

# The Burger Court Opinion Writing Database

## *Milwaukee v. Illinois*

451 U.S. 304 (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

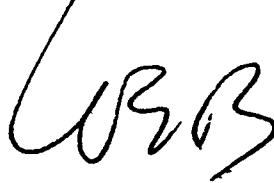
March 13, 1980

RE: 79-408 - Milwaukee v. Illinois

Dear Byron:

I will vote to note in this case and hold  
No. 79-571.

Regards,



Mr. Justice White

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 3, 1980

79-408 - Milwaukee v. Illinois and Michigan

Dear Byron:

Please add my name to your dissenting  
opinion.

Sincerely yours,

P.S.

Mr. Justice White

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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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice White

CITY OF MILWAUKEE ET AL. v. STATES OF ILLINOIS  
AND MICHIGAN

Circulated: 3-3-80

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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

No. 79-408. Decided March —, 1980

MR. JUSTICE WHITE, dissenting.

This case presents the question of whether a federal common law of nuisance survives the enactment of comprehensive federal statutes aimed at restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. I believe this question to be an important one, and dissent from the denial of the petition for certiorari.

The genesis of this case was a motion by Illinois to file a bill of complaint under our original jurisdiction and asking that we abate as a public nuisance the discharge of sewage into Lake Michigan by the city of Milwaukee and associated cities and sewerage commissions (hereafter individually or jointly Milwaukee). We declined to exercise jurisdiction over the case and remitted the parties to Federal District Court. *Illinois v. City of Milwaukee*, 406 U. S. 91 (1972). We found that the District Court would have jurisdiction to entertain the case as one founded on a federal common law of nuisance, and held that that body of law was not pre-empted by the Federal Water Pollution Control Act then in effect, 62 Stat. 1155, as amended, 33 U. S. C. § 1151 *et seq.* (1970 ed.). However, we specifically noted that

"[i]t may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." 406 U. S., at 107.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 5, 1980

Re: No. 79-408 - Milwaukee v. Illinois and Michigan

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Dear Lewis,

If the other votes are firm, your vote would grant this case.

I agree that the companion case, no. 79-571, should also be considered. That case presents two general questions. First is the claim by Illinois that the Court of Appeals erred in reversing the District Court's imposition of certain effluent limitations more stringent than those contained in the permit. The Court of Appeals found that although neither the Act nor the permit limited a federal court's power to require compliance with more stringent limitations under the federal common law, those standards did provide "guidelines" which the court should not ignore. Looking in part to the standards contained in the Act and the permit, the Court of Appeals found itself "unable to conclude, after a careful examination of the evidence cited by the plaintiffs to justify [certain of] the limitations imposed, that this evidence was sufficient." Therefore, the Court of Appeals reversed the District Court insofar as it had imposed certain effluent limitations more stringent than those contained in the discharge permits.

If in no. 79-408 we decide that the federal common law of nuisance does not survive the 1972 and 1977 amendments, the Court of Appeals is correct in no. 79-571, although for the wrong reason. If the federal common law of nuisance still has life, there remains the question whether the Court of Appeals correctly assessed the evidence as well as the question to what extent the statutory limitations should guide the District Court in arriving at a remedy.

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The second question in no. 79-571 is whether the Court of Appeals was correct in not addressing Illinois' state common law and statutory contentions. The Court of Appeals held that it is the federal common law that controls, not state statutes or common law, relying on Illinois v. Milwaukee in 406 U.S. I had thought Illinois v. Milwaukee had settled that federal law controls, absent Congressional indications to the contrary.

I would probably hold, rather than grant, no. 79-571.

Sincerely yours,



Mr. Justice Powell

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 4, 1980

79-408 Milwaukee v. Illinois and Michigan

Dear Byron:

Please add my name to your dissent from denial of  
cert.

I also would consider granting the companion case  
No. 79-571. The issues seem related though not as important.

Sincerely,

*L. Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

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MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 11, 1980

79-408 Milwaukee v. Illinois

Dear Byron:

I should have replied sooner to your letter of  
March 5.

I would agree to holding 79-571.

Sincerely,

*L. Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

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