

The Burger Court Opinion Writing Database

Silkwood v. Kerr-McGee Corp.

465 U.S. 238 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Sally - ~~to~~ write

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

CHAMBERS OF
THE CHIEF JUSTICE

October 8, 1983

81-2159 - Silkwood v. Kerr-McGee Corp.

Dear Lewis:

Would you take on the dissent in this case?

Regards,



Justice Powell

*I will be glad to
take the dissent,*

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

CHAMBERS OF
THE CHIEF JUSTICE

December 8, 1983

Re: No. 81-2159 Silkwood v. Kerr-McGee Corp.

Dear Lewis:

Please join me.

Regards,

WRB

Copies to the Conference

P.S. See attached "thoughts while shaving." I

will try to suppress my
indignation at his absurd
holding.

II

Even if *Pacific, Gas and Electric Co.* had not been decided, I would find preemption of punitive damages awards because they conflict with the fundamental concept of comprehensive federal regulation of nuclear safety.⁹ See *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

A

Congress has been committed to the policy of encouraging private development of nuclear energy from 1954 to the present.¹⁰ We explicitly recognized this commitment in *Pacific Gas & Electric Co.*, 103 S. Ct., at 1723. The economy particularly of the western democracies—perhaps, indeed, democracy itself—depends upon the energy that is now primarily derived from fossil sources. No informed person suggests that these sources are inexhaustible. ~~We~~ had a brief but shattering experience in 1973 during the embargo on Middle East oil. The effect of this experience confirmed the wisdom—indeed necessity—of identifying and exploiting al-

⁹ Silkwood argues that the regulation of Kerr-McGee's conduct through punitive damages is an area of local, rather than federal, concern. Assuming *arguendo* that this assertion is correct, the degree of local concern is irrelevant. Federal preemption doctrine applies regardless of the importance of the issue to local authorities. *Fidelity Federal Savings & Loan Ass'n*, 102 S. Ct. at 3022. As the Court stated in *Free v. Bland*, 369 U. S. 663 (1962): "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.*, at 666.

¹⁰ As a result of advances in nuclear technology, the percentage of total electricity produced in the United States by nuclear means rose from zero in 1954 to 12% in 1981. See *Statistical Abstract of the United States, 1982-1983*, at 581; *Historical Statistics of the United States, Vol. II*, at 95-107. During that period, and to this day, there have been no fatalities due to radioactive contamination from nuclear facilities, a record few industries have equaled. Much of the credit for the progress and safety record of the nuclear industry also must go to Congress for enacting appropriate safety regulatory authority and to the action and oversight of the AEC and its successor, the NRC.

This country

I would go along with the Chief on this one.

Rob

ators of nuclear facilities rely on the regulations and oversight of the NRC. Unskilled juries apparently will be free to find any regulations adopted by the NRC irrelevant if not indeed invalid as a basis for finding the malice, fraud or gross negligence that alone may justify punitive damages.¹⁶ Nor will the NRC ever know when its regulations will be respected by lay jurors.

III

We hardly could have spoken more clearly in *Pacific Gas & Electric Co.* on April 20, 1983, on the issue of preemption.

"State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns . . ." *Id.*, at 1726.

This left no doubt whatever as to the sole responsibility for nuclear safety regulation under the governance of the Nuclear Regulatory Commission and its large staff—experts in the technology and safety controls of nuclear energy. Today, the Court unsettles the law. It opens a wide and inviting door to indirect regulation by juries authorized to impose damages to punish and deter on the basis of inferences even when a plant has taken the utmost precautions provided by law. Not only is this unfair; it also could discourage investment needed to further the national need for this essential alternate source of energy. I would affirm the judgment of the Court of Appeals.

¹⁶The Court cites a House Report in which Congress expressed its misgivings about the ability of the states to deal with the complex and technical nature of the safety considerations in the nuclear industry. See H. R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959). The Court, nevertheless, is willing to allow a jury, untrained in even the most rudimentary aspects of nuclear technology, to impose heavy penalties on the basis of its own perceptions or prejudices.

