

# The Burger Court Opinion Writing Database

## *Ohio v. Wyandotte Chemicals Corp*

401 U.S. 493 (March 23, 1971)

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 18, 1971

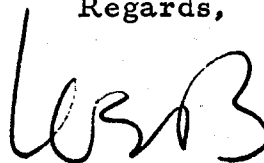
Re. #41 Orig. - Ohio v. Wyandotte Chemicals Corp.

TO THE CONFERENCE:

At Conference on Friday we will treat the motion for leave to file a complaint in this case. I have not resolved the issue in my mind except that it will take a large showing for me to get ourselves engaged in this kind of litigation. The 50 states and range of pollution problems give me pause.

If we do grant leave to file, I believe we should consider appointing not one but three Special Masters, at least one of whom should be a scientist with background in the subject matter and without conflicting attachments or published positions on the subject matter.

Regards,

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

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

CHAMBERS OF  
THE CHIEF JUSTICE

March 16, 1971

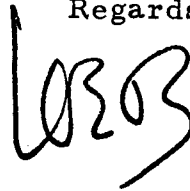
Re: No. 41 Original - Ohio v. Wyandotte Chemical Corp.

Dear John:

I have been occupied in preparation for the Conference and attendance at sessions that run through Wednesday.

Your proposed opinion for the Court seems desirable to me in view of the opposing school of thought and I heartily join.

Regards,



Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HUGO L. BLACK

March 17, 1971.

Dear John,

Re: No. 41- Orig. - Ohio v. Wyandotte Chemical Corp.

Your opinion for the Court in this case has just been read to me over the telephone. As you know, you have written the way I voted and I am glad to join your opinion. I am wondering, however, if it would not be better to state specifically in the closing paragraph of your opinion that while we are denying the right to file in our Court, it leaves the case open for consideration by the state courts.

I do not insist upon this suggestion but it does strike me it would be a little better.

Sincerely,

*HLB*  
H. L. B.

Mr. Justice Harlan

cc: Members of the Conference

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 41, Orig.—OCTOBER TERM, 1970

State of Ohio, Plaintiff,  
v.  
Wyandotte Chemicals Corporation et al.

On Motion for Leave to File  
Bill of Complaint.

[February —, 1971]

Memorandum from MR. JUSTICE DOUGLAS.

The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is to abate a public nuisance. Such was the claim of Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. The Court said:

"It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source." *Id.*, at 238.

Dumping of sewage in an interstate stream, *Missouri v. Illinois*, 200 U. S. 496, or towing garbage to sea only to have the tides carry it to a State's beaches, *New Jersey v. New York City*, 283 U. S. 473, have presented analogous situations which the Court has entertained in suits invoking our original jurisdiction. The pollution of Lake Erie or its tributaries by the discharge of mercury or compounds thereof, if proved, certainly creates a public nuisance of a seriousness and magnitude which a State

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

cc: Douglas, J.

1/26/71

Chrys Thurgood

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 41, Orig.—OCTOBER TERM, 1970  
: Douglas, J.

State of Ohio, Plaintiff,  
v.  
Wyandotte Chemicals Corporation et al. } On Motion for Leave to File  
Bill of Complaint.

1/24/71

[February —, 1971]

Memorandum from MR. JUSTICE DOUGLAS.

The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is to abate a public nuisance. Such was the claim of Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. The Court said:

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 41, Orig.—OCTOBER TERM, 1970 <sup>From: Douglas, J.</sup>

Circulated: 3/8/71

State of Ohio, Plaintiff,  
 v.  
 Wyandotte Chemicals Corporation et al. } On Motion for Leave to File Bill of Complaint.

[March —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is to abate a public nuisance. Such was the claim of Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. The Court said:

"It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source." *Id.*, at 238.

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Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

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2nd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

FILED MAR 5 1971

No. 41, Orig.—OCTOBER TERM, 1970

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

State of Ohio, Plaintiff,  
v.  
Wyandotte Chemicals Corporation et al. } On Motion for Leave to File  
Bill of Complaint.

[March —, 1971]

MR. JUSTICE HARLAN, concurring.

This opinion sets forth my reasons for voting to deny Ohio leave to file this original action.

The action is for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corporation (Wyandotte), Dow Chemical Company (Dow America), and Dow Chemical Company of Canada, Limited (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

The complaint alleges that Dow Canada and Wyandotte have each dumped mercury into streams whose course ultimately reaches Lake Erie, thus contaminating and polluting that lake's waters, vegetation, fish, and wildlife and that Dow America is jointly responsible for the acts of its foreign subsidiary. Assuming the State's ability to prove these assertions, Ohio seeks a decree: (1) declaring the introduction of mercury into Lake Erie's tributaries a public nuisance; (2) perpetually enjoining these defendants from introducing mercury into Lake



STYLISTIC CHANGES THROUGHOUT.  
+ SEE PAGE 1

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 41, Orig.—OCTOBER TERM, 1970

Circulated:

Recirculated: MAR 10 1971

State of Ohio, Plaintiff,  
v.  
Wyandotte Chemicals Corporation et al. } On Motion for Leave to File  
Bill of Complaint.

