

DECISION-MAKING AT THE SECOND CIRCUIT: JUDGES  
BARRINGTON D. PARKER, JR. AND ROBERT D. SACK

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I. INTRODUCTION

This article seeks to empirically examine the voting patterns of two judges, Judge Barrington D. Parker, Jr. and Judge Robert D. Sack of the United States Court of Appeals for the Second Circuit. These judges were selected for inclusion in this issue of *New York Appeals* because their opinions evidenced a clear pattern of protecting a defendant or petitioner against the power of the state. Examining judicial decision-making helps to illuminate the priorities of judges that underlie their decisions. Particularly with regard to appeals, there is often a disagreement about the outcome and there are frequently strong arguments and case law in support of both positions. The way a judge votes can thus be analyzed over time to reveal patterns.

First, this article will examine the background of the judges.<sup>1</sup> Second, the dissenting opinions authored by the judges over the past five years will be examined in detail.<sup>2</sup> Next, this article will examine the voting patterns in the majority opinions the judges authored.<sup>3</sup> Finally, this paper will conclude with a discussion of the themes and patterns which have emerged from the study.<sup>4</sup>

II. BIOGRAPHIES

A. *Judge Parker*

Judge Parker was born and raised in Washington, D.C.<sup>5</sup> His father, Barrington D. Parker, Sr., was a federal district court judge

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> See *infra* Parts III.A–B.

<sup>3</sup> See *infra* Parts III.C–D.

<sup>4</sup> See *infra* Part IV.

<sup>5</sup> FED. BAR COUNCIL, SECOND CIRCUIT REDBOOK 2010–2011 39 (2011).

for the District of Columbia from 1969 to 1993.<sup>6</sup> Judge Parker attended Yale for both undergraduate and law school.<sup>7</sup> He received his Bachelor of Arts degree in 1965 and his Bachelor of Laws<sup>8</sup> (“LL.B.”) in 1969.<sup>9</sup>

After law school, Judge Parker began his legal career clerking for Judge Aubrey E. Robinson, Jr. of the District Court for the District of Columbia.<sup>10</sup> Following his clerkship, Judge Parker worked in private practice for approximately twenty-three years in New York City with Sullivan & Cromwell, Parker Auspitz Neesemann & Delehanty, P.C., and Morrison & Foerster.<sup>11</sup> Judge Parker’s practice focused on general commercial litigation.<sup>12</sup>

In 1994, President Clinton appointed Judge Parker to the District Court for the Southern District of New York.<sup>13</sup> He served there until 2001 when President Bush elevated Judge Parker to the Second Circuit Court of Appeals.<sup>14</sup> Judge Parker took senior status in 2009.<sup>15</sup>

### B. Judge Sack

Judge Sack’s legal career followed much the same path as Judge Parker’s. He graduated from the University of Rochester in 1960 and Columbia Law School in 1963.<sup>16</sup> Following law school, Judge Sack clerked for Judge Arthur S. Lane at the District Court for the District of New Jersey.<sup>17</sup>

Judge Sack spent approximately thirty-three years in private practice in New York City as an associate and partner with Patterson, Belknap, Webb & Tyler and a partner with Gibson, Dunn & Crutcher.<sup>18</sup> Judge Sack’s practice focused on national and

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> An LL.B. degree was a law degree formerly given by American law schools and a law degree still conferred by British law schools. BLACK’S LAW DICTIONARY 1019 (9th ed. 2009).

<sup>9</sup> FED. BAR COUNCIL, *supra* note 5, at 39.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Judge Parker was an associate at Sullivan & Cromwell from 1970–1977, a partner at Parker Auspitz Neesemann & Delehanty, P.C. from 1977–1987, and a partner at Morrison & Foerster from 1987–1994, when he was appointed to the federal bench. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* A judge on senior status may still hear cases at the Second Circuit. *See* FED. R. APP. P. 35. However, a senior judge no longer sits on en banc panels. *See id.*

<sup>16</sup> FED. BAR COUNCIL, *supra* note 5, at 42.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* Judge Sack worked at Patterson, Belknap, Webb & Tyler from 1964–1986 and Gibson, Dunn & Crutcher LLP from 1986–1998. *Id.*

international press law.<sup>19</sup> Judge Sack also “served as a Senior Associate Special Counsel to the United States House of Representatives Impeachment Inquiry Staff” in 1974.<sup>20</sup>

Judge Sack has authored and co-authored a number of texts on press law including *Sack on Defamation: Libel, Slander, and Related Problems*,<sup>21</sup> *Advertising and Commercial Speech: A First Amendment Guide*,<sup>22</sup> and *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill: “Defamation and Privacy Under the First Amendment.”*<sup>23</sup>

Judge Sack was appointed to the Second Circuit by President Clinton in 1998.<sup>24</sup> He was “awarded the Federal Bar Council’s Learned Hand Medal for excellence in federal jurisprudence” on May 1, 2008.<sup>25</sup> He took senior status on August 6, 2009.<sup>26</sup>

### III. DECISIONS

A central focus of this paper is Judge Parker’s and Judge Sack’s dissents. A dissent is a very illuminating piece of writing in that it is a public proclamation that the judge disagrees with the majority of the court.<sup>27</sup> On the Second Circuit, unless it is an en banc dissent, a written dissent is a lone opinion which shows that the judge disagreed with the other members of the panel.<sup>28</sup> A dissent is never mandatory. The decision to write a dissent in any particular case is a personal decision where the judge disagrees strongly

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* (4th ed. 2011).

<sup>22</sup> P. CAMERON DEVORE & ROBERT D. SACK, *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* (1st ed. 1999).

<sup>23</sup> Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill: “Defamation and Privacy Under the First Amendment,”* 100 COLUM. L. REV. 294 (2000).