Lay jurors with no more skill in evaluating the complexities of atomic fission than judges and open to responses guided by passion, prejudice & emotions

This suggestion seems a little inflammatory I would leave the sentence as written.

Rob

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

CHAMBERS OF
THE CHIEF JUSTICE

December 8, 1983

RECEIVED
SUPREME COURT OF THE U.S.
JUSTICE MARSHALL

'83 DEC -8 P12:52

Re: No. 81-2159 Silkwood v. Kerr-McGee Corp.

Dear Lewis:

Please join me.

Regards,



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MA

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 7, 1983

No. 81-2159

Silkwood v. Kerr-McGee Corporation

Dear Chief,

Byron has agreed to take on the
opinion for the Court in the above.

Sincerely,

The Chief Justice

Copies to the Conference

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N

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 7, 1983

No. 81-2159

Silkwood v. Kerr-McGee Corp.

Dear Byron,

I agree.

Sincerely,



Justice White

Copies to the Conference

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: NOV 4 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-McGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[November —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

Last term, this Court examined the relationship between federal and state authority in the nuclear energy field and concluded that states are precluded from regulating the safety aspects of nuclear energy. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, — U. S. —, — (1983). This case requires us to determine whether a state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility is preempted either because it falls within that forbidden field or because it conflicts with some other aspect of the Atomic Energy Act.

I

Karen Silkwood was a laboratory analyst for Kerr-McGee¹ at its Cimmaron plant near Crescent, Oklahoma. The plant fabricated plutonium fuel pins for use as reactor fuel in nuclear power plants. Accordingly, the plant was subject to licensing and regulation by the Nuclear Regulatory Commis-

¹Silkwood was employed by Kerr-McGee Nuclear Corporation, a subsidiary of Kerr-McGee Corporation. The jury found that the former was the "mere instrumentality" of the latter. We therefore refer to both as Kerr-McGee.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: DEC 6 1983

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 18

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-McGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[November —, 1983]

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

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Recirculated: DEC 23 1983

CHANGES THROUGHOUT.
SEE PAGES: 12

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-McGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[January —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

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¹ Silkwood was employed by Kerr-McGee Nuclear Corp., a subsidiary of Kerr-McGee Corp. The jury found that the former was the "mere instrumentality" of the latter. We therefore refer to both as Kerr-McGee.

To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

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3rd DRAFT 4

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
 TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
 LANT *v.* KERR-McGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
 FOR THE TENTH CIRCUIT

[January —, 1983]

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Karen Silkwood was a laboratory analyst for Kerr-McGee¹ at its Cimmaron plant near Crescent, Oklahoma. The plant fabricated plutonium fuel pins for use as reactor fuel in nuclear power plants. Accordingly, the plant was subject to licensing and regulation by the Nuclear Regulatory Commis-

¹Silkwood was employed by Kerr-McGee Nuclear Corp., a subsidiary of Kerr-McGee Corp. The jury found that the former was the "mere instrumentality" of the latter. We therefore refer to both as Kerr-McGee.

HAB

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

January 17, 1984

CHAMBERS OF
JUSTICE BYRON R. WHITE

MEMORANDUM TO THE CONFERENCE

Re: Case held for Silkwood v. Kerr-McGee, No. 81-2159

Van Dissel v. Jersey Central Power & Light Co, No. 81-2065

As the pool memo indicates, the lower court opinion addresses two issues, only the first of which is affected by the opinion in Silkwood. Petrs brought a suit against the resp power company alleging that the power company's cooling system caused damage to their property. Petrs alleged eight theories of liability: (1) negligence, (2) nuisance, (3) trespass, (4) strict liability, (5) violation of state water pollution laws, (6) violation of federal refuse laws, (7) violation of federal water pollution laws, and (8) inverse condemnation. The TC held that it did not have jurisdiction over the first seven claims because the cooling system, an integral part of which was the radioactive waste disposal system, had been approved by the AEC. Interference with the federal regulatory scheme by claims for money damages was forbidden, the court held. As to the inverse condemnation claim, the TC held that plaintiffs had failed to establish that the "taking" was caused by the cooling system. The N.J. Ct. App. affirmed both rulings.

