



10-1971

## United States v. Midwest Video Corp.

Lewis F. Powell Jr.

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Query: How does 1934 Act apply to TV?

~~Affirm~~  
~~Deny~~

Case involves extent of FCC's authority to regulate CATV.

The Act (FCA of 1934) was adopted prior to any use of CATV.

In US v Southeastern Cable (1968), certain incidental powers of regulation - incidental to regulation of other TV - were recognized.

CC 8 held 1934 Act did not authorize the broad power asserted by FCC (to require CATV to "originate programming").

~~Affirm~~ <sup>Deny</sup> & leave this problem to Congress

No. 71-506 OT 1971

This Case on CJ's Discuss List

United States v. Midwest Video Corp.

Cert to CA 8 (Van Oosterhout, Gibson & Lay)

This case presents the question whether the Federal Communications Commission (FCC) has the statutory authority to require operators of community antenna television systems (CATV) serving more than 3500 subscribers to originate programming, as a condition to the right to continuing functioning as a CATV system. CATV systems receive the signals of television broadcasting stations, amplify them, and distribute them by private wire to their subscribers. The FCC finds its authority to impose the origination requirement in the Federal Communications Act of 1934, which was enacted before CATV came into existence. Efforts to have Congress enact legislation dealing with CATV regulation and the role of the FCC have been unsuccessful.



It is clear that the FCC does have some authority over CATV. This case raises a question as to the extent of that authority. United States v. In/Southwestern Cable Co., 392 US 157 (1968), this Court held that the FCC had authority under the 1934 Act to require CATV systems to carry signals of local television stations, to avoid duplicating local programming, and to refrain from transmitting "distant signals" into the one hundred largest television markets. The regulations in question in Southwestern Cable were promulgated by the FCC to protect local broadcasters from excessive competition from far-away broadcasters, and to foster the development of local UHF and educational broadcasters ("local" used to refer to the area served by the CATV system). Statutory authority for the challenged regulations was found primarily in 47 USC 152(a), which extends the Act's coverage to "all interstate and foreign communication by wire or radio", and in 47 USC 151, which contains the FCC's mandate to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." This Court was careful to emphasize, however:

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may for these purposes issue "rules and regulations and prescribe such ~~rules-and-regulations~~ restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." 47 USC 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

392 US at 178. (Emphasis supplied)

The Court in effect reserved the question presented to CA 8 in this case. CA 8 unanimously held that the FCC did not have ~~the~~ authority to promulgate the rule requiring program origination



by CATV systems. In so holding, CA 8 relied heavily upon the "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" language just quoted from Southwestern Cable. The CA 8 held that "the Commission's power to adopt rules requiring cablecasting [program origination], to the extent that it exists, must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field." The CA 8 concluded that the FCC lacked the authority to require program origination, since such a requirement went far beyond the regulation of the use of broadcast signals which was held authorized in Southwestern Cable. Indeed, CA 8 suggests (probably correctly) that program origination has little, if anything, to do with broadcasting.

The US and the FCC urge that cert be granted, because the CA 8 decision will frustrate the FCC in its efforts to integrate fully the the rapidly expanding CATV industry into the nationwide communications system. I am sure that the CA 8 decision will "frustrate" the FCC, but I do not understand what impact it will have upon the FCC's efforts "to integrate fully the rapidly expanding CATV industry into the nationwide communications system." What the decision means is that the FCC may not require CATV systems to originate programs as a condition of doing business. The CA 8 specifically stated that it was not passing on the power of the FCC to permit CATVs to originate programs, and to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programming.

Illinois wants this Court to grant cert to further define the scope of the FCC's authority, because Illinois proposes to regulate CATVs in Illinois, and it presumably wants a holding

to the effect that the area has not been pre-empted by the Federal Communications Act of 1934.

The US and the FCC also urge that the CA 8 decision casts grave doubts on a giant program that the FCC is cooking up to regulate comprehensively all phases of CATV. True. But what the US and FCC are really asking the Court to do is to take a fairly old statute, written before CATV was conceived, and somehow construe it to confer on the FCC plenary authority over CATV. We are asked, in effect, to amend the statute to cover a gigantic new area of communications not contemplated at the time the statute was written. I believe that this is more appropriately a job for Congress. There is no conflict in the Circuits, and I would let this buck stop at the door of Congress.

