153 (1955)	76 S. Ct. 31
Bustop, Inc. v. Board of Ed. of Los Angeles	2 Rapp 870 (1978)	439 U.S. 1380
Bustop, Inc. v. Board of Ed. of Los Angeles	2 Rapp 879 (1978)	439 U.S. 1384
Califano v. McRae	2 Rapp 744 (1977)	434 U.S. 1301
California v. Alcorcha	1 Rapp 377 (1966)	86 S. Ct. 1359
California v. American Stores Co.	3 Rapp 1310 (1989)	492 U.S. 1301
California v. Braeseke	3 Rapp 938 (1980)	444 U.S. 1309
California v. Brown	3 Rapp 1236 (1986)	475 U.S. 1301
California v. Freeman	3 Rapp 1304 (1989)	488 U.S. 1311
California v. Hamilton	3 Rapp 1241 (1986)	476 U.S. 1301
California v. Harris	3 Rapp 1175 (1984)	468 U.S. 1303
California v. Prysock	3 Rapp 1041 (1981)	451 U.S. 1301
California v. Ramos	3 Rapp 1094 (1982)	459 U.S. 1301
California v. Riegler	3 Rapp 1034 (1981)	449 U.S. 1319
California v. Velasquez	3 Rapp 943 (1980)	445 U.S. 1301
California v. Winson	3 Rapp 1069 (1981)	none
Campos v. Houston	3 Rapp 1330 (1991)	502 U.S. 1301
Capital Cities Media, Inc. v. Toole	3 Rapp 1119 (1983)	463 U.S. 1303
Capitol Square Review and Adv. Bd. v. Pinette	3 Rapp 1352 (1993)	510 U.S. 1307
Carbo v. United States	1 Rapp 292 (1962)	82 S. Ct. 662
Carlisle v. Landon	1 Rapp 97 (1953)	73 S. Ct. 1179
Carter v. United States	1 Rapp 142 (1955)	75 S. Ct. 911
Catholic League v. Feminist Women's Health Ctr.	3 Rapp 1199 (1984)	469 U.S. 1303
CBS Inc. v. Davis	3 Rapp 1360 (1994)	510 U.S. 1315
Certain Named and Unnamed Children v. Texas	3 Rapp 993 (1980)	448 U.S. 1327
Chabad of Southern Ohio v. City of Cincinnati	4 Rapp 1435 (2002)	537 U.S. 1501
Chamber of Commerce v. Legal Aid Society	2 Rapp 658 (1975)	423 U.S. 1309
Chambers v. Mississippi	2 Rapp 525 (1972)	405 U.S. 1205
Cheney v. United States District Court	4 Rapp 1441 (2004)	541 U.S. 913
Chesapeake Western Co. v. Murray	4 Rapp 1584 (1913)	none
Chestnut v. New York	1 Rapp 375 (1966)	86 S. Ct. 940
Chin Gum v. United States	4 Rapp 1415 (1945)	none
City-Wide Comm. for Integration v. Bd. of Educ. of N.Y.	4 Rapp 1488 (1965)	none
Claiborne v. United States	3 Rapp 1168 (1984)	465 U.S. 1305
Clark, Ex parte	4 Rapp 1519 (1888)	9 S. Ct. 2
Clark v. California	3 Rapp 1159 (1983)	464 U.S. 1304
Clark v. United States	1 Rapp 108 (1953)	74 S. Ct. 357
Clements v. Logan	3 Rapp 1074 (1981)	454 U.S. 1304
Cohen v. United States	1 Rapp 268 (1961)	82 S. Ct. 8
Cohen v. United States	1 Rapp 279 (1962)	82 S. Ct. 518
Cohen v. United States	1 Rapp 281 (1962)	82 S. Ct. 526
Cole v. Texas	3 Rapp 1324 (1991)	499 U.S. 1301
Coleman v. Paccar, Inc.	2 Rapp 684 (1976)	424 U.S. 1301
Columbus Bd. of Ed. v. Penick	2 Rapp 842 (1978)	439 U.S. 1348
CFTC v. British Am. Commodity Options	2 Rapp 758 (1977)	434 U.S. 1316
Commonwealth Oil Ref. Co. v. Lummus Co.	1 Rapp 274 (1961)	82 S. Ct. 348
Communist Party of Indiana v. Whitcomb	2 Rapp 559 (1972)	409 U.S. 1235
Conforte v. Commissioner	3 Rapp 1102 (1983)	459 U.S. 1309
Conkright v. Frommert	4 Rapp 1589 (2009)	556 U.S. ____
Cooper v. New York	1 Rapp 137 (1955)	75 S. Ct. 908
Cooper v. New York	4 Rapp 1482 (1955)	none
Corpus Christi School Dist. v. Cisneros	2 Rapp 488 (1971)	404 U.S. 1211
Corsetti v. Massachusetts	3 Rapp 1092 (1982)	458 U.S. 1306
Costello v. United States	1 Rapp 118 (1954)	74 S. Ct. 847

TITLE	PAGE	OTHER CITATION
Cote v. New Hampshire	4 Rapp 1548 (1948)	none
County School Board of Arlington v. Deskins	4 Rapp 1610 (1959)	none
Cousins v. Wigoda	2 Rapp 527 (1972)	409 U.S. 1201
Cunningham v. English	1 Rapp 200 (1957)	78 S. Ct. 3
Curry v. Baker	3 Rapp 1252 (1986)	479 U.S. 1301
D'Aquino v. United States	1 Rapp 33 (1950)	180 F.2d 271
Davis v. Adams	2 Rapp 463 (1970)	400 U.S. 1203
Day v. Louisiana Western Railroad Co.	4 Rapp 1581 (1910)	none
Dayton Bd. of Ed. v. Brinkman	2 Rapp 854 (1978)	439 U.S. 1357
Dayton Bd. of Ed. v. Brinkman	2 Rapp 855 (1978)	439 U.S. 1358
Deaver v. United States	3 Rapp 1276 (1987)	483 U.S. 1301
DeBoer v. DeBoer	3 Rapp 1343 (1993)	509 U.S. 1301
Deere v. United States	4 Rapp 1614 (1959)	none
Delli Paoli v. United States	4 Rapp 1483 (1955)	none
Democratic Nat'l Comm. v. Republican Nat'l Comm.	4 Rapp 1498 (2004)	543 U.S. 1304
Dennis v. United States	1 Rapp 57 (1951)	none
Dexter v. Schrunk	1 Rapp xvi & 2 Rapp 467 (1970)	400 U.S. 1207
Di Candia v. United States	1 Rapp 204 (1958)	78 S. Ct. 361
Divans v. California	2 Rapp 746 (1977)	434 U.S. 1303
Divans v. California	2 Rapp 857 (1978)	439 U.S. 1367
Doe v. Gonzales	4 Rapp 1533 (2005)	546 U.S. 1301
Doe v. Smith	3 Rapp 1290 (1988)	486 U.S. 1308
Dolman v. United States	2 Rapp 891 (1978)	439 U.S. 1395
Dow Jones & Co. Inc., In re	3 Rapp 1370 (1994)	513 U.S. 1301
Drifka v. Brainard	2 Rapp 416 (1968)	89 S. Ct. 434
Drummond v. Acree	2 Rapp 553 (1972)	409 U.S. 1228
Durant, Ex parte	4 Rapp 1416 (1946)	none
East Coast Lumber Terminal, Inc. v. Town of Babylon	4 Rapp 1552 (1949)	none
Eckwerth v. New York	1 Rapp 216 (1959)	79 S. Ct. 755
Eckwerth v. New York	1 Rapp 217 (1959)	79 S. Ct. 894
Edelman v. Jordan	2 Rapp 587 (1973)	414 U.S. 1301
Edwards v. Hope Medical Group	3 Rapp 1367 (1994)	512 U.S. 1301
Edwards v. New York	1 Rapp 163 (1956)	76 S. Ct. 538
Edwards v. New York	1 Rapp 171 (1956)	76 S. Ct. 1058
Ehrlichman v. Sirica	2 Rapp 639 (1974)	419 U.S. 1310
Ellis v. United States	1 Rapp 215 (1959)	79 S. Ct. 428
English v. Cunningham	1 Rapp 234 (1959)	80 S. Ct. 18
Equitable Office Bldg. Corp., In re	1 Rapp 24 (1946)	72 S. Ct. 1086
Evans v. Alabama	3 Rapp 1110 (1983)	461 U.S. 1301
Evans v. Atlantic Richfield Co.	2 Rapp 730 (1976)	429 U.S. 1334
Evans v. Bennett	2 Rapp 896 (1979)	440 U.S. 1301
Eveleigh v. United States	4 Rapp 1615 (1960)	none
Ewing v. Gill	4 Rapp 1472 (1945)	none
Fairbanks Steam Shovel Co. v. Wills	4 Rapp 1603 (1914)	none
Fare v. Michael C.	2 Rapp 810 (1978)	439 U.S. 1310
Farr v. Pitchess	2 Rapp 583 (1973)	409 U.S. 1243
Febre v. United States	2 Rapp 447 (1969)	396 U.S. 1225
Federal Communications Comm'n. v. Radiofone	3 Rapp 1385 (1995)	516 U.S. 1301
Fernandez v. United States	1 Rapp 256 (1961)	81 S. Ct. 642
Field v. United States	1 Rapp 58 (1951)	193 F.2d 86
Finance Comm. to Re-elect the Pres. v. Waddy	2 Rapp 577 (1972)	none
Fishman v. Schaffer	2 Rapp 721 (1976)	429 U.S. 1325
Flamm v. Real-BLT Inc.	2 Rapp 696 (1976)	424 U.S. 1313
Flynn v. United States	1 Rapp 128 (1955)	75 S. Ct. 285
Foster v. Gilliam	3 Rapp 1374 (1995)	515 U.S. 1301
Fowler v. Adams	2 Rapp 465 (1970)	400 U.S. 1205
Frank v. Georgia	4 Rapp 1521 (1914)	none
Frank v. Georgia	4 Rapp 1523 (1914)	none
Frank, In re	4 Rapp 1524 (1914)	none
Garcia-Mir v. Smith	3 Rapp 1207 (1985)	469 U.S. 1311
Garrison v. Hudson	3 Rapp 1173 (1984)	468 U.S. 1301

TITLE	PAGE	OTHER CITATION
General Council on Finance & Admin. v. Superior Ct.	2 Rapp 852 (1978)	439 U.S. 1355
General Council on Finance & Admin. v. Superior Ct.	2 Rapp 859 (1978)	439 U.S. 1369
General Dynamics v. Anderson	2 Rapp 895 (1979)	none
George F. Alger Co. v. Peck	1 Rapp 110 (1954)	74 S. Ct. 605
Goldman v. Fogarty	1 Rapp 123 (1954)	75 S. Ct. 257
Goldsmith v. Zerbst	1 Rapp 18 (1932)	none
Gomperts v. Chase	2 Rapp 514 (1971)	404 U.S. 1237
Graddick v. Newman	3 Rapp 1058 (1981)	none
Graves v. Barnes	2 Rapp 521 (1972)	405 U.S. 1201
Gregg v. Georgia	2 Rapp 698 (1976)	429 U.S. 1301
Gregory-Portland Indep. Sch. Dist. v. United States	3 Rapp 1008 (1980)	448 U.S. 1342
Grinnell Corp. v. United States	1 Rapp 373 (1965)	86 S. Ct. 231
Grubbs v. Delo	3 Rapp 1334 (1992)	506 U.S. 1301
Gruner v. Superior Court of Cal.	2 Rapp 711 (1976)	429 U.S. 1314
Guiteau, In re	1 Rapp ix (1882)	12 D.C. 498, 560
Guterma v. United States	1 Rapp 245 (1960)	80 S. Ct. 666
Haack v. Brooklyn Labor Lyceum Association	4 Rapp 1602 (1906)	none
Haner v. United States	2 Rapp 903 (1979)	440 U.S. 1308
Hanrahan v. Hampton	3 Rapp 945 (1980)	446 U.S. 1301
Harris v. United States	2 Rapp 471 (1970)	400 U.S. 1211
Harris v. United States	2 Rapp 508 (1971)	404 U.S. 1232
Harvey, In re	4 Rapp 1616 (1960)	none
Hawaii Housing Authority v. Midkiff	3 Rapp 1135 (1983)	463 U.S. 1323
Hayakawa v. Brown	2 Rapp 619 (1974)	415 U.S. 1304
Hayes, Ex parte	2 Rapp 614 (1973)	414 U.S. 1327
Haywood v. National Basketball Assn.	2 Rapp 477 (1971)	401 U.S. 1204
Heart of Atlanta Motel v. United States	1 Rapp 351 (1964)	85 S. Ct. 1
Heath, In re	4 Rapp 1599 (1892)	none
Heckler v. Blankenship	3 Rapp 1164 (1984)	465 U.S. 1301
Heckler v. Lopez	3 Rapp 1139 (1983)	463 U.S. 1328
Heckler v. Redbud Hospital District	3 Rapp 1218 (1985)	473 U.S. 1308
Heckler v. Turner	3 Rapp 1177 (1984)	468 U.S. 1305
Henry v. Warner	2 Rapp 586 (1973)	412 U.S. 1201
Herzog v. United States	1 Rapp 130 (1955)	75 S. Ct. 349
Hicks v. Feiock	3 Rapp 1256 (1986)	479 U.S. 1305
Hile v. Baker	4 Rapp 1588 (1915)	none
Hirsch v. U.S. Court of Appeals for the Second Circuit	4 Rapp 1618 (1960)	none
Holtzman v. Schlesinger	2 Rapp 590 (1973)	414 U.S. 1304
Holtzman v. Schlesinger	2 Rapp 602 (1973)	414 U.S. 1316
Hortonville Joint School Dist. v. Hortonville Ed. Assn.	2 Rapp 652 (1975)	423 U.S. 1301
Houchins v. KQED Inc.	2 Rapp 736 (1977)	429 U.S. 1341
Hubbard v. Wayne County Election Commission	4 Rapp 1480 (1955)	none
Hughes v. Thompson	2 Rapp 616 (1974)	415 U.S. 1301
Hung v. United States	2 Rapp 831 (1978)	439 U.S. 1326
Hurst v. West Virginia	4 Rapp 1554 (1951)	none
Hutchinson v. New York	1 Rapp 372 (1965)	86 S. Ct. 5
Hysler v. Florida	4 Rapp 1531 (1942)	none
INS v. Legalization Assistance Project of L.A. County	3 Rapp 1346 (1993)	510 U.S. 1301
International Boxing Club v. United States	1 Rapp 201 (1957)	78 S. Ct. 4
Jackson v. District of Columbia Bd. of Elections & Ethics	4 Rapp 1620 (2010)	559 U.S. ____
Jackson v. New York	1 Rapp 285 (1962)	82 S. Ct. 541
Jaffree v. Board of School Comm'rs of Mobile County	3 Rapp 1107 (1983)	459 U.S. 1314
Jefferson Parish School Bd. v. Dandridge	2 Rapp 496 (1971)	404 U.S. 1219
Jimenez v. United States District Court	1 Rapp 336 (1963)	84 S. Ct. 14
John Doe Agency v. John Doe Corp.	3 Rapp 1299 (1989)	488 U.S. 1306
Johnson, In re	1 Rapp 67 (1952)	72 S. Ct. 1028
Jones v. Lemond	2 Rapp 449 (1969)	396 U.S. 1227
Jordan v. Clemmer	4 Rapp 1547 (1947)	none
Julian v. United States	3 Rapp 1116 (1983)	463 U.S. 1308
Kadans v. Collins	2 Rapp 520 (1972)	404 U.S. 1244
Kaine, In re	4 Rapp 1503 (1852)	14 F. Cas. 82

TITLE	PAGE	OTHER CITATION
Kaine, Ex parte	4 Rapp 1393 (1853)	3 Blatch. 1; 14 F. Cas. 78
Kake v. Egan	1 Rapp 222 (1959)	80 S. Ct. 33
Karcher v. Dagget	3 Rapp 1083 (1982)	455 U.S. 1303
Karr v. Schmidt	2 Rapp 474 (1971)	401 U.S. 1201
Katzenbach v. McClung	1 Rapp 354 (1964)	85 S. Ct. 6
Keith v. New York	1 Rapp 218 (1959)	79 S. Ct. 938
Keith v. New York	4 Rapp 1613 (1959)	none
Kemp v. Smith	3 Rapp 1133 (1983)	463 U.S. 1321
Kemp v. Smith	3 Rapp 1155 (1983)	463 U.S. 1344
Kentucky v. Stincer	3 Rapp 1254 (1986)	479 U.S. 1303
Kenyeres v. Ashcroft	4 Rapp 1436 (2003)	538 U.S. 1301
Keyes v. School Dist. No. 1, Denver	2 Rapp 437 (1969)	396 U.S. 1215
Kimble v. Swackhamer	2 Rapp 882 (1978)	439 U.S. 1385
King v. Smith	2 Rapp 393 (1968)	88 S. Ct. 842
Kleem v. INS	3 Rapp 1259 (1986)	479 U.S. 1308
Knickerbocker Printing Corp. v. United States	1 Rapp 119 (1954)	75 S. Ct. 212
KPNX Broadcasting Co. v. Arizona Superior Court.	3 Rapp 1095 (1982)	459 U.S. 1302
Krause v. Rhodes	2 Rapp 775 (1977)	434 U.S. 1335
La Marca v. New York	1 Rapp 203 (1957)	78 S. Ct. 106
Laird v. Tatum	2 Rapp 560 (1972)	409 U.S. 824
Land v. Dollar	1 Rapp 48 (1951)	none
Ledbetter v. Baldwin	3 Rapp 1260 (1986)	479 U.S. 1309
Lee v. Johnson	2 Rapp 492 (1971)	404 U.S. 1215
Leigh v. United States	1 Rapp 303 (1962)	82 S. Ct. 994
Lenhard v. Wolff	2 Rapp 924 (1979)	443 U.S. 1306
Lenhard v. Wolff	3 Rapp 931 (1979)	444 U.S. 1301
Levy v. Parker	2 Rapp 426 (1969)	396 U.S. 1204
Lewis, In re	2 Rapp 630 (1974)	418 U.S. 1301
Liles v. Nebraska	3 Rapp 1167 (1984)	465 U.S. 1304
Little v. Ciuros	2 Rapp 802 (1978)	436 U.S. 1301
Local 1545, United Brotherhood of Carpenters v. Vincent	4 Rapp 1619 (1961)	none
Locks v. Commanding General, Sixth Army	2 Rapp 408 (1968)	89 S. Ct. 31
Long Beach Fed. S&L v. Fed. Home Loan Bank	1 Rapp 154 (1955)	76 S. Ct. 32
Long Island R.R. Co. v. New York Central R.R.	4 Rapp 1617 (1960)	none
Lopez v. United States	2 Rapp 490 (1971)	404 U.S. 1213
Los Angeles NAACP v. L.A. Unified Sch. Dist.	3 Rapp 1040 (1981)	101 S. Ct. 1965
Los Angeles v. Lyons	3 Rapp 1064 (1981)	453 U.S. 1308
Louisiana v. United States	1 Rapp 386 (1966)	none
Lucas v. Townsend	3 Rapp 1284 (1988)	486 U.S. 1301
Ludecke v. Watkins	4 Rapp 1475 (1947)	none
Lux v. Rodrigues	4 Rapp 1626 (2010)	561 U.S. ____
Lynch v. Watson	4 Rapp 1544 (1947)	none
M.I.C. Ltd. v. Bedford Township	3 Rapp 1152 (1983)	463 U.S. 1341
MacKay v. Boyd	4 Rapp 1481 (1955)	none
Madden v. Texas	3 Rapp 1318 (1991)	498 U.S. 1301
Mahan v. Howell	2 Rapp 482 (1971)	404 U.S. 1201
Mallonee v. Fahey	1 Rapp 78 (1952)	97 L. Ed. 1635
Marcello v. Brownell	4 Rapp 1486 (1955)	none
Marcello v. United States	2 Rapp 468 (1970)	400 U.S. 1208
Marks v. Davis	4 Rapp 1413 (1912)	4 Green Bag 2d 179, 186 (2001)
Marshall v. Barlow's, Inc.	2 Rapp 742 (1977)	429 U.S. 1347
Marten v. Thies	3 Rapp 963 (1980)	446 U.S. 1320
Mathis v. United States	1 Rapp 392 (1967)	88 S. Ct. 8
Matthews v. Little	2 Rapp 445 (1969)	396 U.S. 1223
McCarthy v. Briscoe	2 Rapp 713 (1976)	429 U.S. 1316
McCarthy v. Briscoe	2 Rapp 714 (1976)	429 U.S. 1317
McCarthy v. Harper	3 Rapp 1024 (1981)	449 U.S. 1309
McDaniel v. Sanchez	3 Rapp 985 (1980)	448 U.S. 1318
McDonald v. Missouri	3 Rapp 1161 (1984)	464 U.S. 1306

TITLE	PAGE	OTHER CITATION
McGee v. Alaska	3 Rapp 1150 (1983)	463 U.S. 1339
McGee v. Eyman	1 Rapp 318 (1962)	83 S. Ct. 230
McGraw-Hill Cos. v. Proctor & Gamble Co.	3 Rapp 1382 (1995)	515 U.S. 1309
McLeod v. General Elec. Co.	1 Rapp 389 (1966)	87 S. Ct. 5
Mecom v. United States	2 Rapp 779 (1977)	434 U.S. 1340
Meeropol v. Nizer	2 Rapp 733 (1977)	429 U.S. 1337
Meredith v. Fair	1 Rapp 312 (1962)	83 S. Ct. 10
Merrifield v. Kentucky	4 Rapp 1558 (1955)	none
Merryman, Ex parte	4 Rapp 1400 (1861)	*Decision of Chief Justice Taney, in the Merryman Case* (John Campbell 1862); 17 F. Cas. 144
Metropolitan County Bd. of Ed. v. Kelley	3 Rapp 1062 (1981)	453 U.S. 1306
Microsoft Corp. v. United States	4 Rapp 1424 (2000)	530 U.S. 1301
Mikutaitis v. United States	3 Rapp 1247 (1986)	478 U.S. 1306
Mincey v. Arizona	2 Rapp 782 (1977)	434 U.S. 1343
Miroyan v. United States	2 Rapp 836 (1978)	439 U.S. 1338
Mississippi v. Turner	3 Rapp 1323 (1991)	498 U.S. 1306
Mitchell v. California	1 Rapp 380 (1966)	86 S. Ct. 1411
Montanans for Balanced Fed. Budget v. Harper	3 Rapp 1197 (1984)	469 U.S. 1301
Montgomery v. Jefferson	3 Rapp 1193 (1984)	468 U.S. 1313
Moore v. Brown	3 Rapp 1001 (1980)	448 U.S. 1335
Mori v. Boilermakers	3 Rapp 1071 (1981)	454 U.S. 1301
Morison v. United States	3 Rapp 1289 (1988)	486 U.S. 1306
Motlow v. United States	1 Rapp 1 (1926)	10 F.2d 657
Multimedia Holdings Corp. v. Circuit Ct. of Fla.	4 Rapp 1499 (2005)	544 U.S. 1301
Murdaugh v. Livingston	3 Rapp 1391 (1998)	525 U.S. 1301
National Broadcasting Co. v. Niemi	2 Rapp 792 (1978)	434 U.S. 1354
National Coll. Athl. Assn. v. Bd. of Regents	3 Rapp 1124 (1983)	463 U.S. 1311
National Farmers Union Ins. Co. v. Crow Tribe	3 Rapp 1185 (1984)	468 U.S. 1315
National Farmers Union Ins. Co. v. Crow Tribe	3 Rapp 1211 (1985)	471 U.S. 1301
National Labor Relations Board v. Getman	2 Rapp 481 (1971)	404 U.S. 1204
National League of Cities v. Brennan	2 Rapp 648 (1974)	419 U.S. 1321
National Socialist Party of America v. Skokie	2 Rapp 767 (1977)	434 U.S. 1327
Nebraska Press Assn. v. Stuart	2 Rapp 668 (1975)	423 U.S. 1319
Nebraska Press Assn. v. Stuart	2 Rapp 675 (1975)	423 U.S. 1327
Netherland v. Gray	3 Rapp 1387 (1996)	519 U.S. 1301
Netherland v. Tuggle	3 Rapp 1386 (1996)	517 U.S. 1301
New England Water Works Co. v. Farmers' Loan & Trust	4 Rapp 1576 (1906)	none
New England Water Works Co. v. Farmers' Loan & Trust	4 Rapp 1577 (1906)	none
New Jersey v. Auld	4 Rapp 1553 (1950)	none
New Motor Veh. Bd. of Cal. v. Orrin W. Fox Co.	2 Rapp 784 (1977)	434 U.S. 1345
New York Times Co. v. Jascalevich	2 Rapp 803 (1978)	439 U.S. 1301
New York Times Co. v. Jascalevich	2 Rapp 805 (1978)	439 U.S. 1304
New York Times Co. v. Jascalevich	2 Rapp 816 (1978)	439 U.S. 1317
New York Times Co. v. Jascalevich	2 Rapp 824 (1978)	439 U.S. 1331
New York v. Kleppe	2 Rapp 704 (1976)	429 U.S. 1307
Northern Cal. Power Ag'y v. Grace Geothermal.	3 Rapp 1202 (1984)	469 U.S. 1306
Noto v. United States	1 Rapp 156 (1955)	76 S. Ct. 255
Noyd v. Bond	2 Rapp 418 (1968)	89 S. Ct. 478
Nukk v. Shaughnessy	1 Rapp 126 (1955)	75 S. Ct. 255
Numer v. United States	4 Rapp 1550 (1948)	none
O'Brien v. O'Laughlin	4 Rapp 1591 (2009)	557 U.S. ____
O'Brien v. Skinner	2 Rapp 580 (1972)	409 U.S. 1240
O'Connell v. Kirchner	3 Rapp 1372 (1995)	513 U.S. 1303
O'Connor v. Board of Ed. of School Dist. 23	3 Rapp 1017 (1980)	449 U.S. 1301
O'Rourke v. Levine	1 Rapp 243 (1960)	80 S. Ct. 623
Oden v. Brittain	2 Rapp 432 (1969)	396 U.S. 1210
Oerlikon Machine Tool Works Buehrle & Co. v. U.S.	4 Rapp 1608 (1957)	none
Office of Personnel Management v. Gov't Employees	3 Rapp 1212 (1985)	473 U.S. 1301