<sup>24</sup> FED. BAR COUNCIL, *supra* note 5, at 42.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., Vincent Bonventre, *Justice Alito’s Goat—What Gets It? (Part 1)*, N.Y. CT. WATCHER, (Feb. 16, 2010), <http://www.newyorkcourtwatcher.com/2010/02/justice-alitos-goat-what-gets-it.html> (“[The dissents] are the disagreements with his colleagues’ rulings where he felt strongly enough that he chose to go public. Strongly enough that he chose to spend his time and use his staff and resources to compose a personal statement to say that his colleagues are wrong. The personal statement does not change the outcome of a case. It only serves to make public the author’s disagreements, criticisms, and deeply held beliefs that the majority of his colleagues have made a mistake. A mistake that is so big and so bad that he cannot in good conscience be silent and just go along.”).

<sup>28</sup> CLERK’S OFFICE, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, *Oral Argument*, [http://www.ca2.uscourts.gov/clerk/Forms\\_and\\_instructions/How\\_to\\_appeal/Criminal\\_case/Ora\\_l\\_argument.htm](http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Criminal_case/Ora_l_argument.htm) (last visited Feb. 1, 2012).

enough with the majority to go public with his concerns. At the Second Circuit, a dissent in a panel opinion may help to encourage an en banc review of the case to help to overturn the decision or to strengthen the case for certiorari at the Supreme Court. In any case, a dissent is personal and therefore very informative about a judge's motivations and priorities.

Neither Judge Parker nor Judge Sack writes a large number of dissents. Part of this may be due to the fact that there are only three judges on a panel.<sup>29</sup> Thus, if one other judge rules the same way, that opinion becomes the majority. This article will focus on the dissenting and majority opinions authored by Judge Parker and Judge Sack. After examining the dissenting opinions, the voting pattern in the majority opinions will help give more insight into the priorities of each judge. These opinions will tell us, in their own words, what these judges thought was the correct resolution of the case. After examining these opinions, some themes and similarities will become apparent.<sup>30</sup>

#### A. *Judge Parker's Dissenting Opinions*

Judge Parker dissented four times between August 1, 2006 and October 1, 2011.<sup>31</sup> In these four cases, Judge Parker felt the majority's holding was wrong enough to go public in his disagreement with the resolution of the case.

##### 1. *United States v. Gupta*

In *United States v. Gupta*, the defendant was convicted in the Southern District of New York of immigration fraud.<sup>32</sup> During *voir dire* of the jury pool, the defendant's brother and girlfriend had been excluded from the courtroom because of a lack of space and to ensure that the jury pool would not be tainted by hearing any information about the case from the public.<sup>33</sup> The defendant argued

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<sup>29</sup> *Id.*

<sup>30</sup> This study was done by searching on Westlaw and LexisNexis for dissenting and majority opinions authored by the judges during the study period. While all care has been taken to ensure the accuracy of this study, no guarantees are made. This study serves to provide a useful analysis of the voting patterns of Judges Parker and Sack during the study period.

<sup>31</sup> *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011); *United States v. Johnson*, 616 F.3d 85 (2d Cir. 2010); *Jenkins v. Greene*, 630 F.3d 298 (2d Cir. 2010); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

<sup>32</sup> *Gupta*, 650 F.3d at 865.

<sup>33</sup> *Id.* at 865–66.

that the exclusion of these people violated his right to a public trial guaranteed by the Sixth Amendment and thus required the overturning of his conviction.<sup>34</sup> The majority of the court found that the reasons the judge had excluded the family members from *voir dire* were insufficient to justify closing the courtroom under *Waller v. Georgia*.<sup>35</sup> Based on the triviality exception espoused in *Gibbons v. Savage*, the court found that while the exclusion of family members violated the right to a public trial, it was too small of an incursion and “did not subvert the values underlying the Sixth Amendment’s public trial guarantee.”<sup>36</sup>

Judge Parker dissented, noting that the exclusion of the defendant’s brother and girlfriend was for the entire *voir dire* process, while the exclusion that had occurred in *Gibbons* was for merely one afternoon of *venire*.<sup>37</sup> Judge Parker noted that precedent recognized that jury selection “has presumptively been a public process” to “[assure] those not attending trials that others were able to observe the proceedings and enhanced public confidence.”<sup>38</sup> A “violation of the right to a public trial is a ‘structural’ error” and thus “renders a criminal trial fundamentally unfair and ‘requires automatic reversal.’”<sup>39</sup> Judge Parker reviewed the precedents and concluded that the triviality exception utilized by the majority was inapplicable to this case because “[a] trial judge’s undisclosed exclusion of the public from jury selection, without the knowledge or assent of the accused or the lawyers, seriously undermines the basic fairness of a criminal trial and the appearance of fairness so essential to public confidence in the system.”<sup>40</sup> Judge Parker closed his opinion by noting that, in his view, the case was not even close and he “hope[d] that it be[came] the subject of certiorari.”<sup>41</sup>

## 2. *United States v. Johnson*

In *United States v. Johnson*, the defendant was convicted of being

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<sup>34</sup> *Id.* at 866–67.

<sup>35</sup> *Id.* at 866 (citing *Waller v. Georgia*, 467 U.S. 39, 45–47 (1984); *Gibbons v. Savage*, 555 F.3d 112, 117 (2d Cir. 2009)).

<sup>36</sup> *Gupta*, 650 F.3d at 868–69 (citing *Waller*, 467 U.S. at 121).

<sup>37</sup> *Gupta*, 650 F.3d at 872 (Parker, J., dissenting).

<sup>38</sup> *Id.* at 873 (quoting *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 505–07 (1984)).

<sup>39</sup> *Gupta*, 650 F.3d at 873 (quoting *Waller*, 467 U.S. at 50 n.9; *Washington v. Rencuenco*, 548 U.S. 212, 218–19 (2006)).

