In the

# Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

PETITIONER,

V.

PACIFICA FOUNDATION AND UNITED STATES,

RESPONDENTS.

No. 77-528

Washington, D. C.
April 18, 1978
and
April 19, 1978

Pages 1 thru 54



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IN THE SUPREME COURT OF THE UNITED STATES

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| FEDERAL COMMUNICATIONS COMMISSION, Petitioner, | |
| v. | No. 77-528 |
| PACIFICA FOUNDATION and UNITED STATES, Respondents. | |

Washington, D. C.,

Tuesday, April 18, 1978.

The above-entitled matter came on for argument at 2:25 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOSEPH A. MARINO, ESQ., Federal Communications Commission, Washington, D. C. 20554; on behalf of the Petitioner.

APPEARANCES [Cont'd]:

HARRY M. PLOTKIN, ESQ., 1815 H Street, N.W., Washington, D.C. 20006; on behalf of Respondent Pacifica Foundation.

LOUIS F. CLAIBORNE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of Respondent United States.

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C O N T E N T S



[Second day - pg. 28]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-528, Federal Communications Commission against Pacifica Foundation.

Mr. Marino, you may proceed when you're ready. You may bear in mind that we are familiar with the facts of the case ans get directly to your legal argument, if you wish.

ORAL ARGUMENT OF JOSEPH A. MARINO, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MARINO: Thank you, Your Honor.

Mr. Chief Justice and may it please the Court:

In this case the FCC has brought this case to you for review from a judgment of the court below, an opinion in which the court split in their opinion, with Justice Leventhal dissenting, in the hope of getting some clarification to the meaning of the word "indecent" as it appears in the Criminal Code, 1464.

The FCC has, from, beginning in 1970, tried to give some concrete meaning to the statute. The FCC recognized in the very first decision in 1970 that its opinion would of course be subject to the judicial review, and it welcomed judicial review.

This case came to the FCC on a specific complaint from a citizen in New York. The case, as it now is before the Court, really raises two issues. The first question of statutory

construction is whether or not the "indecent" as that word appears in 1464 should be subsumed into the "obscene", as it has been in several other federal cases.

On this issue, both the FCC and the Department of Justice are in agreement, and, in their brief before you, argue that it should not be. The Department of Justice, in their brief, makes a very literal statutory analysis of the provision of 1464. It points out that the language, the clear language that Congress used, is "any obscene, indecent, or profane", that this language was used in a disjunctive, that Congress was obviously trying to reach even the use of one word which was either "indecent, obscene, or profane", although we quickly add that the case we have before you deals not with obscenity but with indecency.

And if I could just back up and focus on the complaint that the Commission had before it, that complaint was filed by a listener in New York, a specific complaint which identified four words. Those words would be defined as verbal taboos, and in fact Professor Hayakawa in his textbook on Language: In Thought and Action, identifies them as verbal taboos and says that this usually deals with words having something to do with sexual or excretory organs.

The words amount, as one judge has described them, as verbal slaps.

So this specific complaint came to the Commission.

It came to the Commission at a time shortly after this Court's opinion in Miller. It came to the Commission shortly after the D. C. Circuit had affirmed its opinion in the Illinois Citizens case dealing with the question of obscenity, and had recognized that the presence of children in the audience was a vital factor. And this really was at the heart of the Commission's decision, it was at the heart of the complaint that the Commission had before it.

The listener pointed out that the words were broadcast at a time in the afternoon when a child could have been tuning the dial and would have come across those words. The listener pointed out that in fact he had a child with him in the car.

And this really was, we think, at the heart of the Commission's decision, when it came to the concept of indecency.

The Commission, as the Justice Department correctly recognizes and points out, took Element D of the Miller case, "patently offensive", tried to give flesh to that element in a case where you are merely dealing with words, individual words. And what it said is that: what we are dealing with when we construe the indecent is words which are patently offensive by contemporary community standards for the broadcast media, which deal with sexual and excretory organs, which are broadcast at a time of the day when there is a reasonable risk that children may be in the audience.

And this is where the Commission took a new tack, we

believe,, and I think Judge Leventhal recognized this, with regard to the indecency standard. It tried to channel these words out of time periods when there would be a reasonable risk of children being in the audience.

The case was appealed to the D.C. Circuit, which split.