TITLE	PAGE	OTHER CITATION
Ohio Citizens for Responsible Energy v. NRC	3 Rapp 1262 (1986)	479 U.S. 1312
Orloff v. Willoughby	1 Rapp 76 (1952)	72 S. Ct. 998
Overfield v. Pennroad Corp.	4 Rapp 1473 (1946)	none
Owen v. Kennedy	1 Rapp 323 (1963)	84 S. Ct. 12
Pabon v. Board of Personnel of Puerto Rico	4 Rapp 1609 (1958)	none
Pacific Tel. & Tel. v. Public Util. Comm'n of Cal.	2 Rapp 919 (1979)	443 U.S. 1301
Pacific Un. of Seventh-Day Adventists v. Marshall	2 Rapp 748 (1977)	434 U.S. 1305
Pacileo v. Walker	3 Rapp 946 (1980)	446 U.S. 1307
Packwood v. Senate Select Comm. on Ethics	3 Rapp 1364 (1994)	510 U.S. 1319
Panama Canal Co. v. Grace Lines, Inc.	1 Rapp 195 (1957)	77 S. Ct. 854
Parisi v. Davidson	2 Rapp 455 (1969)	396 U.S. 1233
Pasadena City Bd. of Ed. v. Spangler	2 Rapp 682 (1975)	423 U.S. 1335
Patterson v. Superior Court of Cal.	2 Rapp 650 (1975)	420 U.S. 1301
Patterson v. United States	1 Rapp 125 (1954)	75 S. Ct. 256
Peeples v. Brown	3 Rapp 933 (1979)	444 U.S. 1303
Pennsylvania v. Wheeling & Belmont Bridge Co.	4 Rapp 1565 (1854)	59 U.S. 421
Penry v. Texas	3 Rapp 1377 (1995)	515 U.S. 1304
Perez v. United States	2 Rapp 461 (1970)	none
Philip Morris USA Inc. v. Scott	4 Rapp 1622 (2010)	561 U.S. ____
Pirinsky, In re	1 Rapp 30 (1949)	70 S. Ct. 232
Planned Parenthood v. Casey	3 Rapp 1354 (1994)	510 U.S. 1309
Pon v. United States	4 Rapp 1549 (1948)	none
Portley v. Grossman	3 Rapp 940 (1980)	444 U.S. 1311
Prato v. Vallas	4 Rapp 1440 (2003)	539 U.S. 1301
Prudential Fed. Sav. & Loan Assn. v. Flanigan	3 Rapp 1251 (1986)	478 U.S. 1311
Pryor v. United States	2 Rapp 518 (1971)	404 U.S. 1242
Public Service Board v. United States	1 Rapp 384 (1966)	87 S. Ct. 3
Public Utilities Comm'n of D.C. v. Pollak	4 Rapp 1423 (1952)	343 U.S. 451, 466
Quinn v. Laird	2 Rapp 421 (1969)	89 S. Ct. 1491
Railway Express Agency, Inc. v. United States	1 Rapp 275 (1962)	82 S. Ct. 466
Railway Labor Executives' Assn. v. Gibbons	3 Rapp 969 (1980)	448 U.S. 1301
Rehman v. California	1 Rapp 356 (1964)	85 S. Ct. 8
Renaissance Arcade & Bookstore v. Cook Cty.	3 Rapp 1232 (1985)	473 U.S. 1322
Reproductive Services, Inc. v. Walker	2 Rapp 808 (1978)	439 U.S. 1307
Reproductive Services, Inc. v. Walker	2 Rapp 851 (1978)	439 U.S. 1354
Republican National Committee v. Burton	3 Rapp 1081 (1982)	455 U.S. 1301
Republican Party of Hawaii v. Mink	3 Rapp 1234 (1985)	474 U.S. 1301
Repub. State Central Comm. v. Ripon Soc'y	2 Rapp 547 (1972)	409 U.S. 1222
Reynolds v. Int'l Amateur Athletic Fed'n	3 Rapp 1332 (1992)	505 U.S. 1301
Reynolds v. United States	1 Rapp 239 (1959)	80 S. Ct. 30
Richardson, In re	4 Rapp 1600 (1896)	none
Richardson v. New York	1 Rapp 206 (1958)	78 S. Ct. 1188
Richmond v. Arizona	2 Rapp 764 (1977)	434 U.S. 1323
Riverside v. Rivera	3 Rapp 1225 (1985)	473 U.S. 1315
Roche, In re	3 Rapp 979 (1980)	448 U.S. 1312
Rockefeller v. Socialist Workers Party	2 Rapp 459 (1970)	400 U.S. 1201
Rodriguez v. Texas	3 Rapp 1380 (1995)	515 U.S. 1307
Roller v. Murray	4 Rapp 1579 (1909)	none
Roller v. Murray	4 Rapp 1582 (1912)	none
Roller v. Murray	4 Rapp 1583 (1913)	none
Rosado v. Wyman	2 Rapp 435 (1969)	396 U.S. 1213
Rosenberg v. United States	1 Rapp 89 (1953)	346 U.S. 313
Rosenblatt v. American Cyanamid Co.	1 Rapp 360 (1965)	86 S. Ct. 1
Rosoto v. Warden	1 Rapp 321 (1963)	83 S. Ct. 1788
Rostker v. Goldberg	3 Rapp 974 (1980)	448 U.S. 1306
Roth v. United States	1 Rapp 192 (1956)	77 S. Ct. 17
Rubin v. United States Independent Counsel	3 Rapp 1389 (1998)	524 U.S. 1301
Ruckelshaus v. Monsanto Co.	3 Rapp 1128 (1983)	463 U.S. 1315
Russo v. Byrne	2 Rapp 544 (1972)	409 U.S. 1219
Russo v. United States	2 Rapp 486 (1971)	404 U.S. 1209

TITLE	PAGE	OTHER CITATION
Sacco v. Hendry	1 Rapp 15 (1927)	5 *The Sacco-Vanzetti Case* 5532 (2d ed. 1969)
Sacco v. Massachusetts	1 Rapp 16 (1927)	5 *The Sacco-Vanzetti Case* 5516 (2d ed. 1969)
Sacher v. United States	1 Rapp 55 (1951)	none
San Diegans for Mt. Soledad Nat. War Mem. v. Paulson	4 Rapp 1538 (2006)	548 U.S. 1301
Satterfield v. Smyth	4 Rapp 1543 (1945)	none
Sawyer v. Dollar	1 Rapp 52 (1951)	none
Scaggs v. Larsen	2 Rapp 428 (1969)	396 U.S. 1206
Schlesinger v. Holtzman	2 Rapp 607 (1973)	414 U.S. 1321
Schlesinger v. Holtzman	2 Rapp 609 (1973)	414 U.S. 1322
Schweiker v. McClure	3 Rapp 1051 (1981)	452 U.S. 1301
Seagram & Sons v. Hostetter	1 Rapp 371 (1965)	86 S. Ct. 10
Seals, Ex parte	4 Rapp 1466 (1943)	none
Seals, Ex parte	4 Rapp 1468 (1943)	none
Sellers v. United States	2 Rapp 395 (1968)	89 S. Ct. 36
Shearer v. United States	4 Rapp 1545 (1947)	none
Shelton v. McKinley	4 Rapp 1612 (1959)	none
Sica v. United States	1 Rapp 290 (1962)	82 S. Ct. 669
Simon, In re	4 Rapp 1556 (1953)	none
Simon v. United States	4 Rapp 1461 (1941)	none
Sklaroff v. Skeadas	1 Rapp 164 (1956)	76 S. Ct. 736
Smith v. Ritchey	2 Rapp 407 (1968)	89 S. Ct. 54
Smith v. United States	2 Rapp 653 (1975)	423 U.S. 1303
Smith v. Yeager	2 Rapp 513 (1971)	none
Socialist Labor Party v. Rhodes	2 Rapp 402 (1968)	89 S. Ct. 3
Socialist Labor Party v. Rhodes	2 Rapp 406 (1968)	89 S. Ct. 4
Socialist Workers Party v. Attorney General	2 Rapp 642 (1974)	419 U.S. 1314
South Park Indep. School Dist. v. United States	3 Rapp 1054 (1981)	453 U.S. 1301
Spencer v. Pugh	4 Rapp 1496 (2004)	543 U.S. 1301
Spenkelink v. Wainwright	2 Rapp 905 (1979)	442 U.S. 1301
Spenkelink v. Wainwright	2 Rapp 911 (1979)	442 U.S. 1308
Spies v. Illinois	4 Rapp 1567 (1887)	123 U.S. 131
Stanard v. Olesen	1 Rapp 112 (1954)	74 S. Ct. 768
Stanley v. United States	4 Rapp 1605 (1956)	none
Steinberg v. United States	1 Rapp 168 (1956)	76 S. Ct. 822
Stevens, Ex parte	4 Rapp 1508 (1861	none
Stickel v. United States	1 Rapp 188 (1956)	76 S. Ct. 1067
Stickney, Ex parte	1 Rapp 278 (1962)	82 S. Ct. 465
Strickland Transportation Co. v. United States	2 Rapp 420 (1969)	89 S. Ct. 732
Stroup v. Willcox	4 Rapp 1562 (2006)	549 U.S. 1501
Sulzer v. Sohmer	4 Rapp 1585 (1914)	none
Sumner v. Mata	3 Rapp 950 (1980)	446 U.S. 1302
Synanon Foundation Inc. v. California	3 Rapp 936 (1979)	444 U.S. 1307
Tate v. Rose	3 Rapp 1170 (1984)	466 U.S. 1301
Thomas v. Sierra Club	3 Rapp 1205 (1985)	469 U.S. 1309
Thomas v. South Side Elevated Railroad Co.	4 Rapp 1578 (1906)	none
Thompson v. United States	4 Rapp 1551 (1948)	none
Tierney v. United States	2 Rapp 557 (1972)	409 U.S. 1232
Times-Picayune Pub. Corp. v. Schulingkamp	2 Rapp 631 (1974)	419 U.S. 1301
Tomaiolo v. United States	1 Rapp 271 (1961)	none
Travia v. Lomenzo	1 Rapp 367 (1965)	86 S. Ct. 7
Tri-Continental Financial Corp. v. United States	1 Rapp 242 (1960)	80 S. Ct. 659
Turner Broadcasting System, Inc. v. FCC	3 Rapp 1335 (1993)	507 U.S. 1301
Tuscarora Nation of Indians v. Power Auth.	1 Rapp 211 (1958)	79 S. Ct. 4
Twentieth Century Airlines Inc. v. Ryan	1 Rapp 102 (1953)	74 S. Ct. 8
Uhler v. AFL-CIO	3 Rapp 1182 (1984)	468 U.S. 1310
United States ex rel. Cerullo v. Follette	2 Rapp 454 (1969)	396 U.S. 1232
United States ex rel. Knauff v. McGrath	1 Rapp 36 (1950)	96 Cong. Rec. A3750
United States ex rel. Norris v. Swope	1 Rapp 73 (1952)	72 S. Ct. 1020
United States v. Allied Stevedoring Corp.	1 Rapp 179 (1956)	76 S. Ct. 1068

TITLE	PAGE	OTHER CITATION
United States v. Edgar	2 Rapp 484 (1971)	404 U.S. 1206
United States v. Cooper	4 Rapp 1568 (1891)	none
United States v. FMC Corp.	1 Rapp 325 (1963)	84 S. Ct. 4
United States v. Gates	4 Rapp 1476 (1949)	none
United States v. Klopp	4 Rapp 1469 (1944)	none
United States v. Patterson	4 Rapp 1593 (1887)	29 F. 775
United States v. Portell	4 Rapp 1606 (1956)	none
United States v. United Liquors Corp.	1 Rapp 190 (1956)	77 S. Ct. 208
United States Postal Service v. Letter Carriers	3 Rapp 1274 (1987)	481 U.S. 1301
Uphaus v. Wyman	1 Rapp 247 (1960)	81 S. Ct. 22
Valenti v. Spector	1 Rapp 209 (1958)	79 S. Ct. 7
Van Newkirk v. McLain	1 Rapp 20 (1940)	34 F. Supp. 404
Vetterli v. United States District Court	2 Rapp 797 (1978)	435 U.S. 1304
Volkswagonwerk A.G. v. Falzon	3 Rapp 1112 (1983)	461 U.S. 1303
Volvo of America Corp. v. Schwarzer	2 Rapp 727 (1976)	429 U.S. 1331
Waller, Ex parte	1 Rapp 22 (1942)	62 S. Ct. 1313
Walters v. Nat'l Assn. of Radiation Survivors	3 Rapp 1195 (1984)	468 U.S. 1323
Ward v. United States	1 Rapp 181 (1956)	76 S. Ct. 1063
Warm Springs Dam Task Force v. Gribble	2 Rapp 621 (1974)	417 U.S. 1301
Warm Springs Dam Task Force v. Gribble	2 Rapp 885 (1978)	439 U.S. 1392
Wasmuth v. Allen	1 Rapp 350 (1964)	85 S. Ct. 5
Westermann v. Nelson	2 Rapp 576 (1972)	409 U.S. 1236
Western Airlines, Inc. v. Teamsters	3 Rapp 1264 (1987)	480 U.S. 1301
Whalen v. Roe	2 Rapp 662 (1975)	423 U.S. 1313
White v. Florida	3 Rapp 1087 (1982)	458 U.S. 1301
Willhauck v. Flanagan	3 Rapp 990 (1980)	448 U.S. 1323
Williams v. Missouri	3 Rapp 1115 (1983)	463 U.S. 1301
Williams v. Rhodes	2 Rapp 399 (1968)	89 S. Ct. 1
Williams v. Zbaraz	2 Rapp 912 (1979)	442 U.S. 1309
Williamson v. United States	1 Rapp 40 (1950)	184 F.2d 280
Wilson v. O'Malley	4 Rapp 1529 (1937)	none
Winston-Salem/Forsyth Cty. Bd. of Ed. v. Scott	2 Rapp 498 (1971)	404 U.S. 1221
Winters v. United States	2 Rapp 404 (1968)	89 S. Ct. 34
Winters v. United States	2 Rapp 410 (1968)	89 S. Ct. 57
Wisconsin Right to Life, Inc. v. FEC	4 Rapp 1458 (2004)	542 U.S. 1305
Wise v. Lipscomb	2 Rapp 769 (1977)	434 U.S. 1329
Wise v. New Jersey	4 Rapp 1487 (1955)	none
Wolcher v. United States	1 Rapp 161 (1955)	76 S. Ct. 254
Wyckoff, In re	4 Rapp 1561 (1961)	6 Race R. L. Rptr. 794
Yanish v. Barber	1 Rapp 82 (1953)	73 S. Ct. 1105
Yasa v. Esperdy	1 Rapp 246 (1960)	80 S. Ct. 1366

CUMULATIVE TABLE OF CASES BY DATE

19TH CENTURY

8/3/52 *Kaine, In re*
4/25/53 *Kaine, Ex parte*
6/26/54 *Penn. v. Wheeling & Belmont Bridge Co.*
6/1/61 *Merryman, Ex parte*
8/??/61 *Stevens, Ex parte*
6/19/82 *Guiteau, In re*
1/31/87 *U.S. v. Patterson*
10/21/87 *Spies v. Illinois*
8/7/88 *Clark, Ex parte*
8/10/91 *United States v. Cooper*
1/18/92 *In re Heath*
8/24/96 *In re Richardson*

20TH CENTURY

2/5/06 *N.E. Water v. Farmers'*, 4 Rapp 1576
2/20/06 *N.E. Water v. Farmers'*, 4 Rapp 1577
3/5/06 *Thomas v. South Side Elevated R. Co.*
6/29/06 *Haack v. Brooklyn Labor Lyceum Assn.*
11/17/09 *Roller v. Murray*, 4 Rapp 1579
1/25/10 *Day v. Louisiana Western Railroad Co.*
1/31/12 *Roller v. Murray*, 4 Rapp 1582
8/1/12 *Marks v. Davis*
12/3/13 *Roller v. Murray*, 4 Rapp 1583
12/15/13 *Chesapeake Western Co. v. Murray*
2/23/14 *Fairbanks Steam Shovel Co. v. Wills*
11/23/14 *Frank v. Georgia*, 4 Rapp 1521
11/24/14 *Sulzer v. Sohmer*
11/25/14 *Frank v. Georgia*, 4 Rapp 1523
12/28/14 *Frank, In re*
5/28/15 *Burgess v. Pere Marq. R.*, 4 Rapp 1586
5/31/15 *Burgess v. Pere Marq. R.*, 4 Rapp 1587
12/15/15 *Hile v. Baker*
2/14/26 *Motlow v. United States*
8/10/27 *Sacco v. Hendry*
8/20/27 *Sacco v. Massachusetts*
11/18/32 *Goldsmith v. Zerbst*
7/2/36 *Associated Gas & Electric Co., In re*
6/16/37 *Wilson v. O'Malley*
6/20/40 *Van Newkirk v. McLain*
7/22/41 *Simon v.United States*
6/13/42 *Hysler v. Florida*
6/27/42 *Waller, Ex parte*
9/4/43 *Seals, Ex parte*, 4 Rapp 1466
11/23/43 *Seals, Ex parte*, 4 Rapp 1468
7/17/44 *United States v. Klopp*
3/31/45 *Chin Gum v. United States*
6/20/45 *Ewing v. Gill*
11/5/45 *Satterfield v. Smyth*
8/6/46 *Equitable Office Bldg. Corp., In re*
9/6/46 *Ex parte Durant*
9/18/46 *Overfield v. Pennroad Corp.*
7/30/47 *Lynch v. Watson*
8/23/47 *Shearer v. United States*
8/25/47 *Jordan v. Clemmer*
9/4/47 *Ludecke v. Watkins*
5/17/48 *Cote v. New Hampshire*
7/17/48 *Pon v. United States*
11/27/48 *Numer v. United States*
12/3/48 *Thompson v. United States*
4/15/49 *East Coast Lumber v. Town of Babylon*
6/16/49 *United States v. Gates*
9/10/49 *Pirinsky, In re*
1/17/50 *New Jersey v. Auld*
2/6/50 *D'Aquino v. United States*
5/17/50 *U.S. ex rel. Knauff v. McGrath*
5/18/50 *Ala. G.S.R. v. R.R. & P.U.C. of Tenn.*
9/25/50 *Williamson v. United States*
4/17/51 *Land v. Dollar*
5/22/51 *Sawyer v. Dollar*
6/22/51 *Sacher v. United States*
6/22/51 *Dennis v. United States*
7/25/51 *Field v. United States*
8/29/51 *Hurst v. West Virginia*
4/25/52 *Johnson, In re*
4/29/52 *United States ex rel. Norris v. Swope*
5/3/52 *Orloff v. Willoughby*
5/26/52 *Public Utilities Comm'n v. Pollak*
11/20/52 *Mallonee v. Fahey*
2/25/53 *In re Simon*
5/16/53 *Yanish v. Barber*
6/17/53 *Rosenberg v. United States*
8/5/53 *Carlisle v. Landon*
9/24/53 *Twentieth Century Airlines v. Ryan*
12/10/53 *Clark v. United States*
3/29/54 *George F. Alger Co. v. Peck*
5/22/54 *Stanard v. Olesen*
6/18/54 *Costello v. United States*
9/3/54 *Knickerbocker Printing Corp. v. U.S.*
12/9/54 *Albanese v. United States*
12/20/54 *Goldman v. Fogarty*
12/23/54 *Patterson v. United States*
1/3/55 *Nukk v. Shaughnessy*
1/12/55 *Flynn v. United States*
2/11/55 *Herzog v. United States*
3/14/55 *Hubbard v. Wayne Cty. Elect. Comm'n*
7/5/55 *MacKay v. Boyd*
7/7/55 *Cooper v. New York*, 1 Rapp 137
7/8/55 *Cooper v. New York*, 4 Rapp 1482
7/13/55 *Carter v. United States*
7/13/55 *Delli Paoli v. United States*
8/3/55 *Breswick & Co. v. United States*
8/19/55 *Marcello v. Brownell*
8/25/55 *Wise v. New Jersey*
9/2/55 *Wise v. New Jersey*
9/27/55 *Burwell v. California*
10/31/55 *Long Beach Fed. S&L v. FHLB*
11/21/55 *Noto v. United States*
12/21/55 *Merrifield v. Kentucky*
12/31/55 *Wolcher v. United States*
3/30/56 *Edwards v. New York*, 1 Rapp 163
5/4/56 *Sklaroff v. Skeadas*
5/28/56 *Steinberg v. United States*
6/25/56 *Edwards v. New York*, 1 Rapp 171
7/13/56 *United States v. Allied Stevedoring Corp.*
8/8/56 *Ward v. United States*
8/14/56 *Stickel v. United States*
8/29/56 *Stanley v. United States*

20TH CENTURY (cont'd)
9/19/56 *United States v. United Liquors Corp.*
10/8/56 *Roth v. United States*
12/22/56 *United States v. Portell*
5/7/57 *Panama Canal Co. v. Grace Lines*
5/24/57 *Brody v. United States*
8/7/57 *Oerlikon Machine Tools Works v. U.S.*
10/1/57 *Cunningham v. English*
10/29/57 *International Boxing Club v. U.S.*
11/6/57 *La Marca v. New York*
1/20/58 *Di Candia v. United States*
6/17/58 *Richardson v. New York*
7/16/58 *Pabon v. Bd. of Personnel of Puerto Rico*
8/29/58 *Bletterman v. United States*
9/3/58 *Valenti v. Spector*
9/8/58 *Tuscarora Nation v. Power Authority*
1/31/59 *County Sch. Bd. of Arlington v. Deskins*
2/7/59 *Ellis v. United States*
4/7/59 *Eckwerth v. New York*, 1 Rapp 216
4/20/59 *Eckwerth v. New York*, 1 Rapp 217
5/11/59 *Keith v. New York*, 1 Rapp 218
6/29/59 *Shelton v. McKinley*
7/7/59 *Appalachian Power Co. v. AICPA*
7/11/59 *Kake v. Egan*
7/20/59 *Keith v. New York*, 4 Rapp 1613
8/4/59 *English v. Cunningham*
9/25/59 *Deere v. United States*
10/8/59 *Am. Trading Corp. v. Railroad Comm'n*
11/2/59 *Reynolds v. United States*
3/2/60 *Tri-Continental Fin. Corp. v. U.S.*
3/5/60 *O'Rourke v. Levine*
3/18/60 *Guterma v. United States*
4/4/60 *Eveleigh v. United States*
6/23/60 *Yasa v. Esperdy*
7/5/60 *In re Harvey*
7/7/60 *Uphaus v. Wyman*
7/19/60 *Akel v. New York*
8/1/60 *Long Island R.R. v. N.Y. Central R.R.*
8/31/60 *Bandy v. United States*, 1 Rapp 252
12/5/60 *Bandy v. United States*, 1 Rapp 253
12/12/60 *Hirsch v. U.S. Ct. App. for the 2d Cir.*
1/31/61 *Local 1545, Carpenters v. Vincent*
2/27/61 *Fernandez v. United States*
6/28/61 *Bandy v. United States*, 1 Rapp 261
7/26/61 *In re Wyckoff*
8/30/61 *Board of Education v. Taylor*
10/11/61 *Cohen v. United States*, 1 Rapp 268
11/21/61 *Tomaiolo v. United States*
12/14/61 *Commonwealth Oil Ref. v. Lummus Co.*
1/17/62 *Railway Express Agency, Inc. v. U.S.*
1/18/62 *Stickney, Ex parte*
1/30/62 *Cohen v. United States*, 1 Rapp 279
2/14/62 *Cohen v. United States*, 1 Rapp 281
3/6/62 *Jackson v. New York*
3/13/62 *Bart, In re*
3/19/62 *Bloeth v. New York*
3/19/62 *Sica v. United States*
3/19/62 *Carbo v. United States*
5/11/62 *Leigh v. United States*
8/17/62 *Arrow Trans. v. Southern Ry.*, 1 Rapp 307
8/23/62 *Bidwell v. United States*
9/10/62 *Meredith v. Fair*
9/26/62 *Arrow Trans. v. Southern Ry.*, 1 Rapp 314
11/29/62 *McGee v. Eyman*
4/10/63 *A.B. Chance Co. v. Atlantic City Elec.*
6/26/63 *Rosoto v. Warden*
7/19/63 *Owen v. Kennedy*
8/9/63 *United States v. FMC Corp.*
8/16/63 *Board of School Comm'rs v. Davis*
8/23/63 *Jimenez v. U.S. District Court*
7/24/64 *Aronson v. May*
7/25/64 *Wasmuth v. Allen*
8/10/64 *Heart of Atlanta Motel v. U.S.*
9/23/64 *Katzenbach v. McClung*
10/7/64 *Rehman v. California*
11/18/64 *Bowman v. United States*
3/1/65 *City-Wide Comm. v. Bd. of Educ. of N.Y.*
3/8/65 *City-Wide Comm. v. Bd. of Educ. of N.Y.*
7/13/65 *Rosenblatt v. American Cyanamid Co.*
7/16/65 *Travia v. Lomenzo*
8/5/65 *Seagram & Sons v. Hostetter*
9/20/65 *Hutchinson v. New York*
11/8/65 *Grinnell Corp. v. United States*
3/4/66 *Chestnut v. New York*
4/22/66 *Alcorcha v. California*
5/5/66 *Mitchell v. California*
8/1/66 *Am. Mfrs. Mut. Ins. v. Am. Broadcasting*
8/8/66 *Public Service Board v. United States*
8/12/66 *Louisiana v. United States*
8/19/66 *Birtcher Corp. v. Diapulse Corp.*
9/21/66 *McLeod v. General Elec. Co.*
8/15/67 *Baytops v. New Jersey*
8/15/67 *Mathis v. United States*
1/29/68 *King v. Smith*
8/17/68 *Sellers v. United States*
9/10/68 *Williams v. Rhodes*
9/16/68 *Socialist Labor v. Rhodes*, 2 Rapp 402
9/23/68 *Winters v. United States*, 2 Rapp 404
9/23/68 *Socialist Labor v. Rhodes*, 2 Rapp 406
9/29/68 *Smith v. Ritchey*
10/12/68 *Locks v. Commanding General*
10/21/68 *Winters v. United States*, 2 Rapp 410
12/5/68 *Drifka v. Brainard; Allen v. Brainard*
12/24/68 *Noyd v. Bond*
2/4/69 *Strickland Transportation Co. v. U.S.*
5/1/69 *Quinn v. Laird*
7/16/69 *Atlantic Coast Line R.R. v. BLE*
8/2/69 *Levy v. Parker*
8/5/69 *Scaggs v. Larsen*
8/13/69 *Oden v. Brittain*
8/20/69 *Rosado v. Wyman*
8/29/69 *Keyes v. School Dist. No. 1, Denver*
9/5/69 *Alexander v. Board of Education*
9/9/69 *Matthews v. Little*
9/10/69 *Febre v. United States*
9/15/69 *Jones v. Lemond*
10/10/69 *Brussel v. United States*
10/16/69 *U.S. ex rel. Cerullo v. Follette*
12/29/69 *Parisi v. Davidson*
1/30/70 *Beyer v. United States*
7/11/70 *Rockefeller v. Socialist Workers Party*
7/22/70 *Rockefeller v. Socialist Workers Party*
7/30/70 *Perez v. United States*
8/5/70 *Davis v. Adams*
8/11/70 *Fowler v. Adams*
8/29/70 *Dexter v. Schrunk*