<sup>40</sup> *Gupta*, 650 F.3d at 874.

<sup>41</sup> *Id.* at 876.

a felon in possession of a firearm.<sup>42</sup> The question on appeal was whether one of the defendant's prior convictions, namely for "rioting at a correctional institution,"<sup>43</sup> qualified as a "violent felony," thus making him eligible for sentencing under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B).<sup>44</sup> The majority looked at the Connecticut statute categorically and "examine[d] it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."<sup>45</sup> Using this approach, the majority found that the statute was not a strict liability crime and thus included "the purposeful conduct required by *Begay [v. United States]*."<sup>46</sup> The majority noted that rioting is typically aggressive and violent and thus satisfied the definition required under the ACCA.<sup>47</sup>

Judge Parker dissented on the basis that the Connecticut statute in question "criminalizes much more than rioting."<sup>48</sup> He argued that because conduct which is not inherently violent or aggressive could be the basis of the conviction, it was inappropriate to categorically define a conviction under the Connecticut statute as a crime of violence under the ACCA.<sup>49</sup> Judge Parker advocated for using a case-by-case approach to examine the actual conduct underlying the conviction in order to determine whether the conviction fell within the enumerated categories of violent crimes as outlined in the ACCA.<sup>50</sup> Judge Parker concluded by saying that "[b]efore we require defendants like Johnson to spend at least five extra years in prison . . . I would remand and require the government to establish the type of conduct that led to the conviction."<sup>51</sup>

### 3. *Jenkins v. Greene*

In *Jenkins v. Greene*, the defendant was convicted of assault in the New York State courts and sentenced to fifty years.<sup>52</sup> After

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<sup>42</sup> *United States v. Johnson*, 616 F.3d 85, 87 (2d Cir. 2010).

<sup>43</sup> *Id.* at 87. The conviction was under Connecticut General Statute section 53a-179b. *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 88 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

<sup>46</sup> *Johnson*, 616 F.3d at 90 (citing *Begay*, 553 U.S. at 144).

<sup>47</sup> *Johnson*, 616 F.3d at 90–91.

<sup>48</sup> *Id.* at 95 (Parker, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 95–97.

<sup>51</sup> *Id.* at 100.

<sup>52</sup> *Jenkins v. Greene*, 630 F.3d 298, 300 (2d Cir. 2010). "The conviction arose from an incident . . . in which Jenkins asked two people for change inside a grocery store in upper

exhausting his state appeals, he sought state habeas corpus relief on the basis of ineffective assistance of counsel, claiming that his attorney had not accurately told him the length of sentence he was facing and, if he had been given that information, he would have accepted a plea deal.<sup>53</sup> The state courts denied his motion.<sup>54</sup> Thereafter, Jenkins filed pro se seeking federal habeas corpus relief, raising “his original challenges to his conviction” and ineffective assistance of counsel.<sup>55</sup> After Jenkins was appointed counsel and dropped all but his ineffective assistance of counsel claim, the district court denied his motion as untimely, finding that his ineffective assistance of counsel claim did not relate back to his original claims under Federal Rule of Civil Procedure 15(c)(1)(B).<sup>56</sup> On appeal, Jenkins argued that he was entitled to equitable tolling of the statutory period.<sup>57</sup> The majority noted that equitable tolling was available “only in ‘rare and exceptional’ circumstances”<sup>58</sup> and

[a] petitioner seeking equitable tolling must “demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of the filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances.”<sup>59</sup>

The majority held that Jenkins could not “show a causal relationship between the alleged extraordinary circumstance[s] and the lateness of his filing” so he was ineligible for equitable tolling.<sup>60</sup> The majority noted that this result may be harsh but it was the result of the statute of limitations period imposed by Congress.<sup>61</sup>

Judge Parker dissented on the basis that the majority incorrectly analyzed New York case law regarding habeas claims of ineffective assistance of counsel “[a]nd more importantly, it fails meaningfully

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Manhattan. After the two refused, Jenkins argued with them, followed them outside the store, and slashed both victims’ faces with a razor blade.” *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 301.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 301–02.

<sup>57</sup> *Id.* at 302.

<sup>58</sup> *Id.* (quoting *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000)).

<sup>59</sup> *Jenkins*, 630 F.3d at 303 (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)).

<sup>60</sup> *Jenkins*, 630 F.3d at 304–05 (citing *Valverde*, 224 F.3d at 134).

<sup>61</sup> *Jenkins*, 630 F.3d at 305 (“Such limitations statutes by their nature preclude sympathetic or meritorious claims as well as frivolous ones. And the doctrine of equitable tolling does not permit us to excuse compliance with the statute whenever a meritorious claim is at stake, or whenever a petitioner faces an especially severe sentence.”).

to engage in the equitable analysis required by *Holland v. Florida*.<sup>62</sup> Judge Parker opined that after *Holland*, Jenkins met the test required for equitable tolling and thus should be granted the ability to pursue his ineffective assistance of counsel claim in federal court.<sup>63</sup> Judge Parker based his opinion on the meaning of equity and quoted *Holland* that “the role of courts sitting in equity is to ‘relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules.’”<sup>64</sup> He noted that Jenkins’ petition might fail if he was given the chance to prosecute his ineffective assistance of counsel claim.<sup>65</sup> However, he maintained that “before being required to spend an additional forty years incarcerated as a result of what could well have been constitutionally ineffective assistance of trial counsel, I would permit his petition, at the very least, to be received and examined by the district court.”<sup>66</sup>

#### 4. *Arar v. Ashcroft*

In *Arar v. Ashcroft*, a dual citizen of Canada and Syria was detained while changing planes at John F. Kennedy Airport.<sup>67</sup> He alleged that he was detained on a warning from Canadian authorities that he was a member of Al Qaeda, was mistreated for the twelve days he spent in United States custody, and was “then removed to Syria via Jordan pursuant to an inter-governmental understanding that he would be detained and interrogated under torture by Syrian officials.”<sup>68</sup> His complaint alleged violations of the Torture Victim Protection Act,<sup>69</sup> his Fifth Amendment rights, and *Bivens* claims<sup>70</sup> against federal officials.<sup>71</sup> The district court dismissed his claims with leave to re-plead; Arar appealed to the Second Circuit without re-pleading and a three-judge panel affirmed the District Judge’s order.<sup>72</sup> Sitting en banc, the Second

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<sup>62</sup> *Id.* (citing *Holland v. Florida*, 130 S. Ct. 2549 (2010)).

