

# The Burger Court Opinion Writing Database

*Burbank v. Lockheed Air Terminal, Inc.*

411 U.S. 624 (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



CHAMBERS OF  
THE CHIEF JUSTICE

January 15, 1973

Dear Lewis:

Re: No. 71-1637 - Burbank v. Lockheed  
Air Terminal

The above case was put over to the  
February session so there is no hurry. I see  
no disqualification.

Regards,

A handwritten signature, likely "WJB", is written in ink above the name Mr. Justice Powell.

Mr. Justice Powell

Supreme Court of the United States

Washington, D. C. 20543

RECEIVED

*File*

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 19, 1973 FEB 20 9 06 AM '73

CHAMBERS OF THE  
CHIEF JUSTICE

*See Chief's  
note on next page*

Re: No. 71-1637 Burbank v. Lockheed Air  
Terminal, Inc.

Dear Chief:

This will supplement my letter of January 14, in which I mentioned my former representation, from time to time, of Eastern Air Lines. I expressed the view that this would not disqualify me, and you concurred.

Since writing you, I have recalled that United Air Lines was a party to a suit pending in the Eastern District of Virginia at the time of my nomination to the Court, in which I had been associated by New York counsel to join them in defending all of the air lines using National Airport. I was associated in the case at the request of Eastern Air Lines, and I had no communications with anyone on behalf of United or indeed any other air line. But I was among counsel of record for all of the air lines, and the case is still pending in the federal courts.

The Virginia case, although related to airport noise and pollution, involves different issues from the Burbank case. The latter involves the question of federal preemption with respect to a local municipal ordinance.

Thus, the situation is this: United Air Lines is one of the parties using the Burbank Airport and is a party in that case. United is also a party in the Virginia case. The question is whether my casual representation of a group of air lines in the Virginia case, including United, is a ground for my disqualification in this case.

I would think not, but would like your judgment on the merits and also whether I should submit this to the Conference. So far as I

can recall, neither I nor my firm has represented United in the past. This employment came about through my relationship with Eastern, and my only discussions concerning the litigation were with Eastern's counsel and with the New York law firm (Cleary, Gottlieb) primarily in charge of the litigation.

We also have pending United Air Lines v. Mahin, in which I have participated up to this point. My relationship with United was so casual and tangential that I had forgotten it altogether until my secretary suggested that we check the file in the Virginia case.

I will be happy to bring all of this to the Conference or handle it as you may suggest. I personally feel no incapacity to sit and act impartially, but I want to accord due respect to appearances as well.

Sincerely,

Lewis

The Chief Justice

lfp/ss

Dear Lewis,

I see no problem here or in U.A.L. v. Mahin. Were it my question I would not consider it one to submit to the Conf.

Regards

WRB

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

CHAMBERS OF  
THE CHIEF JUSTICE

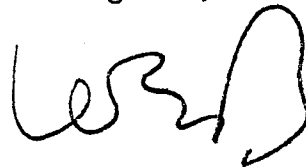
May 11, 1973

Re: No. 71-1637 - City of Burbank v. Lockheed Air Terminal

Dear Bill:

Please join me.

Regards,



Mr. Justice Douglas

Copies to the Conference

105-4

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Circulated: 3-14-73

No. 71-1637

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

City of Burbank et al.,	}	On Appeal from the United States Court of Appeals for the Ninth Circuit.
Appellants,		
v.		
Lockheed Air Terminal Inc. et al.		

[March —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Court in *Cooley v. Board of Wardens*, 12 How. 299, first stated the rule of pre-emption which is the critical issue in the present case. Speaking through Justice Curtis, it said:

"Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.*, at 319.

This suit brought by appellees asked for an injunction against the enforcement of an ordinance adopted by the City Council of Burbank, California, which made it unlawful for a so-called pure jet aircraft to take off from

4,9

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1637

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: Douglas, J.

Circulated:

Recirculated:

City of Burbank et al.,  
Appellants,  
v.  
Lockheed Air Terminal  
Inc. et al.

On Appeal from the United  
States Court of Appeals for  
the Ninth Circuit.

4-20

[March —, 1973]

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9/ 14  
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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-1637

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

Recirculated: 4-23

City of Burbank et al.,  
Appellants,  
v.  
Lockheed Air Terminal  
Inc. et al.

On Appeal from the United  
States Court of Appeals for  
the Ninth Circuit.

[March —, 1973]

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 14, 1973

RE: No. 71-1637 - City of Burbank v. Lockheed Air Terminal

Dear Bill:

I agree.

