The Lot Is Cast into the Lap: Federal Communications Commission Mistreatment of State Lottery Broadcasts

Peter Petrakis

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol6/iss2/6
The Lot Is Cast into the Lap: Federal Communications Commission Mistreatment of State Lottery Broadcasts

INTRODUCTION

The State of New Hampshire is the only one of the 50 states which can make the claim that it manages to maintain itself without the financial help of either a sales tax or a broad-based personal income tax. One possible reason for the prolonged economic survival of this minority of one is that New Hampshire, 10 years ago, had the wisdom to implement the first modern state-run lottery.¹ Presently, 13 states² are attempting to raise revenue without increasing their taxes by utilizing this form of gambling.

These state lotteries have had a modicum of success in accruing capital which can be used for churches, schools, hospitals, or placed in a general fund.³ However, the lottery states feel that anachronistic federal lottery laws⁴ have, from the inception of the state games until the recent modification of the laws, needlessly inhibited their efforts to collect even more revenue for the public good⁵ by forcing

---

1. 120 CONG. REC. E3016 (daily ed. May 15, 1974) (remarks of Congressman Roncallo).
2. The 13 states are New Hampshire, Illinois, New York, New Jersey, Connecticut, Delaware, Maryland, Maine, Massachusetts, Michigan, Ohio, Pennsylvania, and Rhode Island.
3. The states listed below have received $601.5 million from their lotteries; this amount was collected and used by these states as follows: New York, $243 million for education since 1967; New Jersey, $200 million for education from 1971 to 1973; Pennsylvania, $80 million for property tax assistance for the elderly from 1972 to 1973; Massachusetts, $36 million for municipalities from 1972 to 1973; Connecticut, $25 million for a general fund from 1972 to 1973; Michigan, $14 million for a general fund in six months; Maryland, $3.5 million for a general fund in two months. 120 CONG. REC. E3016-17, supra note 1.
4. Some cases strongly suggest that broadcasters are subject to both federal and state regulation in this area. Volner, The Games Consumers Play, 25 FED. COM. B. J. 121 (1973); see, e.g., Midwest Television Inc. v. Waaler, 44 Ill. App. 2d 401, 194 N.E. 2d 653 (1963).
5. Ralph F. Batch, superintendent of the Illinois state lottery, told the United States Senate Judiciary Committee in November that the federal ban on the use of the mails had cost the state $97,000 per delivery of promotional materials, and the prohibition on broadcasting contributed to the 2500 prizes a week which went unclaimed. In
On September 6, 1974, apparently in response to the supplications of some non-lottery states which resent the siphoning of their citizens' dollars to neighboring states which have lotteries, Attorney General William Saxbe invoked the spectre of federal prosecution for violations by the states of federal lottery laws. The immediate reaction to this statement in Congress was a proliferation of voices in support of bills to exempt state lotteries from federal law. Finally, on December 20, only hours before the sounding of the final gavel of the 93d Congress, the entreaties of the lottery states were answered by the passage of 18 U.S.C. § 1307, which lifted the restrictions on lottery-related publicity and the mailing of lottery tickets within a state.

Prior to this legislative liberation of state lotteries, however, one lottery statute, 18 U.S.C. § 1304, which prohibits the broadcasting of any advertisement or information concerning a lottery, had become the source of a controversy which proceeded to the brink of a Supreme Court decision. The Federal Communications Commission and two circuit courts of appeal had occasion to construe and apply section 1304 to the broadcast of information concerning the state lotteries of New York and New Jersey. If the various constructions of this statute provide an interesting illustration of administrative inconsistency, the propriety and constitutionality of these constructions, Batch estimated, the federal laws reduced Illinois lottery profits by $10.4 million per year. Chicago Sun-Times, Nov. 20, 1974, at 52, col. 1.

6. The State of Michigan, for example, unable to advertise for its lottery on local broadcast outlets, was forced to publicize its lottery on Canadian stations accessible to Michigan listeners. 119 Cong. Rec. E2750 (daily ed. May 1, 1973) (remarks of Congressman Harrington).


8. 18 U.S.C. § 1307 reads, in relevant part, as follows:
   (a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under authority of State law—

   (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

9. 18 U.S.C. § 1304 provides:
   Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said 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.
   Each day's broadcasting shall constitute a separate offense.

structions furnish an equally engaging example of diverse judicial and and federal agency attitudes toward broadcast freedom. The appropriate starting point is not the present, but the past.