<sup>63</sup> *Jenkins*, 630 F.3d at 306.

<sup>64</sup> *Id.* at 309 (quoting *Holland*, 130 S. Ct. at 2563).

<sup>65</sup> *Jenkins*, 630 F.3d at 309.

<sup>66</sup> *Id.*

<sup>67</sup> *Arar v. Ashcroft*, 585 F.3d 559, 565 (2d Cir. 2009) (en banc).

<sup>68</sup> *Id.* at 563.

<sup>69</sup> Torture Victim Protection Act, 28 U.S.C. § 1350(a)(1) (2011).

<sup>70</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). “In *Bivens* . . . the Supreme Court ‘recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.’” *Arar*, 585 F.3d at 571 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)).

<sup>71</sup> *Arar*, 585 F.3d at 563.

<sup>72</sup> *Id.*

Circuit affirmed the panel's decision dismissing Arar's claims.<sup>73</sup> Judges Parker, Sack, Calabresi, and Pooler all dissented, with each filing a separate dissenting opinion and concurring in the others' dissenting opinions.<sup>74</sup>

Judge Parker's dissenting opinion focused on the majority's neglect of the Convention Against Torture.<sup>75</sup> He noted that the Convention required compliance with its tenets regardless of extraordinary circumstances.<sup>76</sup> He felt that the majority's dismissal of Arar's claims left him without a remedy despite his credible claims of conspiracy on the part of United States officials.<sup>77</sup> Judge Parker was disturbed by the majority's reliance on separation of powers to justify its decision, noting that such a result undermined the system of checks and balances on which the government is based.<sup>78</sup> Judge Parker argued that since the majority recognized that Arar had been harmed but nevertheless found he was without a remedy in the federal courts, the majority's approach could lead to an executive branch that can interpret and bend the laws to its will.<sup>79</sup> Judge Parker maintained that the war against terror should not limit judicial inquiry into Constitutional violations but that the judiciary must continue to examine allegations of violations in order to maintain a working government and protect individual liberties.<sup>80</sup> The end result of Judge Parker's dissent—and most importantly, the result of his vote in favor of Arar—would lead to Arar being able to contest his claims in the district court and seek relief for the alleged violations of his rights.

### *B. Judge Sack's Dissenting Opinions*

Between August 1, 2006 and October 1, 2011, Judge Sack dissented a total of six times; five of these cases involved criminal defendants and issues—only *New York Times Co. v. Gonzales*, did not.<sup>81</sup> Because the majority of these dissents are concerning

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 582.

<sup>75</sup> *Id.* at 610 (Parker, J., dissenting).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 610–11.

<sup>79</sup> *Id.* at 611.

<sup>80</sup> *Id.* at 612–13.

<sup>81</sup> *United States v. Kumar*, 617 F.3d 612 (2d Cir. 2010); *United States v. Fell*, 571 F.3d 264 (2d Cir. 2009); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc); *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008); *United States v. Elfgeeh*, 515 F.3d 100 (2d Cir. 2008); *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). *New York Times Co.* was a First Amendment case

criminal issues, only the criminal cases will be discussed below.<sup>82</sup>

### 1. *United States v. Kumar*

In *United States v. Kumar*, the defendants pled guilty “to several counts of conspiracy, securities and wire fraud, obstruction of justice, and perjury.”<sup>83</sup> Both defendants appealed on the basis that they were sentenced according to the Sentencing Guidelines in effect at sentencing and not when the offenses were committed and that they were improperly denied responsibility credit and restitution was improperly calculated.<sup>84</sup> Defendant Richards also appealed on the grounds that: (1) the indictment failed to properly charge him and (2) his guilty plea was unconstitutionally procured as the result of coercion by the government.<sup>85</sup> The majority affirmed the district court’s decisions in all respects except that it remanded because Richards was eligible for a reduction on the basis of acceptance of responsibility and therefore it was necessary to resentence him.<sup>86</sup>

Judge Sack concurred in almost all of the majority’s conclusions, except that he found that the sentencing calculation based on the sentencing guidelines in effect at sentencing violated the constitutional prohibition against ex post facto laws.<sup>87</sup> Judge Sack noted that he disagreed with the characterization of the later-in-time obstruction of justice charges as related to the wire and securities fraud charges such that the later Guidelines would apply.<sup>88</sup> Judge Sack argued that the defendants would not have had “fair notice” of the sentences to be imposed at the time the acts were committed.<sup>89</sup> Because of this, Judge Sack would remand for resentencing under the Guidelines in effect at the time the crimes were committed.<sup>90</sup>

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involving issues of privileges when reporters allegedly endanger national security by alerting potential terrorists of imminent searches. *N.Y. Times Co.*, 459 F.3d at 162.

<sup>82</sup> Because Judge Sack dissented in *Arar v. Ashcroft* for both the three-judge panel and the en banc rehearing, his position in that case will be discussed only once.

<sup>83</sup> *Kumar*, 617 F.3d at 616.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 616–17.

