

The Burger Court Opinion Writing Database

Lehman v. Nakshian

453 U.S. 156 (1981)

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

June 10, 1981

No. 80-242, Lehman v. Nakshian

Dear Potter:

I join your opinion.

Regards,

Justice Stewart

Copies to the Conference

A handwritten signature in dark ink, appearing to be 'W. Stewart', written in a cursive style.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1981

RE: 80-242 - Lehman v. Nakshian

MEMORANDUM TO THE CONFERENCE:

To "amend the pleadings to conform with the proof,"
this case is reassigned to Potter.

Regards,

WZB

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

CHAMBERS OF
THE CHIEF JUSTICE

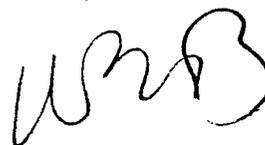
June 19, 1981

No. 80-242, Lehman v. Nakshian

Dear Potter:

I join.

Regards,



Justice Stewart

Copies to the Conference

To confer - for the record

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 27, 1981

No. 80-242: Lehman v. Nakshian

To the Conference:

While I voted the other way at Conference, I can't find any persuasive way to distinguish Lorillard, and this proposed opinion, therefore, comes out to affirm and to hold that an ADEA plaintiff suing the federal government is entitled to a jury trial.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

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

Lehman v. Nakshian No. 80-242

From: Mr. Justice Brennan

Circulated: MAY 27 1981

JUSTICE BRENNAN delivered the opinion of the Court.

Recirculated: _____

In Lorillard v. Pons, 434 U.S. 575 (1978), this Court held that an employee who brings an action against his private employer under §7(c) of the Age Discrimination in Employment Act ("ADEA" or "Act"), 29 U.S.C. §626(c), is entitled to trial by jury. The question presented in this case is whether a plaintiff has a right to trial by jury in an action against the federal government under §15(c) of the ADEA, 29 U.S.C. §633a(c).

I

Respondent brought this lawsuit in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the ADEA. She demanded a jury trial, and the Government moved to strike that demand. The District Court denied the motion to strike, but certified for interlocutory appeal the question whether a jury trial is available in an ADEA action against the federal government. See 28 U.S.C. §1292(b). The Court of Appeals granted the Government's petition for interlocutory review and affirmed the ruling of the District Court that respondent is entitled to a jury trial. ___ F.2d ___ (CA DC 1980). Relying principally on the fact that Congress vested jurisdiction over ADEA suits

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: JUN 3 1981

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-242

<p>John F. Lehman, Secretary of the Navy, Petitioner, <i>v.</i> Alice Nakshian.</p>	}	<p>On Writ of Certiorari to the United States Court of Ap- peals for the District of Co- lumbia Circuit.</p>
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[June —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Lorillard v. Pons*, 434 U. S. 575 (1978), this Court held that an employee who brings an action against his private employer under § 7 (c) of the Age Discrimination in Employment Act (ADEA or Act), 29 U. S. C. § 626 (c), is entitled to trial by jury. The question presented in this case is whether a plaintiff has a right to trial by jury in an action against the Federal Government under § 15 (c) of the ADEA, 29 U. S. C. § 633a (c).

I

Respondent brought this lawsuit in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the ADEA. She demanded a jury trial, and the Government moved to strike that demand. The District Court denied the motion to strike, but certified for interlocutory appeal the question whether a jury trial is available in an ADEA action against the Federal Government. See 28 U. S. C. § 1292 (b). The Court of Appeals granted the Government's petition for interlocutory review and affirmed the ruling of the District Court that respondent is entitled to a jury trial. — U. S. App. D. C. —, 628 F. 2d 59 (1980). Relying principally on the fact that Congress vested jurisdiction over ADEA suits

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 10, 1981

No. 80-242: Lehman v. Nakshian

To the Conference:

In response to Potter's dissent, I have sent the enclosed additions to the printer.

Sincerely,

cc: The Conference



Add to footnote 11:

The dissent contends that the presence of express language granting a jury trial right in §7(c) in contrast to the absence of such express language in §15 demonstrates that Congress "knew how to provide a statutory right to a trial by jury when it wished to do so." Post, at . We find this argument hard to fathom. The dissent recognizes, as it must, that there was no such express language in §7(c) when this Court decided in Lorillard that Congress intended ADEA actions against private employers to include a jury trial right, and that the express language relied on by the dissent was added two months after Lorillard was decided and four years after the identical language which was construed in Lorillard was added to the ADEA in §15(c). Therefore, unless the dissent is proposing to overrule Lorillard, we are bound to apply the same analysis to this case.

