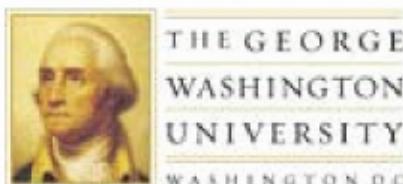


The Burger Court Opinion Writing Database

FCC v. Midwest Video Corp.
440 U.S. 689 (1979)

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

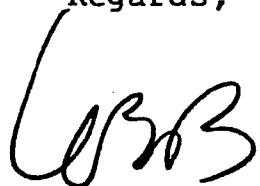
March 29, 1979

RE: (77-1575 - FCC v. Midwest Video Corp.
(77-1648 - American Civil Liberties
(Union v. FCC
(77-1662 - National Black Media
(Coalition v. Midwest
(Video Corp.

Dear Byron:

I join.

Regards,



Mr. Justice White

Copies to the Conference

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

M
CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

January 23, 1979

Dear John:

Thurgood, you and I are in dissent in No.
77-1575 FCC v. Midwest Video Corporation.
Would you be willing to undertake that dissent?

Sincerely,

Bill

Mr. Justice Stevens
cc: Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 14, 1979

RE: Nos. 77-1575, 1648 & 1662 F.C.C. v. Midwest
Video, American Civil Liberties Union & National
Black Media Coalition, et al.

Dear John:

Please join me in the dissenting opinion you have
prepared in the above.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 7, 1979

Re: Nos. 77-1575, 77-1648, and 77-1662
FCC v. Midwest Video Corp.

Dear Byron,

I am glad to join your opinion for the
Court.

Sincerely yours,

P.S.
P.

Mr. Justice White

Copies to the Conference

BRW
marking the dissent
JM

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

From: Mr. Justice White
Circulated: 7 MAR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1575, 77-1648, AND 77-1662

Federal Communications Commission, Petitioner,

77-1575 *v.*

Midwest Video Corporation et al.

American Civil Liberties Union, Petitioner,

77-1648 *v.*

Federal Communications Commission et al.

National Black Media Coalition et al., Petitioners,

77-1662 *v.*

Midwest Video Corporation et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. *Report and Order in Docket No. 20528*, 59 F. C. C. 2d 294 (1976) (1976 Order). The issue here is whether these rules are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U. S. 157, 178 (1968), and hence within the Commission's statutory authority.

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

2-3, 6, 10, 12, 16-18

From: Mr. Justice White

2nd DRAFT

Circulated: _____

Recirculated: 21 MAR 1979

SUPREME COURT OF THE UNITED STATES

Nos. 77-1575, 77-1648, AND 77-1662

Federal Communications Commission, Petitioner,
77-1575 v.

Midwest Video Corporation et al.

American Civil Liberties Union,
Petitioner,

77-1648 v.

Federal Communications Commission et al.

National Black Media Coalition
et al., Petitioners,

77-1662 v.

Midwest Video Corporation et al.

On Writs of Certiorari to
the United States Court
of Appeals for the Eighth
Circuit.

[March —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. *Report and Order in Docket No. 20528*, 59 F. C. C. 2d 294 (1976) (1976 Order). The issue here is whether these rules are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.*, 392 U. S. 157, 178 (1968), and hence within the Commission's statutory authority.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 7, 1979

MEMORANDUM TO THE CONFERENCE

No. 77-1835 - NARUC v. Brookhaven Cable TV, Inc., et al.;

No. 77-1845 - Kelly, et al. v. Brookhaven Cable TV, Inc., et al.

Two consolidated cases, NARUC and Kelly, were held for FCC v. Midwest Video, No. 77-1575, etc., but I doubt that the latter has any direct bearing on either of them. Nor do I think either is otherwise certworthy.

The cases inquire whether the FCC can preempt state regulation of rates charged for pay cable television, and, if so, whether the FCC has done so in a procedurally proper manner. The dispute arose when New York attempted to regulate cablecasters such as respondents and the latter sued in federal court arguing federal preemption of local rate regulation. The District Court agreed and granted respondents' motion for summary judgment. The CA 2 affirmed.

The CA 2 determined that the FCC had clearly intended to "delay all price regulation of special pay cable," Petn. 4a, saying that "a policy of permitting development [of pay cable] free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity," a goal that the FCC was deemed entitled to pursue in the broadcast area. Ibid. Accordingly, the CA 2 ruled that the FCC's preemption of state regulation was within the authority recognized by this Court in Southwestern Cable and Midwest Video (I).