<sup>86</sup> *Id.* at 617.

<sup>87</sup> *Id.* at 638 (Sack, J., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

## 2. United States v. Fell

In *United States v. Fell*, a three-judge panel upheld the imposition of the death penalty for murder.<sup>91</sup> The defendant petitioned for an en banc rehearing.<sup>92</sup> The concurring opinion<sup>93</sup> dealt with each of the defendant's arguments in order to respond to the criticisms raised by the dissent.<sup>94</sup> Judges Calabresi and Pooler also filed dissenting opinions.<sup>95</sup>

Judge Sack wrote a separate dissenting opinion to note his disagreement with the denial of the rehearing.<sup>96</sup> Judge Sack noted that if the rehearing were granted he would likely have ultimately agreed with the panel opinion that denied the defendant's petition.<sup>97</sup> However, he felt that because "death is different" and this was the first death penalty case to be decided in decades, it warranted a decision by the entire court.<sup>98</sup> Noting the importance of the issue, Judge Sack said "that an exchange of views among the members of the Court on these issues in this discrete context—with the benefit of briefing, argument, and deliberation—would be of considerable value to the Court and, through it, to the public."<sup>99</sup>

## 3. Arar v. Ashcroft

In *Arar v. Ashcroft*,<sup>100</sup> Judge Sack's dissent focused on the majority's refusal to find a valid *Bivens* claim.<sup>101</sup> He noted that the

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<sup>91</sup> *United States v. Fell*, 571 F.3d 264, 265 (2d Cir. 2009). The defendant and an accomplice killed Fell's mother and her companion by stabbing them. *Id.* In fleeing Vermont, the two kidnapped a convenience store clerk and stole her car. *Id.* Once in New York, Fell and his accomplice stopped in the woods and beat her to death. *Id.* This third murder was the basis of the federal prosecution which led to the imposition of the death penalty since it was an interstate killing and carjacking. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> There was no majority opinion for the denial of the rehearing. Judge Raggi filed a concurring opinion to respond to some of the arguments raised by the dissent. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 282, 295.

<sup>96</sup> *Id.* at 295.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)).

<sup>99</sup> *Fell*, 571 F.3d at 296.

<sup>100</sup> Since this case was discussed above, the facts and holding of the majority opinion will not be repeated here. See *supra* text accompanying notes 67–74. Also, because Judge Sack dissented for much the same reasons in the three-judge panel, his dissenting opinion in the three-judge panel will not be discussed here. See *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008). His dissenting vote in that case would have been to allow Arar's claim to move forward in federal court to seek a remedy for the alleged violations of his rights. *Id.* at 193 (Sack, J., dissenting).

<sup>101</sup> *Arar v. Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009) (Sack, J., dissenting).

majority incorrectly split the complaint into two different claims—a domestic one (without torture) and an international claim (with torture)—thus finding no violation domestically which would be a valid basis for a *Bivens* claim.<sup>102</sup> Judge Sack maintained that the separation of the claims like this was inappropriate but, even with such a division of causes of action, the complaint still validly alleged a *Bivens* claim.<sup>103</sup> Judge Sack warned that the majority opinion is so concerned with not finding a valid *Bivens* claim that it makes “dubious law.”<sup>104</sup> Judge Sack claims that the majority’s decision was reached only by relying on the incorrect statements of law relied on by the district court and that the ultimate disposition cannot be reconciled with existing *Bivens* case law.<sup>105</sup> Going through each of Judge Sack’s legal arguments, the end result of his vote would be to allow Arar’s case to move forward in the district court—to give Arar the chance to prove his allegations and potentially obtain some relief for what he claims happened to him.

#### 4. *United States v. Elfgeeh*

In *United States v. Elfgeeh*, the defendants, an uncle and nephew, were convicted of “operating an unlicensed money-transmitting business” and one of the defendants was convicted of “structuring financial transactions.”<sup>106</sup> The defendants appealed, contending “that they received an unfair trial due to newspaper publicity and trial testimony relating to terrorism and violence, and that the district court improperly instructed the jury on the *mens rea* element of the money-transmitting statute,” among other things.<sup>107</sup> The three-judge panel affirmed most of the convictions and sentences but “vacate[d] and remand[ed] for reconsideration of the fine imposed on [one defendant] and one of the sentencing enhancements applied to [the other defendant].”<sup>108</sup> The defendants were tried in the wake of September 11th and the *New York Post* published articles questioning whether the Elfgeehs’ money-transmitting business was terrorism-related.<sup>109</sup>

Judge Sack concurred in most of the parts of the opinion but

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<sup>102</sup> *Id.* at 582–83.

<sup>103</sup> *Id.* at 583.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 590.

<sup>106</sup> *United States v. Elfgeeh*, 515 F.3d 100, 107 (2d Cir. 2008).

<sup>107</sup> *Id.* at 107–08 (emphasis in original).

<sup>108</sup> *Id.* at 108.

<sup>109</sup> *Id.* at 116–18.

dissented insofar as the convictions against one of the defendants did not comport with principles of due process because of “extensive and particularly prejudicial publicity . . . [and] with the district court’s instructions to the jury as to the state of [the defendant’s] knowledge needed to permit a conviction.”<sup>110</sup> Judge Sack recognized that the trial was likely tainted by media suggestions that the defendants’ money-transmitting business was terrorism-related.<sup>111</sup> Judge Sack also disagreed with the majority insofar as the majority seemed to affirm the failure to properly instruct the jury on the mens rea requirement by applying something close to a harmless error test.<sup>112</sup> Judge Sack noted that the evidence as to the second defendant’s knowledge of the business was more circumstantial and thus the mens rea instruction was more critical to his conviction.<sup>113</sup> Because Judge Sack felt that there was the possibility that the instruction was not harmless error, he would vacate and remand for further proceedings.<sup>114</sup>

### C. Judge Parker’s Majority Opinions

Between August 1, 2006 and October 1, 2011, Judge Parker authored seventy-five total opinions.<sup>115</sup> Of these, twenty-six were of a criminal nature.<sup>116</sup> Broken down further, there were sixteen

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<sup>110</sup> *Id.* at 140 (Sack, J., dissenting).