We in our brief have called to your attention the opinion of Judge Leventhal. We think that that opinion correctly construes the Commission's order as a narrow order, a declaratory order limited to the facts that the Commission had before it, that the complainant had brought to the Commission. That the order was presented to the court as a flat ban on these words, that these words could not be broadcast at any -- really at different times of the day; but that the only -- that when it rules on the complaint itself the Commission narrowed its holding to the facts that it had before it, and that it tried to accomplish two things with a declaratory order.

It tried to furnish a concrete definition of the word "indecency" and we must bear in mind that the Justice Department has told the Court that the Commission could have read the indecent prohibition in the criminal statute as a flat ban. The Commission did not do so. It then proceeded to analyze the complaint and the conflicting interests and competing interests that were at stake here. And central to

those interests, Your Honor, was the recognition that this Court made in the Yoder case, that the parental interest in the upbringing of children is an important value.

That opinion the Commission found very helpful because of the fact that in Yoder this Court not only relied on that interest but also relied on the Ginsberg opinion, where Mr. Justice Brennan had recognized a similar interest.

The Yoder opinion was also instructive because it relied on, at least CF, the Rowan case in which this Court recognized that in certain circumstances people are captive in their own homes, and that at that point they are entitled to privacy interests.

Now, the Commission's opinion really at the heart of the case was the attempt to protect children from these words. The Commission also tried to give some recognition to privacy rights of people in their home who would tune in to a station and be confronted with these words.

We would point out that in a CBS vs. DNC case, this Court recognized that a radio listener is, in many ways, a member of a captive audience. And I think we have made our points, Your Honor; if there are no further questions I would save some time for rebuttal, and will be very happy to answer any questions.

QUESTION: You referred to some work of now Senator Hayakawa, but it is not cited in your brief.

MR. MARINO: I apologize, Your Honor, that the text --

QUESTION: Do you have the citation for it?

MR. MARINO: It is his text, Professor Hayakawa's text on Language in Thought and Action. There are two editions, or at least I know of two editions, the 1949 Edition is very interesting because it recognizes not only the verbal taboos that are before you dealing with sexual or excretory organs, but goes on to point out that at least at that time in broadcasting there were many more taboos that made it very hard for people to communicate. But in the '70 Edition he drops the reference to special taboos applicable to radio, and then identifies the ones that we think are before you.

If there are no further questions --

QUESTION: I do have a question.

MR. MARINO: Yes, Your Honor.

QUESTION: I take it the Commission's position is that these words are indecent but not obscene?

MR. MARINO: Yes, Your Honor.

QUESTION: Does that mean that if this particular record or these particular words are sent over, say, a CB radio transmission from an automobile to another automobile or something like that, would the person playing the record or saying the words commit a crime?

MR. MARINO: Your Honor, the Commission's definition and this declaratory order addressed the broadcast medium,

which is different from the CB --

QUESTION: I understand that. I was just wondering what the Commission's view is on whether that would be a crime if these words, the same record were played at the same time of day over a CB transmission. The statute would seem to apply to it, would it not?

MR. MARINO: Your Honor, we have a problem here. The Department of Justice looks at that statute with criminal enforcement in mind, the Commission looks at the statute with civil enforcement in mind, and with an attempt to channel. I think that once the Commission has adopted this concept for channeling, at least in broadcasting, it really has to be an egregious case before it would rise to the point of --

QUESTION: My question is: under your construction of the statute, would playing this record and saying these words over a CB at two o'clock in the afternoon constitute a crime?

MR. MARINO: Your Honor, I think that if we are looking at this as a criminal statute and not --

QUESTION: It is a criminal statute, isn't it? There is no statute except a criminal statute.

MR. MARINO: We think that it would violate the Commission's construction of the statute, yes. Now, whether --

QUESTION: Then let me ask you again: would it constitute a crime in the opinion of the Federal Communications Commission? Or do you have a position on that?

MR. MARINO: I don't think we have a position on that, Your Honor, and I think that --

QUESTION: Do you take the view that the statute can -- the same words in the same statute can mean different things in different proceedings?

MR. MARINO: If one is -- if it's for purposes of regulatory action in one case and channeling the words into a different time period, and in another case really it's the -- the reason why I hesitate on the crime, is because that's really a question that we would defer to the Justice Department. If we brought a complaint to them and they said this doesn't constitute an offense, that would be the end of it.

