In the

Supreme Court of the United States

PAUL P. ERLENBAUGH, ET AL., Petitioners,	)	
v.	)	No. 71-839
THE UNITED STATES OF AMERICA, Respondent.	)	

Washington, D. C.
November 13, 1972

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v.	:	No. 71-839
THE UNITED STATES OF AMERICA, Respondent.	:	

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Monday, November 13, 1972

The above-entitled matter came on for argument at 11:50 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES W. GRUBB, ESQ., P.O. Box 354, Cedar Lake, Indiana 46303, for the Petitioners.

ALLAN A. TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-839, Erlenbaugh against the United States.

Mr. Grubb, you may proceed whenever you are ready now.

ORAL ARGUMENT OF CHARLES W. GRUBB, ESQ.

ON BEHALF OF THE PETITIONERS

MR. GRUBB: Mr. Chief Justice, and may it please the Court:

I am here in a rather ominous position today, fatally speaking, in that when the Travel Act, Section 1952, of Title 18 of the United States Code was passed in 1961, I was a special agent of the Federal Bureau of Investigation assigned to Lake County, Indiana, and I had prepared at that time the first summary report to be used for the prosectuion of people like I am representing today.

This Act is the Travel Act, Section 1952, of Title 18 of the United States Code. Now, the question before this Court today is whether the Seventh Circuit erred in not following the case of the U.S. v. Arnold which was cited in the briefs and treated in the briefs. In that case they treated also Section 1953 which was a companion section of Section of 1952 which is the Travel Act.

The Court of Appeals for the Seventh Circuit stated and rejected Arnold on the ground that there was lack of precedent and also that there was lack of reasoning in the

case. This was actually a case of first impression for all practical purposes and thus there was lack of precedent for it. But I believe that a study of the legislative history, study of the Acts themselves, and a study of the cases cited by the Government and cases which I shall cite, support Arnold, and give reasoning. Arnold was terse, there is no doubt about it, it was a terse opinion. But nevertheless I think that we have proper reasoning that can be found in the cases and also in the statutes.

Now, the petitioners were convicted under Section 1952 of the Travel Act. They were horse race bookies and they used what was known as the Illinois Sports News -- I don't believe we got this in the record, brought it out -- but the Illinois Sports News. It's a newspaper published in Chicago, Illinois, and is used by bookies because it contains horse race betting information and predictions. This paper was sent to the petitioners who all reside in Lake County, Indiana. Incidentally, some of them were my informants when I was in the FBI. These persons used this. The paper was sent from Chicago, Illinois, to Hammond, Indiana, and it was consigned to what was known as the Hammond News Agency. These petitioners are into the record, went to the railroad station and picked up copies of it, leaving their money there, they took the copies, and they did use it in their horse-racing operation.

The Illinois Sports News has been held to be a

newspaper and exempt under Section 1953 of Title 18 which is the companion section. And it was so held by the Seventh Circuit which pleaded this case previously. That was in Kelly v. Illinois Bell Telephone Company. That's a 1963 case. I'm giving the citation because there were two Kelly cases in the briefs. 325 Fed. 2nd 148. And it was held in a general way by the Seventh Circuit to be a newspaper and exempt from the operation of Section 1953.

Now, Congress had a reason to exempt newspapers from Section 1953, and that is to protect the right of the free press. But in passing 1953, it permitted the interstate transportation of a paper carrying with it information, carrying with it gambling information, betting information. This information could be used for only one purpose, nothing else. It's not worth anything for anything else except gambling. It's a betting paper. But Congress permitted this to be passed and they knew it would be passed and in doing so they knew it would be transported for one purpose, and that is to use for gambling purposes. This is not going to be used to paper walls, this is not going to be used to line bureau drawers. It's strictly a gambling paper, and the Government made that quite plain in the various trials that we had.

Now, the cases cited by the Government in opposition can be distinguished from the cases before the Court and also from Arnold. In fact, I think they had to explain Arnold.

U.S. v. Miller which is cited in the brief, that's a 1967 case out of the Seventh Circuit. And that's how this began. The defendants there subscribed to Western Union Service. The defendants had a ticker, they paid for it, they had it in their gambling joint wherever it was in Lake County, Indiana, and they used the information from that. They didn't cause the use of interstate commerce or cause the use of an interstate facility. They used it, they actually used it. In the case before the Court these petitioners didn't subscribe to any paper, they didn't order any paper, they didn't cause any direct use of interstate commerce.

