

# The Burger Court Opinion Writing Database

## *Albernaz v. United States*

450 U.S. 333 (1981)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

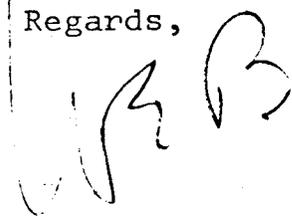
March 6, 1981

Re: 79-1709 - Albernaz v. United States

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 25, 1981

RE: No. 79-1709 Albernaz v. United States

Dear Bill:

I'd be happy to join your opinion in the above if you are willing to delete the attribution to Boswell - the last sentence in the second full paragraph of page 9.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 26, 1981

RE: No. 79-1709 Albernaz v. United States

Dear Bill:

I agree.

Sincerely,

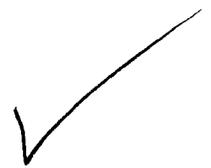
*Bill*

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART



February 17, 1981

Re: No. 79-1709, Albernaz v. United States

Dear Bill,

It seems to me that, while legislative intent is important, it cannot always decide whether or not there has been a violation of the Double Jeopardy Clause. In other words, I think that even if a legislature explicitly and clearly provided that two courses of action should constitute two separate criminal offenses, punishable cumulatively, it could not constitutionally do so unless each course of action contained an ingredient that the other did not under the Blockburger test. That, I think, is what the Court opinion in the Whalen case said. It is for this reason that I agree with the views expressed by John, and cannot join your opinion as presently written.

Sincerely yours,

Handwritten initials "P.S." with a diagonal slash underneath, positioned above the typed name of Justice Rehnquist.

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

February 25, 1981

Re: No. 79-1709, Albarnaz v. United States

Dear Bill,

I agree with the views expressed by John  
Stevens in his letter to you of today.

Sincerely yours,

*J.S.*

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

February 27, 1981

Re: No. 79-1709, Albernaz v. United States

Dear Bill,

It seems to me that, while legislative intent is important, it cannot always decide whether or not there has been a violation of the Double Jeopardy Clause. In other words, I think that even if a legislature explicitly and clearly provided that two courses of action should constitute two separate criminal offenses, punishable cumulatively, it could not constitutionally do so unless each course of action contained an ingredient that the other did not under the Blockburger test. That, I think, is what the Court opinion in the Whalen case said. It is for this reason that I agree with the views expressed by John, and cannot join your opinion as presently written.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

To: The Chief Justice.  
 Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Mr. Justice Stewart

Circulated: 5 MAR 1981

No. 79-1709

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

Thomas J. Albernaz and Edward Rodriguez, Petitioners, v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[March —, 1981]

JUSTICE STEWART, concurring in the judgment.

In *Whalen v. United States*, the Court said that “the question whether punishments imposed by a court after a defendant’s conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.” 445 U. S., at 688.

But that is a far cry from what the Court says today: “. . . [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.” *Ante*, at 11. These statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court’s conclusion.

No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United States*, 254 U. S. 299.

Since Congress has created two offenses here, and since each requires proof of a fact that the other does not, I concur in the judgment.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 26, 1981

Re: 79-1709 - Albernaz v. U.S.

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

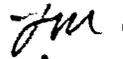
March 6, 1981

Re: No. 79-1709 - Albarnaz v. United States

Dear Potter:

Please join me.

Sincerely,



T.M.

Justice Stewart

cc: The Conference

February 26, 1981

Re: No. 79-1709 - Albernaz v. United States

Dear Bill:

While, of course, I would prefer that you retain the sentence on page 11 to which John and Potter object, I shall, and do, join your opinion even if that sentence is omitted.

I trust, however, that you will retain the quoted material from Whalen, set forth at the bottom of page 10, inasmuch as that is from a Court opinion. What do you think, however, of buttressing the citation "445 U.S., at 688" by adding "id., at 696 (White, J., concurring in part and concurring in the judgment); id., at 697 (Blackmun, J., concurring in the judgment)"?

Sincerely,

HAB

Mr. Justice Rehnquist

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 26, 1981

Re: No. 79-1709 - Albernaz v. United States

Dear Bill:

Please join me.

You may recall that at oral argument I indicated some concern about Senator Dodd's statement quoted on page 19 of petitioners' brief, and that I chided counsel for not specifying the source of that citation. Counsel later supplied that citation by her letter of January 20. I would feel more comfortable if your opinion would address Senator Dodd's statement, for I think it is a troublesome one. When read in context, it perhaps could be explained as a reference to the fact that the House made no change (with two exceptions) in the type of drugs covered by the Act.

Because you are now eliminating the reference on page 9 to Boswell, I cannot chide you about the facts that I think it was Johnson, not Boswell, and that, if my memory serves me correctly, it was to the effect that "Patriotism is the last refuge of a scoundrel." Boswell maintained "that certainly all patriots were not scoundrels."

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 25, 1981

79-1709 Albernaz v. United States

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Pp 5, 8, 9, 11

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

From: Mr. Justice Rehnquist

Circulated: FEB 24 1981

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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

No. 79-1709

Thomas J. Albernaz and Edward Rodriguez, Petitioners,  
v.  
United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of conspiracy to import marihuana (Count I), in violation of 21 U. S. C. § 963, and conspiracy to distribute marihuana (Count II), in violation of 21 U. S. C. § 846. Petitioners received consecutive sentences on each count. The United States Court of Appeals for the Fifth Circuit, sitting en banc, affirmed petitioners' convictions and sentences. *United States v. Rodriguez*, — F. 2d — (1980). We granted certiorari to consider whether Congress intended consecutive sentences to be imposed for the violation of these two conspiracy statutes and, if so, whether such cumulative punishment violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. — U. S. — (1980).

