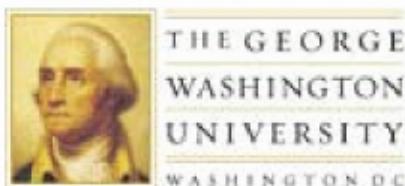


# The Burger Court Opinion Writing Database

*United States v. Maine*

420 U.S. 515 (1975)

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 3, 1975

Re: 35 Orig. - U. S. v. Maine

MEMORANDUM TO THE CONFERENCE:

In this case there seems to be four Justices who think an opinion (either per curiam or signed) should be written.

Beyond doubt time is of the essence on this matter and I believe we should announce the disposition as soon as possible and let the opinion follow, unless the "brief" opinion suggested by someone can come down within two weeks, i.e., March 17.

Byron was perhaps the most vehement on the matter of an opinion preceding the Decree and I assign the case to him. He will work out the possible remand to the Special Master to consider the alternative basis for his recommendation on the juridical bay at the southerly tip of the mainland.

Regards,

WES

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

CHAMBERS OF  
THE CHIEF JUSTICE

March 3, 1975

Re: 35 Orig. - U. S. v. Maine

MEMORANDUM TO THE CONFERENCE:

Please disregard the last sentence of today's  
earlier memo under this title. (The sentence applies  
to 52 Orig. - U. S. v. Florida.)

Regards,

les B

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

CHAMBERS OF  
THE CHIEF JUSTICE

March 3, 1975

Re: 35 Orig. - U. S. v. Maine

MEMORANDUM TO THE CONFERENCE:

In case it missed your eyes, the enclosed  
may be of interest.

Regards,

15

Enclosure

## Lawmaking for the Seas

# Lawmaking for the Seas

by John R. Stevenson

The United Nations Conference on the Law of the Sea is engaged in a monumental task—nothing short of drafting a constitution for the oceans that will gain the support of the world's nations. The first substantive session of the conference has been concluded, and the second will open next month in Geneva. Several new approaches to international lawmaking are being used.

THE THIRD United Nations Conference on the Law of the Sea held its first substantive session last summer in Caracas from June 20 to August 29, and a second substantive session is scheduled to meet for eight weeks in Geneva commencing on March 17 of this year.

The fundamental task of this conference, which many consider the most important international lawmaking conference since the establishment of the United Nations in 1945, is to agree on a legal regime governing the activities of men and nations on more than two thirds of the surface of the world. The results of the first substantive session of the conference and the prospects for agreement have been reported in hearings before congressional committees<sup>1</sup> and in other journals.<sup>2</sup> Rather than essentially repeating those reports, this article focuses on the law of the sea negotiations as an example of the international lawmaking process and on those aspects of the process that appear to be most constructive in facilitating agreement on a constitution for the oceans.

Why do we need international lawmaking for the seas? Consideration of this basic question resolves itself into two subquestions: Why do we need any legal regime for the oceans, and why is it necessary to have a system of international as opposed to national law for this vast area of the world?

The answer to the first is merely a variant of the basic political theory and jurisprudential inquiry as to why we need law at all: As long as nations and their nationals use this vast area and exploit its resources, there must be certain agreed principles of conduct to resolve competing uses and conflicts. Otherwise there will be chaos.

But why is international rather than national lawmaking necessary?

This is a more complex issue. One possibility would have been to extend the national state system established in the seventeenth century to embrace the seas as well as the land territory of the world. This, in fact, was attempted, with brief periods of varying success, by those countries that sought to establish maritime empires with the same sovereignty over the seas as they had on land. Because of the desires, however, of other states to navigate freely and to carry on naval and commercial activities throughout the ocean without seeking the consent of a territorial sovereign, the extension of coastal state territorial sovereignty was limited by and large to a fairly narrow belt of territorial sea that ranged until very recent history between three and twelve miles. In the area beyond the international regime freedom of the seas was firmly established. This regime excluded national sovereignty over the ocean and permitted everyone the free use of the seas and their resources, providing they showed reasonable regard for the interests of others in their exercise of this freedom.

This simple, comprehensive rule of international law served the international community well for more than three centuries. It reflected the general interest in free common utilization of the ocean, at least on the part of those countries with the national power to enforce this rule and the apparent inexhaustability of the principal ocean resource—fish. Moreover, while this basic constitutional provision was a rule of customary international law only finally codified in the 1958 High Seas Convention, the constitutional allocation of powers provided for a large measure of national jurisdiction through the establishment of the principle of flag state control over vessels navigating the high seas.

Commencing at the end of World War II, however, this established constitutional scheme for the ocean—freedom of the high seas beyond a narrow territorial sea, with flag state control over vessels on the high seas—has been widely challenged on the ground that it no longer serves the needs of the international community

1. Hearings before Senate Foreign Relations Committee on September 5, 1974, Subcommittee on Minerals, Materials and Fuels of Senate Interstate and Insular Committee on September 17, 1974, House of Representatives Merchant Marine and Fisheries Committee on September 25, 1974, and House of Representatives Foreign Affairs Committee on November 18, 1974.

2. Stevenson and Oxman, *The Third United Nations Law of the Sea Conference: The 1974 Caracas Session*, 69 AM. J. INT'L. L. 387-88.



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

CHAMBERS OF  
THE CHIEF JUSTICE

March 13, 1975

Re: No. 35 Original - United States v. Maine

Dear Byron:

I join in your proposed opinion dated

March 12.