QUESTION: Well, do you have any direct criminal enforcement authority?

MR. MARINO: No.

QUESTION: Can you bring a criminal proceeding?

MR. MARINO: No, we can't. We have to refer it to the Attorney General.

QUESTION: Right. Now, going to the question about the CB, are the CB people licensed in some way that they can get a license of some sort?

MR. MARINO: They do, Your Honor.

QUESTION: Would not the Commission at least have, arguably, some other remedy against the holder of a license, by cancelling his license?

MR. MARINO: Yes, Your Honor. We have administrative and regulatory actions.

QUESTION: Just as you do with a broadcast license, at the end of his -- when he came up for renewal, this kind of conduct would certainly be a factor to be considered in the renewal of the license, would it not?

MR. MARINO: Yes, Your Honor.

QUESTION: Well, Mr. Marino, doesn't the Commission consider any number of factors at the time of license renewal that very likel- the government couldn't prosecute a station for criminally?

MR. MARINO: Yes, Your Honor. Under the public interest standard it would have to be -- one violation might not arise to the level of justifying some action at renewal; but, yes, it would.

QUESTION: Well, why doesn't the Commission justify this particular rule under the public interest standard, as a definition of the public interest standard?

MR. MARINO: Your Honor, the Commission has been given at least -- there are at least three sections in the Communications Act, in which Congress has asked the Commission to enforce 1464 by administrative action. And it feels that in a situation where we are reaching a type, at least words, that since there was the prohibition, the indecency prohibition, that was the way to try to give it some concrete meaning.

In response to Justice Stevens' question, we do refer cases to the Justice Department for prosecution of CB operators, and I think that's really the only -- that's the only area that I know of in which there have been any recent convictions for violating 1464. I think there were two cases arising in the Seventh Circuit in which I know you were on those panels, where those prosecutions were appealed.

QUESTION: Well, we'll be interested in Mr. Claiborne's response to Justice Stevens' question.

QUESTION: Could I ask you, I'm still not completely clear on whether the Commission takes the position that the same statutory meaning can have a different -- the same statutory words can have a different meaning in a civil proceeding for cancellation or whatever it might be, than it has in a criminal proceeding.

In other words, can the word "indecent" have a broader meaning in one proceeding than it has in another when it's in the same statute?

MR. MARINO: As Justice Stevens has pointed out, we have not only the indecency prohibition here, --

QUESTION: Well, I understand, you have the public interest theory.

MR. MARINO: -- we have the public interest.

QUESTION: Well, to the extent that you rely on the criminal statute, do you say that word has different meaning

depending on the kind of proceeding that is brought to enforce that statute?

MR. MARINO: I guess we rely on more than the criminal statute, we rely on the criminal --

QUESTION: But to the extent that you rely on that statute, do you contend that the same word has two different meanings, depending on the nature of the proceeding that is brought?

MR. MARINO: I don't think we could, because Congress wrote the word, and all we're trying to do, Your Honor, is give some limiting construction to it.

QUESTION: But you're not confined to that statute on a renewal of a license, are you? By any means.

MR. MARINO: We are not, Your Honor, we have the public interest statute. You're absolutely correct. The Commission feels --

QUESTION: The same conduct, the same words, whether they were ultimately found to be criminal or noncriminal, might constitute the basis for not renewing a license, might they not?

MR. MARINO: The public interest standard would have to be -- the Commission would have to make a, as you pointed out in United Church of Christ, the Commission has to make a positive finding that renewal of this application is in the public interest.

QUESTION: Is in the public interest.

MR. MARINO: And that finding could not be made in a situation where the --

QUESTION: And while it would not be criminal conduct for a licensee to have one-sided programs on racial or political matters, that might be a grounds for refusing to renew their license.

MR. MARINO: And it has --

QUESTION: That's clearly held up to now --

MR. MARINO: Yes, Your Honor.

QUESTION: -- in the courts that have reached it.

MR. MARINO: Yes, Your Honor.

So that the Commission could have reached it under the public interest standard, and I think it did fall -- it did rely on the public interest standard and encouraging the wider use of radio in the public interest. But it felt that since that specific prohibition has been in the statute, it would try to give some concrete meaning to it, and limit it as much as possible in the light of this Court's opinions in First Amendment cases.