DENY

CEP



Court ..... CA - 8 .....

Argued ....., 19...

Submitted ....., 19...

Voted on....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 71-506

UNITED STATES, ET AL., Petitioners

vs.

MIDWEST VIDEO CORPORATION

10/8/71 Cert. filed.

*Grant*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....		✓												
Rehnquist, J. ....		✓												
Powell, J. ....			✓											
Blackmun, J. ....		✓												
Marshall, J. ....		✓												
White, J. ....		✓												
Stewart, J. ....		✓												
Brennan, J. ....		✓												
Douglas, J. ....		✓												
Burger, Ch. J. ....														

*Join three*

Deny

No. 71-506 OT 1971

US v. Midwest Video Corp.

DISCUSS

Cert to CA 8

This is a motion from the AG of Illinois seeking leave to participate as amicus curiae in oral argument. The case presents a straightforward question concerning the reach of the Federal Communications Act. You were the only Justice who voted to deny certiorari. The AG of Illinois will argue in support of the judgment below, as will the resp, who is ably represented by Hogan & Hartson. The AG says, however, that Illinois has a different perspective, and a position which has developed as a result of an extensive legislative inquiry. Considering the quality of work emanating from the office of the AG of Illinois, I would DENY, and let Illinois rest on its brief amicus curiae. But then you are the one who has to listen to argument.

CEP



No. 71-506 U. S. v. MIDWEST VIDEO CORP.  
Argued 4/19/72

Tentative Impressions\*

This case involves the question whether the FCC has authority under the Communications Act of 1934 to require cable television systems (CATV) to originate programs as a condition of their remaining in business.

CA 8 ruled that the Commission did not have such authority. It is conceded that there is no specific language in the Communications Act authorizing this regulation. It is argued on behalf of FCC that it has authority under our case in U. S. v. Southwestern Cable Co., 392 U. S. 197, in which we held that FCC has authority to regulate CATV systems where the activity is "reasonable ancillary" to FCC's statutory power.

See my notes taken during argument for the positions of the parties.

See also the statement and summary of argument in the first ten pages of the brief on behalf of Midwest Video Corp., and the summary on behalf of the FCC in brief filed by the Solicitor General.

\*These impressions are dictated on the afternoon following argument to record my initial and tentative impressions. I will have read, in preparation for the arguments, the principal briefs, some of the cases and the bench memo. I hope to do further study and have discussion with appropriate law clerk before the Conference. My views are subject to change and to the discussion at the Conference.



My Tentative View:

Although this is an area in which I have no expertise, and have made no extensive study, I am inclined to agree with the opinion of CA 8 and therefore would affirm.

The Act of 1934, written long before CATV, has no language which specifically authorizes this type of regulation. Congress has never legislated specifically with respect to CATV. Our decision in Southwestern Cable went rather far in the absence of any specific legislation.

But here, as I understand the case, FCC - in the interest of "integrating" CATV with broadcast TV, has ordered all CATV systems serving 3,500 people or more to do some "originating" of their own programs. This means that the average CATV company - which has only a few technicians and billing and supervisory personnel operating a very simple system - might be required to become producers of programs and shows, drastically changing the nature of their business. The theory is that - especially where CATV has a monopoly or dominating posture in a community - this sort of regulation is necessary to assure a balanced program for the public.

My tentative view is that before FCC imposes such drastic regulation, it should be authorized expressly by Congress and not

deduced from language never intended even to deal with CATV.

The issue is not whether the result of the FCC's order is in the public interest; rather, it is whether FCC, under present law, has the power to go this far.



Cable-casting case

Wallace (for SG)

CA 8 held invalid an FCC order

start with U.S. v Southwestern

→ Cable Co 392 U.S. 157 - FCC has power where activity is "reasonably ancillary" to FCC's statutory power.

In this case the FCC sought to integrate the expanding cable TV industry with the TV industry which FCC regulates.

FCC does have power over interstate wire communications.

