

# The Burger Court Opinion Writing Database

*Pennsylvania v. New Jersey*

426 U.S. 660 (1976)

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

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CHAMBERS OF  
THE CHIEF JUSTICE

April 14, 1976

Re: Nos. 68 Orig. - Pennsylvania v. New Jersey  
69 Orig. - Maine v. New Hampshire

MEMORANDUM TO THE CONFERENCE:

At Conference there was at least one question raised as to explicating our denial of the motion for leave to file the bills of complaint in these two cases.

It appears that a simple order has regularly been used without more.

In Arizona v. California, 377 U.S. 926 (1964), the order recited Massachusetts v. Missouri, 308 U.S. 1.

My inclination is for a "bare bones" denial or, as John Harlan put it, "denial plaino."

Absent dissent, it will be the latter.

Regards,

Lee B

To: Mr. Joseph L. Brennen  
Mr. John P. Harlan  
Mr. John Paul Stevens  
Mr. Lewis F. Powell  
Mr. John M. Harlan  
Mr. William J. Brennan  
Mr. William J. Brennan  
Mr. John P. Stevens

From: The Major Justice

Circulated: APR 15 1976

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

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 68, Orig.

Commonwealth of Pennsylvania, Plaintiff,  
v.  
State of New Jersey. } On Motion for Leave to  
File Bill of Complaint.

[April —, 1976]

PER CURIAM.

The motion for leave to file a bill of complaint is denied.

MR. JUSTICE BRENNAN would grant leave to file.

To: Mr. Justice BRENNAN  
Mr. Justice POWELL  
Mr. Justice STEVENS  
Mr. Justice MARSHALL  
Mr. Justice BLACKMUN  
Mr. Justice WHITE  
Mr. Justice REHNQUIST  
Mr. Justice CLARK

From: The Clerk of Justice

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

Recirculated: APR 15 1976

**2nd DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 68, Orig.

Commonwealth of Pennsylvania, Plaintiff,      }  
    v.      } On Motion for Leave to  
State of New Jersey.                                      File Bill of Complaint.

[April —, 1976]

**PER CURIAM.**

The motion for leave to file a bill of complaint is denied.

MR. JUSTICE BRENNAN would grant leave to file.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 7, 1976

Re: ( 68 Orig. - Pennsylvania v. New Jersey  
( 69 Orig. - Maine v. New Hampshire

MEMORANDUM TO THE CONFERENCE:

At Conference, the consensus was to dispose of these cases with a denial "plaino" in John Harlan's terms.

Now, several have expressed some doubt and Potter has written a concurring statement. I agree with all he says and I suspect everyone will be able to do so since the prior difference was only on whether any writing was called for.

I am therefore converting the essence of Potter's concurrence into a per curiam and it is attached.\*

If all agree by Thursday, these cases can come down as scheduled.

Regards,

WJB

\*The per curiam will not be available until morning.

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

From: [Redacted]

Circled: [Redacted]

Received by [Redacted] JUN 7 1976

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 68 and 69, Orig.

Commonwealth of Pennsylvania, Plaintiff,

68, Orig. v.

State of New Jersey.

State of Maine, Commonwealth of Massachusetts, and State of Vermont, Plaintiffs,

69, Orig. v.

State of New Hampshire.

On Motions for Leave to File Bill of Complaint.

[June —, 1976]

**PER CURIAM.**

The motions for leave to file bills of complaint in these cases are denied.

The complaints, which seek to invoke our original jurisdiction, filed by Pennsylvania against New Jersey, and by Maine, Massachusetts, and Vermont against New Hampshire, rely on our decision last Term in *Austin v. New Hampshire*, 420 U. S. 656 (1975), in which we held the New Hampshire Commuters Income Tax unconstitutional.

In *Austin, supra*, the Court held that the New Hampshire tax violated the Privileges and Immunities Clause of the Constitution. That law imposed a 4% tax on the New Hampshire-derived income of nonresidents. Although the law also imposed a tax on the income earned by New Hampshire residents outside the State,

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

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CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 14, 1976

RE: Nos. 68 Orig. Pennsylvania v. New Jersey  
69 Orig. Maine v. New Hampshire

Dear Chief:

If the final disposition is a "denial plaino", as you suggest, will you please add in each case:

"Mr. Justice Brennan would grant leave to file."

Sincerely,

*Bill*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 8, 1976

RE: Nos. 68 and 69 Original - Pennsylvania v. New Jersey  
and Maine v. New Hampshire

Dear Chief:

Since Potter's opinion is to be a Court Per Curiam,  
will you please revise my statement at the foot of the  
opinion to read,

"MR. JUSTICE BRENNAN dissents and would  
grant leave to file both bills of complaint."

Sincerely,



The Chief Justice

cc: 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

From: Mr. Justice Stewart

Circulated: JUN 3 1976

Recirculated:

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

Nos. 68 and 69, Orig.

Commonwealth of Pennsylvania, Plaintiff,  
 68, Orig. v.  
 State of New Jersey.

State of Maine, Commonwealth of Massachusetts,  
 and State of Vermont,  
 Plaintiffs,  
 69, Orig. v.  
 State of New Hampshire.

On Motions for Leave to  
 File Bill of Complaint.

[June —, 1976]

**MR. JUSTICE STEWART, concurring.**

Although I agree with the judgments of the Court in both of these cases, I think it appropriate to explain the reasons for my agreement.