Add new footnote 8 at end of blocked quote on page 5:

The dissent's statement that "[i]n Lorillard, the authorization for the award of 'legal' relief was significant only because of the presence of a constitutional question" is untenable. Post, at . To be sure, a constitutional question was present in Lorillard, but the Court specifically declined to ground its decision on the Seventh Amendment. Rather, it construed the language "legal or equitable relief" in §7(c) of the ADEA. The Court concluded that when Congress used the words "legal...relief," which are equally present in §15(c), it intended that a jury trial right be available. That Congress used the words "legal...relief" in §7(c) differently from the way it used the same words in §15(c) is implausible.

The dissent further mischaracterizes Lorillard when it states that "the principal basis of the decision" was §7(b)'s reference to the FLSA. Post, at . The Court relied equally on the provision for "legal...relief." Moreover, the dissent erroneously suggests that §§15(a) and (b) are identical to §§717(a) and (b) of Title VII of the Civil Rights Act of 1964, post, at , for it fails to note that Title VII does not authorize the courts to award "legal relief," as §15(c) does.

Add to footnote 3:

The dissent does not argue otherwise in stating that Rule 38 requires "an affirmative statutory grant" of the jury trial right. Post, at . The dissent does not argue that Rule 38 requires a jury trial right to be express. Obviously, that argument would be frivolous since Lorillard found a jury trial right in the absence of an express provision conferring the right. Either Rule 38 does not require that the grant be

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1981

No. 80-242: Lehman v. Nakshian

To the Conference:

I intend to make the further addition to footnote 1 in my opinion in the above:

"The dissent's view that there is a presumption against jury trials in suits against the Federal Government is belied by the very statutes that it cites to indicate that Congress has often 'conditioned[the] waiver [of immunity] upon a plaintiff's relinquishing any claim to a jury trial.' Post, at _____. The fact that Congress has found it necessary to state expressly that there is no jury trial right in a broad range of cases against the Government, see 28 U.S.C. 1346, 2402, demonstrates that Congress does not legislate against the backdrop of any presumption against a jury trial right in suits against the United States."

Sincerely,



cc: The Conference

1-6, 8, 10-14

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

1st DRAFT

Circulated: _____

Recirculated: JUN 19 1981

SUPREME COURT OF THE UNITED STATES

No. 80-242

John F. Lehman, Secretary of the Navy, Petitioner,
v.
Alice Nakshian. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit,

[June —, 1981]

JUSTICE BRENNAN, dissenting.

In *Lorillard v. Pons*, 434 U. S. 575 (1978), this Court held that an employee who brings an action against his private employer under § 7 (c) of the Age Discrimination in Employment Act (ADEA or Act), 29 U. S. C. § 626 (c), is entitled to trial by jury. The question presented in this case is whether a plaintiff has a right to trial by jury in an action against the Federal Government under § 15 (c) of the ADEA, 29 U. S. C. § 633a (c). The Court today holds that a jury trial is not available in such actions. Because I believe that Congress unmistakably manifested its intention to accord a jury trial right, I dissent.

I

Respondent brought this lawsuit in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the ADEA. She demanded a jury trial, and the Government moved to strike that demand. The District Court denied the motion to strike, but certified for interlocutory appeal the question whether a jury trial is available in an ADEA action against the Federal Government. See 28 U. S. C. § 1292 (b). The Court of Appeals granted the Government's petition for interlocutory review and affirmed the ruling of the District Court that respondent is entitled to a jury trial. 202 U. S. App. D. C. 59, 628 F. 2d 59 (1980). Relying principally on

✓
P. 1

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-242

From: Mr. Justice Brennan

Circulated

John F. Lehman, Secretary of the Navy, Petitioner,
v.
Alice Nakshian.
On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit,

Rec. Circulated JUN 24 1981

[June —, 1981]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

In *Lorillard v. Pons*, 434 U. S. 575 (1978), this Court held that an employee who brings an action against his private employer under § 7 (c) of the Age Discrimination in Employment Act (ADEA or Act), 29 U. S. C. § 626 (c), is entitled to trial by jury. The question presented in this case is whether a plaintiff has a right to trial by jury in an action against the Federal Government under § 15 (c) of the ADEA, 29 U. S. C. § 633a (c). The Court today holds that a jury trial is not available in such actions. Because I believe that Congress unmistakably manifested its intention to accord a jury trial right, I dissent.