<sup>111</sup> *Id.* at 143.

<sup>112</sup> *Id.* at 147.

<sup>113</sup> *Id.* at 148.

<sup>114</sup> *Id.*

<sup>115</sup> This number represents the results of a Westlaw search run by the author (au(parker) & da(aft 8/1/2006 & bef 11/1/2011)) in the Westlaw United States Court of Appeals for the Second Circuit database.

<sup>116</sup> *United States v. Tzolov*, 642 F.3d 314 (2d Cir. 2011); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Ramirez*, 609 F.3d 495 (2d Cir. 2010); *United States v. Needham*, 604 F.3d 673 (2d Cir. 2010); *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2010); *United States v. McCallum*, 584 F.3d 471 (2d Cir. 2009); *United States v. Dhafir*, 577 F.3d 411 (2d Cir. 2009); *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009); *Weng v. Holder*, 562 F.3d 510 (2d Cir. 2009); *United States v. Kapelioujnyj*, 547 F.3d 149 (2d Cir. 2008); *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008); *United States v. Yannotti*, 541 F.3d 112 (2d Cir. 2008); *Nnebe v. United States*, 534 F.3d 87 (2d Cir. 2008); *United States v. Becker*, 502 F.3d 122 (2d Cir. 2007); *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2d Cir. 2007); *Hemstreet v. Greiner*, 491 F.3d 84 (2d Cir. 2007); *United States v. Amico*, 486 F.3d 764 (2d Cir. 2007); *United States v. Robinson*, 473 F.3d 487 (2d Cir. 2007); *Mosby v. Senkowski*, 470 F.3d 515 (2d Cir. 2006); *Islam v. Gonzales*, 469 F.3d 53 (2d Cir. 2006); *Gjolaj v. Bureau of Citizenship & Immigration Serv.*, 468 F.3d 140 (2d Cir. 2006); *Singh v. Gonzales*, 468 F.3d 135 (2d Cir. 2006); *Beskovic v. Gonzales*, 467 F.3d 223 (2d Cir. 2006); *United States v. Rangolan*, 464 F.3d 321 (2d Cir. 2006); *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006); *Bao v. Gonzales*, 460 F.3d 426 (2d Cir. 2006). This list includes cases which are criminal (i.e., a criminal defendant or the state is directly appealing a criminal prosecution), habeas corpus cases (a criminal defendant or the state through a warden is appealing the

criminal opinions, two habeas corpus opinions, and eight immigration opinions.<sup>117</sup>

In the criminal opinions, the state won five times,<sup>118</sup> the defendant won eight times,<sup>119</sup> and in three of them, the result was mixed.<sup>120</sup> It is somewhat unsurprising, given Judge Parker's record in his dissents, that the criminal defendant won in fifty percent of the criminal cases where he authored the majority opinion. A criminal defendant is generally more likely to lose an appeal than win it, so the fact that criminals fare so well with Judge Parker shows a priority for protecting the rights of defendants in court.

Judge Parker only authored two habeas corpus opinions during the study period. Of these, both votes were in favor of the state.<sup>121</sup> Like criminal defendants, habeas corpus petitioners generally do not fare well on appeal.

In immigration cases, Judge Parker voted for the petitioner in fifty percent of the cases.<sup>122</sup> In these cases, Judge Parker frequently remanded for a more meaningful review of the petitioner's application, ensuring that the petitioner received a full chance to prove his or her case.

Comparing all of these results, for all of the "criminal nature"

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disposition of a habeas corpus petition), and immigration cases (where a individual is facing deportation or removal). These types of cases were chosen because the consequences of these cases are in line with the issues which came up during the study of Judge Parker's dissents. The consequences to a losing criminal defendant, habeas petition, or a deportable individual are similar in that it can result in the loss of the ability to live free in the United States and thus many of the same rationales come into play in these cases.

<sup>117</sup> *Tzolov*, 642 F.3d at 314; *Dorvee*, 616 F.3d at 174; *Ramirez*, 609 F.3d at 495; *Needham*, 604 F.3d at 673; *Reeves*, 591 F.3d at 77; *McCallum*, 584 F.3d at 471; *Dhafir*, 577 F.3d at 411; *Ivezaj*, 568 F.3d at 88; *Weng*, 562 F.3d at 510; *Kapelioujnyj*, 547 F.3d at 149; *Al-Moayad*, 545 F.3d at 139; *Yannotti*, 541 F.3d at 112; *Nnebe*, 534 F.3d at 87; *Becker*, 502 F.3d at 122; *Shi Liang Lin*, 494 F.3d at 296; *Hemstreet*, 491 F.3d at 84; *Amico*, 486 F.3d at 764; *Robinson*, 473 F.3d at 487; *Mosby*, 470 F.3d at 515; *Islam*, 469 F.3d at 53; *Gjolaj*, 468 F.3d at 140; *Singh*, 468 F.3d at 135; *Beskovic*, 467 F.3d at 223; *Rangolan*, 464 F.3d at 321; *Shou Yung Guo*, 463 F.3d at 109; *Bao*, 460 F.3d at 426.

<sup>118</sup> *Ramirez*, 609 F.3d at 495; *McCallum*, 584 F.3d at 471; *Ivezaj*, 568 F.3d at 88; *Yannotti*, 541 F.3d at 112; *Robinson*, 473 F.3d at 487.