QUESTION: That is, you are now talking about 18 U.S.C. Section 1464?

MR. MARINO: Yes, Your Honor.

QUESTION: And that's really -- that's the issue in this case, isn't it?

MR. MARINO: It's 18 U.S.C. 1464, but it's also in the context of the Communications Act, and --

QUESTION: Yes, I understand that, but it's the meaning of Section 1464 that's at issue here, isn't it?

MR. MARINO: Yes.

QUESTION: And the Commission's power.

MR. MARINO: Yes, as the Commission can use it for regulatory --

QUESTION: Under the statutes that incorporate by reference that criminal statute.

MR. MARINO: Yes. And as it uses that prohibition for regulatory activities.

QUESTION: Right.

MR. MARINO: Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Marino.

Mr. Plotkin.

ORAL ARGUMENT OF HARRY M. PLOTKIN, ESQ.,

ON BEHALF OF RESPONDENT PACIFICA FOUNDATION

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

I would like to place this case just a little bit into proper perspective, so that we will know what we are talking about, because we are talking about a criminal statute.

This case, very briefly, involves a program on a non-commercial educational station in New York, with a limited

audience, which was a discussion program that was involved on this particular day -- it's a regular program, and on this particular day the program was devoted to discussion of contemporary attitudes with respect to language.

QUESTION: I didn't get your characterization of this station. What kind of a station?

MR. PLOTKIN: It's a noncommercial educational station. That means it's a station licensed to a nonprofit organization, none of whose activities can be -- there can be no commercials on it, and its programs are of an educational nature. It's like WETA here in Washington; the same type of station.

QUESTION: Almost!

[Laughter.]

MR. PLOTKIN: If it's a little hyperbole, I would describe them as a (?) rather than a function, I think.

But, in any event, this was a discussion program, and that day the discussion was devoted to contemporary language, and as part of the program the moderator took questions, answered questions, and then played this 12-minute segment of a record by George Carlin, called "Occupation: Foole", and the particular selection was "Filthy Words". And it's a 12-minute dialogue.

Before the dialogue was put on, there was an announcement that some of the words on this program may be of a delicate

and offensive nature, and those who might be offended by it might tune out for 15 minutes, and come back again to the program.

QUESTION: Do you think that leads young people to turn off the program? Or is that an attempt --

MR. PLOTKIN: No, it might be a --

QUESTION: Is that intended to be a come-on, to be sure that they will listen?

MR. PLOTKIN: It's awfully hard to know, both in advertising and in general, you know, this type might be invitational rather than the contrary. I think on this type of station it is not, because this is not the type of station that's devoted to commercial enterprises, this was not a

(?) program, it's not a titillating pr3gram, it's a station which does devote itself to the unusual programs, to highly controversial programs, to a wide variety of programming. And while on other stations this type of ad might be a come-on, on this type of station I don't think this is the intention, but I don't think we are dealing with subjective matters, I think we are dealing with objective ones.

QUESTION: But of course the child that happens to tune in knows what kind of station it is?

MR. PLOTKIN: Oh, yes. Yes. The child was sitting with his father, and presumably --

QUESTION: No, I say the average child knows that this

is an educational station which has a broad range of programs -- how in the world could a child know that?

MR. PLOTKIN: How could he know it's educational?

QUESTION: Yes.

MR. PLOTKIN: Well, this particular child, we know very little about him, we only know about his father who sent in the complaint.

But, in any event, he sends in a complaint and Pacifica Foundation answered that this was the work of a social satirist, and that this was intended to have a discussion of the whole subject.

The FCC then adopted a memorandum opinion and order. They adopted a memorandum opinion and order as part of an over-all proceeding, where the Commission, in response to complaints from Congress and pressure from other groups, was addressing several different subjects: violence, sex-related programs, and obscene and indecent language.

And, very interestingly, they talked at great length about violence in programs, and they are talking about television as well as radio. They are talking about violent programs, they are talking about sexually oriented programs, and very interestingly the Commission says that while there may be social harm attributable to some of these things, that there's nothing we can do about it, because this is a very delicate area of the First Amendment, and therefore this is the

sort of thing we leave to the station's good judgment, to their editorial discretion and judgment.

But when it comes to obscenity or indecency, it says it's a different subject, because here we have a statute, a specific criminal statute, 18 U.S.C. 1464, and this statute says we can do something about obscenity, indecency or profanity, that you can't do with respect to violence or sex-oriented material.