20TH CENTURY (cont'd)
9/18/70 *Marcello v. United States*
10/10/70 *Harris v. United States*, 2 Rapp 471
2/11/71 *Karr v. Schmidt*
3/1/71 *Haywood v. National Basketball Assn.*
7/27/71 *Labor Board v. Getman*
7/27/71 *Mahan v. Howell*
7/29/71 *Edgar v. United States*
8/16/71 *Russo v. United States*
8/19/71 *Corpus Christi Sch. Dist. v. Cisneros*
8/23/71 *Lopez v. United States*
8/25/71 *Guey Heung Lee v. Johnson*
8/30/71 *Jefferson Parish Sch. Bd. v. Dandridge*
8/31/71 *Winston-Salem Board of Ed. v. Scott*
8/31/71 *Harris v. United States*, 2 Rapp 508
9/3/71 *Smith v. Yeager*
9/10/71 *Gomperts v. Chase*
10/29/71 *Pryor v. United States*
1/31/72 *Kadans v. Collins*
2/7/72 *Graves v. Barnes*
2/14/72 *Chambers v. Mississippi*
7/1/72 *Cousins v. Wigoda*
7/19/72 *Aberdeen & Rockfish R. Co. v. SCRAP*
7/29/72 *Russo v. Byrne*
8/16/72 *Repub. State Cent. Comm. v. Ripon Soc'y*
9/1/72 *Drummond v. Acree*
9/12/72 *Tierney v. United States*
10/6/72 *Communist Party of Ind. v. Whitcomb*
10/10/72 *Laird v. Tatum*
10/20/72 *Westermann v. Nelson*
10/31/72 *Comm. to Re-elect the Pres. v. Waddy*
11/2/72 *Berg, In re*
11/6/72 *O'Brien v. Skinner*
1/11/73 *Farr v. Pitchess*
5/18/73 *Henry v. Warner*
7/19/73 *Edelman v. Jordan*
8/1/73 *Holtzman v. Schlesinger*, 2 Rapp 590
8/4/73 *Holtzman v. Schlesinger*, 2 Rapp 602
8/4/73 *Schlesinger v. Holtzman*, 2 Rapp 607
8/4/73 *Schlesinger v. Holtzman*, 2 Rapp 609
10/26/73 *Hayes, Ex parte*
1/25/74 *Hughes v. Thompson*
3/4/74 *Hayakawa v. Brown*
6/17/74 *Warm Springs v. Gribble*, 2 Rapp 621
7/4/74 *Lewis, In re*
7/29/74 *Times-Picayune v. Schulingkamp*
8/28/74 *Ehrlichman v. Sirica*
12/27/74 *Socialist Workers Party v. Att'y General*
12/31/74 *National League of Cities v. Brennan*
3/21/75 *Patterson v. Superior Court of Cal.*
8/18/75 *Hortonville Sch. Dist. v. H'ville Ed. Assn.*
9/11/75 *Smith v. United States*
9/29/75 *Chamber of Comm. v. Legal Aid Soc'y*
10/28/75 *Whalen v. Roe*
11/13/75 *Nebraska Press v. Stuart*, 2 Rapp 668
11/20/75 *Nebraska Press v. Stuart*, 2 Rapp 675
12/22/75 *Pasadena City Bd. of Ed. v. Spangler*
2/2/76 *Coleman v. Paccar, Inc.*
2/17/76 *Bradley v. Lunding*
2/25/76 *Flamm v. Real-BLT Inc.*
7/22/76 *Gregg v. Georgia*
8/16/76 *Bateman v. Arizona*
8/19/76 *New York v. Kleppe*
9/3/76 *Gruner v. Superior Court of Cal.*
9/14/76 *McCarthy v. Briscoe*, 2 Rapp 713
9/30/76 *McCarthy v. Briscoe*, 2 Rapp 714
10/1/76 *Fishman v. Schaffer*
11/15/76 *Volvo of America Corp. v. Schwarzer*
12/9/76 *Evans v. Atlantic Richfield Co.*
1/18/77 *Meeropol v. Nizer*
2/1/77 *Houchins v. KQED Inc.*
2/3/77 *Marshall v. Barlow's, Inc.*
7/20/77 *Califano v. McRae*
7/28/77 *Divans v. California*, 2 Rapp 746
8/2/77 *Seventh-Day Adventists v. Marshall*
8/5/77 *Beame v. Friends of the Earth*
8/8/77 *CFTC v. British Am. Commodity Options*
8/8/77 *Richmond v. Arizona*
8/26/77 *National Socialist Party v. Skokie*
8/30/77 *Wise v. Lipscomb*
9/16/77 *Krause v. Rhodes*
9/20/77 *Barthuli v. Jefferson Sch. Dist.*
9/20/77 *Mecom v. United States*
10/6/77 *Mincey v. Arizona*
12/6/77 *New Motor Veh. Bd. v. Orrin W. Fox Co.*
2/10/78 *National Broadcasting Co. v. Niemi*
3/29/78 *Bracy v. United States*
4/10/78 *Vetterli v. U.S. District Court*
6/7/78 *Little v. Ciuros*
7/11/78 *N.Y. Times v. Jascalevich*, 2 Rapp 803
7/12/78 *N.Y. Times v. Jascalevich*, 2 Rapp 805
7/17/78 *Reproductive Serv. v. Walker*, 2 Rapp 808
7/28/78 *Fare v. Michael C.*
8/1/78 *N.Y. Times v. Jascalevich*, 2 Rapp 816
8/4/78 *N.Y. Times v. Jascalevich*, 2 Rapp 824
8/4/78 *Truong Dinh Hung v. United States*
8/8/78 *Miroyan v. United States*
8/11/78 *Columbus Bd. of Ed. v. Penick*
8/11/78 *Brennan v. U.S. Postal Service*
8/21/78 *Reproductive Serv. v. Walker*, 2 Rapp 851
8/24/78 *Gen'l Council v. Super. Ct.*, 2 Rapp 852
8/28/78 *Dayton Bd. of Ed. v. Brinkman*
8/30/78 *Dayton Bd. of Ed. v. Brinkman*
9/1/78 *Divans v. California*, 2 Rapp 857
9/1/78 *Gen'l Council v. Super. Ct.*, 2 Rapp 859
9/1/78 *Buchanan v. Evans*
9/8/78 *Bustop, Inc. v. Board of Ed.*, 2 Rapp 870
9/8/78 *Alexis I. Du Pont Sch. Dist. v. Evans*
9/9/78 *Bustop, Inc. v. Board of Ed.*, 2 Rapp 879
10/20/78 *Boston v. Anderson*
10/20/78 *Kimble v. Swackhamer*
10/20/78 *Warm Springs v. Gribble*, 2 Rapp 885
12/21/78 *Dolman v. United States*
3/20/79 *General Dynamics v. Anderson*
4/5/79 *Evans v. Bennett*
4/6/79 *Haner v. United States*
5/22/79 *Spenkelink v. Wainwright*, 2 Rapp 905
5/23/79 *Spenkelink v. Wainwright*, 2 Rapp 911
5/24/79 *Williams v. Zbaraz*
8/13/79 *Pacific Tel. & Tel. Co. v. PUC of Cal.*
9/7/79 *Lenhard v. Wolff*, 2 Rapp 924
10/18/79 *Lenhard v. Wolff*, 3 Rapp 931
11/29/79 *Peeples v. Brown*
12/28/79 *Synanon Foundation v. California*
1/31/80 *California v. Braeseke*
2/1/80 *Portley v. Grossman*

20TH CENTURY (cont'd)
3/24/80 *California v. Velasquez*
4/30/80 *Hanrahan v. Hampton*
5/1/80 *Pacileo v. Walker*
5/1/80 *Sumner v. Mata*
5/6/80 *Blum v. Caldwell*
5/12/80 *Barnstone v. University of Houston*
5/16/80 *Marten v. Thies*
6/28/80 *RLEA v. Gibbons*
7/19/80 *Rostker v. Goldberg*
7/23/80 *Roche, In re*
8/14/80 *McDaniel v. Sanchez*
8/28/80 *Willhauck v. Flanagan*
9/4/80 *Named and Unnamed Children v. Texas*
9/5/80 *Moore v. Brown*
9/8/80 *Gregory-Portland Sch. Dist. v. U.S.*
9/12/80 *Board of Ed. of L.A. v. Superior Court*
11/4/80 *O'Connor v. School Dist. 23*
2/3/81 *McCarthy v. Harper*
2/4/81 *Atiyeh v. Capps*
2/5/81 *California v. Riegler*
3/3/81 *Bureau of Economic Analysis v. Long*
4/19/81 *NAACP v. L.A. Unified School Dist.*
4/24/81 *California v. Prysock*
5/29/81 *Becker v. United States*
6/12/81 *Schweiker v. McClure*
7/21/81 *South Park Indep. Sch. Dist. v. U.S.*
7/25/81 *Graddick v. Newman*
8/20/81 *Metropolitan Cty. Bd. of Ed. v. Kelley*
9/29/81 *Los Angeles v. Lyons*
10/2/81 *California v. Winson*
11/23/81 *Mori v. Boilermakers*
12/9/81 *Clements v. Logan*
3/11/82 *Republican National Comm. v. Burton*
3/15/82 *Karcher v. Dagget*
8/13/82 *White v. Florida*
8/26/82 *Beltran v. Smith*
9/1/82 *Corsetti v. Massachusetts*
10/26/82 *California v. Ramos*
12/23/82 *KPNX v. Arizona Superior Court*
1/12/83 *Conforte v. Commissioner*
1/16/83 *Bonura v. CBS Inc.*
2/11/83 *Jaffree v. School Comm'rs of Mobile*
4/21/83 *Evans v. Alabama*
4/29/83 *Volkswagonwerk A.G. v. Falzon*
7/6/83 *Williams v. Missouri*
7/13/83 *Julian v. United States*
7/13/83 *Capital Cities Media, Inc. v. Toole*
7/21/83 *NCAA v. Bd. of Regents U. of Okla.*
7/27/83 *Ruckelshaus v. Monsanto Co.*
8/11/83 *Bellotti v. Latino PAC*
8/24/83 *Kemp v. Smith*, 3 Rapp 1133
9/2/83 *Hawaii Housing Authority v. Midkiff*
9/9/83 *Heckler v. Lopez*
9/9/83 *McGee v. Alaska*
9/13/83 *M.I.C. Ltd. v. Bedford Township*
9/17/83 *Kemp v. Smith*, 3 Rapp 1155
10/5/83 *Autry v. Estelle*
12/20/83 *Clark v. California*
1/3/84 *McDonald v. Missouri*
1/26/84 *Heckler v. Blankenship*
2/13/84 *Liles v. Nebraska*
3/12/84 *Claiborne v. United States*
5/19/84 *Tate v. Rose*
7/6/84 *Garrison v. Hudson*
7/23/84 *California v. Harris*
8/10/84 *Heckler v. Turner*
9/7/84 *Uhler v. AFL-CIO*
9/10/84 *Nat'l Farmers v. Crow*, 3 Rapp 1185
9/10/84 *Montgomery v. Jefferson*
9/27/84 *Walters v. Nat'l Assn. Radiation Surv.*
10/10/84 *Montanans for Balanced Budg. v. Harper*
10/11/84 *Catholic League v. Women's Health Ctr.*
12/7/84 *N. Cal. Power Ag'y v. Grace Geothermal*
1/17/85 *Thomas v. Sierra Club*
2/1/85 *Garcia-Mir v. Smith*
4/24/85 *Nat'l Farmers v. Crow*, 3 Rapp 1211
7/5/85 *OPM v. Government Employees*
7/24/85 *Block v. North Side Lumber Co.*
7/24/85 *Heckler v. Redbud Hospital Dist.*
8/28/85 *Riverside v. Rivera*
9/5/85 *Renaissance Arcade v. Cook County*
11/29/85 *Republican Party of Hawaii v. Mink*
3/27/86 *California v. Brown*
5/6/86 *California v. Hamilton*
7/19/86 *Araneta v. United States*
9/17/86 *Mikutaitis v. United States*
9/25/86 *Prudential Fed. S&L Assn. v. Flanigan*
10/7/86 *Curry v. Baker*
10/15/86 *Kentucky v. Stincer*
10/23/86 *Hicks v. Feiock*
12/4/86 *Kleem v. INS*
12/18/86 *Ledbetter v. Baldwin*
12/31/86 *Ohio Citizens for Resp. Energy v. NRC*
4/2/87 *Western Airlines, Inc. v. Teamsters*
5/21/87 *U.S. Postal Service v. Letter Carriers*
7/1/87 *Deaver v. United States*
8/10/87 *Bowen v. Kendrick*
8/14/87 *American Trucking Assns. v. Gray*
5/30/88 *Lucas v. Townsend*
6/2/88 *Morison v. United States*
6/15/88 *Doe v. Smith*
12/21/88 *Baltimore Dept. Soc. Servs. v. Bouknight*
1/30/89 *John Doe Agency v. John Doe Corp.*
2/1/89 *California v. Freeman*
3/14/89 *R.R. Signalmen v. S.E. Pa. Transp. Auth.*
8/22/89 *California v. American Stores Co.*
2/20/91 *Madden v. Texas*
3/2/91 *Mississippi v. Turner*
3/18/91 *Cole v. Texas*
8/2/91 *Barnes v. E-Systems, Inc.*
10/29/91 *Campos v. Houston*
6/20/92 *Reynolds v. Int'l Amateur Athletic Fed'n*
10/20/92 *Grubbs v. Delo*
4/29/93 *Turner Broadcasting Sys., Inc. v. FCC*
5/14/93 *Blodgett v. Campbell*
7/26/93 *DeBoer v. DeBoer*
11/26/93 *INS v. Legalization Assistance Project*
12/23/93 *Capitol Sq. Rev. & Adv. Bd. v. Pinette*
2/7/94 *Planned Parenthood v. Casey*
2/9/94 *CBS Inc. v. Davis*
3/2/94 *Packwood v. Senate Select Comm.*
8/17/94 *Edwards v. Hope Medical Group*
12/5/94 *Dow Jones & Co. Inc., In re*
1/28/95 *O'Connell v. Kirchner*
8/17/95 *Foster v. Gilliam*

20TH CENTURY (cont'd)
8/28/95 *Penry v. Texas*
8/31/95 *Rodriguez v. Texas*
9/21/95 *McGraw-Hill v. Proctor & Gamble*
10/25/95 *FCC v. Radiofone Inc.*
5/16/96 *Netherland v. Tuggle*
12/23/96 *Netherland v. Gray*
7/17/98 *Rubin v. U.S. Independent Counsel*
11/18/98 *Murdaugh v. Livingston*
9/26/00 *Microsoft Corp. v. United States*

21ST CENTURY
9/12/01 *Brown v. Gilmore*
11/6/01 *Bagley v. Byrd*
5/17/02 *Bartlett v. Stephenson*
11/29/02 *Chabad of Southern Ohio v. Cincinnati*
3/21/03 *Kenyeres v. Ashcroft*
6/9/03 *Prato v. Vallas*
3/18/04 *Cheney v. United States District Court*
7/26/04 *Associated Press v. District Court*
9/14/04 *Wisconsin Right to Life v. FEC*
11/2/04 *Spencer v. Pugh*
11/2/04 *Dem. Nat'l Comm. v. Rep. Nat'l Comm.*
4/15/05 *Multimedia Holdings v. Cir. Ct. of Fla.*
10/7/05 *Doe v. Gonzales*
7/7/06 *San Diegans for Mt. Soledad v. Paulson*
12/18/06 *Stroup v. Willcox*
4/26/07 *Boumediene v. Bush*
4/30/09 *Conkright v. Frommert*
8/26/09 *O'Brien v. O'Laughlin*
3/2/10 *Jackson v. D.C. Bd. of Elections & Ethics*
9/24/10 *Philip Morris USA Inc. v. Scott*
9/30/10 *Lux v. Rodrigues*

CUMULATIVE TABLE OF CASES BY JUSTICE

Black, Hugo L.
Alexander v. Board of Education
American Trading & Prod. v. Railroad Comm'n
Arrow Transp. Co. v. Southern Ry., 1 Rapp 307
Arrow Transp. Co. v. Southern Ry., 1 Rapp 314
Atlantic Coast Line R.R. v. BLE
Board of School Comm'rs v. Davis
Corpus Christi School Dist. v. Cisernos
Davis v. Adams
Deere v. United States
Edgar v. United States
Fowler v. Adams
Heart of Atlanta Motel v. United States
Hysler v. Florida
Karr v. Schmidt
Katzenbach v. McClung
Keith v. New York, 4 Rapp 1613
King v. Smith
Labor Board v. Getman
Louisiana v. United States
Mahan v. Howell
Marcello v. United States
Matthews v. Little
Meredith v. Fair
Oden v. Brittain
Owen v. Kennedy
Sellers v. United States
Simon v. United States
Wyckoff, In re

Blackmun, Harry A.
American Trucking Assns., Inc. v. Gray
CBS Inc. v. Davis
Grubbs v. Delo
Liles v. Nebraska
McDonald v. Missouri
Nebraska Press Assn. v. Stuart, 2 Rapp 668
Nebraska Press Assn. v. Stuart, 2 Rapp 675
Ruckelshaus v. Monsanto Co.
Williams v. Missouri

Bradley, Joseph P.
Guiteau, In re
United States v. Patterson

Brennan, William J., Jr.
Appalachian Power Co. v. AICPA
Bellotti v. Latino Political Action Comm.
Board of Education v. Taylor
Boston v. Anderson
Brotherhood of R.R. Signalmen v. S.E. Pa. Trans.
Buchanan v. Evans
Capital Cities Media, Inc. v. Toole
Corsetti v. Massachusetts
Hung v. United States
Kake v. Egan
Karcher v. Dagget
Keyes v. School Dist. No. 1, Denver
M.I.C. Ltd. v. Bedford Township
Reproductive Services v. Walker, 2 Rapp 808
Reproductive Services v. Walker, 2 Rapp 851
Roche, In re
Rostker v. Goldberg
Smith v. Yeager
Willhauck v. Flanagan

Breyer, Stephen
Associated Press v. District Court
O'Brien v. O'Laughlin

Burger, Warren E.
Aberdeen & Rockfish R. Co. v. SCRAP
Araneta v. United States
Ehrlichman v. Sirica
Finance Comm. to Re-elect the President v. Waddy
Garrison v. Hudson
National League of Cities v. Brennan
Office of Personnel Mgmt. v. Gov't Employees
Winston-Salem/Forsyth Cty. Bd. of Ed. v. Scott

Burton, Harold H.
Durant, Ex parte
New Jersey v. Auld
Overfield v. Pennroad Corp.
Simon, In re
United States v. Portell
Wise v. New Jersey

Butler, Pierce
Motlow v. United States

Cardozo, Benjamin N.
Associated Gas & Electric Co., In re
Goldsmith v. Zerbst
Wilson v. O'Malley

Day, William R.
Burgess v. Pere Marquette R. Co., 4 Rapp 1586
Burgess v. Pere Marquette R. Co., 4 Rapp 1587
Chesapeake Western Co. v. Murray
Day v. Louisiana Western Railroad Co.
Fairbanks Steam Shovel Co. v. Wills
Haack v. Brooklyn Labor Lyceum Association
Hile v. Baker
N.E. Water Works v. Farmers' Loan, 4 Rapp 1576
N.E. Water Works v. Farmers' Loan, 4 Rapp 1577
Roller v. Murray, 4 Rapp 1579
Roller v. Murray, 4 Rapp 1582
Roller v. Murray, 4 Rapp 1583
Sulzer v. Sohmer
Thomas v. South Side Elevated Railroad Co.

Douglas, William O.
Alcorcha v. California
Aronson v. May
Bandy v. United States, 1 Rapp 252
Bandy v. United States, 1 Rapp 253
Bandy v. United States, 1 Rapp 261

Douglas, William O. (cont'd)
Berg, In re
Bowman v. United States
Carbo v. United States
Carlisle v. Landon
Chamber of Commerce v. Legal Aid Society
Clark v. United States
Cohen v. United States, 1 Rapp 268
Cohen v. United States, 1 Rapp 279
Cohen v. United States, 1 Rapp 281
D'Aquino v. United States
Dexter v. Schrunk
Drifka v. Brainard; Allen v. Brainard
Farr v. Pitchess
Gomperts v. Chase
Harris v. United States, 2 Rapp 471
Harris v. United States, 2 Rapp 508
Hayakawa v. Brown
Hayes, Ex parte
Haywood v. National Basketball Assn.
Henry v. Warner, Secretary of the Navy
Herzog v. United States
Holtzman v. Schlesinger, 2 Rapp 602
Hughes v. Thompson
Johnson, In re
Jones v. Lemond
Kadans v. Collins
Guey Heung Lee v. Johnson
Levy v. Parker
Lewis, In re
Locks v. Commanding General, Sixth Army
Long Beach Fed. S&L v. Fed. Home Loan Bank
Lopez v. United States
Mallonee v. Fahey
McGee v. Eyman
Mitchell v. California
Noyd v. Bond
Orloff v. Willoughby
Parisi v. Davidson
Patterson v. Superior Court of Cal.
Pryor v. United States
Quinn v. Laird
Rehman v. California
Reynolds v. United States
Rosenberg v. United States
Russo v. Byrne
Russo v. United States
Scaggs v. Larsen
Schlesinger v. Holtzman, 2 Rapp 609
Sica v. United States
Smith v. Ritchey
Smith v. United States
Stanard v. Olesen
Steinberg v. United States
Stickney, Ex parte
Thompson v. United States
Tierney v. United States
United States ex rel. Norris v. Swope
Warm Springs Dam v. Gribble, 2 Rapp 621
Westermann v. Nelson
Winters v. United States, 2 Rapp 410
Wolcher v. United States
Yanish v. Barber

Fortas, Abe
Baytops v. New Jersey
Grinnell Corp. v. United States
Mathis v. United States

Frankfurter, Felix
Akel v. New York
Albanese v. United States
Brody v. United States
Burwell v. California
Carter v. United States
Chin Gum v. United States
Cooper v. New York, 4 Rapp 1482
Cote v. New Hampshire
English v. Cunningham
Flynn v. United States
Goldman v. Fogarty
Harvey, In re
Local 1545, U. Bhd. of Carpenters v. Vincent
Long Island R.R. v. N.Y. Central R.R.
Lynch v. Watson
MacKay v. Boyd
Marcello v. Brownell
Nukk v. Shaughnessy
Oerlikon Machine Tools Works Buehrle Co. v. U.S.
Pabon v. Board of Personnel of Puerto Rico
Patterson v. United States
Pon v. United States
Public Utilities Comm'n of D.C. v. Pollak
Sklaroff v. Skeadas
United States v. Allied Stevedoring Corp.
Uphaus v. Wyman
Van Newkirk v. McLain
Waller, Ex parte
Ward v. United States
Wise v. New Jersey

Fuller, Melville W.
Heath, In re

Ginsburg, Ruth Bader
Conkright v. Frommert
Doe v. Gonzales

Goldberg, Arthur J.
Jimenez v. United States District Court
Rosenblatt v. American Cyanamid Co.
United States v. FMC Corp.