The CA 2 distinguished the CA 8's decision in the current Midwest Video case on the ground that the regulations at issue there amounted to "an attempt to do in the cable field something the FCC was specifically prohibited from doing in the broadcast area -- imposing the burdens of common carriers." Petn. 5a. That, of course, was the thrust of our holding in that case. The court also sufficiently distinguished, it seems to me, two other cases that petitioners allege to conflict with the CA 2's decision. NARUC v. FCC, 533 F.2d 601 (CA DC 1976); Home Box Office, Inc. v. FCC, 567 F.2d 9(CA DC), cert. denied, 434 U.S. 829 (1977). Finally,

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 8, 1979

Re: 77-1575, 77-1648, and 77-1662 - FCC v.
Midwest Video Corp.

Dear Byron:

Awaiting the dissent.

Sincerely,

T.M.

T.M.

Mr. Justice White

cc: The Conference

March 8, 1979

Re: No. 77-1575 - FCC v. Midwest Video
No. 77-1648 - ACLU v. FCC
No. 77-1662 - National Black Media Coalition
v. Midwest Video

Dear Byron:

By a separate note, I am joining your opinion. I have one suggestion. It is minor and is submitted only for your consideration. Would it be worth a footnote to describe the posture of the ACLU and the National Black Media Coalition and what Nos. 77-1648 and 77-1662 are about? Without explanation, the affirmation looks a little strange with the FCC on the downside of No. 77-1648, and this might be confusing to the casual reader.

Sincerely,

HAB

Mr. Justice White

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1979

Re: No. 77-1575 - FCC v. Midwest Video
No. 77-1648 - ACLU v. FCC
No. 77-1662 - National Black Media Coalition
v. Midwest Video

Dear Byron:

Please join me.

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 9, 1979

No. 77-1575 FCC v. Midwest Video Corporation
No. 77-1648 ACLU v. FCC
No. 77-1662 National Black Media Coalition v. Midwest Video

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1979

Re: Nos. 77-1575, 77-1648, and 77-1662: FCC v. Midwest
Video Corp.

Dear Byron:

Please join me.

Sincerely,

WHR/cmw

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 23, 1979

Re: 77-1575 - FCC v. Midwest Video Corp.

Dear Bill:

I will be happy to prepare a draft dissent
in this case.

Respectfully,

[Signature]

Mr. Justice Brennan

cc: Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 8, 1979

Re: 77-1575, 77-1648, and 77-1662 - FCC
v. Midwest Video Corp.

Dear Byron:

In a few days I shall circulate a short dissent.

Respectfully,



Mr. Justice White

Copies to the Conference

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

From: Mr. Justice Stevens
Circulated: MAR 13 1979

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 77-1575, 77-1648, AND 77-1662

Federal Communications Commission, Petitioner,

77-1575 *v.*

Midwest Video Corporation et al.

American Civil Liberties Union, Petitioner,

77-1648 *v.*

Federal Communications Commission et al.

National Black Media Coalition et al., Petitioners,

77-1662 *v.*

Midwest Video Corporation et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March —, 1979]

MR. JUSTICE STEVENS, dissenting.

In 1969 the Commission adopted a rule requiring cable television systems to originate a significant number of local programs. In *United States v. Midwest Video Corp.*, 406 U. S. (Midwest Video), the Court upheld the Commission's authority to promulgate this "mandatory origination" rule. Thereafter, the Commission decided that less onerous rules would accomplish its purpose of "increasing the number of outlets for community self expression and augmenting the public's choice of programs and types of services."¹ Accord-

¹ The quotation is from the report accompanying the promulgation of the 1969 rules. See *First Report and Order*, 20 F. C. C. 2d 201, 202 (1969) (1969 Order). The report accompanying the 1976 rules identifies precisely the same purpose. See *Report and Order in Docket 20508*, 59 F. C. C. 2d 294, 30 (1976) (App. 103).

649

298

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

From: Mr. Justice Stevens

Circulated: _____

MAR 30 '79

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1575, 77-1648, AND 77-1662

Federal Communications Commission, Petitioner,

77-1575 *v.*

Midwest Video Corporation et al.

American Civil Liberties Union, Petitioner,

77-1648 *v.*

Federal Communications Commission et al.

National Black Media Coalition et al., Petitioners,

77-1662 *v.*

Midwest Video Corporation et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April —, 1979]

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

In 1969 the Commission adopted a rule requiring cable television systems to originate a significant number of local programs. In *United States v. Midwest Video Corp.*, 406 U. S. 649 (*Midwest Video*), the Court upheld the Commission's authority to promulgate this "mandatory origination" rule. Thereafter, the Commission decided that less onerous rules would accomplish its purpose of "increasing the number of outlets for community self expression and augmenting the public's choice of programs and types of services."¹ Accord-

¹ The quotation is from the report accompanying the promulgation of the 1969 rules. See *First Report and Order*, 20 F. C. C. 2d 201, 202 (1969) (*1969 Order*). The report accompanying the 1976 rules identifies precisely the same purpose. See *Report and Order in Docket 20508*, 59 F. C. C. 2d 294, 298 (1976) (App. 103).