The facts forming the basis of petitioners' convictions are set forth in the panel opinion of the Court of Appeals, *United States v. Rodriguez*, 585 F. 2d 1234 (1978), and need not be repeated in detail here. For our purposes, we need only relate that the petitioners were involved in an agreement, the objectives of which were to import marihuana and then to distribute it domestically. Petitioners were charged and convicted under two separate statutory provisions and received consecutive sentences. The length of each of their com-

2/25  
Walt  
1981

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 25, 1981

Re: No. 79-1709 Albernaz v. United States

Dear Bill:

I am more than happy to delete the attribution to Boswell to which you refer to in your letter of February 25th and have sent a revised copy to the printer.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 26, 1981

Re: No. 79-1709 Albemaz v. United States

Dear John:

As you will note, I have deleted the opprobrious categorization of the "rule of lenity" in response to Bill's suggestion. I do not feel that I want to rest the disposition of the constitutional issue solely on the Blockburger rationale, because of the numerous cases which have been held for this one. Many of them involve conflicting decisions of lower courts, some of which say that even though the legislative intent was to impose multiple punishment, the Double Jeopardy Clause is nonetheless violated. If we do not decide that issue in this case, we will, I believe, have to take one of those cases to resolve that question.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 27, 1981

Re: No. 79-1709 Albernaz v. United States

Dear Harry:

I agree with you that adding the suggested citations to page 10 of the opinion will strengthen the point we are trying to make. I am sending that change to the print shop. I am not sure it is necessary to address the remarks of Senator Dodd inasmuch as both parties concede that the legislative history is silent on whether Congress intended cumulative punishment to be imposed in this type of situation. I will, however, reexamine the remarks and petitioners' arguments on this point.

Sincerely,



Mr. Justice Blackmun

Sty Listic  
9-11

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

From: Mr. [Name] [Title]

Circulated

MAR 4 1981

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-1709

Thomas J. Albernaz and Edward Rodriguez, Petitioners,  
v.  
United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of conspiracy to import marihuana (Count I), in violation of 21 U. S. C. § 963, and conspiracy to distribute marihuana (Count II), in violation of 21 U. S. C. § 846. Petitioners received consecutive sentences on each count. The United States Court of Appeals for the Fifth Circuit, sitting en banc, affirmed petitioners' convictions and sentences. *United States v. Rodriguez*, — F. 2d — (1980). We granted certiorari to consider whether Congress intended consecutive sentences to be imposed for the violation of these two conspiracy statutes and, if so, whether such cumulative punishment violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. — U. S. — (1980).

The facts forming the basis of petitioners' convictions are set forth in the panel opinion of the Court of Appeals, *United States v. Rodriguez*, 585 F. 2d 1234 (1978), and need not be repeated in detail here. For our purposes, we need only relate that the petitioners were involved in an agreement, the objectives of which were to import marihuana and then to distribute it domestically. Petitioners were charged and convicted under two separate statutory provisions and received consecutive sentences. The length of each of their com-

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 17, 1981

Re: Cases held for No. 79-1709 Albernaz v. United States

No. 79-2049 Mann, et al. v. United States. Petitioners were convicted of conspiracy to import marijuana into the United States and conspiracy to possess marijuana with intent to distribute it, and received concurrent sentences. They present the identical statutory construction and double jeopardy arguments which were decided in Albernaz -- the propriety of cumulative punishment for violation of 21 U.S.C. §963 and §846. Petitioners also present a Fourth Amendment contention. They argue that when the Coast Guard boarded and searched their vessel on the high seas, they did so only upon a vague suspicion instead of a "reasonable suspicion grounded on articulable facts." The CA 5 rejected this argument reciting the numerous facts upon which the Coast Guard's suspicion was grounded. The CA also rejected petitioners' final contention that there was no basis upon which a jury could conclude that petitioners had committed a crime against the United States because they were apprehended in international waters and no specific evidence was introduced indicating that they planned to bring the contraband into the United States. The CA concluded that based upon all the facts presented a jury was entitled to infer that the petitioners intended to import and distribute the contraband into the United States.

I will vote to DENY this petition. The double jeopardy argument is directly controlled by this Court's decision in Albernaz. The other two contentions are largely fact-specific.

No. 79-6682 Martinez v. United States. This case presents the contention whether dual convictions and sentences for conspiracy to import heroin in violation of 21

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 25, 1981

Re: 79-1709 - Albernaz v. United States

Dear Bill:

Although I am not quite sure that the application of the rule of lenity would qualify as "the last resort of scoundrels," I join your disposition of the statutory question. I also agree, essentially for the reasons stated in footnote 3, that there is no merit to the constitutional argument. However, I am not yet prepared to go the full way with you when you state at page 11: "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed." If you could rest the disposition of the constitutional issue simply on the Blockburger rationale, I would be happy to join.

Respectfully,



Justice Rehnquist

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 5, 1981

1709  
Re: ~~79-1307~~ - Albernaz and Rodriguez v.  
United States

Dear Potter:

Please join me.

Respectfully,



Justice Stewart

Copies to the Conference