Grier, Robert C.
Pennsylvania v. Wheeling & Belmont Bridge Co.

Harlan, John M.
Clark, Ex parte
Richardson, In re
Spies v. Illinois
United States v. Cooper

Harlan, John M. (II)
A.B. Chance Co. v. Atlantic City Elec. Co.
American Mfrs. Mut. Ins. v. Am. Broadcasting
Beyer v. United States
Bidwell v. United States

Harlan, John M. (II) (cont'd)
Birtcher Corp. v. Diapulse Corp.
Bletterman v. United States
Bloeth v. New York
Breswick & Co. v. United States
Chestnut v. New York
City-Wide Comm. v. Board of Educ. of N.Y.
Commonwealth Oil Ref. Co. v. Lummus Co.
Cooper v. New York, 1 Rapp 137
Delli Paoli v. United States
Di Candia v. United States
Eckwerth v. New York, 1 Rapp 216
Eckwerth v. New York, 1 Rapp 217
Edwards v. New York, 1 Rapp 163
Edwards v. New York, 1 Rapp 171
Eveleigh v. United States
Febre v. United States
Fernandez v. United States
Guterma v. United States
Hirsch v. U.S. Ct. App. for the 2d Cir.
Hutchinson v. New York
International Boxing Club v. United States
Jackson v. New York
Keith v. New York, 1 Rapp 218
La Marca v. New York
McLeod v. General Elec. Co.
Noto v. United States
O'Rourke v. Levine
Panama Canal Co. v. Grace Lines, Inc.
Perez v. United States
Public Service Board v. United States
Railway Express Agency, Inc. v. United States
Richardson v. New York
Rockefeller v. Socialist Workers Party
Rockefeller v. Socialist Workers Party
Rosado v. Wyman
Rosoto v. Warden
Roth v. United States
Seagram & Sons v. Hostetter
Stickel v. United States
Strickland Transportation Co. v. United States
Tomaiolo v. United States
Travia v. Lomenzo
Tri-Continental Financial Corp. v. United States
Tuscarora Nation of Indians v. Power Authority
United States ex rel. Cerullo v. Follette
Valenti v. Spector
Wasmuth v. Allen
Winters v. United States, 2 Rapp 404
Wise v. New Jersey
Yasa v. Esperdy

Holmes, Oliver Wendell, Jr.
Frank v. Georgia, 4 Rapp 1523
Sacco v. Hendry
Sacco v. Massachusetts

Jackson, Robert H.
Costello v. United States
Dennis v. United States
East Coast Lumber Terminal v. Town of Babylon
Knickerbocker Printing Corp. v. United States
Ludecke v. Watkins
Pirinsky, In re
Sacher v. United States
United States v. Gates
United States ex rel. Knauff v. McGrath
Williamson v. United States

Kennedy, Anthony M.
Kenyeres v. Ashcroft
Lucas v. Townsend
Multimedia Holdings v. Cir. Ct. of Fla.
San Diegans for Mt. Soledad v. Paulson

Lamar, Joseph R.
Frank v. Georgia, 4 Rapp 1521
Frank, In re

Marshall, Thurgood
Beame v. Friends of the Earth
Blum v. Caldwell
Brennan v. United States Postal Service
Brussel v. United States
Califano v. McRae
CFTC v. British Am. Commodity Options
Fishman v. Schaffer
Holtzman v. Schlesinger, 2 Rapp 590
Jefferson Parish School Bd. v. Dandridge
John Doe Agency v. John Doe Corp.
Little v. Ciuros
Meeropol v. Nizer
Montgomery v. Jefferson
New York Times v. Jascalevich, 2 Rapp 805
New York Times v. Jascalevich, 2 Rapp 824
New York v. Kleppe
O'Brien v. Skinner
Schlesinger v. Holtzman, 2 Rapp 607
Socialist Workers Party v. Attorney General
Spenkelink v. Wainwright, 2 Rapp 911
Whalen v. Roe

Nelson, Samuel
Kaine, In re
Kaine, Ex parte

O'Connor, Sandra Day
Blodgett v. Campbell
California v. American Stores Co.
California v. Freeman
Heckler v. Blankenship
Hicks v. Feiock
INS v. Legalization Assistance Project of L.A. Cty.
Tate v. Rose
Volkswagonwerk A.G. v. Falzon
Western Airlines, Inc. v. Teamsters

Pitney, Mahlon
Marks v. Davis

Powell, Lewis F., Jr.
Barnstone v. University of Houston
Bustop, Inc. v. Board of Ed. of L.A., 2 Rapp 879
Certain Named and Unnamed Children v. Texas
Chambers v. Mississippi
Curry v. Baker

Powell, Lewis F., Jr. (cont'd)
Drummond v. Acree
Evans v. Alabama
Graddick v. Newman
Graves v. Barnes
Gregg v. Georgia
Jaffree v. Board of Sch. Comm'rs of Mobile Cty.
Kemp v. Smith, 3 Rapp 1133
Kemp v. Smith, 3 Rapp 1155
Ledbetter v. Baldwin
McCarthy v. Briscoe, 2 Rapp 713
McCarthy v. Briscoe, 2 Rapp 714
McDaniel v. Sanchez
Mecom v. United States
Moore v. Brown
South Park Indep. School Dist. v. United States
Times-Picayune Pub. Corp. v. Schulingkamp
White v. Florida
Wise v. Lipscomb

Reed, Stanley F.
Alabama G.S.R. Co. v. R.R. & P.U.C. of Tennessee
Equitable Office Bldg. Corp., In re
Field v. United States
George F. Alger Co. v. Peck
Hubbard v. Wayne County Election Commission
Merrifield v. Kentucky
Numer v. United States
Seals, Ex parte, 4 Rapp 1466
Seals, Ex parte, 4 Rapp 1468
Stanley v. United States
Twentieth Century Airlines Inc. v. Ryan
United States v. Klopp
United States v. United Liquors Corp.

Rehnquist, William H.
Alexis I. Du Pont School Dist. v. Evans
Atiyeh v. Capps
Baltimore City Dept. of Social Servs. v. Bouknight
Barthuli v. Bd. of Trustees of Jefferson Sch. Dist.
Bartlett v. Stephenson
Bateman v. Arizona
Becker v. United States
Beltran v. Smith
Block v. North Side Lumber Co.
Board of Ed. of L.A. v. Superior Court of Cal.
Bowen v. Kendrick
Bracy v. United States
Brown v. Gilmore
Bureau of Economic Analysis v. Long
Bustop, Inc. v. Board of Ed. of L.A., 2 Rapp 870
California v. Brown
California v. Braeseke
California v. Hamilton
California v. Harris
California v. Prysock
California v. Ramos
California v. Riegler
California v. Velasquez
California v. Winson
Catholic League v. Feminist Women's Health Ctr.
Claiborne v. United States
Clark v. California
Clements v. Logan
Coleman v. Paccar, Inc.
Columbus Bd. of Ed. v. Penick
Communist Party of Indiana v. Whitcomb
Conforte v. Commissioner
Cousins v. Wigoda
Dayton Bd. of Ed. v. Brinkman, 2 Rapp 855
Deaver v. United States
Divans v. California, 2 Rapp 746
Divans v. California, 2 Rapp 857
Dolman v. United States
Dow Jones & Co. Inc., In re
Edelman v. Jordan
Evans v. Atlantic Richfield Co.
Evans v. Bennett
Fare v. Michael C.
Flamm v. Real-BLT Inc.
Foster v. Gilliam
Garcia-Mir v. Smith
General Council v. Superior Ct., 2 Rapp 852
General Council v. Superior Ct., 2 Rapp 859
General Dynamics v. Anderson
Gregory-Portland Indep. School Dist. v. U.S.
Gruner v. Superior Court of Cal.
Haner v. United States
Hanrahan v. Hampton
Hawaii Housing Authority v. Midkiff
Heckler v. Lopez
Heckler v. Redbud Hospital Dist.
Heckler v. Turner
Hortonville Joint Sch. Dist. v. Hortonville Ed. Assn.
Houchins v. KQED Inc.
Julian v. United States
Kimble v. Swackhamer
KPNX Broadcasting Co. v. Arizona Superior Ct.
Laird v. Tatum
Lenhard v. Wolff, 2 Rapp 924
Lenhard v. Wolff, 3 Rapp 931
Los Angeles NAACP v. L.A. Unified Sch. Dist.
Los Angeles v. Lyons
Marshall v. Barlow's, Inc.
Marten v. Thies
McCarthy v. Harper
McGee v. Alaska
Microsoft Corp. v. United States
Mincey v. Arizona
Miroyan v. United States
Montanans for Balanced Fed. Budget v. Harper
Mori v. Boilermakers
Morison v. United States
Murdaugh v. Livingston
National Broadcasting Co. v. Niemi
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1185
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1211
Netherland v. Gray
Netherland v. Tuggle
New Motor Vehicle Bd. v. Orrin W. Fox Co.
Northern Cal. Power Ag'y v. Grace Geothermal
Pacific Tel. & Tel. Co. v. Public Util. Comm'n
Pacific Un. of Seventh-Day Adventists v. Marshall
Pacileo v. Walker
Packwood v. Senate Select Comm. on Ethics
Pasadena City Bd. of Ed. v. Spangler

Rehnquist, William H. (cont'd)
Peeples v. Brown
Portley v. Grossman
Prudential Fed. Sav. & Loan Assn. v. Flanigan
Republican National Committee v. Burton
Republican Party of Hawaii v. Mink
Republican State Central Comm. v. Ripon Soc'y
Richmond v. Arizona
Riverside v. Rivera
Rubin v. United States Independent Counsel
Schweiker v. McClure
Spenkelink v. Wainwright, 2 Rapp 905
Sumner v. Mata
Synanon Foundation, Inc. v. California
Thomas v. Sierra Club
Turner Broadcasting System, Inc. v. FCC
United States Postal Service v. Letter Carriers
Uhler v. AFL-CIO
Vetterli v. United States District Court
Volvo of America Corp. v. Schwarzer
Walters v. National Assn. of Radiation Survivors
Warm Springs Dam v. Gribble, 2 Rapp 885
Wisconsin Right to Life v. FEC

Roberts, John G., Jr.
Boumediene v. Bush
Jackson v. D.C. Board of Elections and Ethics
Lux v. Rodrigues
Stroup v. Willcox

Rutledge, Wiley B.
Shearer v. United States

Scalia, Antonin
Barnes v. E-Systems, Inc.
Campos v. Houston
Cheney v. United States District Court
Cole v. Texas
Edwards v. Hope Medical Group
Goodwin v. Texas
Kentucky v. Stincer
Kleem v. INS
Madden v. Texas
Mississippi v. Turner
Ohio Citizens for Responsible Energy Inc. v. NRC
Penry v. Texas
Philip Morris USA Inc. v. Scott
Rodriguez v. Texas

Souter, David H.
Dem. Nat'l Comm. v. Rep. Nat'l Comm.
Planned Parenthood v. Casey

Stevens, John Paul
Bagley v. Byrd
Bradley v. Lunding
Capitol Square Review and Advisory Bd. v. Pinette
Chabad of Southern Ohio v. Cincinnati
DeBoer v. DeBoer
Doe v. Smith
FCC v. Radiofone Inc.
McGraw-Hill Cos. v. Proctor & Gamble Co.
Metropolitan County Bd. of Ed. v. Kelley
Mikutaitis v. United States
National Socialist Party of America v. Skokie
O'Connell v. Kirchner
O'Connor v. Board of Ed. of School Dist.
Prato v. Vallas
Railway Labor Executives' Assn. v. Gibbons
Renaissance Arcade & Bookstore v. Cook County
Reynolds v. International Amateur Athletic Fed'n
Spencer v. Pugh
Williams v. Zbaraz

Stewart, Potter
Dayton Bd. of Ed. v. Brinkman, 2 Rapp 854
Krause v. Rhodes
Socialist Labor Party v. Rhodes, 2 Rapp 402
Socialist Labor Party v. Rhodes, 2 Rapp 406
Williams v. Rhodes

Stone, Harlan Fiske
Ewing v. Gill
Satterfield v. Smyth

Taney, Roger B.
Merryman, Ex parte

Van Devanter, Willis
Marks v. Davis

Vinson, Fred M.
Hurst v. West Virginia
Jordan v. Clemmer
Land v. Dollar
Sawyer v. Dollar

Warren, Earl
Bart, In re
Country School Board of Arlington v. Deskins
Cunningham v. English
Ellis v. United States
Leigh v. United States

Wayne, James M.
Stevens, Ex parte

White, Byron R.
Autry v. Estelle
Bonura v. CBS Inc.
NCAA v. Bd. of Regents U. of Okla.
New York Times v. Jascalevich, 2 Rapp 803
New York Times v. Jascalevich, 2 Rapp 816

Whittaker, Charles E.
Shelton v. McKinley

CUMULATIVE TABLE OF CASES ORALLY ARGUED

19TH CENTURY

Kaine, Ex parte ..... 4/4/53 ..... Nelson
Merryman, Ex parte ..... 5/27 & 28/61 ..... Taney
Stevens, Ex parte ..... 8/??/61 ..... Wayne
United States v. Patterson ..... 1/7/87 ..... Bradley
United States v. Cooper ..... 7/30/92 ..... Harlan

20TH CENTURY

Patrick v. New York ..... 6/12/06 ..... Day
Marks v. Davis ..... 8/1/12 ..... Van Devanter, Pitney
Frank v. Georgia, 4 Rapp 1523 ..... 12/??/14 ..... Holmes
Frank, In re ..... 12/24/14 ..... Lamar
Motlow v. United States ..... 2/3/26 ..... Butler
Sacco v. Hendry ..... 8/10/27 ..... Holmes
Associated Gas & Electric Co., In re ..... 7/2/36 ..... Cardozo
Van Newkirk v. McLain ..... 6/20/40 ..... Frankfurter
Waller, Ex Parte ..... 6/27/42 ..... Frankfurter
Equitable Office Bldg. Corp., In re ..... 8/2/46 ..... Reed
Durant, Ex parte ..... 9/6/46 ..... Burton
Overfield v. Pennroad Corp. ..... 9/??/46 ..... Burton
Shearer v. United States ..... 8/18/1947 ..... Rutledge
Tuthill v. California ..... 1/19/1949 ..... Douglas
Alabama G.S.R. Co. v. R.R. & P.U.C. of Tennessee ..... 5/4/1950 ..... Reed
Mallonee v. Fahey ..... 11/20/52 ..... Douglas
Yanish v. Barber ..... 5/16/53 ..... Douglas
Rosenberg v. United States ..... 6/15 & 16/53 ..... Douglas
Carlisle v. Landon ..... 8/5/53 ..... Douglas
Stanard v. Olesen ..... 5/22/54 ..... Douglas
Herzog v. United States ..... 2/11/55 ..... Douglas
Cooper v. New York, 1 Rapp 137 ..... 7/7/55 ..... Harlan
Breswick & Co. v. United States ..... 8/1/55 ..... Harlan
Marcello v. Brownell ..... 8/19/55 ..... Frankfurter
Wise v. New Jersey ..... 9/1 or 2/55 ..... Burton
Long Beach Fed Sav. & Loan Assn. v. Federal Home Loan Bank ..... 10/31/55 ..... Douglas
Noto v. United States ..... 11/21/55 ..... Harlan
Wolcher v. United States ..... 12/31/55 ..... Douglas
Edwards v. New York, 1 Rapp 171 ..... 6/25/56 ..... Harlan
Panama Canal Co. v. Grace Lines, Inc. ..... 5/7/57 ..... Harlan
Di Candia v. United States ..... 1/20/58 ..... Harlan
Tuscarora Nation of Indians v. Power Authority ..... 9/8/58 ..... Harlan
Appalachian Power Co. v. AICPA ..... 7/7/59 ..... Brennan
Kake v. Egan ..... 7/11/59 ..... Brennan
English v. Cunningham ..... 8/4/59 ..... Frankfurter
Fernandez v. United States ..... 2/25/61 ..... Harlan
Board of Education v. Taylor ..... 8/30/61 ..... Brennan
Carbo v. United States ..... 3/19/62 ..... Douglas
Sica v. United States ..... 3/19/62 ..... Douglas
Arrow Transportation Co. v. Southern Ry., 1 Rapp 307 ..... 8/17/62 ..... Black
United States v. FMC Corp. ..... 8/9/63 ..... Goldberg
Williams v. Rhodes ..... 9/10/68 ..... Stewart
Rockefeller v. Socialist Workers Party ..... 7/22/70 ..... Harlan
Dexter v. Schrunk ..... 8/28/70 ..... Douglas
Gomperts v. Chase ..... 9/10/71 ..... Douglas
Cousins v. Wigoda ..... 7/1/72 ..... Rehnquist
Russo v. Byrne ..... 7/29/72 ..... Douglas
Holtzman v. Schlesinger, 2 Rapp 590 ..... 8/1/73 ..... Marshall
Holtzman v. Schlesinger, 2 Rapp 602 ..... 8/4/73 ..... Douglas
Smith v. United States ..... 9/11/75 ..... Douglas
Chamber of Commerce v. Legal Aid Society ..... 9/29/75 ..... Douglas
Coleman v. Paccar, Inc. ..... 2/2/76 ..... Rehnquist

20TH CENTURY (cont'd)

New York v. Kleppe..... 8/19/76..... Marshall
Beame v. Friends of the Earth..... 8/5/77..... Marshall
Blum v. Caldwell..... 5/6/80..... Marshall

21ST CENTURY

none that we know of

CUMULATIVE INDEX OF CASES BY DISPOSITION

ABSTAIN
Califano v. McRae

DENIED
A.B. Chance Co. v. Atlantic City Elec. Co.
Aberdeen & Rockfish R. Co. v. SCRAP
Akel v. New York
Albanese v. United States
Alcorcha v. California
Alexander v. Board of Education
Alexis I. Du Pont School Dist. v. Evans
Am. Trading Corp. v. Railroad Comm'n
Appalachian Power Co. v. AICPA
Aronson v. May
Associated Gas & Electric Co., In re
Associated Press v. District Court
Bagley v. Byrd
Bandy v. United States, 1 Rapp 253
Bandy v. United States, 1 Rapp 261
Barnstone v. University of Houston
Barthuli v. Bd. of Trustees of Jefferson Sch. Dist.
Bartlett v. Stephenson
Bateman v. Arizona
Baytops v. New Jersey
Beame v. Friends of the Earth
Bellotti v. Latino Political Action Comm.
Beltran v. Smith
Bidwell v. United States
Birtcher Corp. v. Diapulse Corp.
Bletterman v. United States
Block v. North Side Lumber Co.
Blodgett v. Campbell
Bloeth v. New York
Blum v. Caldwell
Board of Ed. of L.A. v. Superior Court of Cal.
Board of Education v. Taylor
Board of School Comm'rs v. Davis
Bonura v. CBS Inc.
Boumediene v. Bush
Bowman v. United States
Bracy v. United States
Bradley v. Lunding
Brennan v. United States Postal Service
Brotherhood of R.R. Signalmen v. S.E. Pa. Trans.
Brown v. Gilmore
Buchanan v. Evans
Bureau of Economic Analysis v. Long
Burgess v. Pere Marquette R. Co., 4 Rapp 1586
Burgess v. Pere Marquette R. Co., 4 Rapp 1587
Bustop, Inc. v. Board of Ed. of L.A., 2 Rapp 870
Bustop, Inc. v. Board of Ed. of L.A., 2 Rapp 879
California v. Freeman
California v. Harris
California v. Winson
Campos v. Houston
Capitol Square Review and Adv. Bd. v. Pinette
Carbo v. United States
Carter v. United States
Catholic League v. Feminist Women's Health Ctr.
Chamber of Commerce v. Legal Aid Society
Chambers v. Mississippi
Cheney v. United States District Court
Chin Gum v. United States
City-Wide Comm. v. Board of Educ. of N.Y.
Claiborne v. United States
Clark, Ex parte
CFTC v. British Am. Commodity Options
Chesapeake Western Co. v. Murray
Commonwealth Oil Ref. Co. v. Lummus Co.
Communist Party of Indiana v. Whitcomb
Conforte v. Commissioner
Conkright v. Frommert
Cooper v. New York, 1 Rapp 137
Cooper v. New York, 4 Rapp 1482
Corsetti v. Massachusetts
Cote v. New Hampshire
County Sch. Bd. of Arlington v. Deskins
Cousins v. Wigoda
Cunningham v. English
Curry v. Baker
Day v. Louisiana Western Railroad Co.
Dayton Bd. of Ed. v. Brinkman
Dayton Bd. of Ed. v. Brinkman
Deaver v. United States
DeBoer v. DeBoer
Deere v. United States
Delli Paoli v. United States
Dem. Nat'l Comm. v. Rep. Nat'l Comm.
Dennis v. United States
Dexter v. Schrunk
Di Candia v. United States
Divans v. California, 2 Rapp 746
Divans v. California, 2 Rapp 857
Doe v. Gonzales
Doe v. Smith
Dolman v. United States
Dow Jones & Co. Inc., In re
Drifka v. Brainard; Allen v. Brainard
Drummond v. Acree
Durant, Ex parte
East Coast Lumber v. Town of Babylon
Edgar v. United States
Edwards v. Hope Medical Group
Edwards v. New York, 1 Rapp 171
Ehrlichman v. Sirica
English v. Cunningham
Evans v. Alabama
Eveleigh v. United States
Ewing v. Gill
Fernandez v. United States
Field v. United States
Finance Comm. to Re-elect the President v. Waddy
Fishman v. Schaffer
Flamm v. Real-BLT Inc.
Frank v. Georgia, 4 Rapp 1521
Garcia-Mir v. Smith
Gen'l Council v. Superior Ct., 2 Rapp 859
General Dynamics v. Anderson
George F. Alger Co. v. Peck
Goldman v. Fogarty

DENIED (cont'd)

Goldsmith v. Zerbst
Gomperts v. Chase
Graddick v. Newman
Graves v. Barnes
Gregory-Portland Indep. Sch. Dist. v. United States
Grinnell Corp. v. United States
Gruner v. Superior Court of Cal.
Guterma v. United States
Haack v. Brooklyn Labor Lyceum Assn.
Haner v. United States
Hanrahan v. Hampton
Harvey, In re
Hawaii Housing Authority v. Midkiff
Hayakawa v. Brown
Heart of Atlanta Motel v. United States
Henry v. Warner
Hile v. Baker
Hirsch v. U.S. Ct. App. for the 2d Cir.
Holtzman v. Schlesinger, 2 Rapp 590
Hortonville Joint Sch. Dist. v. Hortonville Ed. Assn.
Hubbard v. Wayne Cty. Election Comm'n
Hughes v. Thompson
Hurst v. West Virginia
Hutchinson v. New York
Hysler v. Florida
Jackson v. New York
Jefferson Parish School Bd. v. Dandridge
Jimenez v. United States District Court
Johnson, In re
Jordan v. Clemmer
Julian v. United States
Kadans v. Collins
Karr v. Schmidt
Keith v. New York, 4 Rapp 1613
Kemp v. Smith, 3 Rapp 1133
Kemp v. Smith, 3 Rapp 1155
Kentucky v. Stincer
Kenyeres v. Ashcroft
Kimble v. Swackhamer
Kleem v. INS
KPNX Broadcasting Co. v. Arizona Sup. Ct.
Krause v. Rhodes
Labor Board v. Getman
Laird v. Tatum
Guey Heung Lee v. Johnson
Lenhard v. Wolff, 3 Rapp 931
Liles v. Nebraska
Little v. Ciuros
Local 1545, U. Bhd. of Carpenters v. Vincent
Locks v. Commanding General, Sixth Army
Long Beach Fed. S&L v. Fed. Home Loan Bank
Long Island R.R. v. N.Y. Central R.R.
Los Angeles NAACP v. L.A. Unified Sch. Dist.
Louisiana v. United States
Lux v. Rodrigues
Lynch v. Watson
MacKay v. Boyd
Madden v. Texas
Mahan v. Howell
Mallonee v. Fahey
Marks v. Davis
Marten v. Thies
McCarthy v. Briscoe, 2 Rapp 713
McGee v. Alaska
McGee v. Eyman
McGraw-Hill Cos. v. Proctor & Gamble Co.
Mecom v. United States
Meeropol v. Nizer
Metropolitan County Bd. of Ed. v. Kelley
Mincey v. Arizona
Miroyan v. United States
Mississippi v. Turner
Mitchell v. California
Montanans for Balanced Fed. Budget v. Harper
Montgomery v. Jefferson
Moore v. Brown
Morison v. United States
Multimedia Holdings v. Circuit Ct. of Fla.
Murdaugh v. Livingston
National Broadcasting Co. v. Niemi
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1211
National Socialist Party of America v. Skokie
Nebraska Press Assn. v. Stuart, 2 Rapp 668
Netherland v. Gray
Netherland v. Tuggle
N.E. Water Works v. Farmers' Loan, 4 Rapp 1576
N.E. Water Works v. Farmers' Loan, 4 Rapp 1577
New Jersey v. Auld
New York Times Co. v. Jascalevich, 2 Rapp 803
New York Times Co. v. Jascalevich, 2 Rapp 805
New York Times Co. v. Jascalevich, 2 Rapp 816
New York Times Co. v. Jascalevich, 2 Rapp 824
New York v. Kleppe
Northern Cal. Power Ag'y. v. Grace Geothermal
Nukk v. Shaughnessy
Numer v. United States
O'Brien v. O'Laughlin
O'Brien v. Skinner
O'Connell v. Kirchner
O'Connor v. Board of Ed. of School Dist.
O'Rourke v. Levine
Oden v. Brittain
Oerlikon Machine Tools Works v. U.S.
Ohio Citizens for Responsible Energy v. NRC
Owen v. Kennedy
Pabon v. Bd. of Personnel of Puerto Rico
Pacific Tel. & Tel. v. Public Util. Comm'n.
Pacific Un. Seventh-Day Adventists v. Marshall
Packwood v. Senate Select Comm. on Ethics
Parisi v. Davidson
Patterson v. United States
Peeples v. Brown
Penry v. Texas
Perez v. United States
Pirinsky, In re
Planned Parenthood v. Casey
Pon v. United States
Portley v. Grossman
Prato v. Vallas
Prudential Fed. Sav. & Loan Assn. v. Flanigan
Public Service Board v. United States
Railway Express Agency, Inc. v. United States
Railway Labor Executives' Assn. v. Gibbons
Rehman v. California
Renaissance Arcade and Bookstore v. Cook County

