

In the

## Supreme Court of the United States

UNITED STATES OF AMERICA AND  
FEDERAL COMMUNICATIONS COMMISSION,

PETITIONERS

v.

NEW JERSEY STATE LOTTERY COMMISSION,

RESPONDENTS

No. 73-1471

Washington, D. C.  
November 20, 1974

Pages 1 thru 34

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## IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES OF AMERICA AND :  
 FEDERAL COMMUNICATIONS COMMISSION, :  
 :  
 Petitioners :  
 v. : No. 73-1471  
 :  
 NEW JERSEY STATE LOTTERY COMMISSION, :  
 :  
 Respondents. :  
 :  
 -----X

Washington, D. C.

Wednesday, November 20, 1974

The above-entitled matter came on for argument at  
 1:31 p.m.

## BEFORE:

WILLIAM O. DOUGLAS, Association  
 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:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor  
 General, Department of Justice, Washington, D.C.  
 for the Petitioners.

STEPHEN SKILLMAN, ESQ., Assistant Attorney General  
 of New Jersey, State House Annex, Trenton, New  
 Jersey 08625, for the Respondent.

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P R O C E E D I N G S

MR. JUSTICE DOUGLAS: Mr. Wallace, and Mr. Skillman, Chief Justice Burger, who is necessarily absent, has asked me to state that he plans to sit in this case on the basis of the record and the briefs and the recorded tape that we have of the oral argument.

## ORAL ARGUMENT OF LAWRENCE G. WALLACE

## ON BEHALF OF THE PETITIONERS

MR. WALLACE: Thank you, Mr. Justice Douglas, and may it please the Court: This case arose on a petition by Jersey Cape Broadcasting Corporation, a broadcast licensee in New Jersey, seeking a declaratory ruling from the Federal Communications Commission. Jersey Cape pointed out to the Commission that the winning number in the New Jersey State Lottery is selected every Thursday and that many of the listeners to the broadcast station were interested in learning what the winning number was and many of them knew that the broadcast stations were informed of that number on their wire service and were telephoning the station to ascertain the number.

The Jersey Cape wanted to know the Commission's opinion on whether its proposal to broadcast on three successive newscasts each Thursday the statement that the winning State lottery number drawn today is -- and recite the number -- whether that would violate section 1304 of title 18 of the



United States Code. That provision is set forth in the Government's brief on page 2, and it provides, summarizing the pertinent language: "Whoever broadcasts or" -- skipping down -- "knowingly permits the broadcasting of, any advertisement of or information concerning any lottery" -- skipping down three lines -- "or any list of the prizes drawn or awarded by means of any such lottery," skipping, "whether such list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

The Commission's response to this request issued a declaratory ruling stating that in its view this broadcast, the proposal, would violate section 1304 of title 18. It based this view on an interpretation of this provision that had been developed in a decision of the Second Circuit Court of Appeals in 1969 called New York State Broadcasters and on the Commission's further proceedings on remand in that case which was also a case involving a declaratory ruling. In that case the Second Circuit and the Commission had both held that the statute applies to legal as well as illegal lotteries and applies not only to advertisements, but also to information directly promoting legal or illegal lotteries. The interpretation limiting the words "information concerning any lottery," was based in part on the face of the statute itself which goes on to specify "or any list of the prizes drawn or awarded"

which would have been surplusage if Congress had intended to use the word "information" as comprehensively as possible. And I might add that the interpretation also could quite properly be based on the fact that at the same time that this provision was enacted, Congress re-enacted 47 U.S.C. 326, which is also set forth on page 2 guaranteeing broadcast licensees the right of free speech and protection from censorship by the Commission.

The Commission held with respect to this --

QUESTION: .. aimed at illegal lotteries? I know it didn't say so.

MR. WALLACE: Well, Mr. Justice, that question was addressed by the Second Circuit and by the Commission, and we have discussed it in our brief. The history of --

QUESTION: There was no such thing as a legal lottery at the time of the enactment.

MR. WALLACE: At the time of the enactment of this particular statute, but this statute is one in a series of anti-lottery statutes that Congress enacted foreclosing the channels of interstate commerce and the channels of communicating regulated by Congress to the promotion of lotteries, including the use of the mails. Those statutes go back to 1827.