<sup>119</sup> *Dorvee*, 616 F.3d at 174; *Reeves*, 591 F.3d at 77; *Kapelioujnyj*, 547 F.3d at 149; *Al-Moayad*, 545 F.3d at 139; *Nnebe*, 534 F.3d at 87; *Becker*, 502 F.3d at 122; *Amico*, 486 F.3d at 764; *Rangolan*, 464 F.3d at 321.

<sup>120</sup> *Tzolov*, 642 F.3d at 314; *Needham*, 604 F.3d at 673; *Dhafir*, 577 F.3d at 411. A mixed result is a result in which there was a partial decision for the state and a partial decision for the defendant. For example, a remand where some of a defendant's claims were dismissed was characterized as a mixed decision.

<sup>121</sup> *Hemstreet*, 491 F.3d at 84; *Mosby*, 470 F.3d at 515.

<sup>122</sup> The cases for the petitioner were: *Islam*, 469 F.3d at 53; *Gjolaj*, 468 F.3d at 140; *Beskovic*, 467 F.3d at 223; *Bao*, 460 F.3d at 426. The cases for the state were: *Shi Liang*, 494 F.3d at 296; *Singh*, 468 F.3d at 135. The mixed cases were: *Weng*, 562 F.3d at 510; *Shou Yung Guo*, 463 F.3d at 109.

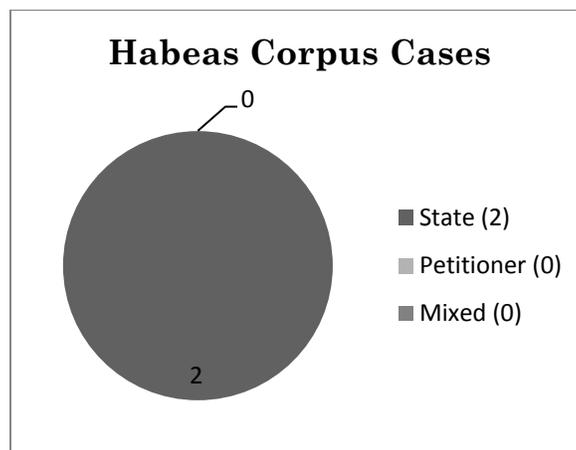
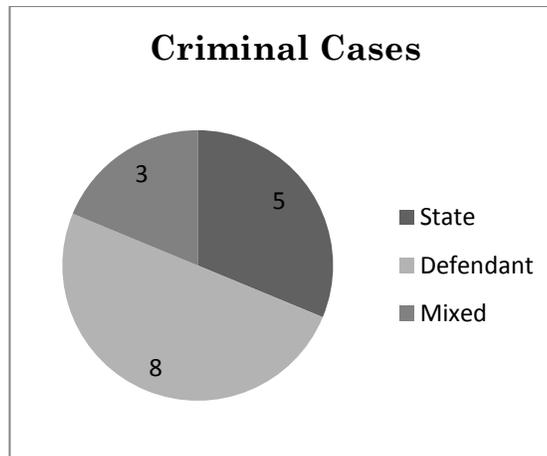
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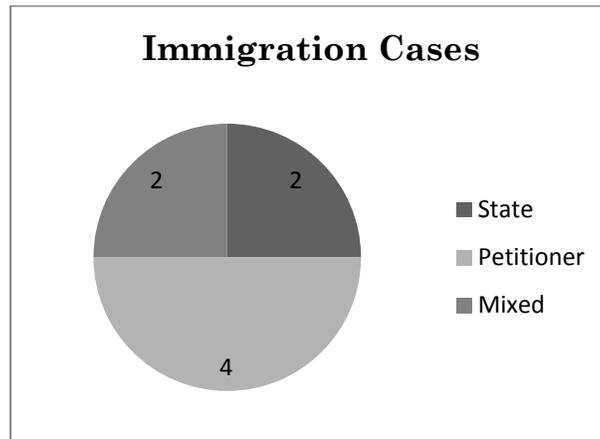
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cases, the state won in nine of the cases, the defendant won in fifteen, and the results were mixed in five. By percentage, the results were thirty-five percent for the state, forty-six percent for the defendant or petitioner, and nineteen percent mixed.

### Judge Parker's Majorities





#### *D. Judge Sack's Majority Opinions*

Between August 1, 2006 and October 1, 2011, Judge Sack authored seventy-eight total opinions.<sup>123</sup> Of these, twenty-two were of a criminal nature.<sup>124</sup> Fifteen were criminal cases, three were habeas corpus cases, and four were immigration cases.

For the criminal cases, four cases were for the state,<sup>125</sup> nine cases were for the defendant,<sup>126</sup> and two cases were mixed.<sup>127</sup> Like Judge Parker, Judge Sack's voting shows a clear pattern in favor of the

<sup>123</sup> This number represents the results of a Westlaw search run by the author (au(sack) & da(aft 8/1/2006 & bef 11/1/2011)) in the Westlaw United States Court of Appeals for the Second Circuit database.