The next case is U.S. v. Azar which is a 1964 case. It's a District Court case in Michigan. There we have another paper. It's like the Illinois Sports News. It's called the Green Sheet. And the Green Sheet was published in Ohio. The two defendants in Azar traveled from Detroit, Michigan, to Ohio where the paper was published, and there they gave information which was used in the paper, actually used in the paper. And then the paper was sent across the State lines back into Michigan and there the defendants as consignees picked up the paper. The paper was sent to them. They used interstate commerce, they caused its use by being consignees, and they also traveled across the State line to give information for publication. Here was direct travel in interstate commerce. We didn't have it in the case at bar.

The next case was U.S. v. Ross, a 1967 case, and it was in the Sixth Circuit. The defendant was a subscriber to what is known as the Angel-Kaplan Sports Publication. Now, this is similar to the Illinois Sports News, I assume. This was shipped in interstate commerce to the defendant in Tennessee. The defendant admitted in this case that he was the subscriber. He was a subscriber to this paper. It was sent to him directly, and he in effect caused the use of interstate commerce which is not true of the petitioners in our case.

And the last case that the Government cited was U.S. v. Menendez, a 1968 case out of the Fifth Circuit Court of Appeals. The defendants in Florida used a telephone to New York to get the total liabilities of the 12 Federal Reserve Banks and the total was to be used as the winning number in a lottery game. Here again they directly used interstate commerce, an interstate facility, which is not true of our petitioners.

Now, the Seventh Circuit -- back to the Seventh Circuit -- in United States v. McCormick, a 1971 case, 442 Fed. 2nd, 316, the Court spoke differently on the use of an interstate facility than in the cases before this Court, spoke entirely differently, and I want to bring these two cases to the Court's attention. The defendant, McCormick, a man in Indianapolis, advertised in a weekly newspaper for salesmen

to be used in his gambling scheme, in his lottery scheme. And this paper went across the State line. It was sent through the mails, not only through the mails, but it was sent into interstate commerce. And the Government urged that this was a sufficient use of an interstate facility. The Seventh Circuit reversed this and said -- I would like to read this out of this decision, U.S. v. McCormick, and they start out:

MR. CHIEF JUSTICE BURGER: We will let you continue after lunch.

MR. GRUBB: Thank you. Thank you.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 10:00 o'clock p.m., the same day.]

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Grubb, you may continue.

MR. GRUBB: Thank you, your Honor.

I was about to read from U.S. v. McCormick. That's a case that came out of the Seventh Circuit Court, and I am reading here from McCormick: "In Rewis v. U.S., 401 U.S." -- and I will give the correct citation; they didn't have it here. It's 28 L. Ed. 2d 493 -- "the Supreme Court reversed the conviction of a gambler whose lottery operation was frequented by out-of-state bettors. Construing this same section, the Court emphasized the intent of Congress to strike at the truly interstate operations of organized crime. The Court refused to give broad-ranging application to the statute particularly since Congress gave no indication that it wished to alter the sensitive Federal-State relationship, overextend limited Federal police resources, or produce situations in which the geographic origins of customers, a matter of happenstance, would transform relatively minor State offenses into Federal felonies.

"Similarly," -- and I'm still reading from McCormick, -- "in U.S. vs. Altobell?, 442 F. 2nd, 310" -- also in the Seventh Circuit -- "this Court struck down the conviction of two extortioners under Section 1952 where jurisdiction was claimed on the basis that the victim's check was cleared by

mail between Chicago and Philadelphia stating, 'When both use of interstate facilities and the subsequent act is as minimal and incidental as in this case, we do not believe a Federal crime has been committed.'"

Th Court then reversed and added in McCormick, "The defendant neither used nor caused to be used any interstate facility as an instrumental part of his illegal operations. We must therefore conclude that no Federal crime was committed and that the State of Indiana is the only appropriate authority to punish the defendant for maintaining this local lottery."

QUESTION: I understand that the opinion you have just been reading from is in a case not referred to in either one of the briefs.

MR. GRUBB: No, it isn't.

QUESTION: May I have the citation?