Lotteries are as endemically Anglo-American as the common law. Both phenomena journeyed westward over the Atlantic at least as early as the *Mayflower*, and both claimed as their *raison d'etre* the commonweal of colonial America. A total of 158 lotteries were licensed in the colonies, 132 of which fed civic coffers rather than private pockets. The list of community lottery managers includes such early American luminaries as Benjamin Franklin, John Hancock, and George Washington; and even the Revolution was financed in part through a lottery established by the Continental Congress.¹¹

Having thus aided the cause of independence, lotteries continued to gain public acceptance and to prosper under the management of privately licensed contractors after the war, and some states even acted as contractors for a time.¹² Eventually, however, lotteries became big business, and abuse and embezzlement ensued, causing a major shift in public opinion.¹³

Reacting to their constituencies, state legislators began to take prohibitive action against lotteries, and had very nearly obliterated them when the outbreak of the Civil War and the resulting postwar poverty in the South caused a lottery renaissance. Paradoxically, however, in this, its finest hour, the great American tradition of lotteries was hoist by its own petard; its revitalization brought it to the attention of the federal government, and ultimately proved to be its undoing.¹⁴

By the late 19th century only the infamous Louisiana Lottery, national in its scope, survived as a remnant of the halcyon days when local lotteries flourished in almost every community. To destroy the the Louisiana Lottery, Congress took multiple action against its very foundations: publicity and interstate transportation.

---

¹² *Id.* at 101. State managed lotteries in Maryland and Georgia were, in fact, early harbingers of modern bond issue financing; the proceeds of the Maryland lottery going to a fund for the construction of a monument to George Washington, and the Georgia lottery contributing to monuments for General Nathanael Greene and Casimir Pulaski. *Id.* at 119.
¹³ *Id.* at 273.
¹⁴ *Id.* at 230.
Congress had prohibited the mailing of information concerning illegal lotteries in 1872.\footnote{15} Four years later, the word "illegal" was dropped from the statute,\footnote{18} and subsequent amendments specifically stated that newspapers were subject to the ban.\footnote{17} Ultimately, Congress closed all the channels of interstate commerce, effectively preventing the circulation and importation of lottery paraphernalia,\footnote{18} and completed the demise of the Louisiana Lottery.

It was this series of legislation, in response to an immediate problem, which eventually became 18 U.S.C. § 1302,\footnote{19} the postal statute whose language was used as the foundation of section 1304. For the purpose of ascertaining the legislative intent of this forerunner of section 1304, the debates on the second of the four above mentioned acts, the amendment which dropped the word "illegal" from the statute, are particularly enlightening and illustrate how the original purpose of the lottery laws is inextricably bound with the milieu in which they were born.

The proposal to delete the word "illegal" from the mail statute was hotly contested in the Senate. The first to rise to question the wisdom of federal restrictions on legal state lotteries was Senator William Whyte, of Maryland, who introduced an amendment to strike this part of the bill and leave this language unchanged. Mr. Whyte noted:

I feel that this bill is going to do injustice in certains [sic] quarters of this country . . .

. . . [The bill] strikes out the word "illegal," . . . Certainly the Senate does not mean to decide that the citizens of a State

\begin{footnotes}
15. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. See Ex parte Jackson, 96 U.S. 727 (1878) for the constitutional basis of Congress's power to legislate in this area.
19. 18 U.S.C. § 1302 provides, in relevant part, as follows:

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.
\end{footnotes}
where lotteries are legal have no right to send a lottery scheme or circular from one portion of the State to another.20

These remarks earned Mr. Whyte a quick reply—"That is precisely what we mean."21—from the bill's sponsor, Senator Hannibal Hamlin of Maine; and the following lecture on congressional power vis-à-vis lotteries from Senator John Logan of Illinois:

If Congress has a right to prohibit obscene matter passing through the mails, it has the right to prohibit lottery tickets or advertisements for lotteries, or any other thing, on the same principle. . . . Lotteries . . . when legalized are legalized gambling, and they can only be legalized in States that are in favor of gambling; and wherever a community is so demoralized that they are in favor of gambling they will then legalize lotteries, and not till they are so . . . . . . . . . Many people in my part of the country have been made the victims of these gambling frauds. They are nothing more than gambling hells. I would just as lief legalize and license to-day a house in Washington for dealing faro as to legalize a lottery. They are on the same principle, except that I think to deal in faro is a little fairer, because a man can stand by and see when they steal from him and in the lottery case he cannot.22

These statements provide a useful incite into the prevailing attitude of the time and into the reasons why Congress was so eager to prohibit the mailing of information on legal as well as illegal lotteries.23 Mr. Whyte's amendment was soundly defeated.