DENIED (cont'd)
Reproductive Services, Inc. v. Walker, 2 Rapp 808
Republican National Committee v. Burton
Republican Party of Hawaii v. Mink
Richardson, In re
Richmond v. Arizona
Rockefeller v. Socialist Workers Party
Rodriguez v. Texas
Roller v. Murray, 4 Rapp 1579
Roller v. Murray, 4 Rapp 1582
Roller v. Murray, 4 Rapp 1583
Rosenblatt v. American Cyanamid Co.
Rosoto v. Warden
Rubin v. United States Independent Counsel
Ruckelshaus v. Monsanto Co.
Russo v. United States
Sacco v. Hendry
Sacco v. Massachusetts
Satterfield v. Smyth
Seals, Ex parte, 4 Rapp 1466
Seals, Ex parte, 4 Rapp 1468
Shearer v. United States
Shelton v. McKinley
Simon, In re
Smith v. Yeager
Socialist Labor Party v. Rhodes, 2 Rapp 402
Socialist Workers Party v. Attorney General
South Park Independent Sch. Dist. v. United States
Spencer v. Pugh
Spenkelink v. Wainwright, 2 Rapp 905
Stanard v. Olesen
Stanley v. United States
Stickel v. United States
Stroup v. Willcox
Sulzer v. Sohmer
Synanon Foundation, Inc. v. California
Thomas v. Sierra Club
Thomas v. South Side Elevated Railroad Co.
Thompson v. United States
Tomaiolo v. United States
Travia v. Lomenzo
Tri-Continental Financial Corp. v. United States
Turner Broadcasting System, Inc. v. FCC
Twentieth Century Airlines Inc. v. Ryan
Uhler v. AFL-CIO
United States ex rel. Cerullo v. Follette
United States ex rel. Norris v. Swope
United States v. Cooper
United States v. FMC Corp.
United States v. Gates
United States v. Klopp
United States v. Portell
United States v. United Liquors Corp.
Uphaus v. Wyman
Valenti v. Spector
Van Newkirk v. McLain
Vetterli v. United States District Court
Volvo of America Corp. v. Schwarzer
Waller, Ex parte
Ward v. United States
Warm Springs Dam v. Gribble, 2 Rapp 885
Wasmuth v. Allen
Westermann v. Nelson
Whalen v. Roe
White v. Florida
Willhauck v. Flanagan
Williams v. Zbaraz
Wilson v. O'Malley
Winston-Salem/Forsyth Cty. Bd. of Ed. v. Scott
Winters v. United States, 2 Rapp 404
Wisconsin Right to Life v. FEC
Wise v. New Jersey
Wyckoff, In re

DISCHARGED
Stevens, Ex parte

GRANTED
American Mfrs. Mut. Ins. v. Am. Broadcasting
American Trucking Assns., Inc. v. Gray
Araneta v. United States
Arrow Transp. Co. v. Southern Ry. Co., 1 Rapp 307
Arrow Transp. Co. v. Southern Ry. Co., 1 Rapp 314
Atiyeh v. Capps
Atlantic Coast Line R.R. v. BLE
Autry v. Estelle
Baltimore City Dept. of Soc. Servs. v. Bouknight
Bandy v. United States, 1 Rapp 252
Barnes v. E-Systems, Inc.
Bart, In re
Becker v. United States
Berg, In re
Beyer v. United States
Boston v. Anderson
Bowen v. Kendrick
Brody v. United States
Brussel v. United States
Burwell v. California
California v. Brown
California v. American Stores Co.
California v. Braeseke
California v. Hamilton
California v. Prysock
California v. Ramos
California v. Riegler
California v. Velasquez
Capital Cities Media, Inc. v. Toole
Carlisle v. Landon
CBS Inc. v. Davis
Certain Named and Unnamed Children v. Texas
Chabad of Southern Ohio v. Cincinnati
Chestnut v. New York
Clark v. California
Clark v. United States
Clements v. Logan
Cohen v. United States, 1 Rapp 268
Cohen v. United States, 1 Rapp 279
Cohen v. United States, 1 Rapp 281
Cole v. Texas
Coleman v. Paccar, Inc.
Columbus Bd. of Ed. v. Penick
Corpus Christi School Dist. v. Cisernos
Costello v. United States
D'Aquino v. United States
Davis v. Adams
Eckwerth v. New York, 1 Rapp 216

GRANTED (cont'd)

Eckwerth v. New York, 1 Rapp 217
Edelman v. Jordan
Edwards v. New York, 1 Rapp 163
Ellis v. United States
Equitable Office Bldg. Corp., In re
Evans v. Atlantic Richfield Co.
Evans v. Bennett
Fairbanks Steam Shovel Co. v. Wills
Fare v. Michael C.
Farr v. Pitchess
FCC v. Radiofone Inc.
Flynn v. United States
Foster v. Gilliam
Fowler v. Adams
Frank, In re
Garrison v. Hudson
Gen'l Council Fin. & Ad. v. Sup. Ct., 2 Rapp 852
Gregg v. Georgia
Grubbs v. Delo
Harris v. United States, 2 Rapp 471
Harris v. United States, 2 Rapp 508
Hayes, Ex parte
Haywood v. National Basketball Assn.
Heckler v. Blankenship
Heckler v. Lopez
Heckler v. Redbud Hospital Dist.
Heckler v. Turner
Herzog v. United States
Hicks v. Feiock
Holtzman v. Schlesinger, 2 Rapp 602
Houchins v. KQED Inc.
Hung v. United States
INS v. Legalization Assistance Project of L.A. Cty.
International Boxing Club v. United States
Jaffree v. Board of Sch. Comm'rs of Mobile County
John Doe Agency v. John Doe Corp.
Jones v. Lemond
Kaine, Ex parte
Kaine, In re
Kake v. Egan
Karcher v. Dagget
Katzenbach v. McClung
Keith v. New York, 1 Rapp 218
Keyes v. School Dist. No. 1, Denver
King v. Smith
Knickerbocker Printing Corp. v. United States
La Marca v. New York
Land v. Dollar
Ledbetter v. Baldwin
Leigh v. United States
Lenhard v. Wolff, 2 Rapp 924
Levy v. Parker
Lewis, In re
Lopez v. United States
Los Angeles v. Lyons
Lucas v. Townsend
Ludecke v. Watkins
M.I.C. Ltd. v. Bedford Township
Marcello v. Brownell
Marks v. Davis
Marshall v. Barlow's, Inc.
Mathis v. United States
Matthews v. Little
McCarthy v. Briscoe, 2 Rapp 714
McCarthy v. Harper
McDaniel v. Sanchez
McDonald v. Missouri
McLeod v. General Elec. Co.
Meredith v. Fair
Merryman, Ex parte
Mikutaitis v. United States
Mori v. Boilermakers
Motlow v. United States
NCAA v. Bd. of Regents U. of Okla.
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1185
National League of Cities v. Brennan
Nebraska Press Assn. v. Stuart, 2 Rapp 675
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.
Noto v. United States
Noyd v. Bond
Office of Personnel Mgmt. v. Gov't Employees
Orloff v. Willoughby
Overfield v. Pennroad Corp.
Pacileo v. Walker
Panama Canal Co. v. Grace Lines, Inc.
Pasadena City Bd. of Ed. v. Spangler
Patterson v. Superior Court of California
Pennsylvania v. Wheeling and Belmont Bridge Co.
Philip Morris USA Inc. v. Scott
Pryor v. United States
Quinn v. Laird
Reproductive Servs., Inc. v. Walker, 2 Rapp 851
Republican State Central Comm. v. Ripon Soc'y.
Reynolds v. Int'l Amateur Athletic Fed.
Reynolds v. United States
Richardson v. New York
Riverside v. Rivera
Roche, In re
Rockefeller v. Socialist Workers Party
Rosenberg v. United States
Rostker v. Goldberg
Roth v. United States
Russo v. Byrne
Sacher v. United States
San Diegans for Mt. Soledad v. Paulson
Sawyer v. Dollar
Scaggs v. Larsen
Schlesinger v. Holtzman, 2 Rapp 607
Schweiker v. McClure
Seagram & Sons v. Hostetter
Sellers v. United States
Sica v. United States
Simon v. United States
Sklaroff v. Skeadas
Smith v. Ritchey
Smith v. United States
Socialist Labor Party v. Rhodes, 2 Rapp 406
Spenkelink v. Wainwright, 2 Rapp 911
Steinberg v. United States
Stickney, Ex parte
Strickland Transp. Co. v. United States
Sumner v. Mata
Tate v. Rose
Tierney v. United States
Times-Picayune Publishing Corp. v. Schulingkamp

GRANTED (cont'd)
Tuscarora Nation of Indians v. Power Authority
United States ex rel. Knauff v. McGrath
United States v. Patterson
United States Postal Service v. Letter Carriers
Volkswagonwerk A.G. v. Falzon
Walters v. National Assn. of Radiation Survivors
Warm Springs Dam v. Gribble, 2 Rapp 621
Western Airlines, Inc. v. Teamsters
Williams v. Missouri
Williams v. Rhodes
Williamson v. United States
Winters v. United States, 2 Rapp 410
Wise v. Lipscomb
Wolcher v. United States
Yanish v. Barber
Yasa v. Esperdy

GRANTED IN PART AND DENIED IN PART
Alabama G.S.R. Co. v. R.R. & P.U.C. of Tennessee
Breswick & Co. v. United States
O'Brien v. O'Laughlin

NO ACTION TAKEN
United States v. Allied Stevedoring Corp.

REMANDED AND HELD IN ABEYANCE
Febre v. United States

REFERRED TO COURT
Heath, In re
Kaine, Ex parte
Marcello v. United States
Rosado v. Wyman
Spies v. Illinois

CUMULATIVE INDEX OF CASES BY TOPIC

ABORTION
Califano v. McRae
Doe v. Smith
Edwards v. Hope Medical Group
Planned Parenthood v. Casey
Reproductive Servs., Inc. v. Walker, 2 Rapp 808
Williams v. Zbaraz

ABUSE OF DISCRETION
Albanese v. United States
Associated Gas & Electric, In re
Kemp v. Smith, 3 Rapp 1133
Kemp v. Smith, 3 Rapp 1155
Patterson v. United States
Railway Express Agency, Inc. v. United States

ACTS OF CONGRESS
Administrative Procedure Act
Cheney v. United States District Court
Stanard v. Olesen

Adolescent Family Life Act
Bowen v. Kendrick

Alaska Statehood Act
Kake v. Egan

All Writs Act
Atiyeh v. Capps
Brown v. Gilmore
Northern Cal. Power Ag'y. v. Grace Geothermal
Ohio Citizens for Responsible Energy v. NRC
Wisconsin Right to Life v. FEC

Articles of War
Durant, Ex parte

Atomic Energy Act
Rosenberg v. United States

Bipartisan Campaign Reform Act of 2002
Wisconsin Right to Life v. FEC

Civil Rights Act of 1964
Heart of Atlanta Motel v. United States
Katzenbach v. McClung

Civilian Aeronautics Act of 1938
Twentieth Century Airlines Inc. v. Ryan

Clayton Act
California v. American Stores Co.
United States v. FMC Corp.

Clean Air Act
Beame v. Friends of the Earth
Thomas v. Sierra Club

Coastal Zone Management Act
Clark v. California

CFTA
CFTC v. British Am. Commodity Options

ERISA
Barnes v. E-Systems, Inc

Ethics in Government Act
Cheney v. United States District Court

Fair Labor Standards Act
National League of Cities v. Brennan

Federal Advisory Committee Act
Cheney v. United States District Court

Freedom of Information Act
Bureau of Economic Analysis v. Long
Chamber of Commerce v. Legal Aid Society
John Doe Agency v. John Doe Corp.
Labor Board v. Getman

Harrison Narcotic Act
Chin Gum v. United States

Immigration Reform & Control Act of 1986
INS v. Legalization Assistance Project L.A. Cty.

Immunity Act of 1954
Bart, In re

Indian Civil Rights Act
Nat'l Farmers. Ins. v. Crow Tribe, 3 Rapp 1185

Interstate Commerce Act
Aberdeen & Rockfish R. Co. v. SCRAP
Arrow Transp. Co. v. Southern Ry., 1 Rapp 307
Arrow Transp. Co. v. Southern Ry., 1 Rapp 314

Judiciary Act of 1789
Merryman, Ex parte

Medicare Act
Schweiker v. McClure

National Labor Relations Act
McLeod v. General Elec. Co.

Patriot Act
Doe v. Gonzales

Presumed Constitutional
Bowen v. Kendrick
Brennan v. United States Postal Service
Marshall v. Barlow's, Inc.
Schweiker v. McClure
Walters v. National Assn. of Radiation Survivors

Railway Labor Act
Western Airlines, Inc. v. Teamsters

Ready Reserve Act
Smith v. Ritchey

Rock Creek Park Act
United States v. Cooper

Selective Service Act
Rostker v. Goldberg

Tax Injunction Act
Barnes v. E-Systems Inc.

Voting Rights Act
Bartlett v. Stephenson
Campos v. Houston
Lucas v. Townsend
McDaniel v. Sanchez

ADOPTION
DeBoer v. DeBoer
Goldman v. Fogarty
Marten v. Thies
O'Connell v. Kirchner
Sklaroff v. Skeadas

ANTITRUST
American Mfrs. Mut. Ins. v. Am. Broadcasting
Haywood v. National Basketball Assn.
International Boxing Club v. United States
NCAA v. Bd. of Regents of U. of Okla.
United States v. FMC Corp.
United States v. United Liquors Corp.

APPEAL, LEAVE TO
Alabama G.S.R. Co. v. R.R. & P.U.C. of Tenn.
Fairbanks Steam Shovel Co. v. Wills
Frank, In re
Lynch v. Watson
Wilson v. O'Malley

APPEAL PENDING BELOW
Atiyeh v. Capps
Becker v. United States
Beltran v. Smith
Bureau of Economic Analysis v. Long
Certain Named and Unnamed Children v. Texas
Chestnut v. New York
Chin Gum v. United States
Coleman v. Paccar, Inc.
Doe v. Gonzales
Drifka v. Brainard
Farr v. Pitchess
Harris v. United States, 2 Rapp 471
Heckler v. Lopez
Heckler v. Redbud Hospital Dist.
Henry v. Warner
INS v. Legalization Assistance Project L.A. Cty.
Jaffree v. Board of Sch. Comm'rs of Mobile Cty.
Guey Heung Lee v. Johnson
Lopez v. United States
Mecum v. United States
Metropolitan County Bd. of Ed. v. Kelley
Montgomery v. Jefferson
Moore v. Brown
Northern Cal. Power Ag'y v. Grace Geothermal
O'Connor v. Board of Ed. of School Dist. 23
Packwood v. Senate Select Comm. on Ethics
Parisi v. Davidson
Pasadena City Bd. of Ed. v. Spangler
Renaissance Arcade and Bookstore v. Cook Cty.
Ruckelshaus v. Monsanto Co.
San Diegans for Mt. Soledad v. Paulson
Scaggs v. Larsen
Shearer v. United States
Smith v. Ritchey
Smith v. United States
Stanard v. Olesen
Thomas v. Sierra Club
Warm Springs Dam v. Gribble, 2 Rapp 621
Warm Springs Dam v. Gribble, 2 Rapp 885
Willhauck v. Flanagan
Winters v. United States, 2 Rapp 410

ARMED FORCES
Cambodia
Holtzman v. Schlesinger, 2 Rapp 590
Holtzman v. Schlesinger, 2 Rapp 602

Civil War
Merryman, Ex parte
Stevens, Ex parte

Conscientious Objectors
Clark v. United States
Jones v. Lemond
Lopez v. United States
Quinn v. Laird
Parisi v. Davidson

Court Martial
Durant, Ex parte

Discharge
Durant, Ex parte
Peeples v. Brown

Draft
Pryor v. United States
Sellers v. United States

Exhaustion Doctrine
Noyd v. Bond

Habeas Corpus
Durant, Ex parte
Levy v. Parker
Locks v. Commanding General, Sixth Army
Scaggs v. Larsen
Stevens, Ex parte

Retention
Hayes, Ex parte

Shipment Overseas
Drifka v. Brainard
Orloff v. Willoughby
Parisi v. Davidson
Smith v. Ritchey
Winters v. United States, 2 Rapp 404
Winters v. United States, 2 Rapp 410

World War II
Durant, Ex parte

ATTORNEY'S FEES
Riverside v. Rivera

BAIL
Application for
Akel v. New York
Albanese v. United States
Alcorcha v. California
Aronson v. May
Bandy v. U.S., 1 Rapp 252
Bandy v. U.S., 1 Rapp 253
Bandy v. U.S., 1 Rapp 261
Bateman v. Arizona
Baytops v. New Jersey
Beyer v. United States
Bletterman v. United States
Bowman v. United States
Brussel v. United States
Carbo v. United States
Carlisle v. Landon
Chambers v. Mississippi
Chin Gum v. United States
Clark v. United States
Cohen v. U.S., 1 Rapp 268
Cohen v. U.S., 1 Rapp 279
Costello v. United States
D'Aquino v. United States
Delli Paoli v. United States
Dennis v. United States
Di Candia v. United States
Ellis v. United States
Eveleigh v. United States
Farr v. Pitchess
Febre v. United States
Fernandez v. United States
Field v. United States
Guterma v. United States
Harris v. United States, 2 Rapp 508
Herzog v. United States
Hung v. United States
Hurst v. West Virginia
Johnson, In re
Julian v. United States
Leigh v. United States
Levy v. Parker
Lewis, In re
Lopez v. United States
Marcello v. United States
Mathis v. United States
McGee v. Alaska
Mecom v. United States
Morison v. United States
Motlow v. United States
Noto v. United States
O'Brien v. O'Laughlin
Patterson v. United States
Perez v. United States
Pirinsky, In re
Rehman v. California
Reynolds v. United States
Roth v. United States
Sellers v. United States
Shearer v. United States
Sica v. United States
Smith v. Yeager
Stanley v. United States
Stickel v. United States
Tierney v. United States
Tomaiolo v. United States
United States ex rel. Cerullo v. Follette
United States v. Allied Stevedoring Corp.
United States v. Gates
United States v. Klopp
United States v. Portell
Uphaus v. Wyman
Valenti v. Specter
Ward v. United States
Williamson v. United States
Wolcher v. United States
Yanish v. Barber

Authority to Grant
Alcorcha v. California
Bandy v. U.S, 1 Rapp 261
Johnson, In re
Merryman, Ex parte
Pirinsky, In re
Simon v. United States

Reasons/Standards for Granting
Aronson v. May
Carbo v. United States
D'Aquino v. United States
Harris v. United States, 2 Rapp 508
Herzog v. United States
Leigh v. United States
Merryman, Ex parte
Motlow v. United States
Reynolds v. United States
Sellers v. United States
Sica v. United States
Ward v. United States

BOND REQUIRED
Arrow Transp. Co. v. Southern Ry., 1 Rapp 314
Bart, In re
Bandy v. U.S., 1 Rapp 252
Breswick & Co. v. United States
California v. American Stores Co.
Twentieth Century Airlines Inc. v. Ryan
Carlisle v. Landon
Cohen v. United States, 1 Rapp 279
Cohen v. United States, 1 Rapp 281
Costello v. United States
Fairbanks Steam Shovel Co. v. Wills

BOND REQUIRED (cont'd)
Herzog v. United States
Noto v. United States
O'Brien v. O'Laughlin
Roth v. United States
Sica v. United States
Steinberg v. United States
Simon v. United States

CAPITAL CASE
Autry v. Estelle
Bagley v. Byrd
Blodgett v. Campbell
Bloeth v. New York
Burwell v. California
California v. Brown
California v. Hamilton
California v. Harris
California v. Ramos
Cooper v. New York, 1 Rapp 137
Eckwerth v. New York, 1 Rapp 216
Eckwerth v. New York, 1 Rapp 217
Edwards v. New York, 1 Rapp 163
Edwards v. New York, 1 Rapp 171
Evans v. Alabama
Gregg v. Georgia
Grubbs v. Delo
Jackson v. New York
Keith v. New York, 1 Rapp 218
Keith v. New York, 4 Rapp 1613
Kemp v. Smith, 3 Rapp 1133
Kemp v. Smith, 3 Rapp 1155
La Marca v. New York
Madden v. Texas
McDonald v. Missouri
McGee v. Eyman
Merrifield v. Kentucky
Mitchell v. California
Netherland v. Tuggle
Netherland v. Gray
Penry v. Texas
Richardson v. New York
Richmond v. Arizona
Rodriguez v. Texas
Rosenberg v. United States
Spenkelink v. Wainwright, 2 Rapp 905
Spenkelink v. Wainwright, 2 Rapp 911
Spies v. Illinois
Stickney v. Texas
Thompson v. United States
White v. Florida
Wise v. New Jersey

Automatic Stay Rejected
Netherland v. Gray

Direct Review
Cole v. Texas
McDonald v. Missouri
Rodriguez v. Texas
Williams v. Missouri

Next Friend Status
Evans v. Bennett
Lenhard v. Wolff, 2 Rapp 924
Lenhard v. Wolff, 3 Rapp 931

CERTIFICATE OF NECESSITY
Meeropol v. Nizer

CERTIFICATE OF PROBABLE CAUSE
Autry v. Estelle
Burwell v. California
Frank, In re
McCarthy v. Harper
Rosoto v. Warden

CERTIORARI
Denied
Jimenez v. United States District Court
Kadans v. Collins
Keith v. New York, 4 Rapp 1613
Pacific Tel. & Tel. v. Public Util. Comm'n of Cal.
Rosoto v. Warden

Denied in Similar Case
General Dynamics v. Anderson
Drifka v. Brainard

Granted
California v. Ramos
Clark v. California
Edelman v. Jordan
Heckler v. Turner

Granted in Similar Case
Berg, In re
California v. Velasquez
Chestnut v. New York
City-Wide Comm. v. Board of Educ. of N.Y.
Costello v. United States
Pasadena City Bd. of Ed. v. Spangler

In Forma Pauperis
Prato v. Vallas

Pending
Am. Trading Corp. v. Railroad Comm'n
Bagley v. Byrd
Brown v. Gilmore
Conkright v. Frommert
Eckwerth v. New York, 1 Rapp 217
Evans v. Alabama
Keith v. New York, 1 Rapp 218
Mincey v. Arizona
Noto v. United States
Richardson v. New York

Suspension of Order Denying
Boumediene v. Bush
Flynn v. United States
Richmond v. Arizona

Unlikely to Be Granted
Appalachian Power Co. v. AICPA
Bartlett v. Stephenson
Curry v. Baker
Harvey, In re
Jackson v. D.C. Bd. of Elections & Ethics
Kentucky v. Stincer
Kenyeres v. Ashcroft
Long Island R.R. v. N.Y. Central R.R.

