

# The Burger Court Opinion Writing Database

## *Davis v. United States*

411 U.S. 233 (1973)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAM  
THE

April 12, 1973

71-6481 - Davis v. U. S.

Dear Bill:

Please join me.

Regards,

WRB

Mr. Justice Rehnquist

Copies to the Conference

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SECRETED BY ADVANCE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

March 26, 1973

Dear Thurgood:

Would you like to prepare  
the dissent in No. 71-6481 - Davis  
v. U. S.?

W. O. D.

Mr. Justice Marshall

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RECORDS OF ADVANCE

B

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

April 10, 1973

Dear Thurgood:

Please join me in your dissent

in 71-6481, Davis v. U.S.

W000  
William O. Douglas

Mr. Justice Marshall

cc: The Conference

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IN THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 26, 1973

RE: No. 71-6481 Davis v. United States

Dear Bill:

This was not one in which I had planned to write. Indeed, it is a companion case to Tollett v. Henderson which Bill Rehnquist is also to write. I have so many dissents in the works now that I'd prefer not to write this one. In any event, I think a single dissent for both this case and Tollett should suffice.

Sincerely,

*Bill*

Mr. Justice Douglas

20

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 5, 1973

RE: No. 71-6481 Davis v. United States

Dear Thurgood:

Please join me in your dissenting  
opinion in the above.

Sincerely,

*Bill*

Mr. Justice Marshall

cc:The Conference

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SECTION OF ADVANCE

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 28, 1973

71-6481 - Davis v. U. S.

Dear Bill,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

P.S.  
/

Mr. Justice Rehnquist

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THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

12  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 2, 1973

Re: No. 71-6481 - Davis v. United States

Dear Bill:

Please join me in your opinion for the  
Court in this case.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference



The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-6481

From: Marshall, J.

Circulated: APR - 5 1973

Recirculated: \_\_\_\_\_

Clifford H. Davis, Petitioner, v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[April —, 1973]

MR. JUSTICE MARSHALL, dissenting.

The opinion of the Court obscures the only sensible argument for the result the majority reaches. I am not persuaded by that argument, and find the majority opinion clearly defective. I believe that Rule 12 (b)(2), properly interpreted in the light of the purposes it serves and the purposes served by making available collateral relief from criminal convictions, does not bar a prisoner from claiming that the grand jury that indicted him was unconstitutionally composed, if he shows that his failure to make that claim before trial was not "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). But first there is some underbrush to be cleared away.

Davis challenged the "key man" system of selection of grand jurors used in the Northern District of Mississippi in 1968, when he was indicted, because it was implemented to exclude qualified Negroes from the grand jury.<sup>1</sup> Cf. *Glasser v. United States*, 315 U. S. 60, 85-87

<sup>1</sup> Davis alleged, in part:

"(b) that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the "Keyman" and "Selectors," system cause nought to token in their selection of prospective qualifying negro jurymen because of their race and color in violation of Section 1863.

"(c) that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, pur-

1,341

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 71-6481

Circulated:

Recirculated: APR 11 1973

Clifford H. Davis, Petitioner, } On Writ of Certiorari to  
 v. } the United States Court  
 United States. } of Appeals for the Fifth  
 Circuit.

[April —, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The opinion of the Court obscures the only sensible argument for the result the majority reaches. I am not persuaded by that argument, and find the majority opinion clearly defective. I believe that Rule 12(b)(2), properly interpreted in the light of the purposes it serves and the purposes served by making available collateral relief from criminal convictions, does not bar a prisoner from claiming that the grand jury that indicted him was unconstitutionally composed, if he shows that his failure to make that claim before trial was not "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). But first there is some underbrush to be cleared away.

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3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 29, 1973

Re: No. 71-6481 - Davis v. United States

Dear Bill:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Rehnquist

cc: The Conference

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3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 30, 1973

Re: No. 71-6481 Davis v. U. S.

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

cc: The Conference

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U.S. SUPREME COURT RECORDS

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

2nd DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3/23/73

Recirculated:

No. 71-6481

Clifford H. Davis, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
United States. } of Appeals for the Fifth  
Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are called upon to determine the effect of Rule 12 (b)(2) of the Federal Rules of Criminal Procedure on a post-conviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury. An indictment was returned in the District Court charging petitioner Davis, a Negro, and two white men with entry into a federally insured bank with intent to commit larceny in violation of 18 U. S. C. §§ 2 and 2113 (a). Represented by appointed counsel,<sup>1</sup> petitioner entered a not guilty plea at his arraignment and was given 30 days within which to file pretrial motions. He timely moved to quash his indictment on the ground that it was the result of an illegal arrest, but made no other pretrial motions relating to the indictment.

On the opening day of the trial, following *voir dire* of the jury, the District Judge ruled on petitioner's pre-

<sup>1</sup> Petitioner was represented throughout the trial by competent, court-appointed counsel, whose advocacy prompted the Court of Appeals to complement him saying:

"We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." *Davis v. United States*, 409 F. 2d 1095, 1101 (CA5 1969).

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6481

Circulated: \_\_\_\_\_

Recirculated: 4/6/77

Clifford H. Davis, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
United States. } of Appeals for the Fifth  
Circuit.

[March —, 1973]

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