QUESTION: It doesn't go because it's gambling, does it?

MR. WALLACE: The 19th century statutes were enacted at a time when there were legally authorized lotteries in the United States.

QUESTION: What strikes me as funny is that you can't broadcast the results of a lottery, but you can broadcast the results of a horse race, including odds.

MR. WALLACE: ... under the Commission's ruling. The only statutory bar that Congress has enacted is on lotteries, and --

QUESTION: And the Commission doesn't impose anything beyond that.

MR. WALLACE: The Commission does not. There is a considerable difference between reporting race results and reporting a lottery number because the lottery number, as the Commission pointed out, has no meaning to the general listener who is not holding a lottery ticket. It conveys nothing to the audience other than whether those holding a ticket are holding a winning ticket or not, unlike the reports of a sports contest or a race or market quotations or other kinds of broadcasts where people are interested in the market and the racing.

QUESTION: Do you think anybody would listen to horse race results who didn't bet?

MR. WALLACE: I know people attend races and don't bet.

QUESTION: You do?

MR. WALLACE: I have done so.

(Laughter.)

Those people may not be the most expert on what is happening in the races, but it certainly is true that race results can be of interest to people who are following the sport, regardless of whether they bet on the particular race or whether they bet on any race.

QUESTION: We don't have to decide whether or not Congress could do it. The point is that Congress has singled out lottery.

MR. WALLACE: It has singled out lottery, and it deliberately did so in the course of the development of this legislation in the 19th century. We recounted the history in our brief. At the time that the word "illegal" was removed from some of these prohibitions in 1876 there was debate specifically on this point. There were some who advocated restricting the statutory prohibition only to illegal lotteries and thought that the function was to aid the States in their enforcement of the law against lotteries. But the prevailing view was, no, that lotteries themselves are an evil even when authorized by State law, as the Louisiana lottery was until almost 20 years later, in 1893, and that the channels -- the use of the mails should be forbidden to lotteries.



Now, in 1934 when this provision was enacted, there weren't any legal lotteries in the United States, although there were legal lotteries elsewhere being conducted elsewhere for which tickets sometimes attempted to be sold in the United States, and the predominant purpose shown in adopting this prohibition for broadcasters was to put them in the same position as publishers of newspapers or circulars who were forbidden to use the mails for this purpose. And Congress drew no distinction on the face of the statute between legal or illegal lottery, and there is no reason to read one in. The predominant intent was to apply the law as it had been developed with respect to the other lottery prohibitions. And this Court held in the Rapier case in Volume 146 U.S. and in the Fabrizio case in Volume 385 U.S., that some of the other prohibitions do apply to legal as well as illegal lotteries, as the Second Circuit put it, Congress long since stopped distinguishing between legal and illegal lotteries in the lottery legislation.

Now, there have been since the more recent development of official State lotteries, there have been efforts in Congress to amend the statute to make an exception for broadcasts concerning the -- well, the Attorney General testified today in support of an amendment which would in effect moot out this case since this case is merely a declaratory ruling. It is still in committee, and we will

keep the Court advised of developments.

QUESTION: (Inaudible)

MR. WALLACE: The testimony was in the Senate today. Previously a House subcommittee had reported favorably.

There is controversy in Congress. There is some difference of opinion about what form the amendment should take, whether it should apply to State-authorized lotteries or only to State-run lotteries, the Department taking the position that it should apply only to State-run lotteries. And there are some other questions to be ironed out, let alone the ultimate question of whether it will be enacted.

QUESTION: Generally does the Department feel that something will be forthcoming?

MR. WALLACE: That is our expectation. The Department is proposing that Congress act, and the Federal Communications Commission is deferring to the Department of Justice on what Congress should do in this area, and it has consulted closely with the Department of Justice in its administration of the statute to the extent it has had occasion to administer it, mostly in just the declaratory rulings that have come to the Court's attention.

Now, not only, it seems to us, and the Third Circuit did not disagree on the legal-illegal aspect, no basis for -- well, perhaps I should stop and tell the Court what the Third Circuit did hold in this case after the Commission

pointed out that in its view the function of such a broadcast would be to help in conducting the lottery and the number would be of interest only to the limited class of persons holding lottery tickets and would serve only that function.

