10-1978

Federal Communications Commission v. Midwest Video Corporation

Lewis F. Powell Jr.

SG's brief req'd.

Grant

Important case in which CA 8 ~~held~~ invalidated Rules of FCC w/respect to cable TV - holding that FCC ~~lacked~~ lacked juris.

9/14/78 - please see p. 10 for comment on recently-received filings.
E.G.

PRELIMINARY MEMORANDUM

Summer List 9, Sheet 2

No. 77-1575-CFX FEDERAL COMMUNICATIONS COMMISSION v. MIDWEST VIDEO CORPORATION, et al.	Cert to CA8 (Stephenson, Markey; Webster, concurring) Federal/Civil	Timely
No. 77-1648-CFX AMERICAN CIVIL LIBERTIES UNION v. FEDERAL COMMUNICATIONS COMMISSION	Same	
No. 77-1662-CFX NATIONAL BLACK MEDIA COALITION, et al. v. MIDWEST VIDEO CORPORATION, et al.	Same	

Please see p. 10.

SUMMARY: This petition presents substantial questions as to the extent of the FCC's authority to regulate the cable television industry. Specifically, Petr seeks review of a ruling of the CA8 setting aside the FCC's mandatory channel capacity, equipment and access rules for cable TV systems on the basis that the FCC lacks jurisdiction to promulgate such rules.

THE REGULATIONS: The FCC adopted the mandatory access rules here in issue in 1976. The rules apply to all cable systems with more than 3,499 subscribers. Such cable systems must provide four "access" channels: a "public access channel" for non-commercial uses on a first-come, non-discriminatory basis; an "educational access channel" for use by local education authorities; a "local government access channel" for local government uses; a "leased access channel" for leased uses. However, until there is sufficient demand for full-time use of each of the four channels for their designated uses, or if, prior to 1986, an existing system lacks channel capacity, a cable system may combine the four uses on one or more channels. In any event, at least one full channel (or in some limited cases, a portion of a channel) must be maintained for shared access programming. When not in use for the designated uses, such channel or channels may be used by the system for broadcast or other purposes. Each system must supply equipment and facilities for local production and presentation of access and leased programs. In addition, all existing cable systems must have a capacity for two-way, non-voice communication and 20 channels by 1986.

Use of the public access channels must forever be free of charge. Use of the educational and government channels must be

free of charge for the first five years after the system first offers such channel time. No charge may be made for equipment, personnel and production costs of live public access programs that do not exceed five minutes in length; for longer public access programs, charges must be reasonable and consistent with the goal of affording users a low-cost means of television access. Finally, a cable system may not exercise control over the content of access programs except to the extent necessary to prohibit transmission of lottery information and obscene or indecent matter, and, in the case of public or educational channels, commercial or political advertising. (The FCC is now reconsidering the obscenity rule.)

Resp Midwest Video Corp. filed a petition in the CA8 to set aside these regulations on the grounds that the regulations were inadequately supported by the record, beyond the FCC's jurisdiction and violative of the First and Fifth Amendments. The ACLU, a Petr herein, also challenged the regulations, but while Midwest essentially argued that the rules went too far, the ACLU contended that they didn't go far enough. The ACLU did not contest FCC jurisdiction. The National Black Media Coalition and the American Broadcasting Co., Inc., among others, intervened.

OPINIONS BELOW: Judge Markey, in a lengthy opinion for the majority, concluded that the mandatory access, channel capacity [1/]

1/ Jurisdiction to require minimum channel and two-way capacity was not argued separately from the mandatory access requirement. Channel capacity apparently was considered necessary to provide access channels. App. at 18 n. 21. The CA did not decide whether an increased channel capacity requirement alone would be impermissible.

and equipment regulations (the "access rules") exceeded the FCC's jurisdiction because: "(1) the statute provides no jurisdiction; (2) the regulations are not 'reasonably ancillary' to the Commission's responsibilities for regulation of broadcast television; (3) objectives do not confer jurisdiction; (4) the Commission's ends do not justify the means; (5) the means are forbidden within the Commission's statutory jurisdiction."

The CA first briefly reviewed the Communications Act of 1934 and determined that the Act provided no express basis for FCC jurisdiction over cable systems. Thus, ruled the court, whether the FCC had jurisdiction to adopt the access rules must be decided in accordance with the standards set forth in U. S. Southwestern Cable Co., 392 U. S. 157 (1968) and in U. S. v. Midwest Video Corp., 406 U. S. 649 (1972), where this Court held that FCC authority to regulate cable TV is "restricted to that reasonably ancillary to effective performance of the Commission's various responsibilities for regulation of television broadcasting." In Southwestern, this Court upheld the FCC's power to prohibit cable TV from importing distant signals into the largest 100 television markets unless the Commission found such importation to be consistent with the public interest. In Midwest Video, this Court, in a split decision, rejected a challenge to the FCC's "mandatory origination" rules, which require certain systems to transmit their own programs, i. e., "cablecast," through their cables to their subscribers in addition simply to transmitting broadcast signals originated elsewhere.[2/]

2/ The FCC never enforced the mandatory origination rules after Midwest Video and adopted the access rules on the ground that "access was a less burdensome but equally effective means of promoting localism and diversity."