Regards,

W.B.

Mr. Justice White

Copies to the Conference

154-15 and 154

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 1, 1975

Re: 35 Orig. - U. S. v. Maine

Dear Byron:

Please join me in your proposed order.

Regards,

W. B.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 12, 1975

RE: No. 35 Original United States v. Maine, et al.

Dear Byron:

I agree.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 29, 1975

RE: No. 35 Original - United States v. Maine

Dear Byron:

I agree with the proposed Order you have prepared in the above.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 12, 1975

Re: No. 35, Orig., United States v. Maine

Dear Byron,

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

Sincerely yours,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 28, 1975

No. 35, Orig. - United States v. Maine

Dear Byron,

The Order you propose in this case  
seems satisfactory to me.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

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

From: White, J.

Circulated: 3-12-75

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 35, Orig.

United States, Plaintiff, |  
v. | On Bill of Complaint.  
State of Maine et al. |

[March —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

Seeking to invoke the jurisdiction of this Court under Art. III, § 2, and 28 U. S. C. § 1251 (b), the United States in April 1969 sought leave to file a complaint against the 13 States bordering on the Atlantic Ocean—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida.<sup>1</sup> We granted leave to file, 395 U. S. 955, on June 16, 1969. The complaint asserted a separate cause of action against each of the States and each alleged that:

"The United States is now entitled, to the exclusion of the defendant State, to exercise sovereignty rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low watermark and from the outer limits of inland waters on the coast, extending seaward to the outer edge of the Continental Shelf, for the purpose of exploring the area and exploiting the natural resources."

<sup>1</sup> The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland waters rather than open sea.

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1-4, 6, 10, 13

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

From: White, J.

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

Recirculated: 3-13-75

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 35, Orig.

United States, Plaintiff,  
v.  
State of Maine et al. } On Bill of Complaint.

[March —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

Seeking to invoke the jurisdiction of this Court under Art. III, § 2, and 28 U. S. C. § 1251 (b), the United States in April 1969 asked leave to file a complaint against the 13 States bordering on the Atlantic Ocean—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida.<sup>1</sup> We granted leave to file, 395 U. S. 955, on June 16, 1969. The complaint asserted a separate cause of action against each of the States, and each alleged that:

"The United States is now entitled, to the exclusion of the defendant State, to exercise sovereignty rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low watermark and from the outer limits of inland waters on the coast, extending seaward to the outer edge of the Continental Shelf, for the purpose of exploring the area and exploiting the natural resources."

<sup>1</sup> The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland waters rather than open sea.

*Byron R. White*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 28, 1975

MEMORANDUM FOR THE CONFERENCE

Re: No. 35, Orig. - United States v. Maine

Normally in this kind of litigation, the Court has entered a decree at this stage expressing the respective rights of the parties and providing for further proceedings to establish the coastline of the State involved. See, for example, United States v. California, 382 U.S. 448 (1966); United States v. Louisiana, 364 U.S. 502 (1960). It would also have been normal for our opinion to have asked the parties to propose such a decree; but we were silent on the matter because of the request of the United States that it be permitted to make a further submission with respect to the matter of further proceedings. It has now filed its motion, which the Conference has voted to grant. The attached is a proposed order granting the motion and asking the parties to submit a decree which makes provision for further proceedings. With twelve States involved, and if expedition is desirable, more than one special master may be thought necessary. In any event, the proceedings may be more complicated than is usually the case.

*Byron R. White*  
B.R.W.

Attachment

35 ORIG  
4-28-1975  
BRW

ORDER

The United States has moved the Court to retain jurisdiction in this case to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to the decision of March 17, 1975, and to the Court's opinion issued on that date. The motion of the United States is granted. The parties, jointly or separately, are requested within sixty days to submit for the Court's consideration a proposed decree effectuating the March 17 decision and opinion, retaining jurisdiction over such supplemental proceedings as may be necessary or advisable and, more specifically, making provision for appropriate proceedings in this Court to establish the coastline of the defendant States and the seaward boundary between the seabed lands of the States and those of the United States.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 13, 1975

Re: No. 35, Orig. -- United States v. State of Maine

Dear Byron:

Please join me.

Sincerely,



T. M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

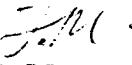
April 29, 1975

Re: No. 35, Orig. -- United States v. Maine

Dear Byron:

I agree with your proposed order in this case.

Sincerely,

  
T. M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 12, 1975

Re: No. 35 Orig. - United States v. Maine, et al.

Dear Byron:

Please join me. I appreciate your taking this on and giving it such expeditious treatment.

Sincerely,

*Harry*

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 29, 1975

Re: No. 35 Orig. - United States v. Maine, et al.

Dear Byron:

The Order you propose seems appropriate to me,  
and it has my approval.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 12, 1975

No. 35 Orig. United States v. Maine

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

1fp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 30, 1975

No. 35 Orig. United States v. Maine

Dear Byron:

I agree with your proposed order in this case.

Sincerely,

*L. Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 13, 1975

Re: No. 35, Orig. - United States v. Maine

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 1, 1975

Re: No. 35, Orig. - United States v. Maine

Dear Byron:

I agree with your proposed Order in this case.

Sincerely,

*WRW*

Mr. Justice White

Copies to the Conference