[March —, 1971]

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join, concurring.

This opinion sets forth my reasons for voting to deny Ohio leave to file this original action.

The action is for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corporation (Wyandotte), Dow Chemical Company (Dow America), and Dow Chemical Company of Canada, Limited (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March 16, 1971

Re: No. 41 Orig. - Ohio v. Wyandotte

Dear Chief:

As you will have noted from your records, five members of the Court (Brennan, Stewart, White, Marshall and Blackmun, JJ.) have joined the concurring opinion which I circulated some days ago in this matter, and have expressed the view that the opinion should come down as a Court opinion. I have therefore taken the liberty of turning my concurrence into a Court opinion.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

All "I"s changed to "we"s.  
Other changes at 1-6, 8 + 13.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

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

No. 41, Orig.—OCTOBER TERM, 1970

Recirculated: **MAR 16 1971**

State of Ohio, Plaintiff,  
v.  
Wyandotte Chemicals Corporation et al. } On Motion for Leave to File  
Bill of Complaint.

[March —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

By motion for leave to file a bill of complaint, Ohio seeks to invoke this Court's original jurisdiction. Because of the importance and unusual character of the issues tendered we set the matter for oral argument, inviting the Solicitor General to participate and to file a brief on behalf of the United States, as *amicus curiae*. For reasons that follow we deny the motion for leave to file.

The action is for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corporation (Wyandotte), Dow Chemical Company (Dow America), and Dow Chemical Company of Canada, Limited (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

P.13

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

6th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 41, Orig.—OCTOBER TERM, 1970

Recirculated MAR 19 1971

State of Ohio, Plaintiff,  
v.  
Wyandotte Chemicals Corporation et al. } On Motion for Leave to File  
Bill of Complaint.

[March —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

By motion for leave to file a bill of complaint, Ohio seeks to invoke this Court's original jurisdiction. Because of the importance and unusual character of the issues tendered we set the matter for oral argument, inviting the Solicitor General to participate and to file a brief on behalf of the United States, as *amicus curiae*. For reasons that follow we deny the motion for leave to file.

The action is for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corporation (Wyandotte), Dow Chemical Company (Dow America), and Dow Chemical Company of Canada, Limited (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 9, 1971

RE: No. 41 Orig. Ohio v. Wyandotte

Dear John:

As I mentioned to you during conference recess Friday, I do hope your circulation becomes a Court opinion. Like Potter, I would in any event join it.

Sincerely,

  
W.J.B. Jr.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 17, 1971

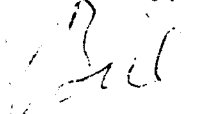
RE: No. 41 Orig. - Ohio v. Wyandotte Chemical  
Corporation

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Dear John:

I am delighted that you converted your  
memorandum into a Court opinion and I am  
very happy to join it.

Sincerely,



W. J. B. Jr.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 9, 1971

No. 41 ORIG., Ohio v. Wyandotte

Dear John,

I think you have done an excellent job, and sincerely hope that it becomes a Court opinion. In any event, I should like to join it. My only suggestion might be the addition of a footnote to make explicit that the discussion does not necessarily apply to cases invoking the Court's original and exclusive jurisdiction.

Sincerely yours,

P.S.  
✓

Mr. Justice Harlan

Copies to the Conference

March 12, 1971

Re: No. 41 Orig. - Ohio v. Wyandotte  
Chemicals Corp.

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Dear John:

I hope what you have written  
will become an opinion of the Court.  
In that event, I would join.

Sincerely,

B.R.W.

Mr. Justice Harlan

cc: The Conference



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 11, 1971

Re: No. 41, Orig. - Ohio v. Wyandotte Chemicals

Dear John:

Please join me in your concurrence.

Sincerely,

  
T.M.

Mr. Justice Harlan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March 8, 1971

Re: No. 41 Orig. - Ohio v. Wyandotte Chemicals Corp.

Dear John:

I like the proposed concurrence you have prepared for this Motion. If the Court denies Ohio leave to file, as apparently it is going to do, I think it highly desirable that the factors which led the Court to its conclusion be stated. Your concurrence admirably fulfills that mission.

You may wish your concurrence to speak only for yourself. If, however, it comes to be an expression on the part of the Court, I would be pleased to have you join me.

Sincerely,

H. A. B.

Mr. Justice Harlan

cc: The Conference