And it's important to look at the statute, because the statute does -- it's not part of the Communications Act, but it does forbid the utterance of indecent, obscene or profane language over radio, whether it's radio, television, CB, any other type of radio communication. And the Commission is given specific authority to enforce it either by revoking a license, by issuing a cease and desist order, or by levying a fine. Here they didn't do any of those three things. Here they issued a general declaration, which says that: We find that these type of words, particularly when children are likely to be in the audience, are indecent because they refer in a patently offensive manner to sexual or excretory activities, or organs, and that therefore they should be banned during that -- they should be banned during that period. And that they cannot be redeemed by context, even though they have literary, artistic or scientific value, they are banned, per se.

They did go on to say --

QUESTION: Are you arguing now that this has literary or artistic value?

MR. PLOTKIN: Well, as a matter of fact, in the over-all context, yes, there was; yes. The words themselves may not, but in the over-all context, yes, Your Honor. As part of the over-all --

QUESTION: This is educational, in your view?

MR. PLOTKIN: The question as to whether it's educational or not was not involved in this case. As to whether it has artistic, literary or scientific value, yes. Even Commissioner Robinson, who concurred in the case, on a very narrow point, said that if he had to judge upon whether it had artistic, literary or scientific value, said he would come down and decide that it did have it. But he agreed with the Commission that you don't look at context when children are likely to be in the audience.

QUESTION: Well, I'm not an expert, but if that's artistic, deliver me.

MR. PLOTKIN: Pardon?

QUESTION: If that is artistic, deliver me.

MR. PLOTKIN: Well, I think the use of words is a very difficult matter, and obviously some people use words in some connection, other people use them in other connections.

I do want to address myself to the statute, because we are talking about a criminal statute. And this Court has

previously held, when the Commissionhas attempted to adopt rules and regulations relating to a lottery, which also was a criminal statute where the Commission had the same authority, this Court, in the Federal Communications Commission v. ABC, which is at 357 U.S., specifically held that the Commission cannot interpret the words of a criminal statute when applying it in its regulatory aspect any differently than a court would. And this Court specifically overturned rules and regulations of the Commission which attempted to define consideration for the purpose of a lottery as being different from what it was in the criminal law.

Here we have a statute that uses "obscene, indecent, or profane", exactly the same type of words that are used in 18 U.S.C. 1461, which has been before this Court in the Hamling case, and this Court has specifically held that, as a matter of statutory construction, that when those words are used, the words "Indecent, filthy, vile and obscene" must mean the same as "obscene" in order to satisfy the dual test of avoiding vagueness under the due process clause, and thus, as a whole, appeal to prurient interest and must be without any literary, artistic, social or scientific value.

QUESTION: To say "hell" may be a little bit of an overstatement, may it not?

MR. PLOTKIN: "Hell"?

QUESTION: Since we did not confront the entire

section by section of the statute in that opinion.

MR. PLOTKIN: I have the same problem as my predecessor here, since you wrote the opinion, Your Honor. But to say --

QUESTION: You get my problem?

MR. PLOTKIN: Yes. But to say we now so construe it as to avoid the problem. I think that's the strongest language to a third person as is possible to say. I'm not saying that no other conclusion was possible, but the language was very strong that in order to say the statute was so construed --

QUESTION: Well, there's no doubt that the words are there in the opinion, I think might quibble, and the thing is for you to describe it as a holding, since a holding is presumably the application of the law to the particular set of facts before the Court.

MR. PLOTKIN: Yes. Well, I think that's right. And technically that was 1461 there and this is 1464. But the words in the statute are the same. The meaning was the same. We have a First Amendment medium here just as we do there, and it seems to me that not only do we have a First Amendment medium under the First Amendment, but Section 326 of the Communications Act specifically says that the Commission shall have no power of censorship.

Now, this is an entirely differentthing from the fair-

ness doctrine, or lack of balance, where, because this is a medium where scarcity is a factor, the Court has said that in order to make sure that the medium was made available to a maximum number of people we will impose certain duties upon broadcast stations to make sure that all can use it.