QUESTION: Limited class. Isn't it a majority of the adults in New Jersey?

MR. WALLACE: Well, some two and three-quarter million persons. This is an atypical first amendment case in that regard, Mr. Justice. It is usually a minority interest of some kind that is seeking protection from the courts against legislation in a first amendment case. We concede, however, that the majority is also protected by the first amendment.

QUESTION: It's a free press case, not a free speech case.

MR. WALLACE: It is put in those terms. There is a first amendment claim here.

QUESTION: It's the claim of the broadcasters, not the claim of the listeners. No listeners went to the Commission or to the courts.

MR. WALLACE: Well, the broadcaster is not in this Court, only the New Jersey State Lottery Commission is in the Court.

QUESTION: The Broadcaster went to the Commission.

MR. WALLACE: They went to the Commission, and after

the Commission's ruling, the New Jersey State Lottery Commission petitioned for rehearing, saying it was aggrieved by the ruling. The broadcaster did not seek rehearing, nor did the broadcaster seek a review in the Court of Appeals. It was the State Lottery Commission who pointed out the large numbers of people who were interested, and the Commission's response was -- and they also pointed out that they had no way of knowing who had what number; they had no record of who won the lottery. It was important for them to disseminate the number to the ticket holder in order to consummate the lottery. And the Commission said this just reconfirms our view that the function of this is an ingredient of the lottery, rather than the kind of discussion or commentary upon the lottery or documentary that is not proscribed by section 1304.

QUESTION: Mr. Wallace, I think you just agreed with my brother Stewart that it's the free press, not free speech?

MR. WALLACE: Well, I said it can be termed that.

QUESTION: The reason I ask is, of course, 326, as I read the Third Circuit opinion, they turned it both on 326 and first amendment, did they not?

MR. WALLACE: They did, Mr. Justice.

QUESTION: And the wording of 326 is free speech. It says nothing about free press.

MR. WALLACE: That is correct, Mr. Justice.

QUESTION: Do you think that 326, right of free



speech, includes the free press guarantee? Do you think 326 is involved here?

MR. WALLACE: Well, our view of 326 is that except for procedural limitations on the ability of the Commission to issue restraining orders, by way of censorship, and that is not involved here, the Commission issued no restraining order of any kind, that it provides for the protection of the first amendment.

Now, it specifies only the right of free speech. It doesn't really matter since the first amendment protects the freedom of the press whether 326 reiterates that or not. So we haven't taken a position on it. It seems immaterial.

QUESTION: Certainly Judge Gibbons' opinion reads more like the free press emphasis on news and so forth, than it does on free speech. It must be that at least he thought the right of free speech that 326 embraces also the free press guarantee.

MR. WALLACE: That seems to be the implication. It was a unanimous opinion for the court en banc.

In the first place the opinion draws no distinction between legal or illegal lotteries, doesn't question the Commission's holding that the statute applies to legal lotteries, and its rationale would seem to apply to a newscast announcement of the winning number of an illegal lottery as much as it applies here. Its rationale is based entirely on the fact

that this is considered news by the licensee and he wants to announce it on his newscast and that is an exercise of protecting broadcast journalism in the Court's view which the implication is the first amendment wouldn't allow Congress to interfere with, and then the Court proceeded to interpret the statute as not reaching it, by holding that the statute applies only to -- well, I hesitate to say only to advertisements -- only to promotions as they put it. At the bottom of page 10 of our brief we have the relevant excerpt, restricting the application to promotion of lotteries for which the licensee receives compensation. Whether that would include a sponsored newscast isn't made entirely clear, but presumably it would not. That would be protected. If the sponsor of the newscast were the New Jersey State Lottery Commission, I don't know what the Third Circuit's view would be. But that is the line drawn, and perhaps it would be a line drawn between a newscast sponsored by the New Jersey State Lottery Commission, which is known to announce its winning number each Thursday, or an announcement sponsored by the New Jersey State Lottery Commission of the winning number each Thursday. So it doesn't seem like a very persuasive line to us. If there is a constitutional right to have this announcement made and the licensee is willing to sell the time to the New Jersey State Lottery Commission, why doesn't the New Jersey State Lottery Commission have the right to make it? Is the New

Jersey State Lottery Commission exercising the right of freedom of the press in that situation?