In *Austin v. New Hampshire*, 420 U. S. 656 (1975), decided last Term, the Court held that the New Hampshire Commuters Income Tax violated the Privileges and Immunities Clause of the Constitution. That law imposed a 4% tax on the New Hampshire-derived income of nonresidents. Although the law also imposed a tax on the income earned by New Hampshire residents outside the State, it then exempted such income from the tax if the income were either taxed or not taxed by the State from which it was derived. Since New Hampshire also did not tax the domestic income of its residents, the net effect of the Commuters Income Tax was to tax only the incomes of nonresidents working in New Hampshire.

The resident State of the plaintiff in *Austin* was Maine,

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 8, 1976

68 Orig. - Pennsylvania v. New Jersey  
69 Orig. - Maine v. New Hampshire

Dear Chief,

Needless to say, I agree with the Per  
Curiam you have circulated in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 15, 1976

Re: No. 68, Orig. - Commonwealth of Pennsylvania  
v. New Jersey

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Dear Chief:

I agree.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 8, 1976

Re: Nos. 68 and 69, Orig. - Pennsylvania v. New  
Jersey and Maine v. New Hampshire

Dear Chief:

In view of the suggested per curiam, I am  
joining Bill Brennan to grant leave to file.  
Please show me accordingly.

Sincerely,



The Chief Justice

Copies to Conference

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

JUSTICE THOMAS M. CAMPBELL

June 15, 1976

No. 76-38 Orig. Pennsylvania v. New Jersey  
No. 76-39 Orig. Florida v. New Hampshire

Dear Justice:

Enclosed is my opinion.

Sincerely,



T. M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

✓ ✓  
April 14, 1976

Re: No. 68 Orig. - Pennsylvania v. New Jersey  
No. 69 Orig. - Maine v. New Hampshire

Dear Chief:

When these matters came up originally at conference I voted, I believe alone, to deny leave to file. I am still of that view and would join a plain and unembellished denial or one patterned after Arizona v. California.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 4, 1976

Re: No. 68 Orig. - Pennsylvania v. New Jersey  
No. 69 Orig. - Maine, et al. v. New Hampshire

Dear Potter:

Your concurrence brightens my day. I could join it, although I do not need do so. I well recall what fun you and the others made of me because of my solitary dissenting posture in Austin v. New Hampshire. The first full paragraph on your page 4 pins the blame on the complaining States. With my tongue only partly in my cheek, I might say that my dissent in Austin, 420 U. S., at 668-669, almost deserves a citation at the end of your paragraph.

Sincerely,

*Harry*

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 8, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 68 Orig. - Pennsylvania v. New Jersey  
No. 69 Orig. - Maine v. New Hampshire

If the per curiam recirculated June 1 is to be utilized,  
I shall file the enclosed concurrence.

H. A. B.

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

From: Mr. Justice Blackmun

No. 68 Orig. - Pennsylvania v. New Jersey  
No. 69 Orig. - Maine v. New Hampshire

Circulated: 6/8/76

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

MR. JUSTICE BLACKMUN, concurring.

Obviously, and naturally, I join the Court's per curiam opinion. Last Term, in lonely dissent, in the case which has spawned the present motions for Pennsylvania and for Maine, et al., I said:

"Because the New Hampshire income tax statutes operate in such a way that no New Hampshire resident is ultimately subjected to the State's income tax, the case at first glance appears to have some attraction. That attraction, however, is superficial and, upon careful analysis, promptly fades and disappears entirely. The reason these appellants, who are residents of Maine, not of New Hampshire, pay a New Hampshire tax is because the Maine Legislature -- the appellants' own duly elected representatives -- has given New Hampshire the option to divert this increment of tax (on a Maine resident's income earned in New Hampshire) from Maine to New Hampshire, and New Hampshire willingly has picked up that option. All that New Hampshire has done is what Maine specifically permits and, indeed, invites it to do. If Maine should become disenchanted with its bestowed bounty, its legislature may change the Maine statute. The crux is the statute of Maine, not the statute of New Hampshire. The appellants, therefore, are really complaining about their own statute. It is ironic that the State of Maine, which allows the credit, has made an appearance in this case as an amicus urging, in effect, the denial of the credit by an adjudication of unconstitutionality of New Hampshire's statute. It seems to me that

Nos. 68 Orig., 69 Orig.

- 2 -

Maine should be here seeking to uphold its own legislatively devised plan or turn its attention to its own legislature."

The Court in its per curiam, ante, page 4, now concedes that the "injuries to the plaintiff's fiscs were self-inflicted" and that no State "can be heard to complain about damages inflicted by its own hand." Quod approbo non reprobo.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 4, 1975

68 Orig. Pennsylvania v. New Jersey  
69 Orig. Maine v. New Hampshire

Dear Chief:

It occurred to me only after the arguments in the above cases that Jo owns some general obligation bonds of the State of Pennsylvania.

Although the statute requires disqualification where there is "ownership of government securities" only if the outcome "could substantially affect the value of the securities", I would feel more comfortable if I remained out of these cases in which the State of Pennsylvania is itself a party claiming \$29 million and the state is the obligor on the bonds.

Fortunately, my remaining out of these cases will leave seven members of the Court and thus assure a majority one way or the other.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 3, 1976

No. 68 Orig. Pennsylvania v. New Jersey  
No. 69 Orig. Maine v. New Hampshire

Dear Chief:

Please show at the end of your Per Curiam that I  
took no part in the decision of these cases.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1976

Re: Nos. 68 and 69 Orig. - Pennsylvania v. New Jersey;  
and Maine v. New Hampshire

Dear Potter:

Please join me in your concurring opinion in these cases.

Sincerely,

*WR*

Mr. Justice Stewart

Copies to the Conference