

# The Burger Court Opinion Writing Database

*Commissioner v. Kowalski*  
434 U.S. 77 (1977)

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  
JUSTICE HARRY A. BLACKMUN

RECEIVED  
CLERK OF THE  
SUPREME COURT

October 19, 1977 OCT 19 PM 5 27

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Chief:

Unless you wish to do so, I shall be glad to attempt a brief dissent in the above case. I suppose that, actually, it wouldn't be a great disaster if the opinion were a unanimous one.

Sincerely,

HAB

The Chief Justice

Harry I agree on both aspects.  
Proceed WRB

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 22, 1977

Dear Harry:

Re: 76-1095 Commissioner of Internal Revenue v. Kowalski  
Please join me in your dissent.

Regards,

WBH

Mr. Justice Blackmun

cc: The Conference

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

## 1st DRAFT

From: Mr. Justice Brennan

## SUPREME COURT OF THE UNITED STATES

Circulated: 11/9

No. 76-1095

Recirculated:

Commissioner of Internal Revenue, Petitioner, v. Robert J. Kowalski et ux. } On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court. This case presents the question whether cash payments to state-police troopers, designated as meal allowances, are included in gross income under § 61 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61 (a),<sup>1</sup> and, if so, are otherwise excludable under § 119 of the Code, *id.*, § 119.<sup>2</sup>

## I

The pertinent facts are not in dispute. Respondent<sup>3</sup> is a state-police trooper employed by the Division of State Police

<sup>1</sup> "§ 61. Gross income defined.

"(a) *General Definition*.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

"(1) Compensation for services, including fees, commissions, and similar items . . . ."

<sup>2</sup> "§ 119. Meals or lodging furnished for the convenience of the employer.

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer, but only if—

"(1) in the case of meals, the meals are furnished on the business premises of the employer . . . .

"In determining whether meals . . . are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation."

<sup>3</sup> References to "respondent" are to Robert J. Kowalski, Nancy A.

## STYLISTIC CHANGES

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

From: Mr. Justice Brennan

Circulated: 11-9-77

Recirculated: 11-10-77

## 2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1095

Commissioner of Internal Revenue, } On Writ of Certiorari to  
 Petitioner, } the United States  
 v. } Court of Appeals for  
 Robert J. Kowalski et ux. } the Third Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether cash payments to state-police troopers, designated as meal allowances, are included in gross income under § 61 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61 (a),<sup>1</sup> and, if so, are otherwise excludable under § 119 of the Code, *id.*, § 119.<sup>2</sup>

## I

The pertinent facts are not in dispute. Respondent<sup>3</sup> is a state-police trooper employed by the Division of State Police

<sup>1</sup> “§ 61. Gross income defined.

“(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

“(1) Compensation for services, including fees, commissions, and similar items . . .”

<sup>2</sup> “§ 119. Meals or lodging furnished for the convenience of the employer.

“There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer, but only if—

“(1) in the case of meals, the meals are furnished on the business premises of the employer . . .”

“In determining whether meals . . . are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.”

<sup>3</sup> References to “respondent” are to Robert J. Kowalski, Nancy A.

STYLISTIC CHANGES

REORGANIZATION 6-7, 12-13

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

From: Mr. Justice Brennan

Circulated: 1 10/13/77

Recirculated: 1 10/13/77

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1095

Commissioner of Internal Revenue, Petitioner,  
v.  
Robert J. Kowalski et ux. } On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Third Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether cash payments to state-police troopers, designated as meal allowances, are included in gross income under § 61 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61 (a),<sup>1</sup> and, if so, are otherwise excludable under § 119 of the Code, *id.*, § 119.<sup>2</sup>

### I

The pertinent facts are not in dispute. Respondent<sup>3</sup> is a state-police trooper employed by the Division of State Police

<sup>1</sup> “§ 61. Gross income defined.

“(a) *General Definition*.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

“(1) Compensation for services, including fees, commissions, and similar items . . . .”

<sup>2</sup> “§ 119. Meals or lodging furnished for the convenience of the employer.

“There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer, but only if—

“(1) in the case of meals, the meals are furnished on the business premises of the employer . . . .”

“In determining whether meals . . . are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.”

<sup>3</sup> References to “respondent” are to Robert J. Kowalski, Nancy A.