I

Respondent brought this lawsuit in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the ADEA. She demanded a jury trial, and the Government moved to strike that demand. The District Court denied the motion to strike, but certified for interlocutory appeal the question whether a jury trial is available in an ADEA action against the Federal Government. See 28 U. S. C. § 1292 (b). The Court of Appeals granted the Government's petition for interlocutory review and affirmed the ruling of the District Court that respondent is entitled to a jury trial. 202 U. S. App. D. C. 59, 628 F. 2d 59 (1980). Relying principally on

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 29, 1981

Re: No. 80-242, Lehman v. Nakshian

Dear Bill,

I shall await the dissent in this case.

Sincerely yours,

A handwritten signature in dark ink, appearing to be "Brennan", with a horizontal line underneath.

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 3, 1981

Re: 80-242 - Lehman v. Nakshian

Dear Bill:

In due course I expect to circulate a
dissenting opinion.

Sincerely yours,

P.S.
/

Justice Brennan

Copies to 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: 9 JUL 1981

Re: 80-242 - Lehman v. Nakshian

Recirculated: _____

JUSTICE STEWART dissenting.

It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the federal government. In Galloway v. United States, 319 U.S. 372, 388-389, the Court observed (footnote omitted):

"The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable."

See also Glidden Co. v. Zdanok, 370 U.S. 530, 572;

McElrath v. United States, 102 U.S. 426, 440.

Moreover, the Court has recognized the general

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 10, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-242, Lehman v. Nakshian

In response to Bill Brennan's additions occasioned by my dissent, I have no substantive changes to make. I propose only to make two minor word changes in the text and to add the following as a new footnote 3 just before the citation to Fedorenko on page 6:

The Court says that this argument can only be made at the expense of overruling the Lorillard decision. But, as hereafter indicated, Lorillard has little relevance here. And, of course, the Court's response totally loses its force in view of the 1978 amendments to the ADEA, see post at 14-16, where Congress expressly extended a jury trial right in § 7(c) but not in § 15(c).

P.S.
P.S.

34

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Fortas
 Mr. Justice Harlan
 Mr. Justice Stewart

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Stewart

No. 80-242

Circulated: _____

Recirculated: 1 10 1981

John F. Lehman, Secretary of } On Writ of Certiorari to the
 the Navy, Petitioner, } United States Court of Ap-
 v. } peals for the District of Co-
 Alice Nakshian. } lumbia Circuit.

[June —, 1981]

JUSTICE STEWART, dissenting.

It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government. In *Galloway v. United States*, 319 U. S. 372, 388-389, the Court observed (footnote omitted):

“The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable.”

See also *Glidden Co. v. Zdanok*, 370 U. S. 530, 572; *McElrath v. United States*, 102 U. S. 426, 440. Moreover, the Court has recognized the general principle that “the United States, as sovereign, ‘is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.’” *United States v. Testan*, 424 U. S. 392, 399, quoting *United States v. Sherwood*, 312 U. S. 584, 586. See also *United States v. Mitchell*, 445 U. S. 535, 538. Thus, if Congress waives the Government’s immunity from suit, as it has in the ADEA, 29 U. S. C. § 633a, the plaintiff has a right to a trial by jury only where that right is one of “the terms of [the Government’s] consent to be sued.” *Testan, supra*, 424 U. S., at 399. Like a waiver of immunity itself, which the Court ac-

Change drafted by [unclear]
[unclear]

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: 19 JUN 1981

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-242

John F. Lehman, Secretary of } On Writ of Certiorari to the
the Navy, Petitioner, } United States Court of Ap-
v. } peals for the District of Co-
Alice Nakshian. } lumbia Circuit.

[June —, 1981]

JUSTICE STEWART delivered the opinion of the Court.

The question presented by this case is whether a plaintiff in an action against the United States under § 15 (c) of the Age Discrimination in Employment Act is entitled to trial by jury.