Act passed in 1934 - with no amend. relating to cable TV. No leg. introduced since So. W Cable case.

FCC has ~~to~~ made detailed study of how best to integrate cable & ordinary TV.

Wallace (cont)

FCC has adopted comprehensive rules.

→ See April issue of Notre Dame Lawyer

This case is under 1969 Rules. (See summary of Rules challenged in this case - p 55 et seq)

Only Q ~~is~~ dealt in rule with respect to origination of cable casting

Definition cable casting is programming ~~by the~~ originated by some one other than a regulated TV or Radio program. The origination might be an entirely new program devised by the cable TV co. or it might be any program not available to ordinary TV viewers)

The TV viewer - merely by turning dial - may switch from regular to cable TV & vice versa. Thus FCC should have regulatory authority.

Does FCC have power to apply fairness standard to cable TV



Mr Plotkin (for Midwest)

said  
to be  
only  
issue

FCC has said to all CATV  
companies that ~~to~~ each of them must  
originate some programs in addition  
to relaying programs originated by others

As long as CATV merely  
relayed programs of regulated broadcasters  
their activity is "auxiliary" to that  
of the broadcasters. But not if program  
is not so originated.

Although State of Ill has filed  
brief asserting the originating function  
should be left to State control, Mr Plotkin  
does not agree with Ill. He thinks  
~~neither~~ neither State nor Fed Gov't has  
authority to compel CATV cos. to  
go into business of originating programs.

If a CATV has 3500 or more  
customers, the FCC's order requires  
the orig. of programs.\*

This is not auth. by statute  
Does it have to reach Court. issue  
here.

\* This would require buying eq.,  
hiring creative people to orig. programs,  
etc - revolutionize bus. & ops. of these  
small cos. Entirely diff. business.

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

Assigned . . . . ., 19...

**No. 71-506**

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

## UNITED STATES

vs.

MIDWEST VIDEO CORP.

Reverse 5

Afternoon 4

[illegible]



DOUGLAS, J.

Affirm

Argument changed Bill's  
mind. There is a need for  
leg. action. Congress has  
never addressed this complex  
area.

MARSHALL, J.

Reverse

BRENNAN, J.

Reverse

Agree with Chief

BLACKMUN, J.

Reverse

Agree with Byron

STEWART, J.

Affirm (tentative)

Southwest Cable went very  
far.

POWELL, J.

Affirm

See my notes in file.  
I see no statutory  
authority.

WHITE, J.

Reverse (tentative)

Sustaining FCC is stretching  
Act quite far - but CATV does  
rely on broadcast signals &  
yet is not subject to regulation.  
CATV now determines the mix  
of programs.

There is FCC's ancillary  
power - as in Southwest.

REHNQUIST, J.

Affirm

~~XXXX~~ The Chief Justice Reverse + Remand

FCC should have this power.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL


May 17, 1972

Re: No. 71-506 - U. S. v. Midwest Video Corp.

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: Conference



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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 18, 1972

No. 71-506, U.S. v. Midwest Video Corp.

Dear Bill,

I should appreciate your adding my name  
to your dissenting opinion in this case.

Sincerely yours,

PS.  
1.

Mr. Justice Douglas

Copies to the Conference

5/18/72 CEP

MEMORANDUM TO MR. JUSTICE POWELL

Re: No. 71-506, United States v. Midwest Video Corp.

Brennan has circulated an opinion for the Court, reversing CA 8 and holding that the FCC does have authority to require CATV operators to originate programming.

Douglas has circulated a dissent, which Stewart has joined. You voted to affirm, and I think that the Douglas dissent, while it rambles a bit, generally reflects your views.

JOIN WOD'S DISSENT

CEP



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 19, 1972

Re: No. 71-506 United States v. Midwest Video

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

*Lewis*

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

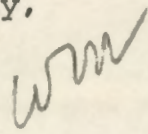
May 19, 1972

No. 71-506 - United States v. Midwest Video

Dear Bill:

Please join me in your dissent in this case.

Sincerely,

A handwritten signature in dark ink, appearing to be 'WR', is written below the word 'Sincerely,'.