CIRCUIT COURT
Split
Kenyeres v. Ashcroft

CIRCUIT JUSTICE
Abstention
Califano v. McRae

Authority to Act
Blodgett v. Campbell
Breswick & Co. v. United States
CFTC v. British Am. Commodity Options
Cousins v. Wigoda
Durant, Ex parte
Equitable Office Bldg. Corp., In re
Grinnell Corp. v. United States
Hawaii Housing Auth. v. Midkiff
Johnson, In re
Kimble v. Swackhamer
Locks v. Commanding General, Sixth Army
Meeropol v. Nizer
New York Times v. Jascalevich, 2 Rapp 816
New York Times v. Jascalevich, 2 Rapp 824
Sacco v. Massachusetts
Smith v. Yeager
Socialist Labor Party v. Rhodes, 2 Rapp 406
U.S. ex rel. Norris v. Swope
Turner Broadcasting System, Inc. v. FCC
Wasmuth v. Allen

Conferred with Other Justices
Barnstone v. University of Houston
City-Wide Comm. v. Board of Educ. of N.Y.
Evans v. Alabama
Graves v. Barnes
Hughes v. Thompson
Katzenbach v. McClung
McCarthy v. Briscoe, 2 Rapp 713
McCarthy v. Briscoe, 2 Rapp 714
McGee v. Eyman
Meredith v. Fair
Microsoft Corp. v. United States
Noto v. United States
Richmond v. Arizona
Schlesinger v. Holtzman, 2 Rapp 607
Socialist Labor Party v. Rhodes, 2 Rapp 406
Spenkelink v. Wainwright, 2 Rapp 905
Thompson v. United States
Williams v. Rhodes
Wyckoff, In re

Jurisdiction of
Barthuli v. Bd. of Trustees of Jefferson Sch. Dist.
Durant, Ex parte
M.I.C. Ltd. v. Bedford Township
Pac. Union Seventh-Day Adventists v. Marshall
Prudential Fed. Sav. & Loan Assn. v. Flanigan
Rosado v. Wyman

Reasons for Granting Relief
Aberdeen & Rockfish R. Co. v. SCRAP
American Trucking Assns., Inc. v. Gray
Araneta v. United States
Barnes v. E-Systems, Inc.
Bellotti v. Latino Political Action Comm.
Boston v. Anderson
Brennan v. United States Postal Service
Buchanan v. Evans
California v. Riegler
Capital Cities Media, Inc. v. Toole
Cohen v. U.S., 1 Rapp 268
Conkright v. Frommert
Corsetti v. Massachusetts
Curry v. Baker
Edwards v. Hope Medical Group
Fare v. Michael C.
General Dynamics v. Anderson
Graves v. Barnes
Heckler v. Lopez
Heckler v. Blankenship
Hicks v. Feiock
Houchins v. KQED Inc.
INS v. Legalization Assistance Project L.A. Cty.
John Doe Agency v. John Doe Corp.
Julian v. United States
Karcher v. Daggett
Ledbetter v. Baldwin
Lucas v. Townsend
Mahan v. Howell
McDaniel v. Sanchez
McGraw-Hill Cos. v. Proctor & Gamble Co.
Miroyan v. United States
NCAA. v. Bd. of Regents of U. of Okla.
Packwood v. Senate Select Comm. on Ethics
Philip Morris USA Inc. v. Scott
Planned Parenthood v. Casey
Republican State Central Comm. v. Ripon Society
Roche, In re
Rostker v. Goldberg
Rubin v. United States Independent Counsel
Ruckelshaus v. Monsanto Co.
United States Postal Service v. Letter Carriers
Whalen v. Roe
Williams v. Zbaraz
Wise v. Lipscomb

Role of
Alexander v. Board of Education
Board of Ed. of L.A. v. Superior Court of Cal.
Corsetti v. Massachusetts
Doe v. Gonzales
Durant, Ex parte
Ehrlichman v. Sirica
Evans v. Bennett

Role of (cont'd)
Gregory-Portland Indep. Sch. Dist. v. U.S.
Holtzman v. Schlesinger, 2 Rapp 590
Hortonville Jt. Sch. Dist. v. Hortonville Ed. Assn.
San Diegans for Mt. Soledad v. Paulson
South Park Indep. Sch. Dist. v. United States

COMMERCE CLAUSE
American Trucking Assns., Inc. v. Gray

CONDITIONAL STAY
Albanese v. United States
Edwards v. New York, 1 Rapp 163
La Marca v. New York
Seagram & Sons v. Hostetter
Sklaroff v. Skeadas
Tuscarora Nation of Indians v. Power Authority

CONFESSIONS
Durant, Ex parte

CONTEMPT
Civil
Araneta v. United States
Baltimore City Dept. of Soc. Servs. v. Bouknight
Brussel v. United States
Farr v. Pitchess
Haner v. United States
Hicks v. Feiock
Mikutaitis v. United States
New York Times v. Jascalevich, 2 Rapp 816
Patterson v. Superior Court of Cal.
Roche, In re
Russo v. United States
Sawyer v. Dollar
Tierney v. United States
United States v. Portell
Uphaus v. Wyman

Criminal
Dolman v. United States
Field v. United States
Gruner v. Superior Court of Cal.
Lewis, In re
Patterson v. United States
Sacher v. United States

CRIMINAL PROCEEDINGS, STAY OF
Claiborne v. United States
Divans v. California, 2 Rapp 746
Mincey v. Arizona
O'Rourke v. Levine

DECLARATION OF INDEPENDENCE
Merryman, Ex parte

DEFERENCE TO LOWER COURT
Bletterman v. United States
D'Aquino v. United States
Di Candia v. United States
Garcia-Mir v. Smith
Jackson v. D.C. Bd. of Elections & Ethics
Julian v. United States
Marten v. Thies
Mecom v. United States

DELAY
In Filing
Alexis I. Du Pont Sch. Dist. v. Evans
Beame v. Friends of the Earth
Brody v. United States
Conforte v. Commissioner
Cooper v. New York, 1 Rapp 137
Cunningham v. English
Evans v. Bennett
Fishman v. Schaffer
General Council v. Superior Ct., 2 Rapp 852
O'Brien v. Skinner
Ruckelshaus v. Monsanto Co.
Socialist Labor Party v. Rhodes, 2 Rapp 402
Westermann v. Nelson
Winston-Salem/Forsyth County Bd. of Ed. v. Scott

Unreasonable
Bureau of Econ. Analysis v. Long

DENIED WITHOUT PREJUDICE
Am. Trading Corp. v. Railroad Comm'n
Associated Press v. District Court
Bandy v. U.S., 1 Rapp 253
Baytops v. New Jersey
East Coast Lumber v. Town of Babylon
Grinnell Corp. v. United States
Hawaii Housing Auth. v. Midkiff
Jordan v. Clemmer
Krause v. Rhodes
Labor Board v. Getman
Lynch v. Watson
McCarthy v. Briscoe, 2 Rapp 713
Murdaugh v. Livingston
Nebraska Press Assn. v. Stuart, 2 Rapp 668
New York Times v. Jascalevich, 2 Rapp 803
Oden v. Brittain
Rodriguez v. Texas
Shearer v. United States

DEPORTATION
Garcia-Mir v. Smith
Kenyeres v. Ashcroft
Nukk v. Shaughnessy
U.S. ex rel. Knauff v. McGrath
Yasa v. Esperdy

DESIGNATION OF CIRCUIT JUDGE
Van Newkirk v. McLain

DISSENT TO CHAMBERS OPINION
Schlesinger v. Holtzman, 2 Rapp 607

DOUBLE JEOPARDY CLAUSE
Cohen v. United States, 1 Rapp 279
Divans v. California, 2 Rapp 746
Divans v. California, 2 Rapp 857
Julian v. United States
Willhauck v. Flanagan

EIGHTH AMENDMENT
Atiyeh v. Capps
Hung v. United States
Graddick v. Newman

ELECTIONS
Campos v. Houston
Louisiana v. United States
Marks v. Davis
Moore v. Brown
Owen v. Kennedy
Spencer v. Pugh

Ballot Access
Bradley v. Lunding
Communist Party of Indiana v. Whitcomb
Davis v. Adams
Dem. Nat'l Comm. v. Rep. Nat'l Comm.
Fishman v. Schaffer
Fowler v. Adams
Hayakawa v. Brown
Lux v. Rodrigues
McCarthy v. Briscoe, 2 Rapp 714
Montgomery v. Jefferson
Republican Party of Hawaii v. Mink
Rockefeller v. Socialist Workers Party
Socialist Labor Party v. Rhodes, 2 Rapp 402
Westermann v. Nelson
Williams v. Rhodes

Ballot Initiative
Montanans for Balanced Fed. Budget v. Harper
Uhler v. AFL-CIO

Election Enjoined
Bellotti v. Latino Political Action Comm.
Lucas v. Townsend
Oden v. Brittain

Filing Fees
Matthews v. Little

Reapportionment/Redistricting
Bartlett v. Stephenson
Graves v. Barnes
Karcher v. Daggett
Mahan v. Howell
McDaniel v. Sanchez
Republican Nat'l Comm. v. Burton
Travia v. Lomenzo
Wise v. Lipscomb

Referendum
Boston v. Anderson
Kimble v. Swackhamer

State Laws
Bartlett v. Stephenson
California v. Freeman
Curry v. Baker
Hayakawa v. Brown
Hubbard v. Wayne County Election Commission
Sacco v. Massachusetts

Voting Rights
O'Brien v. Skinner

ENLARGEMENT OF DEFENDANT
Foster v. Gilliam

ERROR, WRIT OF
Burgess v. Pere Marquette R. Co., 4 Rapp 1586
Burgess v. Pere Marquette R. Co., 4 Rapp 1587
Day v. Louisiana Western Railroad Co.
Frank v. Georgia, 4 Rapp 1521
Haack v. Brooklyn Labor Lyceum Assn.
Hile v. Baker
Roller v. Murray, 4 Rapp 1579
Spies v. Illinois
Thomas v. South Side Elevated Railroad Co.
United States v. Cooper

EX POST FACTO
Portley v. Grossman

EXECUTION, STAY OF
Autry v. Estelle
Bloeth v. New York
Burwell v. California
Cole v. Texas
Cooper v. New York, 1 Rapp 137
Cooper v. New York, 4 Rapp 1482
Deere v. United States
Eckwerth v. New York, 1 Rapp 216
Eckwerth v. New York, 1 Rapp 217
Edwards v. New York, 1 Rapp 163
Edwards v. New York, 1 Rapp 171
Evans v. Alabama
Evans v. Bennett
Grubbs v. Delo
Jackson v. New York
Keith v. New York, 1 Rapp 218
La Marca v. New York
Lenhard v. Wolff, 2 Rapp 924
Lenhard v. Wolff, 3 Rapp 931
McDonald v. Missouri
McGee v. Eyman
Merrifield v. Kentucky
Mitchell v. California
Richardson v. New York
Richmond v. Arizona
Rosenberg v. United States
Spenkelink v. Wainwright, 2 Rapp 905
Thompson v. United States
Waller, Ex parte
Williams v. Missouri

EXHAUSTION BELOW
Jordan v. Clemmer
Satterfield v. Smyth
Wyckoff, In re

EXTENSION OF TIME
Boumediene v. Bush
Brody v. United States
Carter v. United States
Goldman v. Fogarty

EXTENSION OF TIME (cont'd)
Kleem v. INS
Knickerbocker Printing Corp. v. United States
MacKay v. Boyd
Madden v. Texas
Mississippi v. Turner
New Jersey v. Auld
Numer v. United States
Oerlikon Machine Tools Works v. U.S.
Overfield v. Pennroad Corp.
Pabon v. Bd. of Personnel of Puerto Rico
Penry v. Texas
Pon v. United States
Prato v. Vallas
U.S. ex rel. Cerullo v. Follette

EXTRADITION
Jimenez v. United States District Court
Kaine, Ex parte
Little v. Ciuros
Pacileo v. Walker

EXTRAORDINARY CIRCUMSTANCES, RELIEF NOT SOUGHT BELOW
Brussel v. United States
Heckler v. Turner
Nebraska Press Assn. v. Stuart, 2 Rapp 675
Volkswagonwerk A.G. v. Falzon
Western Airlines, Inc. v. Teamsters

FIFTH AMENDMENT
Araneta v. United States
Baltimore City Dept. of Soc. Servs. v. Bouknight
Fare v. Michael C.
Haner v. United States
Merryman, Ex parte
Mikutaitis v. United States
Rostker v. Goldberg

FINAL DECISION REQUIRED
Bateman v. Arizona
Deaver v. United States
Doe v. Smith
Gen'l Council Fin. & Ad. v. Sup. Ct., 2 Rapp 859
Hortonville Jt. Sch. Dist. v. Hortonville Ed. Assn.
Liles v. Nebraska
New York Times v. Jascalevich, 2 Rapp 816
New York Times v. Jascalevich, 2 Rapp 824
Ohio Citizens for Responsible Energy Inc. v. NRC
Pacific Un. Seventh-Day Adventists v. Marshall
Rosenblatt v. American Cyanamid Co.
Twentieth Century Airlines Inc. v. Ryan
United States v. Cooper
Valenti v. Spector

FIRST AMENDMENT
Bonura v. CBS Inc.
Brown v. Gilmore
Chabad of Southern Ohio v. Cincinnati
Dexter v. Schrunk
Doe v. Gonzales
Farr v. Pitchess
Gruner v. Superior Court of Cal.
Houchins v. KQED Inc.
Lewis, In re
M.I.C. Ltd. v. Bedford Township
McGraw-Hill Cos. v. Proctor & Gamble Co.
National Socialist Party of America v. Skokie
New York Times v. Jascalevich, 2 Rapp 816
New York Times v. Jascalevich, 2 Rapp 824
Pacific Un. Seventh-Day Adventists v. Marshall
Patterson v. Superior Court of Cal.
Roche, In re
Socialist Workers Party v. Attorney General
Turner Broadcasting System, Inc. v. FCC
Williamson v. United States
Wisconsin Right to Life v. FEC

Establishment Clause
Brown v. Gilmore
Cath. League v. Feminist Women's Health Ctr.
Jaffree v. Board of Sch. Comm'rs of Mobile Cty.

Prior Restraint
Associated Press v. District Court
Capital Cities Media, Inc. v. Toole
CBS Inc. v. Davis
KPNX Broadcasting Co. v. Arizona Superior Ct.
Multimedia Holdings Corp. v. Circuit Ct. of Fla.
Nebraska Press Assn. v. Stuart, 2 Rapp 668
Nebraska Press Assn. v. Stuart, 2 Rapp 675
Times-Picayune Pub. Corp. v. Schulingkamp

FOREIGN LAW
England, Common Law
Kaine, Ex parte
Merryman, Ex parte

England, Habeas Corpus Act
Merryman, Ex parte

England, Magna Carta
Merryman, Ex parte

Hungary
Kenyeres v. Ashcroft

FOURTEENTH AMENDMENT
Certain Named and Unnamed Children v. Texas
Karr v. Schmidt
New Motor Vehicle Bd. v. Orrin W. Fox Co.
O'Connor v. Board of Ed. of School Dist. 23
Philip Morris USA Inc. v. Scott

FOURTH AMENDMENT
Berg, In re
California v. Riegler
Clements v. Logan
Harris v. United States, 2 Rapp 471
Merryman, Ex parte
Miroyan v. United States
Russo v. Byrne
Steinberg v. United States
Tierney v. United States

GOOD CAUSE, EXTENSIONS OF TIME
Kleem v. INS
Madden v. Texas
Mississippi v. Turner
Penry v. Texas

HABEAS CORPUS, WRIT OF
Clark, Ex parte
Durant, Ex parte
Ewing v. Gill
Goldsmith v. Zerbst
Jordan v. Clemmer
Kaine, Ex parte
Kaine, In re
Locks v. Commanding General, Sixth Army
Richardson, In re
Sacco v. Hendry
Satterfield v. Smyth
Seals, Ex parte, 4 Rapp 1466
Seals, Ex parte, 4 Rapp 1468
Stevens, Ex parte
United States v. Patterson
United States ex rel. Norris v. Swope
Wyckoff, In re

Stay, Issuance of
Foster v. Gilliam
Garrison v. Hudson
O'Connell v. Kirchner
Tate v. Rose

Suspension of
Merryman, Ex parte

Transfer
Hayes, Ex parte

IMMIGRATION
Asylum
Kenyeres v. Ashcroft

INDEPENDENT COUNSEL
Deaver v. United States
Dow Jones & Co. Inc., In re
Rubin v. United States Independent Counsel

INJUNCTION
Application for
American Trucking Assns., Inc. v. Gray
Brotherhood of R.R. Signalmen v. S.E. Pa. Trans.
Brown v. Gilmore
Campos v. Houston
Communist Party of Indiana v. Whitcomb
Fishman v. Schaffer
George F. Alger Co. v. Peck
Gomperts v. Chase
Hubbard v. Wayne County Election Commission
Krause v. Rhodes
Lenhard v. Wolff, 2 Rapp 924
McCarthy v. Briscoe, 2 Rapp 714
Oden v. Brittain
Ohio Citizens for Responsible Energy Inc. v. NRC
Peeples v. Brown
Penn. v. Wheeling & Belmont Bridge Co.
Renaissance Arcade and Bookstore v. Cook Cty.
Shelton v. McKinley
Socialist Labor Party v. Rhodes, 2 Rapp 402
Turner Broadcasting System, Inc. v. FCC
Westermann v. Nelson
Williams v. Rhodes
Wisconsin Right to Life v. FEC

Denied Below
Synanon Foundation, Inc. v. California
Wisconsin Right to Life v. FEC

Pending Appeal
Alabama G.S.R. Co. v. R.R. & P.U.C. of Tenn.
Lux v. Rodrigues
Wisconsin Right to Life v. FEC

Stay of
Aberdeen & Rockfish R. Co. v. SCRAP
Atiyeh v. Capps
Atlantic Coast Line R.R. v. BLE
Breswick & Co. v. United States
Capitol Square Review & Advisory Bd. v. Pinette
CBS Inc. v. Davis
Chabad of Southern Ohio v. Cincinnati Clark v. California
Heckler v. Lopez
Heckler v. Redbud Hospital Dist.
Houchins v. KQED Inc.
Long Beach Fed. S&L v. Fed. Home Loan Bank
Los Angeles v. Lyons
Marshall v. Barlow's, Inc.
M.I.C. Ltd. v. Bedford Township
Moore v. Brown
New Motor Vehicle Bd. v. Orrin W. Fox Co.
Republican State Central Comm. v. Ripon Society
Reynolds v. Int'l Amateur Athletic Federation
Walters v. National Assn. of Radiation Survivors

INTERNATIONAL LAW
Kaine, Ex parte

IRREPARABLE HARM/INJURY
Associated Gas & Electric Co., In re
Bagley v. Byrd
Breswick & Co. v. United States
California v. American Stores Co.
California v. Winson
Capitol Square Review & Advisory Bd. v. Pinette
Davis v. Adams
FCC v. Radiofone Inc.
Finance Comm. to Re-elect the Pres. v. Waddy
Fowler v. Adams
Heckler v. Turner
Garcia-Mir v. Smith
George F. Alger Co. v. Peck
Graddick v. Newman
Kake v. Egan
Ledbetter v. Baldwin
Long Beach Fed. S&L v. Fed. Home Loan Bank
National Broadcasting Co. v. Niemi
Nebraska Press Assn. v. Stuart, 2 Rapp 675

IRREPARABLE HARM/INJURY (cont'd)
New York Times v. Jascalevich, 2 Rapp 803
Railway Labor Executives' Assn. v. Gibbons
Reynolds v. Int'l Amateur Athletic Federation
San Diegans for Mt. Soledad v. Paulson
Schweiker v. McClure
Twentieth Century Airlines Inc. v. Ryan
United States v. United Liquors Corp.
Wasmuth v. Allen
White v. Florida

JURIES
Grand Jury Proceedings
Bracy v. United States
Patterson v. Superior Court of Cal.
Russo v. United States
Smith v. United States

Grand Jury Testimony
A.B. Chance Co. v. Atlantic City Elec. Co.
Bart, In re

Instructions
California v. Brown
California v. Hamilton

Jurors
California v. Harris
Capital Cities Media, Inc. v. Toole
Richardson, In re

JURISDICTION
Durant, Ex parte

Final Order Required
Bateman v. Arizona
Deaver v. United States
Doe v. Smith
Gen'l Council Fin. & Ad. v. Sup. Ct., 2 Rapp 859
Hortonville Jt. Sch. Dist. v. Hortonville Ed. Assn.
Liles v. Nebraska
New York Times v. Jascalevich, 2 Rapp 816
New York Times v. Jascalevich, 2 Rapp 824
Ohio Citizens for Responsible Energy Inc. v. NRC
Pacific Un. Seventh-Day Adventists v. Marshall
Rosenblatt v. American Cyanamid Co.
Twentieth Century Airlines Inc. v. Ryan
Valenti v. Spector

Lack of by Lower Court
Hawaii Housing Authority v. Midkiff
Heckler v. Redbud Hospital Dist.
McCarthy v. Harper
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1185
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1211
Office of Personnel Mgmt. v. Gov't Employees
Public Service Board v. United States

Lack of by Supreme Court
Board of Ed. of Los Angeles v. Superior Ct.
Durant, Ex parte
Harris v. United States, 2 Rapp 471
Heath, In re
Kaine, Ex parte
McCarthy v. Briscoe, 2 Rapp 713
Renaissance Arcade and Bookstore v. Cook Cty.
Simon, In re
Sulzer v. Sohmer
Volvo of America Corp. v. Schwarzer

Preservation of Court's
Bart, In re
Becker v. United States
Garrison v. Hudson
National Socialist Party of America v. Skokie
Orloff v. Willoughby
Tate v. Rose
Sawyer v. Dollar
United States ex rel. Knauff v. McGrath

Relief Must Be Sought Below
Dolman v. United States
Drummond v. Acree
Nebraska Press Assn. v. Stuart, 2 Rapp 668
Oden v. Brittain
United States ex rel. Cerullo v. Follette
United States ex rel. Norris v. Swope
Warm Spgs. Dam v. Gribble, 2 Rapp 885
Winston-Salem/Forsyth County Bd. of Ed. v. Scott

LABOR LAW
Atlantic Coast Line R.R. v. BLE
Commonwealth Oil Ref. Co. v. Lummus Co.
Cunningham v. English
English v. Cunningham
McLeod v. General Elec. Co.
Mori v. Boilermakers
Railway Labor Executives' Assn. v. Gibbons
United States Postal Service v. Letter Carriers
Western Airlines, Inc. v. Teamsters

LOWER COURT
Application for Relief Pending Below
KPNX Broadcasting Co. v. Arizona Superior Ct.

Argument Not Raised Below
Stroup v. Willcox

Explanation for Decision not Given
Febre v. United States

Extraordinary Circumstances no Lower Court Ruling on Stay
Brussel v. United States
Heckler v. Turner
Nebraska Press Assn. v. Stuart, 2 Rapp 675
Volkswagonwerk A.G. v. Falzon
Western Airlines, Inc. v. Teamsters

Relief Not Sought Below
Dolman v. United States
Drummond v. Acree
Nebraska Press Assn. v. Stuart, 2 Rapp 668
Oden v. Brittain
United States ex rel. Cerullo v. Follette
United States ex rel. Norris v. Swope

Relief Not Sought Below (cont'd)
Warm Spgs. Dam v. Gribble, 2 Rapp 885
Winston-Salem/Forsyth County Bd. of Ed. v. Scott

MANDATE
Recall
County Sch. Bd. of Arlington v. Deskins
Wise v. Lipscomb

Stay of
Appalachian Power Co. v. AICPA
Birtcher Corp. v. Diapulse Corp.
Blum v. Caldwell
Board of Education v. Taylor
California v. American Stores Co.
Curry v. Baker
Dennis v. United States
Edelman. v. Jordan
Gregg v. Georgia
Ludecke v. Watkins
McDaniel v. Sanchez
Mikutaitis v. United States
Miroyan v. United States
Montanans for Balanced Fed. Budget v. Harper
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1185
Panama Canal Co. v. Grace Lines, Inc.
Pryor v. United States
Sacher v. United States
Sumner v. Mata
Tri-Continental Financial Corp. v. United States
Tuscarora Nation of Indians v. Power Authority

MIRANDA WARNINGS
California v. Braeseke
California v. Prysock
Fare v. Michael C.

ORIGINAL ACTION
Injunction
Penn. v. Wheeling & Belmont Bridge Co.