The lower court's ruling on the preemption issue is definitely affected by Silkwood. The fact that the lower court may decide to dispose of all of the claims on the basis of the TC's proximate cause findings is no basis for allowing the preemption analysis to stand. However, there is one somewhat significant difference between the claims in this case and those advanced in Silkwood in that the present case involves nuisance and trespass claims. The Joint Committee report on Price-Anderson stated that "it is not the intention of the committee to have the damage to property which is included in the term 'nuclear incident' include the diminution in value or other similar causes of action which may occur, namely, from the location of an atomic energy activity at a particular site." S. Rep. No. 296, 89th Cong., 1st Sess. 16-17 (1957). Nuisance and trespass claims seem to come awfully close to actions for diminution in value caused from the location of an atomic energy site. However, since petrs alleged that their property was actually damaged by the cooling system, the nuisance and trespass claims may not be merely for diminution in value. Therefore, I would GVR in light of Silkwood. If petr picks up on the language in the S. Rep., the lower court can address the issue.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 27, 1984

MEMORANDUM TO THE CONFERENCE

Re: 81-2159 - Silkwood v. Kerr-McGee

The Solicitor General has suggested that footnote 12 in the published opinion would more accurately reflect the statute if after the citation to §2210(c) in the second sentence of the footnote, the words "and certain others not relevant here, §2014(t)," were inserted. The point is well taken, and absent objection, the footnote will be so amended.

A handwritten signature in black ink, appearing to be the initials 'RW' or similar, located at the bottom right of the page.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 7, 1983

Re: No. 81-2159-Silkwood v. Kerr-McGee

Dear Byron:

I await the dissent.

Sincerely,



T.M.

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 4, 1984

Re: No. 81-2159-Silkwood v. Kerr-McGee

Dear Harry:

Please join me in your dissent.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 14, 1983

Re: No. 81-2159 - Silkwood, Administrator v. Kerr-McGee Corp.

Dear Byron:

I shall wait to see what Lewis has to say in dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1983

Re: No. 81-2159 - Silkwood v. Kerr-McGee Corporation

Dear Lewis:

Please join me in your dissent in this case.

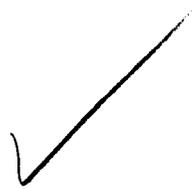
Sincerely,



Justice Powell

cc: The Conference

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



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 29, 1983

Re: No. 81-2159 - Silkwood v. Kerr-McGee Corp.

Dear Lewis:

The Court's opinion in this case continues to disturb me. While I am staying with the joinder I gave you on December 2, I have decided to write separately. I am endeavoring to attack the majority's logic more directly than you have done. My draft will be around shortly. I believe you will find that it in no way impinges upon what you have said.

Sincerely,

Justice Powell

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: DEC 29 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-MCGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[January —, 1984]

JUSTICE BLACKMUN, dissenting.

I join JUSTICE POWELL's opinion in dissent and add com-
ments of my own that, I believe, demonstrate (a) the in-
compatibility between the Court's opinion last Term in *Pa-
cific Gas & Electric Co. v. State Energy Resources Cons.
and Dev. Comm'n*, — U. S. — (1983), and its opinion in
the present case, and (b) the fact that the Court is by no
means compelled to reach the result it espouses today.

JUSTICE POWELL's dissent well explains the fundamental
incongruity of the result the Court reaches today. The
Court acknowledges that Congress pre-empted state regula-
tion of safety aspects of nuclear operations largely out of con-
cern that States were without the technological expertise
necessary to regulate them. *Ante*, at 11. Yet the Court
concludes that Congress intended to allow a jury to impose
substantial penalties upon a nuclear licensee for failure to fol-
low what the jury regards as adequate safety procedures.
The Court recognizes the paradox of its disposition, but
blames the irrationality on Congress. Then, with humility,
the Court explains that it is duty-bound to follow the dictates
of Congress. But such institutional modesty cannot transfer
the blame for the tension that today's decision injects into the
regulation of nuclear power. The Court, in my view, tor-
tures its earlier decisions and, more importantly, wreaks

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____ JAN 5 1984

STYLISTIC CHANGES
pp. 15 + 8

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-MCGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[January —, 1984]

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL
joins, dissenting.