Mr. Justice Douglas

Copies to the Court



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 23, 1972

Re: No. 71-506 - U.S. v. Midwest Video Corp.

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 23, 1972

Re: No. 71-506 - United States v.  
Midwest Video Corp.

Dear Bill:

Please join me.

Sincerely,

*BW*

Mr. Justice Brennan

Copies to Conference



[illegible]

*Join*  
*5/19/72*

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 71-506

From: Douglas, J.

Circulated: *5/19/72*

United States et al.,  
Petitioner,  
v.  
Midwest Video Corporation. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Eighth  
Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The policies reflected in the opinion of the Court may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by coaxial cables into communities unable to receive the signals directly. In *United States v. Southwestern Cable Co.*, 392 U. S. 157, we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

"CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals." *Id.*, at 163.



CATV evolved after the Act was passed in 1934. But we held that the reach of the Act which extends "to all interstate and foreign communication by wire or radio," 47 U. S. C. § 152 (a), was not limited to the precise methods of communication then known. *Id.*, at 173.

Compulsory origination of programs is, however, a far cry from the regulation of communications approved in *Southwestern Cable*. Origination requires new investment and new and different equipment, and an entirely different cast of personnel. We marked the difference between communication and origination in *Fortnightly Corp. v. United Artists*, 392 U. S. 390, and made clear how foreign the origination of programs is to CATV's traditional transmission of signals. In that case, CATV was sought to be held liable for infringement of copyrights of movies licensed to broadcasters and carried by CATV. We held CATV not liable, saying:

"Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the

antenna system is erected and owned not by its users but by an entrepreneur.

"The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." *Id.*, at 399-401.

The Act forbids any person from operating a broadcast station without first obtaining a license from the Commission. 47 U. S. C. § 301. Only qualified persons may obtain licenses and they must operate in the public interest. 47 U. S. C. §§ 308, 309. But nowhere in the Act is there the slightest suggestion that a person may be compelled to enter the broadcasting field.

The Act, when dealing with broadcasters, speaks of "applicants," "applications for licenses," see 47 U. S. C. §§ 307, 308, and "whether the public interest, convenience and necessity will be served by the granting of such application." 47 U. S. C. § 309 (a). The emphasis on the Committee Reports was on "original applications" and "application for the renewal of a license." H. R. Rep. No. 1918, 73d Cong., 2d Sess., p. 48; S. Rep. No. 781, 73rd Cong., 2d Sess., pp. 7, 9. The idea that a carrier or any other person can be drafted against his will to become a broadcaster is completely foreign to the history of the Act, as I read it.



CATV is simply a carrier having no more control over the message content than does a telephone company. The Act separates "carriers" from "broadcasters," making the former common carriers for hire, 47 U. S. C. § 153 (H), but by the same subsection the broadcaster is not to be "deemed a common carrier." A carrier may of course seek a broadcaster's license; but there is not the slightest suggestion in the Act or in its history that a carrier can be bludgeoned into becoming a broadcaster while all other broadcasters live under more lenient rules. There is not the slightest cue in the Act that CATV carriers can be compulsorily converted into broadcasters.

The Court performs the legerdemain by saying that the requirement of CATV origination is "reasonably ancillary" to the Commission's power to regulate television broadcasting. That requires a brand new amendment to the broadcasting provisions of the Act which only the Congress can effect. The Commission is not given *carte blanche* to initiate broadcasting stations; it cannot force people into the business. It cannot say to one who applies for a broadcast outlet in city A that the need is greater in city B and he will be licensed there. The fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs. The fact that the Act directs the Commission to encourage the larger and more effective use of radio in the public interest, 47 U. S. C. § 303 (8), relates to the objectives of the Act and does not grant power to compel people to become broadcasters.

The upshot of today's decision is to make the Commission's authority over activities "ancillary" to its responsibilities greater than its authority over any

broadcast licensee. Of course, the Commission can regulate a CATV that transmits broadcast signals. But to entrust the Commission with the power to force some, a few, or all CATV operators into the broadcast business is to give it a forbidding authority. Congress may decide to do so. But the step is a legislative measure so extreme that we should not find it interstitially authorized in the vague language of the Act.

I would affirm the Court of Appeals.