POLITICAL QUESTIONS
Kaine, Ex parte

PRESIDENTIAL POWER
Kaine, Ex parte
Merryman, Ex parte

PRIVACY RIGHTS
Whalen v. Roe

REAPPLICATION
Previously Denied
Alexis I. Du Pont Sch. Dist. v. Evans
Bandy v. United States, 1 Rapp 252
Bustop. Inc. v. Board of Ed. of L.A., 2 Rapp 879
Clements v. Logan
Columbus Bd. of Ed. v. Penick
Dayton Bd. of Ed. v. Brinkman, 2 Rapp 855
Drummond v. Acree
Waller, Ex parte
Gregory-Portland Independent School Dist. v. United States
Holtzman v. Schlesinger, 2 Rapp 602
Lenhard v. Wolff, 3 Rapp 931
Levy v. Parker
Little v. Ciuros
Nebraska Press Assn. v. Stuart, 2 Rapp 675
New York Times v. Jascalevich, 2 Rapp 816
New York Times v. Jascalevich, 2 Rapp 824
Noyd v. Bond
Reproductive Services v. Walker, 2 Rapp 808
Reproductive Services v. Walker, 2 Rapp 851
Republican State Central Comm. v. Ripon Soc'y.
Richardson, In re
Spenkelink v. Wainwright, 2 Rapp 911
Stickney v. Texas
Tierney v. United States
Travia v. Lomenzo

Previously Granted
Chambers v. Mississippi

RECUSAL
Cheney v. United States District Court
Hanrahan v. Hampton
Laird v. Tatum
Microsoft Corp. v. United States
Public Utilities Comm'n of D.C. v. Pollak

REFER TO FULL COURT
Marcello v. United States
Spies v. Illinois

REHEARING
Boumediene v. Bush

Stay Pending
Dennis v. United States
Flynn v. United States
Gregg v. Georgia
Kadans v. Collins
Richmond v. Arizona
Sacher v. United States

RESTRAINING ORDER, STAY OF
Land v. Dollar

REVERSED PREVIOUS JUSTICE
Schlesinger v. Holtzman, 2 Rapp 607

SCHOOL DESEGREGATION/ SEGREGATION
Alexander v. Board of Education
Alexis I. Du Pont Sch. Dist. v. Evans
Board of Ed. of L.A. v. Superior Court of Cal.
Board of School Comm'rs v. Davis
Board of Education v. Taylor
Buchanan v. Evans
Bustop, Inc. v. Board of Ed. of L.A., 2 Rapp 870
Columbus Bd. of Ed. v. Penick
Corpus Christi School Dist. v. Cisneros
County Sch. Bd. of Arlington v. Deskins
Dayton Bd. of Ed. v. Brinkman
Dayton Bd. of Ed. v. Brinkman
Drummond v. Acree

SCHOOL DESEGREGATION/ SEGREGATION (cont'd)
Edgar v. United States
Gomperts v. Chase
Gregory-Portland Indep. Sch. Dist. v. U.S.
Jefferson Parish School Bd. v. Dandridge
Keyes v. School Dist. No. 1, Denver
Guey Heung Lee v. Johnson
Metropolitan County Bd. of Ed. v. Kelley
Pasadena City Bd. of Ed. v. Spangler
South Park Indep. Sch. Dist. v. U.S.
Vetterli v. United States District Court
Winston-Salem/Forsyth County Bd. of Ed. v. Scott

SEALED MATERIAL
Doe v. Gonzales

SIXTH AMENDMENT
Berg, In re
Kentucky v. Stincer
Merryman, Ex parte
Russo v. Byrne
Tierney v. United States

STATE LAW
Associated Press v. District Court
Clark, Ex parte
Cote v. New Hampshire
Frank v. Georgia, 4 Rapp 1521
Hurst v. West Virginia
Hysler v. Florida
Simon, In re
Wilson v. O'Malley

Presumptively Valid
Brown v. Gilmore

State Law Question
Akel v. New York
Birtcher Corp. v. Diapulse Corp.
Bustop, Inc. v. Bd. of Ed. of L.A., 2 Rapp 870
Catholic League v. Fem. Women's Health Ctr.
Chesapeake Western Co. v. Murray
Day v. Louisiana Western Railroad Co.
DeBoer v. DeBoer
Hile v. Baker
Montanans for Balanced Fed. Budget v. Harper
National Broadcasting Co. v. Niemi
Pacific Tel. & Tel. v. Public Util. Comm'n of Cal.
Republican National Committee v. Burton
Roller v. Murray, 4 Rapp 1579
Roller v. Murray, 4 Rapp 1582
Roller v. Murray, 4 Rapp 1583
Sulzer v. Sohmer
Thomas v. South Side Elevated Railroad Co.
Uhler v. AFL-CIO
Uphaus v. Wyman

STAY
Marcello v. Brownell

Standard for Grant
Kenyeres v. Ashcroft

Temporary
Clements v. Logan
Cooper v. New York
Eckwerth v. New York, 1 Rapp 216
Evans v. Atlantic Richfield Co.
Flynn v. United States
Gen'l Council of F&A v. Sup. Ct., 2 Rapp 852
Kenyeres v. Ashcroft
National League of Cities v. Brennan
Rockefeller v. Socialist Workers Party
Russo v. United States
Strickland Transportation Co. v. United States
Yasa v. Esperdy

SUBPOENA
New York Times v. Jascalevich, 2 Rapp 803
New York Times v. Jascalevich, 2 Rapp 816
Packwood v. Senate Select Comm. on Ethics
Rubin v. United States Independent Counsel

TENTH AMENDMENT
Merryman, Ex parte

TIME TO ACT
Capitol Square Review & Advisory Bd. v. Pinette
Columbus Bd. of Ed. v. Penick
Grubbs v. Delo
Levy v. Parker
Los Angeles NAACP v. Los Angeles Unified School Dist.
Louisiana v. United States
Matthews v. Little
Montgomery v. Jefferson
Moore v. Brown
National League of Cities v. Brennan
Republican Party of Hawaii v. Mink
Spencer v. Pugh

TIME TO FILE
N.E. Water Works v. Farmers' Loan

TREASON
Merryman, Ex parte

TREATIES
Kaine, Ex parte
Kaine, In re

United Nations Convention Against Torture
Kenyeres v. Ashcroft

VACATE STAY, APPLICATIONS TO
Alexander v. Board of Education
Barnstone v. University of Houston
Block v. North Side Lumber Co.
Bonura v. CBS Inc.
Certain Named and Unnamed Children v. Texas
Chabad of Southern Ohio v. Cincinnati
Coleman v. Paccar, Inc.
CFTC v. British Am. Commodity Options
Doe v. Gonzales
FCC v. Radiofone Inc.
Garcia-Mir v. Smith

VACATE STAY, APPLICATIONS TO (cont'd)
Haywood v. National Basketball Assn.
Henry v. Warner
Holtzman v. Schlesinger, 2 Rapp 590
Holtzman v. Schlesinger, 2 Rapp 602
Karr v. Schmidt
Keyes v. School Dist. No. 1, Denver
King v. Smith
Mallonee v. Fahey
Meredith v. Fair
Metropolitan County Bd. of Ed. v. Kelley
Murdaugh v. Livingston
Nat'l Farmers Ins. v. Crow Tribe, 3 Rapp 1211
New York v. Kleppe
O'Connor v. Board of Ed. of School Dist. 23
Office of Personnel Mgmt. v. Gov't Employees
Orloff v. Willoughby

Authority to Vacate
Certain Named and Unnamed Children v. Texas
Coleman v. Paccar, Inc.
CFTC v. British Am. Commodity Options
Holtzman v. Schlesinger, 2 Rapp 590
Meredith v. Fair
New York v. Kleppe
O'Connor v. Board of Ed. of School Dist. 23

Remand Order
Blodgett v. Campbell

Stay of Execution
Kemp v. Smith, 3 Rapp 1133
Kemp v. Smith, 3 Rapp 1155
Netherland v. Tuggle
Netherland v. Gray

[Publisher's note: This opinion is also available in the *Federal Reporter* at 29 F. 775 (C.C.N.J. 1887); *see also Ex parte Lamar*, 274 F. 160, 175 (2d Cir. 1921).]

UNITED STATES *v.* PATTERSON, Keeper, etc.

(*Circuit Court, D. New Jersey*. January 31, 1887.)

On *Habeas Corpus* for the body of Oscar L. Baldwin. The petition for *habeas corpus* in this case was presented to JOSEPH P. BRADLEY, an associate justice of the supreme court of the United States, allotted to the Third circuit, on the thirtieth of December, 1886, and alleges that the petitioner, Oscar L. Baldwin, is imprisoned in the state's prison of the state of New Jersey, in custody of John H. Patterson, the keeper thereof, under judgment, sentence, and commitment thereon of the district court of the United States for the district of New Jersey, said judgment being rendered on the thirty-first day of January, 1882, upon petitioner's plea of guilty to three indictments found against him under section 5209 of the Revised Statutes of the United States, — one for misapplying the funds of the Mechanics' National Bank of Newark, of which he was cashier, one for false entries to conceal such misapplication, and the third for making a false statement with intent to deceive the examining officers; that, being set at the bar of said district court for sentence, the same was pronounced against him in the following words, as recorded in the records of said court, to-wit:

> "The court do order and adjudge that the prisoner, Oscar L. Baldwin, be confined at hard labor in the state's prison of the state of New Jersey , for the term of five (5) years upon each of the three indictments above named, said terms not to run concurrently; and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

— That, immediately upon the rendition of said judgment and sentence, the petitioner was committed to the custody of the keeper of said state's prison, and that from thence hitherto he has been and is now kept in said state's prison, at hard labor, according to all the rules and regulations of said prison, the same established and carried on in the case of all persons convicted under the laws of New Jersey, and sentenced to hard labor by its courts; that by the laws of said state the keeper of the state's prison is required to have kept a correct, impartial, daily record of the conduct of each prisoner, and of his labor, whether satisfactory or otherwise, and to lay the same before the inspectors as often as they may require; that the said inspectors, being satisfied that the record is properly kept, shall di-

rect the keeper, for every month of faithful performance of assigned labor by any convict, to remit to him two days of the term for which he was sentenced; for every month of manifest effort at intellectual improvement and self-control, to be certified by the moral instructors, one day; provided, that in any month in which a convict shall have merited and received punishment no such remission shall be made, and, in case of any flagrant misconduct, the inspectors may declare a forfeiture of the time previously remitted, either in whole or in part, as to them shall seem just; that, on the recommendation of the keeper and moral instructor, it shall be lawful for the inspectors to remit an additional day per month to every convict who for 12 months preceding shall have merited the same by his continuous good conduct, and for each succeeding year, progressively, to increase the remission one day per month for that year.

The petitioner states that, by virtue of the 5544th section of the Revised Statutes of the United States, he is entitled to the benefit of these regulations; and that by reason of his good behavior he became entitled to and has been awarded such credits; and that by force thereof such deductions have been made from the said term of five years, for which he was sentenced, that said term expired and came to an end on the twenty-fifth day of January, 1886, a remission of 372 days having been allowed to him; also that the costs of prosecution of said indictments have been fully paid. The petitioner further states that he is advised by his counsel that he is not now detained in custody in said state's prison by virtue of any sentence; that a second term of five years' imprisonment has not begun, and will not begin, till the thirty-first day of January, 1887; and that he is therefore unlawfully detained in prison. He also, upon the same advice, contends that the judgment was unlawful, because it sentenced him to imprisonment at hard labor, whereas section 5209 of the Revised Statutes of the United States, under which he was indicted, imposed the punishment of imprisonment only. Also that no more than one sentence of five years' imprisonment could lawfully be imposed upon him under the said section, inasmuch as said offenses were each acts forming part of one act of misapplication of moneys. Also that the said sentence is unlawful for uncertainty, except as to the first term of five years' imprisonment, which has expired, and that the court had no lawful right or authority to impose any more than one term of five years' imprisonment on him. A duly-exemplified copy of the three indictments, and the proceedings thereon, and of the sentence pronounced against the petitioner, and of the award of remission of penalty by the inspectors of the state's prison, as stated in the petition, was annexed thereto, confirming the statement of facts set forth therein.

Upon this petition being presented to the said justice of the supreme court he allowed a writ of *habeas corpus* as prayed, and on the seventh

day of January, 1887, the same was duly returned before the said justice, at his chambers, in the city of Washington. The return set forth as the cause of imprisonment the warrant of commitment by virtue of which the petitioner was detained in custody, and which consists of a statement of the three indictments, by their several titles, with a copy of the sentence as set out in the petition, duly certified by the clerk of the said district court. The return further states that it appears by the receipt of said clerk, under his seal, that the costs of the prosecution have been paid; also that, upon the books of the prison, the petitioner appears entitled to a remission from the first of the three terms of imprisonment of 372 days, whereby the period of his punishment under the same expired on the twenty-fifth day of January, 1886.

Annexed to the return is a writing signed by the petitioner and his counsel, waiving all right to the production of his body according to the command of the writ, before the judge issuing the same, and requesting the said judge to proceed to inquire into the cause of his detention, and give judgment thereon without such production. And a supplemental return of the keeper was presented, containing a copy of said waiver and consent, and certifying that in consequence thereof the refrains from producing the said body, but avows his readiness, and submits, to produce the same to answer any order which may be made by said judge.

Cortlandt Parker, for petitioner.

Job H. Lippincott, U.S. Dist. Atty., *contra*.

BRADLEY, Justice. I have duly considered the matter aforesaid, and will proceed to state the conclusion to which I have come, and the reasons thereof. It is manifest that the judgment or sentence in this case is uncertain in this respect: it imposes the penalty of imprisonment at hard labor in the state's prison for the term of five years upon each indictment, and adds that the said terms shall not run concurrently, but does not specify upon which indictment either of said terms of imprisonment is to be undergone. If the prisoner is to be detained in prison for three successive terms, neither he, nor the keeper of the prison, nor any other person, knows, or can possibly know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If, for any reason peculiar to either of said indictments, as, for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell

whether it was the sentence for the first, the second, or the last term of imprisonment. Without the last words of the sentence, declaring that the terms of imprisonment should not run concurrently, it would be sufficiently clear and certain. It would then, by force of law, be a sentence of five years' imprisonment on each indictment, and each sentence would begin to run at once, and they would all run concurrently. Such a sentence is lawful and proper. But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void.

The words used are undoubtedly equivalent to the words, 'the said terms shall follow each other successively.' But, if these words had been used, the case would not have been different. The inherent vice of being insensible and incapable of application to the respective terms, without specifying the order of their succession, would still exist. The joint sentence is equivalent to three sentences, one on each indictment. One of them is applicable to the indictment for misapplication of funds; but, if they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered.

If this were a mere error, it could not be considered on *habeas corpus*. The judgments of the district and circuit courts in criminal cases are final, and cannot be reviewed by writ of error, and a mere error of law, if in fact committed, is irremediable; as much so as are the decisions of the supreme court. But if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on *habeas corpus*.

I do not say that the judgment in this case is void. It is a good judgment for the term of five years' imprisonment on each indictment. Perhaps these terms might have been lawfully made to take effect successively, if the order of their succession had been specified, although there is no United States statute authorizing it to be done. But this was not done. No distinction was made between them in this respect, and, as neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment. The additional words as to non-concurrence are void, because they are inca-

pable of application. It is as if a man should be sentenced to successive terms of imprisonment on each of several indictments, and to hard labor, or to be kept on bread and water, during one of the terms, without specifying which. The latter part of such a sentence would clearly be void, for it could not be allowed to the jailer to exercise his discretion as to the application of the aggravated penalties.

If there were any way in which the district court could amend its judgment, the case might perhaps be different. But I see no way in which it could do so without passing a new sentence, and that it could not do now, after the term has passed, and after one term of imprisonment has been suffered. What right would the court have now to determine that the expired term was due to any particular indictment more than to either of the others?

I have carefully read the able opinion of the supreme court of New Jersey in the case of *Gibbs* v. *State*, 45 N.J. Law, 379, and agree to all that the court there says as to the right of a criminal court to extend its judgment and proceedings on the record in proper form, regardless of imperfections in the minutes of its clerk. But in the present case there are no materials in existence for altering the form of the judgment under consideration, — at least nothing but what may rest in the bosom of the judge; and for him to resort to his memory at this day to alter the judgment would be to render a new judgment. It is unnecessary to say that the honorable judge of the district court would not adopt a proceeding so questionable and hazardous. The district attorney has supplied me with a certified copy, *literatim*, with all the erasures and interlineations of the rough minutes; but they exhibit nothing upon which the court could base any substantial alteration in the judgment as recorded.

In this view of the case, it is unnecessary to consider the other questions raised by the petition, and by the prisoner's counsel on the argument. But it does suggest another question which cannot be entirely overlooked. When the *habeas corpus* was allowed, the first term of five years had not expired by lapse of time, although at least one of the sentences had been satisfied by means of the remissions allowed for good conduct. Considering the three terms of imprisonment as by law running concurrently, do those remissions apply to all three of the sentences, or to only one of them? If to only one, and I had to decide this case, as in ordinary civil actions, according to the state of things when the writ was issued, I might be obliged to remand the petitioner into custody, and put him to the expense and trouble of another writ. But I think that on a *habeas corpus*, where the personal liberty of the citizen is involved, the decision should be made upon the actual *status* of the case. And as the five years have now entirely elapsed, and all the concurring terms have been fulfilled, the question of the applicability of the remission for good conduct to all the

sentences may be waived, and the prisoner be lawfully discharged, without deciding it. He is discharged accordingly.

[Publisher's note: This case should be captioned *In re Heath*. Chief Justice Fuller's handwritten opinion (signed in his hand) is referred to but not quoted in a "Statement by Mr. Chief Justice Fuller" at the beginning of the Supreme Court's decision in the case. From the Melville Weston Fuller Papers, Box 16, Manuscript Division, Library of Congress, Washington, DC; *see also In re Heath*, 144 U.S. 92 (1892).]

Supreme Court of the United States.
October Term 1891

In the matter of the petition of
Thomas ~~James~~ H Heath

for a writ of error to the
Supreme Court of the District
of Columbia

It appearing upon an examination of the petition, assignment of errors and record, that upon this application for a writ of error, a question arises in respect to the jurisdiction of this court, of sufficient gravity to render it proper that the application should be made to the court in session: It is ordered that the petitioner have leave and he is hereby directed to present his application to the court in open session on Monday next, January 25th, for argument upon the question of jurisdiction, and that notice of this order be at once given to the United States, and ~~it is ordered that~~ a copy of the brief for the petitioner be served not later than Friday, January 22d.

/s/ Melville W. Fuller
Chief Justice of the
United States

January 18, 1892

[Publisher's note: This case should be captioned *In re Richardson*. The opinion is in typescript, with "(copy)" handwritten at the top of the first page, and Justice Harlan's signature in his own hand at the end. From the Melville Weston Fuller Papers, Box 5, Manuscript Division, Library of Congress, Washington, DC; *see also* Letters from John M. Harlan to Chief Justice Fuller, Aug. 17 & 24, 1896, *in* Melville Weston Fuller Papers, Box 5, Manuscript Division, Library of Congress, Washington, DC; *State v. Richardson*, 24 S.E. 1028 (S.C. 1896).]

Washington, D.C., August 24th, 1896.

Dear Mr. Barrett:

I have your letter of the 21st, in which it is said that you were specially desirous that I should act on the application for the allowance of an appeal in the case of Aleck Richardson from the order of the Circuit Court of the United States denying his application for the writ of *habeas corpus*. The members of our court do not, in the first instance, unless in some cases requiring immediate action, pass upon applications for writs of error or appeals in cases beyond their respective circuits. In accordance with that custom, the papers you sent to me were transmitted to the Chief Justice, who, as I learn from your latter, has refused to allow an appeal.

You have the technical legal right to apply for your client to each one of the Justices of the Supreme Court, and I therefore take your letter to be substantially an application to me. Before the papers were sent to the Chief Justice, I examined them, and reached the same conclusion that he did. The only ground assigned in the papers sent by you for granting the writ is that your client was tried by a jury composed entirely of white men. It is not claimed that this resulted from any statute of the State excluding blacks from serving on juries, because of their race. If, therefore, any black man was, because of his race, excluded from the jury in Richardson's case, it was error on the part of the court in the trial, which was to be remedied by writ of error, not by *habeas corpus*. The Constitution of the United States does not secure to a black man the right to be tried by a jury composed in whole or in part of men of his race, nor does it secure to a white man the right to be tried by a jury composed in whole or in part of men of his race. The Constitution only secures to each person the right to be tried by a jury from which is not excluded, because of his race, any citizen, otherwise qualified, of the same race as that of the accused. *Ex parte Royall, 117 U.S. 241, 252, 252; In re Wood* [Publisher's note: "*In re Wood*" should be "*Wood v. Brush*"]*, 140 U.S. 278, 289; Gibson v. Missippii* [Publisher's note: "*Missippii*" should be "*Mississippi,*"] 162 U.S. 565. If you will read these cases you will perceive that there was not the slightest reason for the interference by the Circuit Court of the United States upon *habeas corpus* with the final action of the State Court, and

therefore the application for an appeal from the order of the Circuit Court denying the application made to it ought not to be granted. I should feel otherwise about this application if I could perceive that there was any possibility whatever that the Supreme Court would entertain jurisdiction of the case and consider it upon its merits. If the appeal were allowed, it would be dismissed on motion. The careless allowance of appeals in such cases has no other effect than to interfere with the ordinary administration of the criminal laws of the State. If the State court in the trial of the case has denied to the accused any right secured to him by the Constitution and laws of the United States, his remedy is not by *habeas corpus*. *Pepke vs Cronan, 155 U.S. 100; Andrews vs Swartz, 155* [Publisher's note: "*155*" should be "*156*"] *U.S. 272* [Publisher's note: There should be a period at the end of this sentence.]

Yours truly,
/s/ John M. Harlan

Mr. C.P. Barrett,
Spartanburgh, S.C.

[Publisher's note: This case should be captioned *Haack v. Brooklyn Labor Lyceum Association*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 2, Manuscript Division, Library of Congress, Washington, DC; *see also Haack v. Brooklyn Labor Lyceum Association*, 87 N.Y.S. 814; 87 N.Y.S. 814; 89 N.Y.S. 888 (Sup. Ct. 1904); 97 N.Y.S. 1136 (Sup. Ct.); 78 N.E. 1104 (N.Y. 1906); 107 N.Y.S. 1128 (Sup. Ct. 1907).]

Canton O. June, 29, 1906

Mr. Percival S. Menken, Counsellor etc.
c/o Menken Brothers,
87 Nassau St. New York

Dear sir:-

I am in receipt of your letter of the 26 inst. Also by express records in cases Haak V. [Publisher's note: "Haak V." should be "Haack v."] Brooklyn Labor Lyceum Association.

I note your statement of the cases and grounds upon which you claim to have the right of a writ of error to the Supreme Court of the United States.

After examination of the records I am of the opinion that no federal question appears upon the record in suchwise as to entitle you to an allowance of thewrit. [Publisher's note: "thewrit." should be "the writ."]

I therefore return to you by express today the records and papers received from you.

very truly yours,

/s/ William R. Day

[Publisher's note: This case should be captioned *Fairbanks Steam Shovel Co. v. Wills*. The originals of the two letters that make up this opinion were typed and recorded, with Justice Day's signature on each, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC; *see also Fairbanks Steam Shovel Co. v. Wills*, 240 U.S. 642 (1916).]

Feb. 20, 1914.

My dear Sir:

I have your favor of the 18th inst., asking for allowance of appeal in the case of The Fairbanks Steam Shovel Co. v. William V. Wills, Trustee in Bankruptcy of the Estate of the Federal Contracting Co. The papers which you sent are evidently made out for allowance by the presiding Judge of the Circuit Court of Appeals for the Seventh Circuit, in which the case was decided. That Circuit is assigned to Justice Lurton, and ordinarily you would be required to make the application to him. Owing to the fact that Justice Lurton is temporarily absent, I am willing to consider your petition for allowance of appeal, although myself assigned to the Sixth Circuit.

I am inclined to allow the appeal, and suggest that you revise your papers to that it will appear that the allowance is made by me as a Justice of the United States Supreme Court, and reform the other papers accordingly. I notice that you have given person surety on the bond; I think it would be better if you would have it signed by some responsible surety company.

I herewith return the paper which, upon revision, you may send to me again.

Very truly yours,

/s/ William R. Day

E.B. Durfee, Esq.
Scofield, Durfee & Scofield
Marion, Ohio.

[Publisher's note: A handwritten "539" and a check mark appear at the top of the February 23 letter.]

Feb. 23, 1914.

My dear Sir:

I am in receipt of yours of the 21st inst., enclosing papers for allowance of appeal in the case of The Fairbanks Steam Shovel Co. v. Willis

[Publisher's note: "Willis" should be "Wills".], Trustee, etc. I return them herewith, with order allowing appeal and citation signed and bond approved, as requested.

Very truly yours,

/s/ William R. Day

E.B. Durfee, Esq.
Scofield, Durfee & Scofield
Marion, Ohio.

[Publisher's note: This opinion was typed on a sheet of plain paper, with "OFFICE OF THE CLERK SUPREME COURT, U.S." stamps dated "Aug 30 1956" in the upper left and right corners, and an autograph signature of Justice Reed and "August 29th 1956" written at the bottom. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 29 (OT56 St-Z; OT57 A-Hig); *see also Stanley v. United States*, 245 F.2d 427 (2d Cir. 1957).]

SUPREME COURT OF THE UNITED STATES

Jack Stanley, Thomas A. Warren, Isom Meyers and Hubert Stanley, Appellants,	)	
vs.	)	On Motion for Bail
United States of America, Appellee	)	

The appellants were convicted for violation of 18 U.S.C. § 1992 for setting fire to a bridge with intent to derail, disable or wreck interstate trains or other transportation units of an interstate railroad. Transcript of Testimony, Vol. I, p. 52 et seq. The District Court denied their motion for bail pending appeal on the grounds that the appeal is "frivolous and for delay." Motion for Bail, Ex. B. Circuit Judge Miller subsequently denied the same motion on the same grounds. Motion for Bail, Ex. C.

The principal point urged by appellants is that burning the bridge did not necessarily mean with intent to disable or derail a transportation unit. The defense contends that it knew the railroad was inspected before trains passed and therefore they could not have intended to wreck or disable a train. See Motion for Bail, p. 3.

Under the instructions, Transcript of Testimony, Vol. V, p. 636, Judge Ford instructed that an essential factor was "the purpose, the object to be attained, to derail or to disable or to wreck a railroad train that was used in interstate commerce." There was no objection to this instruction and the point now made was not brought out by appellants, see Transcript of Testimony, Vol. V, pp. 648-649, as well as the objections of Mr. Brown, p. 653 et seq.

The effort for review here seems frivolous and merely for delay. Cf. Ward and Bowers v. United States, on petition for admission to bail, opinion August 8, 1956, Mr. Justice Frankfurter as Circuit Justice.

August 29th
1956

/s/ Stanley Reed
Associate Justice

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Burton on the motion itself and dated "December 22, 1956". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 28 (OT56 Fil-Sch); *see also In re Portell*, 245 F.2d 183 (7th Cir. 1957).]

December 26, 1956.