Sincerely,



Mr. Justice Douglas

cc: The Conference

2

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 19, 1973

Re: No. 71-1637, City of Burbank v. Lockheed  
Air Terminal

Dear Bill,

Please add my name to your dissenting opinion  
in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

3

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 20, 1973

Re: No. 71-1637 - City of Burbank v. Lockheed  
Air Terminal

Dear Bill:

Join me in your dissent in this case,  
please.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 26, 1973

Re: No. 71-1637 - Burbank v. Lockheed Air

Dear Bill:

Please join me in your dissenting  
opinion.

Sincerely,



T.M.

Mr. Justice Rehnquist

cc: Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 19, 1973

Re: No. 71-1637 - City of Burbank v. Lockheed Air  
Terminal, Inc.

Dear Bill:

Please join me.

Sincerely,

*H.A.B.*

Mr. Justice Douglas

Copies to the Conference.

January 14, 1973

Re: No. 71-1637 Burbank v. Lockheed Air  
Terminal, Inc. et al

Dear Chief:

In preparing for the argument of the above case over the weekend, it has come to my attention for the first time that an intervening plaintiff is "Air Transport Association of America", described as an unincorporated trade association, the members of which include virtually all United States scheduled air carriers.

As you may recall, I have recused myself in a case in which Eastern Air Lines was a party because I had done some legal work for Eastern in Virginia. Neither I nor my firm was retained by Eastern, but I was employed in several matters over recent years.

The intervening petition on behalf of the Transport Association lists four air lines which use the Hollywood-Burbank Airport. Eastern does not use this airport, does not operate in the western part of the United States, and is not mentioned by name - so far as I can find - in any of the papers filed in this case. Yet, I suppose it is fair to say that all air lines will be interested in the outcome of the case.

In these circumstances, I invite your advice as to whether I should disqualify myself. The issue involves the public interest generally and the entire aviation industry. I am inclined to think that I am not disqualified. If prior representation of a company in a particular industry disqualified one from sitting in any case affecting the industry, the disqualification would be broad indeed. I add that I own no aviation stock.

Nevertheless, I will mention this to the Conference on Friday and wanted you to have an opportunity in advance to reflect on it. Meanwhile, I will sit for the oral argument, unless you have a different thought.

Sincerely,

The Chief Justice

lfp/ss

February 19, 1973

Re: No. 71-1637 Burbank v. Lockheed Air  
Terminal, Inc.

Dear Chief:

This will supplement my letter of January 14, in which I mentioned my former representation, from time to time, of Eastern Air Lines. I expressed the view that this would not disqualify me, and you concurred.

Since writing you, I have recalled that United Air Lines was a party to a suit pending in the Eastern District of Virginia at the time of my nomination to the Court, in which I had been associated by New York counsel to join them in defending all of the air lines using National Airport. I was associated in the case at the request of Eastern Air Lines, and I had no communications with anyone on behalf of United or indeed any other air line. But I was among counsel of record for all of the air lines, and the case is still pending in the federal courts.

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I would think not, but would like your judgment on the merits and also whether I should submit this to the Conference. So far as I

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Sincerely,

The Chief Justice

lfp/ss

67  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 15, 1973

Re: No. 71-1637 City of Burbank v. Lockheed

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 22, 1973

Re: No. 71-1637 - Burbank v. Lockheed

Dear Bill:

In due course, I plan on circulating a dissent  
in this case.

Sincerely,



Mr. Justice Douglas

Copies to the Conference

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-1637

Circuit Court

4/18

Reconsidered

City of Burbank et al.,  
Appellants,  
v.  
Lockheed Air Terminal  
Inc. et al.

On Appeal from the United  
States Court of Appeals for  
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The Court concludes that congressional legislation dealing with aircraft noise has so "pervaded" that field that Congress has *impliedly* pre-empted it, and therefore the ordinance of the city of Burbank here challenged is invalid under the Supremacy Clause of the Constitution. The Court says that "we need not, however, dwell long on the earlier versions of the Federal Aviation Act, for a 1972 Act put the question completely at rest." *Ante*, at —. Yet the House and Senate committee reports explicitly state that the 1972 Act to which the Court refers was *not* intended to alter the balance between state and federal regulation which had been struck by earlier congressional legislation in this area. The House Report, H. R. Rep. No. 92-842, in discussing the general pre-emptive effect of the entire bill, stated:

"The authority of State and local government to regulate use, operation or movement of products is not effected at all by the bill. (The preemption provision discussed in this paragraph does not apply to aircraft. See discussion of aircraft noise below.)"  
*Id.*, at 8.

The report went on to state specifically:

"No provision of the bill is intended to alter in any way the relationship between the authority of the

WHP  
Please join me  
in your dissenting opinion  
This was  
held for dissent