MR. GRUBB: Yes. McCormick is -- I mean Altobello is in 442 F. 2nd, 310. And McCormick is a 1971 case, it's also in 442 F. 2nd, 316.

QUESTION: Thank you.

MR. GRUBB: Now, in McCormick, the Seventh Circuit --

QUESTION: The boundary in the case of the gambling house near the state line is one out of this Court's last term or the term before, isn't it?

MR. GRUBB: Rewis is.

QUESTION: Yes.

MR. GRUBB: Yes, Rewis is.

I'm going to go --

QUESTION: That's in 401. That's the reference that you --

MR. GRUBB: Yes, it's in 401, that's right. I didn't have the U.S. citation; I had the Supreme Court citation, the Supreme Court Reporter and L. Ed.

Now, in McCormick, the Seventh Circuit held that transportation of newspaper information is not a sufficient use of an interstate facility to sustain a conviction. Also, in Altobello, cited in McCormick, the Court held that clearance of a check through the mail in interstate commerce is an insufficient use of an interstate facility, although the courts have held for years that under Section 2314 which is the Interstate Transportation of Stolen Property Act, under Section 2314 of Title 18, that the clearance of a check does give jurisdiction. But Altobello said no.

It is difficult for me to reconcile these cases with the case at bar and also with Arnold, the reasoning that the Court did give. And these cases were cited before the Seventh Circuit when I argued it there.

Now, although the Court in Arnold did not exhaustively explain its opinion, it seems to me that the cases which were cited by the Government and the legislative history here and the cases cited by the petitioner all give some reasoning to

Arnold, and I think that Arnold in all its simplicity should be followed.

But back to Rewis. This Court made it plain that the Travel Act is to be applied to truly interstate operations of organized crime. And the Seventh Circuit so read that in the Rewis decision when it handed down the McCormick decision. Now, the Court in Rewis -- I would like to read one short excerpt in Rewis.

QUESTION: What's that citation?

MR. GRUBB: Yes, Rewis. I have the Supreme Court Reporter citation here. It's 401.

This is what was stated in Rewis: "Legislative history of the Act is limited, but does reveal that 1952 was aimed primarily at organized crime and most specifically at persons who reside in one State while operating or managing illegal activities located in another. In addition, we are struck by what Congress did not say."

The Court further said in Rewis: "Matters of happenstance should not transform relatively minor State offenses into Federal felonies."

Now, in conclusion, I would like to state that here there was no organized crime ever mentioned, no evidence of any organized crime. These petitioners were all independent operators or they were employees of independent operators. They never ordered nor subscribed to the Illinois Sports News.

They did not use the Chicago South Shore and South Bend Railroad, commonly known as the South Shore Railroad, they didn't use that railroad. They picked up the papers there, but they were consigned to the Hammond News Agency just the same as many of us do in the morning to get our morning paper when the drug store is closed and we get there and we want to get our paper before we get on the commuter train, we pick our newspaper out of a bundle and leave our money for it and go on our way.

QUESTION: I suppose it's reasonable to assume, isn't it, Mr. Grubb, that Congress was well aware that there were highly specialized newspapers, as you have characterized this bulletin --

MR. GRUBB: I think so.

QUESTION: -- that catered particularly to people who were betting and to organized gambling. Isn't that accurate?

MR. GRUBB: I am sure of that.

QUESTION: Well, now, then, what have you to say about the fact that Section 1953 expressly excludes newspapers or similar publications which presumably would reach this publication, but Section 1952 does not have any such exception?

MR. GRUBB: That's right.

QUESTION: What do you have to say about that?

MR. GRUBB: That's right. And I think that Section

1953 being the latest in the statute should control. I believe it does control, that the two sections must be construed in pari materia. And I cited what I think is the leading case on that, and I believe that that altered then Section 1952 to the extent that it was exempt for use.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Grubb.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. TUTTLE: Mr. Chief Justice, and may it please the Court:

The eleven petitioners here were convicted on five separate indictments after five separate jury trials of using and causing the use of an interstate facility,in this case the Chicago South Shore and South Bend Railroad, to promote and facilitate the operation of an illegal gambling operation in Hammond, Indiana.

I had thought that the question which this Court had addressed itself to when it granted certiorari was the question of whether since Section 1953 contains a specific exclusion for newspapers, are we to assume that Congress intended to exclude from the scope of the Act an individual who had a scratch sheet sent to him through the facilities of interstate commerce and thereafter used the scratch sheet to promote his

unlawful activities.