I join JUSTICE POWELL's opinion in dissent and add com-
ments of my own that, I believe, demonstrate (a) the in-
compatibility between the Court's opinion last Term in *Pa-
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and Dev. Comm'n*, — U. S. — (1983), and its opinion in
the present case, and (b) the fact that the Court is by no
means compelled to reach the result it espouses today.

JUSTICE POWELL's dissent well explains the fundamental
incongruity of the Court's result. The Court acknowledges
that Congress pre-empted state regulation of safety aspects
of nuclear operations largely out of concern that States were
without the technological expertise necessary to regulate
them. *Ante*, at 11. Yet the Court concludes that Congress
intended to allow a jury to impose substantial penalties upon
a nuclear licensee for failure to follow what the jury regards
as adequate safety procedures. The Court recognizes the
paradox of its disposition, but blames the irrationality on
Congress. Then, with humility, the Court explains that it is
duty-bound to follow the dictates of Congress. But such in-
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that today's decision injects into the regulation of nuclear
power. The Court, in my view, tortures its earlier decisions

October 10, 1983

81-2159 Silkwood v. Kerr-McGee Corp.

Dear Chief:

I will be glad to take the dissent.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'83 NOV -7 A9:14

November 4, 1983

81-2159 Silkwood v. Kerr-McGee Corporation

Dear Byron:

In due time, I will circulate a dissent.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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11/30

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: Nov 30 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-McGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[December —, 1983]

JUSTICE POWELL, dissenting.

The Court's decision, in effect, authorizes lay juries and judges in each of the states to make regulatory judgments as to whether a federally licensed nuclear facility is being operated safely. Such judgments then become the predicate to imposing heavy punitive damages. This authority is approved even though the Nuclear Regulatory Commission (NRC)—the agency authorized by Congress to assure the safety of nuclear facilities—found no relevant violation of its stringent safety requirements worthy of punishment. The decision today also comes less than a year after we explicitly held that federal law has "preempted" all "state safety regulation" except certain limited powers "expressly ceded to the states." *Pacific, Gas and Electric Co.*, 103 S. Ct., at 1726.¹ There is no express authorization in federal law of the authority the Court today finds in a state's common law of torts.

¹ In *Pacific, Gas and Electric Co.*, we held:

"State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government." *Id.*, at 1726.

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Handwritten initials and date: 12/1/83

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

stylistic changes throughout p. 10-13,
note 10, note 12,

LAF
P. 10-13
note 10, note 12

From: Justice Powell

Circulated: _____

Recirculated: DEC 12 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ES-
TATE OF KAREN G. SILKWOOD, DECEASED, APPEL-
LANT *v.* KERR-MCGEE CORPORATION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[January —, 1984]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and
JUSTICE BLACKMUN join, dissenting.

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judges in each of the states to make regulatory judgments as
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imposing heavy punitive damages. This authority is ap-
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we explicitly held that federal law has "preempted" all "state
safety regulation" except certain limited powers "expressly
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Ct., at 1726.¹ There is no express authorization in federal

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"State safety regulation is not preempted only when it conflicts with fed-
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an identifiable portion of it, as it has done here, the test of preemption is
whether 'the matter on which the state asserts the right to act is in any
way regulated by the federal government.'" *Id.*, at 1726.

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December 30, 1983

81-2159 Silkwood v. Kerr-McGee

Dear Harry:

I read your dissent in this case last night with admiration.

It is very well written, and adds strong arguments in addition to those in my dissent. I hope that Thurgood stays with us.

Sincerely,

Justice Blackmun

lfp/ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 6, 1983

Re: No. 81-2159 Silkwood v. Kerr-McGee Corp.

Dear Byron:

Please join me in your circulation of December 6th.

Sincerely,



Justice White

cc: The Conference

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


CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

'83 NOV -8 A9:16

November 7, 1983

Re: 81-2159 - Silkwood v. Kerr-McGee

Dear Byron:

Please join me.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 7, 1983

Re: No. 81-2159 Silkwood v. Kerr-McGee Corporation

Dear Byron,

Please join me.

Sincerely,



Justice White

Copies to the Conference