But that's an entirely different thing from the government coming in and saying that you are forbidden to do something; and in the Red Lion case, which Mr. Justice White authored, you made that very point, that where there's a fairness doctrine and the personal attack doctrine might be sustained, because it's expanding the medium, it had real chaos, an entirely different question would be presented if the government here were trying to suppress speech, and that's exactly what they are doing here, they are trying to suppress speech. And if they are trying to suppress speech, they must be asked to pass the same test here as they do in any other First Amendment meaning. The fact that this is radio does not make a difference.

QUESTION: Well now, you say the question was reserved in Red Lion, as it certainly was, that doesn't necessarily mean that in the case of regulated airwaves they have to pass the same tests as they would if they sought to impose this test on a newspaper, does it?

MR. PLOTKIN: I think 326 does mean that, Your Honor. I think -- normally the First Amendment, I think Congress

was saying that in Section 326, when it says "the Commission shall have no power of censorship." When it comes to suppression, I think the same test is applicable to radio and television as is applicable to a newspaper.

QUESTION: Well, then you say literally the FCC can never tell any station that it may not put out any particular message?

MR. PLOTKIN: I say that they cannot tell a radio or television station, that they cannot suppress what a radio or television station can do any more than they can any other --

QUESTION: You mean like ads?

MR. PLOTKIN: I think that now that ads have a certain amount, a penumbra of First Amendment protections, I think radio and television ads would have the same protection as newspaper ads.

QUESTION: This is because of 326?

MR. PLOTKIN: I think because of 326 and probably because of the First Amendment, I think --

QUESTION: Well, do you have to reach that if you're right under 326?

MR. PLOTKIN: Mr. Justice Tamm in the Court below did not reach it constitutionally, he reached 326. I think it can be decided on 326. I'm not -- I think 326 has First Amendment overtones. But I don't think it's necessary to do it, because I think Congress has said that so far as the Commission

was concerned, when it comes to the area of suppression, they cannot suppress this any more than any other medium can be suppressed.

QUESTION: Well, supposing under your definition of censorship that a station just decided that for an hour it would put on a record consisting of one four-letter word repeated over and over again for the hour, no one would make any claim that it had any coherent message, it was because the person spinning the platter simply liked it that way. Under your definition would the FCC be powerless because of the censorship statute to effect that?

MR. PLOTKIN: I think it would be powerless to tell them to stop doing it. I would have the same problem in response to your hypothetical question if the station did nothing, say, but play "The Music Goes 'Round and 'Round" all day. It is not because of the content but because a station is required to operate in the public interest. And if they -- one of the doctrines that the Commission has announced in the past was that if you don't have a well-rounded program and if you devote too much of your programming to one aspect and neglect other parts of your programming, you're not operating in the public interest.

But not because the particular words are bad, not because particular words have a particular taboo. Here the Commission was saying that just because you use these seven

words, not matter in what context, if you put on a show where people can call in and discuss a live subject, a controversial issue, and if some of the people came from the kind of culture that uses these kinds of words as part of their discussion, particularly in anger and heat, the Commission would say that if you did that in the afternoon that this would be a violation of the criminal code so far as the Commission can see it, and it would also be ground for revoking their license.

I don't think the Commission has that authority.

QUESTION: Can you justify the coexistence of 1464 and 326?

MR. PLOTKIN: Yes, I can --

QUESTION: How?

MR. PLOTKIN: -- to the same extent that I can justify the coexistence of 1461 and the First Amendment. If it's given the same interpretation, this Court has held -- and 1464 is no different than 1461 -- if it is constitutional for a statute to say that obscene material cannot be --

QUESTION: Well, I'm getting away from the Constitution, I'm speaking of just on the statute, because --

MR. PLOTKIN: Yes. Yes, I don't think 326 --

QUESTION: -- you've taken the position just now that 326 was the entire censorship statute, and meant what it said.

MR. PLOTKIN: Yes. Yes.

QUESTION: And what posture then is left to 1464?

MR. PLOTKIN: I think 326 has to be read in the same light as the First Amendment, when it says no censorship, it says no censorship of material that is constitutionally protected. I do not think that the Commission, by 326, has less power than the government does, say, against a newspaper. If they have obscene material, if you can prevent obscene material under 1461.

MR. CHIEF JUSTICE BURGER: We'll resume there at ten o'clock in the morning.

[Whereupon, at 2:59 o'clock, p.m., the Court was recessed, to reconvene at 10:00 a.m., Wednesday, April 19, 1978.]