As Mr. Grubb has argued the case, he seems to me to have argued a different case, one on which this Court did not grant certiorari, one on which the jury resolved against the defendants and one on which the Court of Appeals resolved against these defendants, and one on which no petition for certiorari was filed. Mr. Grubb maintains that these petitioners did not cause the use of an interstate facility. The jury was instructed on this question, and the jury returned a verdict finding that these petitioners had in fact caused the use of this railroad. The Court of Appeals made the same finding. Indeed, it seems to me that Mr. Grubb has conceded the main question in this case when he says the cases like Ross and Azar are to be distinguished. Ross was distinguished by Mr. Grubb just now on the ground that Ross had subscribed to a paper in Chicago and thereby had in fact caused the interstate shipment.

But if the question is whether the shipment of these papers through the channels of commerce is a subject of the Travel Act, then in conceding that Ross is properly decided, in my view that concedes the main question in this case. I might say the same is true of Azar. In Azar, for instance, again, it was an interstate shipment of scratch sheets of the kind we have in this case. And in Azar in fact, one of the two defendants didn't travel in interstate commerce, one did, the

other remained in Detroit and picked up the packages when they reached their destination consigned to Mr. Williams in Detroit.

Now, I will address myself to what I consider to be the question upon which this Court granted certiorari, which is the question of the scope of the Travel Act and whether the transportation or causing the transportation of these sheets through the facilities of interstate commerce could violate the Travel Act. And in the course of stating the facts of the case, I may shed some light on the questions Mr. Grubb has raised but which I contend is not before this Court.

The petitioners were owners and operators of five separate horse-race betting parlors in Hammond, Indiana, each of which was and was conceded to be operated in violation of the laws of Indiana. Now, in connection with the operation of these horse-race betting parlors, petitioners used a publication known as the Illinois Sports News. Mr. Grubb has showed the Court a copy of the Illinois Sports News. The Sports News is known as a scratch sheet. A scratch, as the Court may know, is a horse that has been withdrawn from a race in which it was previously entered and the withdrawal is not reflected perhaps on the previous afternoon's racing forms. Therefore, the scratch sheet is of considerable value because it's published 8 a.m. in the morning, distributed promptly, and can be used by bettors in placing their wagers on that day's races. Indeed, the testimony in this case shows that the

scratch sheet was vital to these operations. One convicted co-conspirator who testified for the Government, testified that on days when the scratch sheet failed to arrive, business fell off by as much as 80 percent. There is also evidence that the entire shipment by the month to the Hammond News Agency dropped off drastically after the raids in this case.

QUESTION: I don't suppose this bears on it, but is that all the kind of information the scratch sheet contains is just what horses have been scratched?

MR. TUTTLE: Oh, I am sorry, your Honor. It contains more than that. It contains, for instance, the day's entries; it contains the jockeys and their weights; it contains the track handicapper's predictions, and sometimes predictions of the publishers themselves.

QUESTION: The reason it's called a scratch sheet is because it has scratch information.

MR. TUTTLE: That's right, but that's only one aspect of the information which is contained. It is the information which makes a scratch sheet different from other kinds of horse race betting publications and makes it important that it be published early in the morning and gotten out and distributed very quickly.

QUESTION: Mr. Tuttle, assuming I don't know anything about it, does it also include the morning line?

MR. TUTTLE: That would be called the morning line,

the handicappers' odds and the other information of which I have spoken.

And the rapidity with which it is distributed or must be distributed is reflected in the facts of this case. These petitioners and their co-conspirators by prearrangement with the local news agency, the Hammond News Agency, arranged to pick up their copies of the Illinois Sports News at approximately 9:02 in the morning when the 8:30 train from the Randolph Street Station in Chicago, Illinois, arrived with these scratch sheets on it. The petitioners would then take their scratch sheets and distribute them to their various horse-race betting parlors.

Now, of the 90 copies that arrived every day consigned to the Hammond New Agency, approximately 57 were picked up and used by the co-conspirators in these five separate cases. Mr. Goodman, whom I have mentioned testified for the Government, picked up 22 copies a day to use in his gambling operation. He paid for them weekly to the Hammond News Agency, a Mr. Frost of the Hammond News Agency. Another 35 copies --

QUESTION: You are emphasizing that he paid for them. Does that mean they are quite an expensive item?