The implications of the New York Times v. Sullivan would be that an advertiser is speaking as a part of the press when he publishes an editorial advertisement.

QUESTION: In the New York Times case the defendant was not the advertiser; he was the New York Times.

MR. WALLACE: That is correct. There could be debate about whether when the Commission licenses someone, the Commission is thereby giving him a right that someone else sold broadcast time by the licensee does not have under the first amendment. We think not, at least in the context of this case.

As we see the case, it does involve basically a constitutional issue since there Congress deliberately chose to say "or information" as well as advertisements, and it is only under the constraint of the constitutional holding that a court would be justified in effect striking that language from the statute. And we get our law basically on this subject from the two recent decisions which we think are the closest in point, one the Capital Broadcasting case in which this Court in a summary affirmance upheld the constitutionality of the statutory bar of cigarette advertising on the airwaves, and the other the Pittsburgh Press case. They are both holding in the opinion dealing with limitations that can be

imposed on certain kinds of advertising, which we take also to apply to promotional announcements that would not be compensated. The examples given in the Pittsburgh Press case were that the Court had no doubt that there could be a ban on want ads proposing sale of narcotics or soliciting prostitutes. I take it this would be true whether the want ad were run as a public service or whether it was paid for by the sponsor or whether it was the newspaper publisher itself that was selling the narcotics and ran an announcement where they could be purchased from the newspaper. And it seems to us that this is the basic principle that governs here. The participation in a lottery is not a constitutionally protected activity. It's an activity that can be suppressed by the proper government. In this case, some States have seen fit to authorize lotteries run by those States, but it is still Congress that has the authority to decide what uses are impermissible over the airwaves. If it has decided that promoting the sale of cigarettes or promoting the sale of lottery tickets is a use to which the airwaves should not be put, this is within the constitutional power of Congress, so long as it doesn't impinge upon the right fully to discuss, debate, and inform the public about the conduct of the affairs of such an enterprise.

In this case, it seems to us to be an extreme example of an application of the statute which does not cut



off any information to the public because the numbers mean nothing outside of the context of role in consumating the lottery.

May I reserve the balance of my time?

MR. JUSTICE DOUGLAS. Mr. Skillman.

ORAL ARGUMENT OF STEPHEN SKILLMAN

ON BEHALF OF THE RESPONDENT

MR. SKILLMAN: Mr. Justice Douglas, and may it please the Court: This appeal involves solely the questions whether the lottery provision of the Federal Communications Act, section 304, prohibits broadcasters from broadcasting winning lottery numbers as part of regular news shows, and that the lobby provision may be read to reach that far, whether it violates the free speech and free press guarantees of the first amendment.

Section 304 by its terms prohibits the broadcasting of any advertisement of or information concerning any lottery. It should be clear initially, as I believe has been conceded by the FCC, that this section cannot be read literally to prohibit any mention whatever by broadcasters of information relating to the lottery. If there were any notion that it could be or should be or is intended to be read this way, it would be patently unconstitutional because it would prohibit, for example, even discussion of information about the lottery in the context of an editorial condemning the lottery or

encouraging the lottery, or so forth. So such an interpretation would be clearly unconstitutional, and for that reason, the FCC has conceded that a strictly literal reading of the statute would be inappropriate.

QUESTION: On the other hand, could the Congress validly prohibit the station from itself conducting a lottery over the airwaves?

MR. SKILLMAN: I would think, your Honor, that it could, although even the response to that question may have been confused somewhat by the passage of time and the widespread circumstances under which other types of gambling operations are at least advertised on radio and television. But I think despite the changes that have occurred in the last few years, the answer today is probably still yes.

QUESTION: And if it were found here and validly so that the station was actually participating in the conduct of a lottery, would you have the same result?

MR. SKILLMAN: I think that would be a far different case, if the station were a participant in the lottery as distinguished from exercising editorial judgment and seeking to meet a public demand for information. That would be a far different case from the one that is in fact before the Court.

QUESTION: What if the only place you could get information as to the lottery winning number was over the

radio?