The access rules failed to meet the "reasonably ancillary" standard because the FCC had not shown the "slightest nexus" between the rules and its responsibilities for broadcast television. The rules, which had no corollary in broadcast regulation, were not designed to govern any deleterious interrelationship of cable TV to broadcasting or to require cable TV to do what broadcasters do, but rather to force cable TV into activities not engaged in or sought and which have no bearing on the health of television broadcasting. The CA rejected the FCC's argument that the access rules were effectively the same as the mandatory origination rules approved in Midwest Video. The court noted that cable systems could satisfy the origination rules by cablecasting programs "produced by others, such as films, tapes and CATV network programming."

The CA further held that the FCC's stated objectives of "increasing the number of outlets of community self-expression and augmenting the public's choice of programs and types of services" could not constitute a basis for authority. The objectives were of the FCC's own design and were not those stated in the Communications Act, and, even if they were, a statutory statement of objectives cannot constitute a grant of power. In addition, the FCC's actions violated the Communications Act's prohibition against imposing common carrier obligations, as the court characterized the access rules, on broadcasters. 47 U. S. C. 153 (h); CBS v. DNC, 412 U. S. 94 (1973).[3/]

3/ The court noted that its judgment concerned only federal jurisdiction to require mandatory access and had no "direct effect" on the election of local franchising authorities to require access in light of community need and interest.

The court concluded its opinion by stating that because of its decision on jurisdiction, it was unnecessary to decide the constitutional questions raised by Midwest or whether the access rules were based on an adequate record. Having said that, however, the CA then discussed the questions at length and strongly suggested that if faced with the issues, it probably would find the access rules to violate the cable operator's First and Fifth Amendment rights and also to be based on an inadequate record. In the court's opinion, there was nothing to suggest a constitutional distinction between cable television and newspapers in the context of the government's power to compel public access. Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 (1974). The court was very concerned with the fact that cable operators could not control the content of programs on the access channels. Also, "presumably," said the court, a requirement that facilities be built and dedicated without compensation to the federal government for public use would be a deprivation forbidden by the Fifth Amendment. Finally, the court noted that there was insufficient evidence in the record of demand for access programs, present or future, by users or viewers. Judge Webster declined to join Judge Markey's discussion of the constitutional and record issues because the court's disposition of the jurisdictional question made such a discussion unnecessary.

CONTENTIONS: Petrs make the following arguments. (1) The CA's opinion is inconsistent with this Court's interpretations of the scope of FCC authority to regulate cable TV in Southwestern and Midwest Video. Petrs argue that the CA failed to consider §2(a) of the Communications Act and instead improperly read the

FCC as having sought to derive its regulatory power from its objectives. In Petrs' view, Midwest Video held that section 2(a) of the Act provides the FCC with jurisdiction to regulate cable systems which also carry broadcast signals and that "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services" is a proper objective for the FCC to pursue in regulating not only broadcasting, but cable TV as well. They deny that the FCC's regulatory authority over cable TV is limited, as the CA held, only to those means of regulation that are employed in the broadcasting area.

Resps repeat the arguments set forth by the CA. They contend that the CA's approach of deciding the jurisdictional issue on the basis of whether there is a sufficient nexus between the access rules and the FCC's responsibilities for broadcast TV is entirely consistent with Midwest Video and Southwestern. Resps stress that the access rules are qualitatively different than the mandatory origination rules approved in Midwest Video. Unlike the origination rules, the access rules require dedication of channels solely for FCC designated programs, the content of which the operators have no control over, and limit the operators ability to recoup the costs incurred for use of the channels and equipment.

(2) Petrs also argue that the CA8's decision is directly contrary to decisions of the CA9 in ACLU v. FCC, 523 F. 2d 1344 (9th Cir. 1975), the CA2 in Brookhaven Cable TV, Inc. v. Kelly, __F. 2d__, Nos. 77-6156.-6157 (2d Cir. Mar. 29, 1978), and the CADC in Nat'l Assoc. of Regulatory Utility Comm. v. FCC, 533 F. 2d 601 (D. C. Cir. 1976). In ACLU, the CA9 upheld the FCC's 1972

access rules, the predecessors to the rules here in issue, against a challenge that the regulations did too little. In Brookhaven, the CA2 approved the FCC's authority to preempt state and local regulation of the prices charged by pay cable systems offering specialized programming. The CADC in NARUC invalidated the FCC's effort to preempt from state public utility regulation the provision of two-way nonvideo communications on cable TV, but the Nat'l Black Media Coalition seizes on language in the opinion that "'suitably diversified programming' is within the ancillariness standard [applied to cable TV]."