Whether the sentiments of these 19th century legislators were echoed in the days preceding passage of the broadcast statute will be

20. 4 CONG. REC. 4262 (1876).
21. Id.
22. Id.
23. Perhaps the simmering passions, if not the total abdication of reason, aroused by congressional discussion of legal and illegal lotteries is better demonstrated by the following angry exchange:

Mr. Whyte: I am delighted that our friends on the other side, the Senator from Illinois and other gentlemen, have suddenly become moralized, if I may be permitted to use that expression. They were not so very moral when they could make money out of lotteries during the war. The Internal Revenue Dept. taxed lottery tickets.

Mr. Logan: What does the Senator mean when he says, speaking of certain Senators, that they were not so very moral when they could make money out of lotteries during the war? Does he refer to us as having anything to do with lotteries?

Mr. Whyte: The Senator must not misunderstand me. I say that to-day it is immoral to allow lottery tickets to go through the mail, while during the war or toward the close of the war it was perfectly moral to tax lottery tickets and to make money out of the sale of lottery tickets! That is all I mean to say.

Mr. Logan: That depends on the men who were in Congress at that time; a different class perhaps. This colloquy is followed by an even further degeneration of the level of debate,
considered elsewhere in this article.\textsuperscript{24} First, however, it is fitting to examine the genealogy of section 1304 itself, and the recent alteration of the lottery laws.

The Radio Act of 1927 was the first congressional attempt to prevent the impending din which the unchecked proliferation of airwave voices threatened to become. The Act did not contain a section pertaining to lotteries. Of particular importance to this article, however, was the initial appearance of a provision later to become 47 U.S.C. § 326, the present anti-censorship provision of the Communications Act.\textsuperscript{25} The passage of this section and of the entire system of broadcast regulation gained impetus from four National Radio Conferences held from 1922 to 1925 which were attended by the principle sponsors of the 1927 legislation. At the last of these conferences unanimous approval was given to a resolution which stated that any form of censorship other than public opinion was unnecessary and to be assiduously avoided.\textsuperscript{26}

In the later debates in Congress, the sponsors of the Radio Act referred to the recommendations of these conferences and made it clear that no power of program censorship was to be given to a government agency.\textsuperscript{27}

From this setting of solicitude toward broadcast freedom, the antecedent of 18 U.S.C. § 1304 first emerged. It was debated and passed as part of House Bill 7716 in 1932, which was pocket-vetoed by President Hoover. It was incorporated 2 years later, without debate, into the bill which eventually became the Federal Communications Act of 1934, which amended and supplemented the 1927 Radio Act. Therefore, it is the 1932 debates which provide the only indication of congressional intent which can aid an assessment of the constructions placed upon section 1304 by the F.C.C., lottery proponents, and the courts four decades later.

\begin{quote}
finally reaching its nadir in a discussion of whether a bottle of whiskey would also be banned from the mail as immoral, and whether it would be wiser to send whiskey in a tin can to prevent breakage. On this point Mr. Whyte expressed the belief that "It drinks just as well out of a tin can... as out of a glass bottle." \textit{Id.} at 4263.
\end{quote}

\textsuperscript{24} See text accompanying note 35 infra.

\textsuperscript{25} 47 U.S.C. § 326 reads:

\begin{quote}
Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.
\end{quote}

\textsuperscript{26} Caldwell, Freedom of Speech and Radio Broadcasting, 177 ANNALS OF AM. ACADEMY OF POL. & SOCIAL SCIENTISTS 185 (1935).

\textsuperscript{27} See 67 CONG. REC. 5480, 12615 (1927).
The House version of the lottery bill prohibited the broadcasting of lottery information; the Senate version prohibited advertising. The conferees of the two houses met to discuss changes in various provisions of the bill and emerged with the perfect compromise for the lottery statute: a section forbidding the broadcasting of both information and advertising. The F.C.C. seems to feel that the fact that this twofold ban issued from the deliberations of the conferees signifies clear congressional intent that the proscription against lottery broadcasts go beyond mere promotional activity and extend instead to what could surely be termed censorship of program content, an intent of questionable first amendment validity.