MR. TUTTLE: As a matter of fact, they are, your Honor. At the time of the trial they were 35 cents apiece. Much of the same information can be obtained from other papers, but this which contains no information except racing information is more expensive because of the rapidity of

distribution and the fact you can get it early and you can place your bets early.

But my point of indicating the arrangement for payment was in a way to allude indirectly to the question of causation. Because in this case there was an arrangement to receive 22 copies a day and to pay for them on a weekly basis to the Hammond News Agency which was the consignee of these papers from Chicago.

The other 35 which were picked up by the co-conspirator were picked up at 9 o'clock in the morning. They left envelopes of cash at the train station. Later on in the morning, in the ordinary course of business, employees of the Hammond News Agency would come, pick up the remaining 33 copies and distribute them to various retail outlets around the Hammond area. They would hit the newsstand around 10:30 or 11, much later, of course, than these petitioners had it for use in their betting parlors.

Now, as I have suggested, the question is whether the exclusion of these papers from 1953 entails a similar exclusion from 1952. The statute in this case, the Travel Act, provides, and I will read if the Court will indulge me the relevant part of the statute. The statute provides: "Whoever uses any facility in interstate commerce with the intent" -- and then in subparagraph (3) -- "to promote, manage, carry on, establish, or facilitate the promotion, management, or

establishing or carrying on of any unlawful activity and thereafter performs any act specified in subparagraph (3)," which I have just read you, "violates the Travel Act."

And then the statute defines "unlawful act." And significantly it defines it as a business activity, a business enterprise involving gambling, gambling offenses in violation of the laws of the State in which they were committed.

Now, the Congressional hearing reflects a concern that otherwise lawful or innocent interstate travel was being used to facilitate illegal gambling. And I stress illegal gambling. As you know, the Travel Act prescribes interstate travel with a purpose to promote other violations of State law such as narcotics violations, liquor violations, prostitution violations, extortion, arson, and now it's been extortion and bribery, and now it's been amended to include arson and controlled substances. But at the time of the hearings when Attorney General Kennedy testified on behalf of this legislation, the stress was on gambling, on the fact that $20 billion a year changed hands in gambling and gambling was a prime source of funds for the underworld. Indeed, his examples all involved gambling. He spoke, for example, of moving the proceeds of an illegal gambling operation in one State to another State. Or he spoke, for example, of the interstate and nation-wide travel of lay-off men for syndicated gambling operations.

Now, if Congress was concerned with otherwise lawful

travel which might be the subject of promoting an unlawful or illegal activity in violation of State law, Congress was equally careful not to make innocent interstate travel the subject of criminal sanctions. And it was Senator Ervin who stressed this, and Senator Ervin stated that he would hate to see the time come when this country would make it a crime to travel having certain thoughts as he conceived this Act could make it a crime simply to be thinking something while you were traveling interstate. And in reaction to Senator Ervin's concern, the Judiciary Committee amended the law and they added a second proviso, they provided, as in the overt act requirement in conspiracy cases, that after the interstate travel, the individual do something which promotes the unlawful activity, thereby assuring that the statute wouldn't involve any kind of thought control or punish somebody merely for their thoughts.

Now, the statute was also limited to be sure not to apply to individual gambler who might be traveling interstate, even if he traveled interstate with the intent to engage in illegal gambling and thereafter in fact engaged in illegal gambling. The statute wouldn't cover such activity as Attorney General Kennedy stressed when he testified in support of this legislation that the target was organized crime and the statute had been drafted to cover only what was called travel in furtherance of "business enterprises" so that no

casual or sporadic involvement in gambling activities would be covered but only such regular and continuous conduct as might be classifed as a business enterprise.

In this way travel in interstate commerce even with an unlawful purpose in mind is not covered unless it's followed by some kind of overt act after the travel which promotes the unlawful activity. And, of course, the same language makes it equally clear or doubly plain that innocent interstate travel could never be the subject of any sanction under this law.