<sup>124</sup> *Ramchair v. Conway*, 601 F.3d 66 (2d Cir. 2010); *United States v. Davis*, 598 F.3d 10 (2d Cir. 2010); *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *United States v. Figueroa*, 548 F.3d 222 (2d Cir. 2008); *Brown v. Alexander*, 543 F.3d 94 (2d Cir. 2008); *In re Basciano*, 542 F.3d 950 (2d Cir. 2008); *United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008); *United States v. Santos*, 541 F.3d 63 (2d Cir. 2008); *United States v. Legros*, 529 F.3d 470 (2d Cir. 2008); *United States v. Frias*, 521 F.3d 229 (2d Cir. 2008); *United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008); *United States v. Griffin*, 510 F.3d 354 (2d Cir. 2007); *United States v. Liriano-Blanco*, 510 F.3d 168 (2d Cir. 2007); *United States v. Rosa*, 507 F.3d 142 (2d Cir. 2007); *Policano v. Herbert*, 507 F.3d 111 (2d Cir. 2007); *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007); *Noble v. Keisler*, 505 F.3d 73 (2d Cir. 2007); *Maiwand v. Gonzales*, 501 F.3d 101 (2d Cir. 2007); *Qin Wen Zheng v. Gonzales*, 500 F.3d 143 (2d Cir. 2007); *Chambers v. Office of Chief Counsel*, 494 F.3d 274 (2d Cir. 2007); *United States v. Sindima*, 488 F.3d 81 (2d Cir. 2007); *United States v. Kaba*, 480 F.3d 152 (2d Cir. 2007). These cases were chosen by the same criteria as for Judge Parker. See *supra* note 116 for an explanation of the methodology used to select these cases.

<sup>125</sup> *Figueroa*, 548 F.3d at 222; *In re Basciano*, 542 F.3d at 950; *Santos*, 541 F.3d at 63; *Frias*, 521 F.3d at 229.

<sup>126</sup> *Davis*, 598 F.3d at 10; *Kozeny*, 541 F.3d at 166; *Legros*, 529 F.3d at 470; *Griffin*, 510 F.3d at 354; *Liriano-Blanco*, 510 F.3d at 168; *Rosa*, 507 F.3d at 142; *Shellef*, 507 F.3d at 82; *Sindima*, 488 F.3d at 81; *Kaba*, 480 F.3d at 152.

<sup>127</sup> *Stewart*, 590 F.3d at 93; *Pepin*, 514 F.3d at 193.

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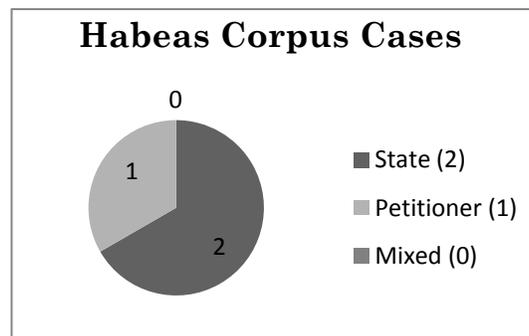
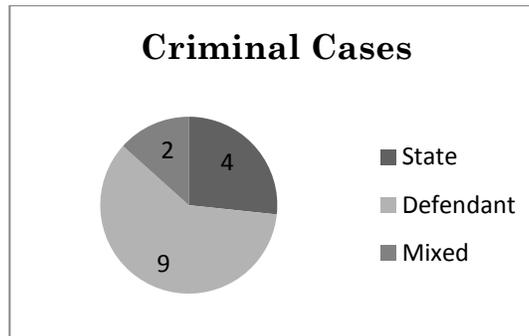
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defendant. These cases frequently gave defendants chances to prove their cases and put the burden on the government to prove its case before incarcerating a defendant.

Judge Sack authored three habeas corpus opinions. Two were for the state<sup>128</sup> and one was for the petitioner.<sup>129</sup> For the immigration cases, Judge Sack voted for the state in three cases<sup>130</sup> and in one case the result was mixed.<sup>131</sup>

Overall, Judge Sack voted for the state nine out of twenty-two times, for the defendant or petitioner ten out of twenty-two times, and the results were mixed in three out of twenty-two cases. By percentage, this is for the state forty percent of the time, for the defendant or petitioner forty-five percent of the time, and mixed fourteen percent of the time.<sup>132</sup>

### Judge Sack's Majorities



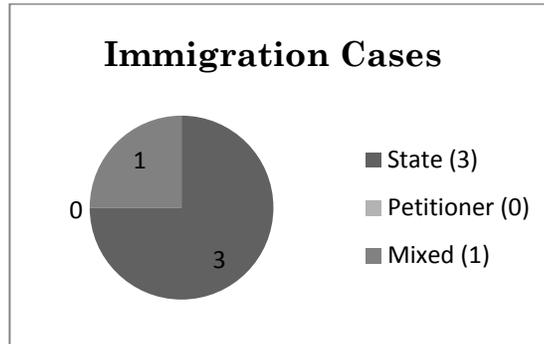
<sup>128</sup> *Brown*, 543 F.3d at 94; *Policano*, 507 F.3d at 111.

<sup>129</sup> *Ramchair*, 601 F.3d at 66.

<sup>130</sup> *Noble*, 505 F.3d at 73; *Qin Wen Zheng*, 500 F.3d at 143; *Chambers*, 494 F.3d at 274.

<sup>131</sup> *Maiwand*, 501 F.3d at 101.

<sup>132</sup> These percentages do not add up to one hundred percent because of rounding.



#### IV. CONCLUSION

As the review of these cases has made apparent, Judges Parker and Sack have a clear record of protecting those who face the power of the government in court. In their majority and dissenting opinions, Judges Parker and Sack seem ready to put the government's case to the test, ensuring that a case is procedurally and structurally sound before allowing the penal and immigration systems to punish an individual.

In all of the split opinions, the parties and judges had compelling arguments to support their side. In a small sample it may have been possible to determine who was "right" in any given case. But over time, what is "right" blurs into a voting pattern which illuminates a judge's priorities.

Looking at Judge Parker's and Judge Sack's biographies, one would not immediately conclude that these two judges would be concerned with controlling the power of the state to ensure individual rights are protected. However, after examining their opinions—with all of the criminal dissenting opinions in favor of the defendant and the plurality of the opinions in favor of the defendant or petitioner—it is clear that protecting the individual against the almost unlimited power of the state is a motivation of these judges. Whether conscious or unconscious, the ultimate pattern is clear.