MR. SKILLMAN: I would be inclined -- in fact, that is not true.

QUESTION: No, but what if it were.

MR. SKILLMAN: That, if anything, might exacerbate the first amendment problem. Certainly it would cut off people who have an interest in lottery, cut them off from all information about lottery, and I would think for that reason we would make the problem even more severe perhaps. That is theoretical. There are many other sources of information as to the winning lottery number, including the newspapers, for one, as well as postings at various lottery locations.

If it is once conceded that a literal interpretation of 1304 is inappropriate, then the question becomes what does the section mean? I think in addressing ourselves to that question, it is important to bear in mind that there were no legal lotteries at the time section 1304 was included in the Federal Communications Act, and it is therefore clear that even if 1304 may be said to be addressed to legal lotteries as well as illegal lotteries, because the distinction is not specifically drawn in the statute, that nonetheless it must be read in a manner consistent with the setting in which it was enacted, and by this I mean that at that time, in 1934, there could have been no conception in the minds of the Members of Congress that there would be a legal State

lottery which would be of such widespread public interest that there might be the type of public demand for the winning lottery number that could lead the broadcast news media in the exercise of its editorial discretion to conclude that there was a public demand to know the winning number and that therefore it should be included as part of a regular news show.

I think, secondly, that 1304 must be construed in light of section 1302. The SEC has urged this point in stating that 1304 applies to legal as well as illegal lotteries. And we are not disputing that point. But I think if the SEC is going to rely on 1302 for that conclusion, then it is also fair for us to rely on 1302 for the further conclusion that the newspapers -- that there is no prohibition and has been no prohibition in the past on the newspapers including as part of a news article the winning number in a lottery and for those newspapers to be sent through the mail.

Starting with several early cases in the 1880's which are cited in our brief, the Commerford and Mason cases, the courts in those cases -- they were not decisions of this Court, but lower Federal courts -- construed the lottery prohibitions of 1302 on use of the mails very, very strictly, and taking the premise that 1304 was patterned after 1302, it is appropriate for this Court to give 1304 a similarly narrow construction.



It also must be kept in mind that 1304 is a penal statute. A violation of 1304 by a newscaster could lead to incarceration and/or a fine. It is therefore, to construe 1304 strictly and to apply it only to those commercial ventures, commercial situations which are clearly within its parameters.

QUESTION: Getting back, Mr. Skillman, to your suggestion that there were no legal lotteries when the statute was adopted, are you also arguing that we ought in that light to construe this statute as not including legal lotteries in order to avoid reaching the first amendment?

MR. SKILLMAN: We are not taking the position, your Honor, that 1304 does not apply to legal lotteries. We think that in light of the legislative background of 1302 and the fact that 1304 was patterned after 1302, that we would probably have to make that concession. And I might add that all of the members of the Second Circuit that have considered this issue, as well as all the members of the Third Circuit who considered this issue have --

QUESTION: The reason I asked, I notice in your brief at page 12 has a sentence, "Accordingly, Section 1304 should be construed so as to avoid these substantial constitutional problems," citing the Machinists v. Street.

MR. SKILLMAN: The substantial constitutional problems to which we refer are the basic free speech and free press problems.

QUESTION: I know, but if we could construe 1304 as not including legal lotteries, obviously, we would not have to reach the --

MR. SKILLMAN: I think that if you could do that, that that would avoid the first amendment problem, but I would have some difficulty urging the Court that it should reach that conclusion in light of legislative history.

There are, however, very, very substantial first amendment problems in this case. If the Court comes to the conclusion that 1304 must be --

QUESTION: How do you suggest that we construe 1304? To exclude what?

MR. SKILLMAN: To exclude winning lottery numbers that are broadcast as part of a regular news show. That is the only question --

QUESTION: Whether the lottery is legal or illegal.

MR. SKILLMAN: That would not matter.

I do think that if they were broadcasting illegal lottery numbers as part of a news show, that there might be questions as to whether it was fulfilling its obligations under the public interest standard of the Communications Act. So I am not suggesting that --

QUESTION: They are different.