I

The 1974 amendments to the Age Discrimination in Employment Act of 1967¹ added a new § 15,² which brought the Federal Government within the scope of the Act for the first time. Section 15 (a)³ prohibits the Federal Government from discrimination based on age in most of its civilian employment decisions concerning persons over 40 years of age. Section 15 (b)⁴ provides that enforcement of § 15 (a) in most agencies, including military departments, is the responsibility of the Equal Opportunity Employment Commission. The Commission is directed to "issue such rules, regu-

¹ 29 U. S. C. §§ 621-634 (1970).

² 29 U. S. C. § 633a (1976).

³ Section 15 (a), as amended in 1978, provides in pertinent part that: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments [and other enumerated government agencies] shall be made free from any discrimination based on age.

29 U. S. C. § 633a (a) (Supp. II 1978).

⁴ 29 U. S. C. § 633a (b) (1976).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1981

Re: 80-242 - Lehman v. Nakshian

Dear Bill,

Although I may end up joining you,
I shall await the dissent in this case.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 11, 1981

Re: 80-242 - Lehman v. Nakshian

Dear Potter,

Although I was tempted to follow Bill Brennan in switching to the affirm column, your dissent persuades me that reversal is the better course. Please join me.

Sincerely yours,



Justice Stewart

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

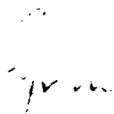
June 19, 1981

Re: 80-242 - Lehman v. Nakshian

Dear Potter,

Please join me.

Sincerely yours,



Justice Stewart

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 5, 1981

Re: No. 80-242 - Lehman v. Nakshian

Dear Harry:

Of course, I still hope that you will take
on the dissent in this case.

Sincerely,



T.M.

Justice Blackmun

cc:
Justice Rehnquist
Justice Stevens

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1981

Re: No. 80-242 - Lehman v. Nakshian

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 4, 1981

Dear Thurgood:

My memory is a little hazy about the assignment of the dissent in No. 80-242, Secretary v. Nakshian. Yours is the privilege to assign. I merely write to say that if you do not wish to take it on, and if you wish me to do so, I shall willingly comply. Will you let me know?

Sincerely,



Mr. Justice Marshall



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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1981

Re: No. 80-242 - Lehman v. Nakshian

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1981

Re: No. 80-242 - Lehman v. Nakshian

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,



Mr. Justice Brennan

cc: The Conference

2
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1981

80-242 Lehman v. Nakshian

Dear Bill:

As I voted to reverse, I will await the dissent.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1981

No. 80-242 Lehman v. Nakshian

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lewis".

Mr. Justice Stewart

LFP/lab

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1981

No. 80-242 Lehman v. Nakshian

Dear Potter:

Please join me in your opinion for the Court.

Sincerely,



Mr. Justice Stewart

LFP/lab

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1981

Re: No. 80-242 Lehman v. Nakshian

Dear Bill:

I think I may have been unaware of Galloway, which you correctly cite in your opinion as holding the Seventh Amendment inapplicable to the United States as a party, when I cast my vote at Conference. I shall, therefore, await further writing.

Sincerely,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1981

Re: No. 80-242 Lehman v. Nakshian

Dear Bill:

This has not been an easy case for me, as I indicated to you in my letter of June 1st. I had originally thought that the Seventh Amendment (which I thought Potter treated so cavalierly in his Parklane Hosiery Co. v. Lane a couple of Terms ago) would have at least some direct bearing on the case, but you and he both apparently agree that Galloway v. United States, 319 U.S. 372 (1943) and McElrath v. United States, 102 U.S. 426 (1880) established the proposition that it does not govern with respect to suits against the sovereign ex proprio vigore, and that Congress must provide for the right of jury trial when it permits the sovereign to be sued. After balancing out the various considerations urged in both of your opinions, I now vote to reverse the judgment of the Court of Appeals for the District of Columbia ✓
Circuit.

Sincerely,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1981

Re: No. 80-242 Lehman v. Nakshian

Dear Potter:

Please join me in your opinion of the Court.

Sincerely,



Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 27, 1981

Re: 80-242 - Lehman v. Nakshian

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 19, 1981

Re: 80-242 - Lehman v. Nakshian

Dear Bill:

Please join me in your dissenting opinion.

Respectfully,



Justice Brennan

Copies to the Conference