Now, of course, there is nothing novel about Congress making interstate travel for unlawful purpose the subject of a criminal sanction and criminal responsibility. It is, after all, no crime to travel interstate with a woman, but if that travel is for the purpose of prostitution, the Mann Act is violated. Similarly, it's no crime to travel interstate with a child, but if the child is held for ransom or reward, the Lindberg law is violated. The mails are available to anyone, but if the mails are used in furtherance of a scheme to defraud, the mail fraud statute is violated. By the same token, anyone can use the telephone, make a long-distance telephone call, or anyone can equally send a telegram interstate, but if these facilities are used to further an unlawful activity, then they are legitimate objects for congressional concern and congressional regulation. And as this Court knows,

a classic violation of the Travel Act is the use of the interstate wires to convey betting information, wagers, or racing results.

Now, just as gambling information can be sent interstate to gamblers over the wires, so the morning line in the Illinois Sports News can be sent interstate to promote illegal gambling operations. And this fact no more inhibits the lawful movement of the Illinois Sports News than the Mann Act or the Lindberg law inhibits the interstate travel of women or children.

Now, in our view Section 1953 achieves its result of avoiding criminal responsibility for innocent conduct by an entirely different route. Section 1953 defines a class of contraband the interstate shipment of which is banned irrespective of the purpose for which it is sent or the motive for which it is sent or the use to which it is put after it is sent. Section 1953 defines gambling paraphernalia in very broad language, including any slip, token, paper, writing, or other device designed or adapted for use in bookmaking or wagering on sports activities or numbers operation.

It was this broad language which caused Senator Keating in the hearings on the bill to express concern that you or I or anyone else might commit a crime under the 1953 provision by traveling from here to New York carrying a copy of the Post because it might happen to contain the results of a sporting activity or the results of a horse race. And it was

in response to this concern that Congress amended the statute to say this section shall not apply to the carriage or transportation in interstate commerce of any newspaper or similar publication. And we concede for the purposes of this argument in any event that the scratch sheet would qualify under that subsection.

It seems to us that what 1952 achieves by limiting its coverage in terms of the intent of the activity and the overt acts which are required after the activity, 1953 achieved by simple definitional exclusion.

Now, Congress recognized that otherwise innocent travel or movement in interstate commerce could in fact be the subject of criminal responsibility where the requisite intent was present and where there were overt acts in furtherance of the unlawful activity following that interstate travel or movement.

We see no reason to assume that Congress intended that one particular kind of innocent act, in this case the transportation by rail of newspapers, should be excluded from the subject of criminal responsibility if and only if the requisite purpose is there and overt act is there following the interstate movement or the causing of the interstate movement.

QUESTION: If this material that's in this sheet, racing sheet that you have got, was a special column on the sports page of a conventional newspaper and was transported in the

ordinary course of sending thousands of them to Philadelphia or Richmond or somewhere else, would that standing alone violate the statute?

MR. TUTTLE: Well, standing alone, it does nothing at all. One would have to hypothesize circumstances under which it was used. I mean, to ship alone doesn't violate the Act in any regard. One has to hypothesize a subsequent use.

QUESTION: Someone has to connect it up with some other activity.

MR. TUTTLE: Well, again, it depends. The Act requires that it be shipped with a given purpose to promote an unlawful activity and requires also that after the shipment it is used to promote the unlawful activity.

QUESTION: Well, if these same gentlemen had then purchased a hundred of them and sent them by special courier and delivered them to people in furtherance of this, then that would violate the statute, in your opinion.

MR. TUTTLE: No question about it, in our view, assuming that they were then used in furtherance of the unlawful activity. We do not -- assuming as we do for the purposes of argument that this is a lawful publication, we would argue that the statute could in principle be violated by the use of any publication if it were used with the requisite intent and if it were caused to be shipped in interstate commerce and if it were thereafter used to promote an unlawful activity.

Now, we believe that the evidence in this case showed that these petitioners in fact caused the interstate shipment of the Illinois Sports News. I have recited to you the way in which it was obtained, the way in which it was distributed, the way in which it was picked up and the way in which it was used. We therefore believe that these individuals caused the interstate shipment of these newspapers with the intent to promote their unlawful gambling operations, that they thereafter used these newspapers in violation of Indiana law to promote their unlawful gambling operations. And we therefore believe that they were guilty as charged in the indictment and as the jury found, and we further believe that the convictions should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tuttle.

I think your time is consumed, Mr. Grubb.

The case is submitted.

[Whereupon, at 1:27 o'clock p.m., the case in the above-entitled matter was submitted.]