MR. SKILLMAN: That would be a different question. But what we are talking about here is the exercise of editorial

discretion by a broadcaster. And there are various kinds of topics, I think, that generally we see less moral approval than lotteries and gambling that are the subject of news broadcasts. We could take prostitution, for example, as the subject of news broadcasts and a feature broadcast, whether it be legal prostitution in the few counties where that is in Nevada or illegal prostitution in Times Square in New York.

QUESTION: They don't give telephone numbers, though, do they?

MR. SKILLMAN: They do, your Honor, indicate where legal prostitution takes place, which may be even more helpful information for an interested party than the type of information that the State of New Jersey -- that the broadcasters are providing.

QUESTION: What if lotteries were illegal in New Jersey. Would you say that the first amendment prohibited the State of New Jersey making punishable the broadcast that the broadcasters sought to make here?

MR. SKILLMAN: If they were illegal --

QUESTION: If they were illegal.

MR. SKILLMAN: I think we could still have first amendment problems, your Honor, but it would certainly be a much more difficult case. I think the element of legality versus illegality is a significant one. But I think that if we made an attempt to completely prohibit the broadcast

news media from mentioning winning numbers, there still might be first amendment problems. It would be a coarser first amendment case, but I think there still would be a first amendment issue that might be raised there by the broadcasters.

There are only certain narrow exceptions to first amendment protection for speech, such as the broadcasting of winning lottery numbers. One recognized exception is that for commercial speech. I think that is significant here because it is commercial speech cases that the FCC is relying upon. It relied upon the Capital Broadcasting Company case which involved the congressional legislation prohibiting broadcasting of cigarette advertisements. They have relied heavily on the Pittsburgh Press Company case which sustained a Pittsburgh ordinance prohibiting sex-based advertisements for employment, both cases clearly arising in the context of commercial speech where the author of the communication was seeking his own commercial gain. Here, by contrast, the author of the communication is the broadcast news media who are providing this information to the public in response to what they have decided in their editorial judgment is a public demand for the information. The communication is thus at the very heart of the first amendment.

QUESTION: You represent the State of New Jersey, don't you?

MR. SKILLMAN: That is correct, your Honor.



QUESTION: And doesn't the State have a commercial interest in this?

MR. SKILLMAN: I think the State does have a commercial interest, although I might say --

QUESTION: (Inaudible) as well as they expected.

MR. SKILLMAN: Its commercial interest here is in producing revenue for education and for public institutions, so perhaps it's a commercial interest of a different dimension than that that is involved in the other commercial speech cases.

But the first amendment interest --

QUESTION: Would this be a different case, do you suppose, if the facts were these, that you had offered to pay the broadcasting company so much per spot announcement of the winning number every Thursday and it had expressed a willingness to accept your offer and then done everything else as is in this case, had gone to the Commission, and the Commission said, "No, sorry."

MR. SKILLMAN: That would be a totally different case.

QUESTION: A totally different case?

MR. SKILLMAN: We would be clearly under 1304, because 1304 mentions advertisement (inaudible).

QUESTION: Would it be a different case constitutionally?

MR. SKILLMAN: Constitutionally I think it would be within the realm of the commercial speech doctrine. I think we still might be before this Court arguing that the FCC had not shown the type of overwhelming or compelling public need for the restriction to justify it. But I think it would be a different case. I think it would be a much harder case. In this case we have no payment of money by the State, and we are not the author of the communication. It's rather the broadcaster who is doing this in response to what it conceives to be a public demand for the information.

QUESTION: Well, the court's opinion in Pittsburgh Press didn't speak in terms of an overwhelming or compelling State demand, did it? It simply said it was a permissible State policy.

MR. SKILLMAN: It did not speak in those terms, your Honor, because it found the speech to be commercial speech. In that sense, perhaps I did misspeak myself in responding to Mr. Justice Stewart.

But in this context, once we get away from commercial speech into news broadcasting, clearly a compelling, overwhelming public interest is required to sustain any type of restriction upon the press.

QUESTION: Mr. Skillman, I think I am bothered a little, too, because I sense in your remarks that public interest is a definite factor in news. Information becomes

news because there is a public interest in it. I think this is what you are saying.