76-1095

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

Harry,

This will need a little  
more work but I hope it will  
give you what you need  
Bill

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 29, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-1095, Commissioner v. Kowalski

Two cases are held for the Kowalski opinion.

No. 76-1243, United States v. Smith

This is a refund suit filed by the taxpayers to recover amounts claimed as taxes with respect to cash meal payments paid to Mississippi Highway Safety Patrol officers.

The subsistence payments involved here are quite different in character than those in Kowalski. Here, the trooper must file a voucher and swear that the reimbursement claimed represents an amount actually spent on lunch. In addition, troopers are apparently required to eat in designated restaurants. Finally, the amount of the allowance is limited to \$5 and no money is received by the trooper for days when he is off duty.

Oct 77  
J.W. Brennan

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 10, 1977

Re: No. 76-1095, Commissioner v. Kowalski

Dear Bill,

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

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 11, 1977

Re: No. 76-1095 - CIR v. Kowalski

Dear Bill:

I agree.

Sincerely,



Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 10, 1977

Re: No. 76-1095, Commissioner of Internal Revenue v. Kowalski

Dear Bill:

Please join me.

Sincerely,

*JM*  
T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

RECEIVED  
LETTERS OF THE  
SUPREME COURT OF THE UNITED STATES

October 19, 1977 OCT 19 PM 5 27

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Chief:

Unless you wish to do so, I shall be glad to attempt a brief dissent in the above case. I suppose that, actually, it wouldn't be a great disaster if the opinion were a unanimous one.

Sincerely,

H. A. B.

✓

The Chief Justice

Harry

I agree on both aspects.

Proceed

W. B.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 10, 1977

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Bill:

I shall try my hand at a short dissent, and promise that I'll do my best to complete it by tomorrow. Unfortunately, because Friday will be a long conference day, I may not be able to do this. In that case, although I am embarrassed about it, may I ask that you be patient until I can get something done about it upon my return.

Sincerely,

*Harry*

Mr. Justice Brennan

OCT 77  
Wm. Brennan

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

1st DRAFT

From: Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

Circulated: 11/15/77

No. 76-1095

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

Commissioner of Internal Revenue, Petitioner,  
v.  
Robert J. Kowalski et ux.

On Writ of Certiorari to  
the United States  
Court of Appeals for  
the Third Circuit.

[November —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

More than a decade ago the United States Court of Appeals for the Eighth Circuit, in *United States v. Morelan*, 356 F. 2d 199 (1966), held that the \$3 per day subsistence allowance paid Minnesota state highway patrolmen was excludable from gross income under § 119 of the Internal Revenue Code of 1954, 26 U. S. C. § 119. It held, alternatively, that if the allowance were includable in gross income, it was deductible as an ordinary and necessary meal-cost trade or business expense under § 162 (a)(2) of the Code, 26 U. S. C. § 162 (a)(2). I sat as a Circuit Judge on that case. I was happy to join Chief Judge Vogel's opinion because I then felt, and still do, that it was correct on both grounds. Certainly, despite the usual persistent Government opposition in as many Courts of Appeals as were available, the ruling was in line with other authority at the appellate level at that time.\* Two cases, *Magness v. Commissioner*, 247 F. 2d 740 (CA5 1957), cert. denied, 355 U. S. 931 (1958), and *Hyslope v. Commissioner*, 21 T. C. 131 (1953), were distinguished. 356 F. 2d, at 207.

On December 11, 1967, however, this Court by a 5-3 vote decided *United States v. Correll*, 389 U. S. 299, restricting to

\**Saunders v. Commissioner*, 215 F. 2d 768 (CA3 1954); *United States v. Barrett*, 321 F. 2d 911 (CA5 1963); *Hanson v. Commissioner*, 298 F. 2d 391 (CA8 1962). As in *Morelan*, certiorari apparently was not sought in any of this line of cases up to that time.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota

November 21, 1977

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Bill:

Please do not let my absence prevent bringing this case down when all the votes are in. There is no reason to hold it up for Central Illinois.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 14, 1977

No. 76-1095 Commissioner v. Kowalski

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 22, 1977

Re: No. 76-1095 - CIR v. Kowalski

Dear Bill:

Please join me.

Sincerely,

*W*

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 10, 1977

Re: 76-1095 - CIR v. Kowalski

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Brennan

Copies to the Conference