Morris A. Shenker, Esquire,
408 Olive Street, Suite 802,
St. Louis, Missouri.

RE: UNITED STATES OF AMERICA V. PORTELL

Dear Mr. Shenker:

This letter is in confirmation of the action in the above-entitled case by Justices Burton and Douglas, respectively, and in confirmation of telegrams dispatched to you by this office on December 22nd and 24th, with respect to such action.

On December 22nd, Mr. Justice Burton denied the application for admission to bail in the following language:

> "December 22, 1956 -
>
> Upon consideration of the within motion, filed December 17, 1956, to admit to bail to appellant, who is now in custody pursuant to a commitment for civil contempt, and the brief in support of such motion, together with the memorandum for the United States, filed to-day, in opposition and a transcript of the contempt proceedings in the District Court of November 29 and December 6, 1956, and noting the denial by the District Court and the Court of Appeals on similar motions for bail, oral argument here is deemed unnecessary, and the motion for admission to bail is denied.
>
> Treating such motion also as an application to stay the execution of the civil contempt order, such application is denied.
>
> HAROLD H. BURTON
> Associate Justice assigned as Circuit
> Justice to the Seventh Judicial Circuit."

On December 24th, Mr. Justice Douglas denied the application, referred to herein, with the simple endorsement

"Denied - Wm. O. DOUGLAS - 12/24/56."

Very truly yours,
JOHN T. FEY, Clerk
BY

CJDG:tw Deputy.

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Frankfurter on the application itself and dated "Aug. 7/57". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 28 (OT56 Fil-Sch); *see also Oerlikon Machine Tool Works Buehrle & Co. v. United States*, 151 F. Supp. 332 (Ct. Cl. 1957).]

August 7, 1957

Ralph A. Gilchrist, Esq.
1200 - 18th Street, N.W.
Washington 6, D.C.

RE: OERLIKON MACHINE TOOL WORKS
BUEHRLE & CO. v. UNITED STATES:

Dear Sir:

Confirming our telephone conversation, I quote below the endorsement of Mr. Justice Frankfurter on your application for an extension of time within which to file a petition for certiorari in the above-entitled cause:

> "To change counsel the last day for filing a petition for certiorari — particularly since no suggestion is even offered that original counsel were incompetent — is, for me, a wholly inadmissible reason for granting an extension."
>
> Aug. 7/57 Frankfurter, J.

Yours truly,
JOHN T. FEY, Clerk
By

E.P. Cullinan,
Deputy.

EPC:ht

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Frankfurter on the motion itself and dated "July 16/58". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 35 (OT58 Ne-Tu); *see also Ramirez-Pabon v. Board of Personnel of Puerto Rico*, 254 F.2d 1 (2d Cir. 1958).]

July 16, 1958

Santos P. Amadeo, Esq.
Professor of Law
University of Puerto Rico
San Juan, Puerto Rico

RE: PASON [Publisher's note: "PASON" should be "PABON".] v. BOARD OF PERSONNEL OF PUERTO RICO, ETC., No. ---, October Term, 1958:

Dear Sir:

Your application for an extension of time to file a petition for certiorari, together with a certified copy of the record, was presented to Mr. Justice Frankfurter who has today endorsed thereon:

> "Petitioner is asking for an extension of time to file a certiorari at a time when she had thirty days remaining within which to file such a petition. The reason for the request is 'inability' to get counsel other than the one who represented petitioner in the Court of Appeals. This is not, in my view, considering the merits of the case, a sufficient reason to extend the statutory period of ninety days. The most plausible grounds for a petition for certiorari can be briefly stated. Application denied."

The certified record accompanying your application is returned herewith.

Very truly yours,
JOHN T. FEY, Clerk
By

E.P. Cullinan,
Deputy.

Encl.
EPC:ht
AIRMAIL

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a typewritten version (signed and dated "1/31/59 1^{30} pm" in Chief Justice Warren's hand) inserted at the bottom of the motion itself. Also inserted on the motion was an intermediate order (signed and dated "1/30/59 1^{am}" in Chief Justice Warren's hand) that reads as follows:

> This motion does not conform to our Rule 35 in that it fails to state the grounds on which it is based and is not accompanied by proof of service on respondents. If counsel desire they may supply these defects by five o'clock p.m. today. Respondents may, if they desire, file a response by eleven o'clock tomorrow morning, and the motion will be decided on the papers.

From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 33 (OT58 A-Dar); *see also Hamm v. County School Bd. of Arlington County, Va.*, 263 F.2d 226 (4th Cir. 1959).]

February 2, 1959

Frank L. Ball, Esq.
Ball Building
Court House Road
Arlington, Va.

RE: COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL. v. DESKINS, ET AL.

Dear Mr. Ball:

Confirming our telephone conversation of Saturday, January 31, I quote below the order entered by the Chief Justice on January 31 in the above-captioned cause:

> "Upon consideration of the memorandum in support of the application and of the opposition thereto, I conclude that the test of extraordinary showing required in these circumstances by Magnum Import Co. v. Coty, 262 U.S. 159, 164, has not been met.

"The 'Motion for Recall and Stay of Mandate of the United States Court of Appeals for the Fourth Circuit' is denied."

1/31/59 1^{30} p.m. /S/ Earl Warren
C.J.

Very truly yours,
JAMES R. BROWNING, Clerk
By

E.P. Cullinan,
Deputy.

EPC:ht
cc: James H. Simmonds, Esq.
1500 N. Court House Road
Arlington, Va.

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Whittaker on the motion itself and dated "June 29, 1959". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 35 (OT58 Ne-Tu); *see also Shelton v. Tucker*, 364 U.S. 479 (1960).]

June 29, 1959

Robert L. Carter, Esquire
20 West 40th Street
New York 18, N.Y.

RE: SHELTON, ET AL. v. McKINLEY, ET AL.

Dear Sir:

Your application for stay in the above-entitled case was presented to Mr. Justice Whittaker, who was returned it to this office with the following endorsement:

"The challenged portion of the Judgment rejected appellants contention that Act 10 is unconstitutional and thus left that Act standing. The requested "stay" of that portion of the Judgment, if granted, would still leave that Act standing and be fruitless. What appellants appear, inferentially and in effect, to ask is that I, a single Justice, issue an injunction, enjoining not the challenged portion of the Judgment but Act 10 itself pending determination by this court of appellants appeal. That I decline to do. This application is therefore denied. Charles E. Whittaker. June 20 [Publisher's note: "20" should be "29".], 1959."

Very truly yours,
JAMES R. BROWNING, Clerk
By

Michael Rodak, Jr.
Assistant

MRjr:jmh

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Black on the application itself and dated "July 20, 59". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 38 (OT59 Gu-Na); *see also Keith v. New York*, 1 Rapp 218 (Harlan, J., in chambers); 359 U.S. 998 (1959).]

July 20, 1959

Nathan Kestnbaum, Esquire
110 East 42nd Street
New York 17, New York

RE: LEROY KEITH VS. NEW YORK

Dear Sir:

This is the advise you that Mr. Justice Black today denied the application for stay of execution in the above case with the following endorsement thereon:

> "Application for stay denied. The questions presented here in this new independent proceeding were apparently all presented to the court in the original petition for certiorari and I am unable to find any circumstances that lead me to believe four votes for certiorari here could be enlisted.
>
> July 20, 1959 Hugo L. Black"

Mr. Justice Stewart has also denied the application for stay with the endorsement "Denied. July 20, 1959."

Yours truly,
JAMES R. BROWNING, Clerk
By

R. J. Blanchard
Deputy

RJB:erl
cc: Irving Anolik, Esq.
Assistant Dist. Attorney
County of Bronx
New York, New York

[Publisher's note: This opinion was typed on a sheet of plain paper. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 37 (OT59 Bunn-Gr).]

September 28, 1959

Fred Crane, Esquire
P.O. Box 200
Fairbanks, Alaska

RE: DEERE v. UNITED STATES

Dear Sir:

This will confirm my telegram of today's date, and advise you that your application for stay of execution in the above-entitled cause was presented to Mr. Justice Black, who returned it to this office with the following endorsement thereon:

> "Petition for stay of execution denied since the facts set out in the present application fail to show that certiorari is available under timeliness provisions of Rule 22. Hugo L. Black, Associate Justice. September 25, 1959."

Very truly yours,
JAMES R. BROWNING, Clerk
By

R.J. Blanchard
Deputy

RJB:jmh

AIR MAIL

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a typewritten version (initialed in Justice Harlan's hand and dated "April 4, 1960") attached the motion itself. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 37 (OT59 Bunn-Gr); *see also United States v. Guterma*, 281 F.2d 742 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960); *Guterma v. United States*, 1 Rapp 245 (1960).]

April 5, 1960

Emanuel Eschwege, Esquire
200 West 57th Street
New York 19, New York

RE: EVELEIGH v. UNITED STATES

Dear Sir:

I write to advise that Mr. Justice Harlan on April 4th denied the application for bail pending appeal in the above case. The Justice has attached the following memorandum to the application:

> "Petitioner's application for bail pending appeal was considered by the District Court and the Court of Appeals in conjunction with that of petitioner's co-defendant Guterma. Having considered the papers submitted by both sides, I am constrained to deny this application for the reasons stated in my Memorandum of March 18, 1960, denying a similar application of Guterma.
>
> (S) JMH
> J.M.H.
> April 4, 1960."

I am enclosing a copy of the Justice's memorandum in the case of Guterma v. United States.

Very truly yours,
JAMES R. BROWNING, Clerk
By

E.P. Cullinan
Deputy

EPC:vmg
Enclosure

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Frankfurter on the application itself and dated "July 5/60". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also In re Harvey*, 168 N.E.2d 715 (N.Y. 1960).]

July 5, 1960

Ralph L. Ellis, Esq.
Manning, Harnisch, Hollinger & Shea
41 East 42nd Street
New York 17, N.Y.

IN THE MATTER OF ROBERT E. HARVEY

Dear Mr. Ellis:

I write to advise you that Mr. Justice Frankfurter has today endorsed the following upon your application for stay In the Matter of Robert E. Harvey:

> "Careful consideration leaves me with the firm conviction that the grounds on which a petition for certiorari is to be made are so unmeritorious that balancing the remoteness of its being granted with the threatened mooting for the State of Washington's proceedings, for which the books, etc. are found to be necessary, the application for stay is denied."

The records and briefs accompanying your letter are returned herewith.

Very truly yours,
JAMES R. BROWNING, Clerk
By

Encl.
EPC:ht

E.P. Cullinan,
Deputy.

[Publisher's note: This opinion was handwritten by Justice Frankfurter on a piece of his chambers stationary. Typed copies were distributed to counsel for the parties and to Justice John Marshall Harlan. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also Long Island R. Co. v. New York Cent. R. Co.*, 281 F.2d 379 (2d Cir. 1960).]

The Long Island Railroad Company, et al.	)	
Petitioners	)	
vs.	)	Application for a stay
The New York Central R.R.	)	

The issue which will be tendered by the petition for certiorari to be filed has been decided against the petitioners by the Interstate Commerce Commission, the District Court and the Court of Appeals for the Second Circuit. Having fully considered the issue, I cannot bring myself to believe that a petition for certiorari will be granted to review the judgment below or that it would be reversed. Accordingly, I do not feel justified to overrule the Court of Appeals in denying a stay.

Felix Frankfurter
Associate Justice

August 1, 1960

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Harlan on the motion itself and dated "12/12/60". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also Hirsch v. Bruchhausen*, 284 F.2d 783 (2d Cir. 1960).]

December 12, 1960

Leonard W. Wagman, Esquire
60 East 42d Street
New York 17, N.Y.

RE: MYRTLE G. HIRSCH, ET AL. v. UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Dear Sir:

Your application for stay, together with opposition thereto, in the above-captioned cause was presented to Mr. Justice Harlan, who has today denied the application with the following endorsement thereon:

> "I can find no equity in this application nor any other reason for granting the stay which the Court of Appeals has denied. Application denied.
>
> 12/12/60 JMH."

Very truly yours,
JAMES R. BROWNING, Clerk
By

E.P. Cullinan
Deputy

EPC:jmh

cc: Martin Rosen, Esquire
170 Broadway
New York 38, N.Y.

A. Daniel Fusaro, Esquire
Clerk, U.S. Court of Appeals
for the Second Circuit
New York 7, N.Y.

[Publisher's note: This opinion was typed on a sheet of plain paper. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also Local 1545, United Broth. of Carpenters and Joiners of America, AFL-CIO v. Vincent*, 286 F.2d 127 (2d Cir. 1960).]

February 1, 1961

Charles H. Tuttle, Esquire
15 Broad Street
New York 5, N.Y.

RE: LOCAL 1545, UNITED BROTHERHOOD OF
CARPENTERS, ETC. v. VINCENT, ET AL.

Dear Sir:

Your application for a stay of the enforcement of the Decision and Direction of Election by the N.L.R.B., dated August 24, 1960, in the above-entitled cause was presented to Mr. Justice Frankfurter, who denied the application on January 31, 1961 with the following endorsement thereon:

> "With due regard to the merits of the decision proposed to be reviewed on a petition for certiorari and balancing the respective equities of the parties, on a claim of "irreparable damage", granting the application for a stay would, under the particular circumstances here, in effect give the losing litigant what it would have had had the Court of Appeals decided in its favor. Stay denied.
>
> January 31/61 Frankfurter, J."

Very truly yours,
JAMES R. BROWNING, Clerk
By

R.J. Blanchard
Deputy

RJB:jmh
cc: Mr. Justice Harlan
The Honorable Archibald Cox
The Honorable Henry J. Friendly
Martin Raphael, Esquire

[Publisher's note: See 559 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 09A807)

HARRY R. JACKSON ET AL. *v.* DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS ET AL.

ON APPLICATION FOR STAY

[March 2, 2010]

CHIEF JUSTICE ROBERTS, Circuit Justice.

Petitioners in this case are Washington D.C. voters who would like to subject the District of Columbia's Religious Freedom and Civil Marriage Equality Amendment Act of 2009 to a public referendum before it goes into effect, pursuant to procedures set forth in the D. C. Charter. See D.C. Code §§ 1-204.101 to 1-204.107 (2001-2006). The Act expands the definition of marriage in the District to include same-sex couples. See D.C. Act 18-248; 57 D.C. Reg. 27 (Jan. 1, 2010).

The D.C. Charter specifies that legislation enacted by the D.C. Council may be blocked if a sufficient number of voters request a referendum on the issue. D. C. Code § 1-204.102. The Council, however, purported in 1979 to exempt from this provision any referendum that would violate the D. C. Human Rights Act. See §§ 1-1001.16(b)(1)(C), 2-1402.73 (2001-2007). The D.C. Board of Elections, D.C. Superior Court, and D.C. Court of Appeals denied petitioners' request for a referendum on the grounds that the referendum would violate the Human Rights Act.

Petitioners argue that this action was improper, because D.C. Council legislation providing that a referendum is not required cannot trump a provision of the D.C. Charter specifying that a referendum *is* required. See *Price* v. *District of Columbia Bd. of Elections*, 645 A. 2d 594, 599-600 (D.C. 1994). They point out that if the Act does become law, they will permanently lose any right to pursue a referendum under the Charter. See § 1-204.102(b)(2) (2001-2006). Petitioners ask the Court for a stay that would prevent the Act from going into effect, as expected, on March 3, 2010.

This argument has some force. Without addressing the merits of petitioners' underlying claim, however, I conclude that a stay is not warranted. First, as "a matter of judicial policy" — if not "judicial power" — "it

has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern." *Whalen* v. *United States*, 445 U. S. 684, 687 (1980); see also *Fisher* v. *United States*, 328 U. S. 463, 476 (1946).

Second, the Act at issue was adopted by the Council and placed before Congress for the 30-day period of review required by the D.C. Charter, see § 1-206.02(c)(1). A joint resolution of disapproval by Congress would prevent the Act from going into effect, but Congress has chosen not to act. The challenged provision purporting to exempt certain D.C. Council actions from the referendum process, § 1-1001.16(b)(1)(C), was itself subject to review by Congress before it went into effect. While these considerations are of course not determinative of the legal issues, they do weigh against granting petitioners' request for a stay, given that the concern is that action by the Council violates an Act of Congress.

Finally, while petitioners' challenge to the Act by way of a referendum apparently will become moot when the Act goes into effect, petitioners have also pursued a ballot initiative, under related procedures in the D.C. Charter, that would give D.C. voters a similar opportunity to repeal the Act if they so choose. See §§ 1-204.101 to 1-204.107; *Jackson* v. *District of Columbia Bd. of Elections and Ethics*, Civ. A. No. 2009 CA 008613 B (D.C. Super., Jan. 14, 2010). Their separate petition for a ballot initiative is now awaiting consideration by the D.C. Court of Appeals, which will need to address many of the same legal questions that petitioners have raised here. Unlike their petition for a referendum, however, the request for an initiative will not become moot when the Act becomes law. On the contrary, the D.C. Court of Appeals will have the chance to consider the relevant legal questions on their merits, and petitioners will have the right to challenge any adverse decision through a petition for certiorari in this Court at the appropriate time.

The foregoing considerations, taken together, lead me to conclude that the Court is unlikely to grant certiorari in this case. Accordingly, the request for a stay is denied.

It is so ordered.

[Publisher's note: See 561 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 10A273)

PHILIP MORRIS USA INC. ET AL. *v.* GLORIA SCOTT ET AL.

ON APPLICATION FOR STAY

[September 24, 2010]

JUSTICE SCALIA, Circuit Justice.

Respondents brought this class action against several tobacco companies on behalf of all Louisiana smokers. The suit alleged that the companies defrauded the plaintiff class by "distort[ing] the entire body of public knowledge" about the addictive effects of nicotine. *Scott* v. *American Tobacco Co.*, 2004-2095, p. 14. (La. App. 2/7/07) 949 So. 2d 1266, 1277. The Fourth Circuit Court of Appeal of Louisiana granted relief on that theory, and entered a judgment requiring applicants to pay $241,540,488 (plus accumulated interest of about $29 million) to fund a10-year smoking cessation program for the benefit of the members of the plaintiff class. *Scott* v. *American Tobacco Co.*, 2009-0461, p. 21-23 (5/5/10) 36 So. 3d 1046, 1059-1060. (Still to be determined are the allowable attorney's fees, which will likely be requested in the tens of millions of dollars.) The Supreme Court of Louisiana declined review. *Scott* v. *American Tobacco Co.,* 2010-1361 (9/3/10), ___ So. 3d ___. The applicants have asked me, in my capacity as Circuit Justice for the Fifth Circuit, to stay the judgment until this Court can act on their intended petition for a writ of certiorari.

A single Justice has authority to enter such a stay, 28 U. S. C. § 2101(f), but the applicant bears a heavy burden. It is our settled practice to grant a stay only when three conditions are met: First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted). Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed. *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302 (1991) (SCALIA, J., in chambers). I conclude that this standard is met.

Applicants complain of many violations of due process, including (among others) denial of the opportunity to cross-examine the named representatives of the class, factually unsupported estimations of the number of class members entitled to relief, and constant revision of the legal basis for the plaintiffs' claim during the course of litigation. Even though the judgment that is the alleged consequence of these claimed errors is massive — more than $250 million — I would not be inclined to believe that this Court would grant certiorari to consider these fact-bound contentions that may have no effect on other cases.

But one asserted error in particular (and perhaps some of the others as well) implicates constitutional constraints on the allowable alteration of normal process in class actions. This is a fraud case, and in Louisiana the tort of fraud normally requires proof that the plaintiff detrimentally relied on the defendant's misrepresentations. 949 So. 2d, at 1277. Accordingly, the Court of Appeal indicated that members of the plaintiff class who wish to seek individual damages, rather than just access to smoking cessation measures, would have to establish their own reliance on the alleged distortions. *Ibid.* But the Court of Appeal held that this element need *not* be proved insofar as the class seeks payment into a fund that will *benefit* individual plaintiffs, since the defendants are guilty of a "distort[ion of] the entire body of public knowledge" on which the "class as a whole" has relied. *Id.,* at 1277-1278. Thus, the court eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result.

Applicants allege that this violates their due-process right to "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (internal quotation marks omitted) (quoting *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168 (1932)). Respondents concede that due process requires such an opportunity, but they contend that the intermediate state court's pronouncement means that, as a matter of Louisiana's substantive law, applicants *have* no nonreliance defense. That response may ultimately prove persuasive, but at this stage it serves to describe the issue rather than resolve it. The apparent consequence of the Court of Appeal's holding is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action.

The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question. National concern over abuse of the class-action device induced Congress to permit removal of most major class actions to federal court, see 28 U. S. C.

§ 1332(d), where they will be subject to the significant limitations of the Federal Rules. Federal removal jurisdiction has not been accorded, however, over many class actions in which more than two-thirds of the plaintiff class are citizens of the forum State. See §1332(d)(4). Because the class here was drawn to include only residents of Louisiana, this suit typifies the sort of major class action that often will not be removable, and in which the constraints of the Due Process Clause will be the only federal protection. There is no conflict between federal courts of appeals or between state supreme courts on the principal issue I have described; but the former seems impossible, since by definition only state class actions are at issue; and the latter seems implausible, unless one posits the unlikely case where the novel approach to class-action liability is a legislative rather than judicial creation, or the creation of a lower state court disapproved by the state supreme court on federal constitutional grounds. This constitutional issue ought not to be permanently beyond our review.

Given those considerations, I conclude applicants have satisfied the prerequisites for a stay. I think it reasonably probable that four Justices will vote to grant certiorari, and significantly possible that the judgment below will be reversed. As for irreparable harm: Normally the mere payment of money is not considered irreparable, see *Sampson* v. *Murray*, 415 U. S. 61, 90 (1974), but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable. See, *e.g.*, *Mori* v. *Boilermakers*, 454 U. S. 1301, 1303 (1981) (Rehnquist, J., in chambers). Here it appears that, before this Court will be able to consider and resolve applicants' claims, a substantial portion of the fund established by their payment will be irrevocably expended. Funds spent to provide anti-smoking counseling and devices will not likely be recoverable; nor, it seems, will the $11,501,928 fee immediately payable toward administrative expenses in setting up the funded program.

That does not end the matter. A stay will not issue simply because the necessary conditions are satisfied. Rather, "sound equitable discretion will deny the stay when 'a decided balance of convenience'" weighs against it. *Barnes, supra*, at 1304-1305 (SCALIA, J., in chambers) (quoting *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 164 (1923)). Here, however, the equities favor granting the application. Refusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents. Applicants allege that similar smoking-cessation measures are freely and readily available from other sources in Louisiana, and respondents have not disputed that. Under those circumstances, the equitable balance favors issuance of the stay.

The application for a stay of the execution of the judgment of the Court of Appeal of Louisiana, Fourth Circuit, is granted pending appli-

cants' timely filing, and this Court's disposition, of a petition for a writ of certiorari.

It is so ordered.

[Publisher's note: See 561 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 10A298

HERB LUX ET AL. *v.* NANCY RODRIGUES, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE VIRGINIA BOARD OF ELECTIONS, ET AL.

ON APPLICATION FOR INJUNCTION

[September 30, 2010]

CHIEF JUSTICE ROBERTS, Circuit Justice.

Herb Lux has filed with me as Circuit Justice for the Fourth Circuit an application for an injunction pending appeal. Lux seeks an injunction requiring the Virginia State Board of Elections to count signatures that he collected in an effort to place himself on the congressional ballot. The application is denied.

Lux is an independent candidate for the U.S. House of Representatives in Virginia's Seventh Congressional District. Under Virginia law, an independent candidate for Congress must obtain 1,000 signatures from voters registered in the relevant congressional district in order to appear on the ballot. Va. Code Ann. § 24.2-506 (Lexis 2010 Cum. Supp.). That same provision requires, among other things, that each signature be witnessed by a resident of that district. *Ibid.*

Although Lux is a candidate for the Seventh District, he is a resident of Virginia's First District. As a result, he cannot serve as a witness for signatures from Seventh District residents. Despite that fact, Lux witnessed 1,063 of the 1,224 signatures collected on his behalf. The State Board of Elections refused to count those signatures. Lux unsuccessfully sought an injunction requiring the Board to do so from the District Court for the Eastern District of Virginia and from the Court of Appeals for the Fourth Circuit.

To obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that "the legal rights at issue are 'indisputably clear.'" *Turner Broadcasting System, Inc.* v. *FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers)). A Circuit Justice's issuance of an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been with-

held by lower courts," and therefore "demands a significantly higher justification" than that required for a stay. *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers).

Lux does not meet this standard. He may very well be correct that the Fourth Circuit precedent relied on by the District Court — *Libertarian Party of Va.* v. *Davis*, 766 F.2d 865 (1985) — has been undermined by our more recent decisions addressing the validity of petition circulation restrictions. See *Meyer* v. *Grant*, 486 U.S. 414, 422, 428 (1988) (invalidating a law criminalizing circulator compensation and describing petition circulation as "core political speech"); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186-187 (1999) (holding unconstitutional a requirement that initiative petition circulators be registered voters). At the same time, we were careful in *American Constitutional Law Foundation* to differentiate between registration requirements, which were before the Court, and residency requirements, which were not. *Id.,* at 197. Lux himself notes that the courts of appeals appear to be reaching divergent results in this area, at least with respect to the validity of state residency requirements. Application 13-14. Accordingly, even if the reasoning in *Meyer* and *American Constitutional Law Foundation* does support Lux's claim, it cannot be said that his right to relief is "indisputably clear."

It is so ordered.