What if a lady's aid society of some church in Cape May, New Jersey, had a raffle and there was intense interest in Cape May but nowhere else in the State of New Jersey, would this be news as you regard it and broadcastable?

MR. SKILLMAN: I think that that might depend on a factual inquiry as to whether the broadcast were made by the broadcaster as an accommodation to the group that is holding the raffle, in which event one might not classify this as news, or whether the broadcaster came to the conclusion in its editorial judgment that there is sufficient public interest in the information that wholly apart from the accommodation of the persons holding the raffle, that there is public demand for the information. Then I would say, yes, that it would be news. It really comes down to that process, who is the author of the communication? And if it can be said that it is the press, that then it is protected by the first amendment.

QUESTION: Let me ask you one more question while I have you interrupted. Do you distinguish between broadcasting the news of winners as was the case in the Second Circuit case and broadcasting the numbers as is the Third Circuit situation?

MR. SKILLMAN: No. I think conceptually if the broadcaster reasonably comes to the conclusion that the names

of winners are newsworthy, and certainly there have been front page news news and even television features in New Jersey about the winners of the millionaire lottery. There is tremendous public interest in someone who is made a millionaire overnight, and I have no doubt whatever, and I don't think the FCC has even taken the position that that type of communication falls within 1304.

QUESTION: Even though it is information concerning a lottery.

MR. SKILLMAN: That is correct. On a very technical analysis of the information concerning a lottery, and I think that is the reason that even the FCC concedes that a literal analysis, a literal construction of 1304 would not be inappropriate -- excuse me, would not be appropriate.

The second basic exception to first amendment protections which is relied upon by the FCC are those cases dealing with communications in furtherance of illegal activity, such as mail fraud schemes or misrepresentations in advertisements that maybe endanger the health of the purchasers of consumer products. All of those cases, however, deal with communication by the parties engaged in the illegal enterprise for their own profit. The cases are thus closely related to the commercial speech cases and do not implicate the basic rights of the press under the first amendment. And, secondly, all of those cases deal with illegal activities. The mail



fraud, the misrepresentation in advertising is declared to be illegal, and for that reason the public interest in preventing that form of communication is evident.

Here, on the other hand, the subject of this communication, winning lottery numbers, is itself clearly legal under State law and as far as Federal law is concerned, I think it must be concluded that the Federal position is ambivalent at best. The Federal Government has imposed certain restrictions, such as that contained in 1304, whatever it may mean, but in other instances it has permitted Federal banks, for example, to handle recordkeeping and the handling of money in connection with lottery, it has permitted the mailing of newspapers and other communications through the mail. So you have an ambivalent Federal position.

Therefore, on any view of the first amendment, the restriction that the FCC's expansive interpretation of 1304 imposes on broadcasting could only be sustained if there were some overriding public interest. But the FCC has not urged even any significant public interest in their brief in this case. They merely made the conclusory statement that lotteries are suppressible. The point is that they haven't been suppressed, that they are legal, and that the broadcast news media in its editorial discretion has concluded that there is sufficient public interest that the public should be advised as to the results of the lotteries. For this reason the

communications enjoy first amendment protection, and if the Court finds that 1304 must be interpreted to reach this type of communication, and we submit that it doesn't have to interpret 1304 in this manner, then that statute would be unconstitutional in these applications.

Thank you.

MR. JUSTICE DOUGLAS: Mr. Wallace, I believe you have six minutes left.

REBUTTAL ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONERS

MR. WALLACE: All right.

Let me first say that the Department of Justice' view is not that newspapers listing winning numbers can be mailed without violating 1302, and our understanding is that most newspapers leave the winning numbers out of the mail editions. That is why they are often printed in a little box by themselves.

QUESTION: Suppose you have an interview with a millionaire winner?

MR. WALLACE: That is not bound by 1304 under the Commission's view, spelled out on the remand in New York State Broadcasters, and that is on page 849 of 21 FCC 2d, paragraph 11, deals with interviews with persons having winning lottery tickets, relating among other matters of general interest, the number of tickets they purchased, their expectation of

winning a prize, their reaction upon learning they held winning tickets, and what they did or intend to do with the prize money.

QUESTION: It is information concerning a lottery.

MR. WALLACE: Yes.

QUESTION: What page was that?