Resps assert that the CA9 was not presented with the question of FCC jurisdiction to adopt access rules in ACLU, that Brookhaven dealt with much different regulations than are at issue here, and that the CADC's decisions in NARUC and Home Box Office v. FCC, 567 F.2d 9 (D. C.), cert. denied, 98 S. Ct. 111 (1977) (No. 76-1724) support the CA8's decision.

(3) On the constitutional issues, Petrs attempt to distinguish Tornillo. They essentially contend that cable TV is more like broadcast TV than newspapers and so it is subject to more limited First Amendment protection. CBS v. DNC, supra; Red Lion Broadcasting v. FCC, 395 U. S. 367 (1969). Unlike newspapers, cable TV relies on broadcast signals, is unable to operate freely, without public sufferance, licensing and assistance, and is technologically a "hybrid," sharing significant characteristics of broadcasting and common carriers. On the Fifth Amendment issue, Petrs assert that the question already has been decided against Midwest in Midwest Video. None of the Petrs address the issue of the adequacy of the administrative record.

Resps merely repeat the arguments made by the CA8 on all of these issues.

DISCUSSION: This Court should consider granting cert in this case to resolve the question of the FCC's authority to issue the access rules. In light of the split decision in Midwest Video and the fact that the access rules seem clearly to go further than the mandatory origination rules considered in that case, it is not clear whether the CA8's decision is consistent or inconsistent with this Court's decisions. Contrary to Petr's assertions, there is no direct conflict in the circuits on this precise issue. The decisions of the CA2 and CADC are factually distinguishable. And while there are statements by the CA9 in ACLU that would appear to support FCC jurisdiction to issue access rules, that court was not asked to decide that issue, nor briefed on it. Nevertheless, these courts have adopted varying interpretations of the extent of FCC jurisdiction approved in Midwest Video. This case presents an opportunity to clarify this Court's position on the extent of FCC jurisdiction over the cable TV industry.

If this Court determines to grant cert, I would suggest limiting the grant to the jurisdictional issue. Despite the CA8's extended discussion of the constitutional issues and the question of adequancy of the record, it stated no less than six times that it did not have to reach those issues and was not resting its decision on those grounds. Judge Webster specifically declined to decide these questions. The FCC apparently did not even brief the issues in the lower court. If this Court reverses the CA8 on the jurisdictional issue, the CA8 should have the opportunity

to decide, rather than simply to discuss, those questions on remand.

There are responses, and a brief by Consumers Union, which requests leave to file the brief as amicus curiae.

7/20/78 Kravitz Op. in separate app.
WS

I would grant on the jurisdictional issue. The lack of a majority opinion in Midwest Video, the practical importance of CATV, and the need for a statement from this Court on these regulations, which go beyond those at issue in Midwest Video and are national in scope, support this recommendation.

E.A.

9/14/78

The United States (SG) has filed a brief in support of the petition for cert. Midwest Video has filed a response. Both briefs argue the merits of the Court of Appeals decision and, in my view, merely underscore the importance of the issue. Resp. has done nothing to show that the case is not clw. I would still vote to grant. E.A.

PRELIMINARY MEMORANDUM

Summer List 9, Sheet 2

No. 1662-CFX

Cert to CA8 (Stephenson, Markey; Webster, concurring)

NATIONAL BLACK MEDIA COALITION

v.

FEDERAL COMMUNICATIONS COMMISSION Federal/Civil Timely

Please see Preliminary Memorandum in No. 77-1575.

7/19/78 Kravitz Op. in separate app.

September 25, 1978

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 77-1662

Submitted ....., 19... *Announced* ....., 19...

NAT'L. BLACK MEDIA

vs.

MIDWEST VIDEO CORP.

Also motion of Consumers Union of United States, Inc., for leave to file a brief, as amicus curiae.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.									Same vote as 77-1575				
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

PRELIMINARY MEMORANDUM

Summer List 9, Sheet 2

No. 1648-CFX

Cert to CA8 (Stephenson, Markey; Webster, concurring)

AMERICAN CIVIL LIBERTIES UNION

v.

FEDERAL COMMUNICATIONS COMMISSION Federal/Civil Timely

Please see Preliminary Memorandum in No. 77-1575-CFX.

7/19/78 Kravitz Op in separate app.
WS