MR. WALLACE: That is on page 849 of 21 FCC 2d.

The whole opinion on remand starts at 846.

QUESTION: What is the distinction?

MR. WALLACE: Well, the Commission and the Second Circuit said that the word "information" has to be interpreted narrowly to apply only to information directly promoting a lottery and not to interviews, commentaries, documentaries --

QUESTION: I can't think of a better promotion than interviewing someone who has won a million dollars.

MR. WALLACE: Well, it is not .. it's not telling people where to buy lottery tickets and urging them to --

QUESTION: An awful lot of people run out and buy them in consequence.

MR. WALLACE: Well, the same thing, people might be encouraged to buy tickets by a news program about the aid to education that has resulted from lottery receipts, and so forth, but these are all considered matters of legitimate news interest that are not primarily promotions of the lottery.

QUESTION: You say if the publication promotes an activity that the Congress has the constitutional power to

proscribe, then it is constitutional. And it is also within the coverage of 1304.

MR. WALLACE: Yes, that Congress has the power to deny the use of the mails or of the broadcast media to promote activities that Congress believes are injurious to the public, and ---

QUESTION: You say constitutionally.

MR. WALLACE: I thought that was much of what the holding was in the Capital Broadcasting case with regard to cigarette advertising. If the exact same jingles or testimonials were repeated voluntarily by the broadcaster on something that he called newscasts, I don't see the constitutional difference.

QUESTION: Mr. Wallace, you can have the story and the pictures and all of the man winning the million dollars. That is O.K.

MR. WALLACE: That is the Commission's interpretation of 1304.

QUESTION: Could you announce the number of the winning ticket on that program? No.

MR. WALLACE: Well --

QUESTION: No.

MR. WALLACE: The Commission hasn't spoken to that. It would be most difficult.

QUESTION: First you said you can't announce the



number.

MR. WALLACE: Yes. Well, what the Commission dealt with in this case is a proposal that the number be announced weekly at the time of the drawing on a newscast so that someone buying a lottery ticket would know that he could tune in next Thursday and know whether he held the winning ticket or not. That's a different case from a public interest interview which the Commission really hasn't spoken to.

QUESTION: But the point is that that encourages lottery playing more so than to tell somebody that they won.

MR. WALLACE: Yes. Well --

QUESTION: (Inaudible)

MR. WALLACE: Well, many people think that the lottery statutes are outmoded insofar as they apply to legal State-sponsored lotteries. And that question is pending before Congress. The Attorney General has testified that he thinks they should be amended. But Congress has adopted a policy judgment here which in the view of many may be quaint now, but it is still entitled to the respect of the Department of Justice and of the Federal Communications Commission and, in our view, of the courts, because it was a permissible policy judgment, it was based on determination spelled out in some detail -- if you would like a citation -- in 4 Congressional Record 3261 to 4264, that lotteries are injurious to people even if they are legally sponsored and therefore the word

"illegal" should be removed from the statute and that view prevailed in Congress, and most States today do not permit lotteries. There is still a large body of opinion in this country that these lotteries are injurious.

Now, some suggestion has been made that even though activities are protected by the first amendment, broadcast on a newscast might be protected by the first amendment, this would be all right because the Commission nevertheless could in applying the public interest limitations on licensees discipline the licensee for engaging in such a broadcast. I find this a little hard to imagine, the Commission applying the sanction for an action that is constitutionally protected. If it is constitutionally protected to broadcast the winning number of an illegal lottery, why is that then a basis for Commission discipline? I have thought from Pittsburgh Press and Capital Broadcasting that it was fairly clear that it would be interpreted that it could be, the Government could prevent a broadcaster from announcing daily on a newscast where is the best place to buy narcotics today in a way similar to the announcement of where the traffic is flowing better, over which bridges, from the helicopter. It seemed to me that was the implication of those opinions and that the first amendment issue is not of such difficulty here as to justify tampering with the plain words of the statute and the intent and history behind them.

Thank you.

MR. JUSTICE DOUGLAS: Thank you, Mr. Wallace.

Thank you, Mr. Skillman.

The case is submitted.

(Whereupon, at 2:24 p.m., the oral argument in the above-entitled matter was concluded.)