The clarity with which the F.C.C. discerns this intent is somewhat surprising in light of the continued vitality of 47 U.S.C. § 326, the anti-censorship provision mentioned above, and statements in the 1932 debates such as the following from a member of the conference committee, Congressman Frederick Lehlbach:

There is no change in the substantive provisions of the radio law except the new paragraph which prohibits the broadcasting or advertising of lotteries. . . . and it is not in the sense of censorship that this provision is sought . . . .

and from the bill's sponsor in the House, Congressman Ewin Davis:

I must conclude my remarks with an explanation of the only thing that is new, and that is section 13, which forbids, in effect, conducting lotteries over radio stations.

It seems, therefore, that the question of how far Congress had intended its ban on lottery broadcasting to extend in terms of program content was not clearly answered when section 1304 was passed. There appears to be little doubt about what a court must do when faced with congressional confusion of this sort in a first amendment area. Before a court sustains a restriction upon free expression, it must be certain that the legislature has recognized that the restriction creates a conflict between freedom of expression and the need for regulation, and that the legislature has made a deliberate decision in favor of the latter. Since it is apparent from the debates that such a decision was not made, the F.C.C.'s interpretation of section 1304, border-

30. 75 Cong. Rec. 3684 (1932) (emphasis added).
31. Id. at 3683 (emphasis added).
ing on censorship of program content, should not be sustained by a court.

Another unresolved question is whether the legislators of 1932, unlike their 1974 counterparts, intended such restrictions on the use of the media to apply to state lotteries. In the debates on the recent passage of 18 U.S.C. § 1307, the lottery laws were treated generically. Much emphasis was placed upon the fact that they were originally enacted to deal with the evils of the Louisiana Lottery and its contemporaries, and thus could not have been meant to apply to legal lotteries. As has already been demonstrated, however, the early mail statutes were intended to apply to all lotteries in an effort to protect the gullible citizenry from colonial con men. Wholly apart from this attitude of the 19th century Congress, however, are the problems of whether 18 U.S.C. § 1304, the product of a different milieu, should not really be treated separately from the earlier statutes prohibiting the mailing of lottery information, and, therefore, whether the possible different motives for the passage of section 1304 should be examined. Although the earlier statutes were passed with an eye toward any lottery scheme, section 1304 was seemingly passed to deal with problems like the following:

[F]rauds and deadbeats, who call themselves wizards, soothsayers, mind readers, and miracle performers, . . . talk over many of the various radios in various parts of the country 15 minutes or 30 minutes a day, read characters, discuss certain human characteristics, and then notify the gullible people to come to the offices of these wizards, where the people are hoodwinked into paying from $1 to $5 for readings, talks, and the like.

Therefore, as can be seen, legal state lotteries were not intended by the legislators to be within the ambit of section 1304.

Actually, it makes little difference, whether the passage of section 1307 rested upon an erroneous reading of the original intent of the mail statutes or upon the belief that the only bans presently necessary on lottery broadcasting are more closely akin to the needs of the 1930's Congress to combat "frauds and deadbeats." The result for pro-lottery forces is identical: an ultimate decision that state-sanctioned lotteries should be exempt from federal law.

F.C.C. POLICY: LOTTERIES VIS-À-VIS HORSERACING

An interesting counterpoint to the apparent relish with which the
F.C.C. has applied 18 U.S.C. § 1304 to state lotteries has been the Commission's approach to the broadcasting of horseracing information. In a 1964 policy statement on the subject, the F.C.C. stated:

[We] wish to stress that it [is] not the Commission's intention to inhibit the broadcasting of appropriate news, publicity, and advertising concerning horseracing. Horseracing and parimutuel betting at racetracks are, of course, permitted in many States. Indeed, the revenues derived . . . are of considerable significance to many of the States . . . . Rather, as stated, the proposed rules [are] intended to specify those broadcast practices which [are] most likely to aid illegal gambling and which do not appear to serve a legitimate public need.36

The formula, then, for determining whether a horseracing broadcast is impermissible is twofold. The nature of the broadcast must be such that it would benefit those whose gambling activities are illegal,37 and the broadcast must not be one which serves a legitimate public need. The stress laid upon the second half of the formula is illustrated in a 1973 F.C.C. ruling on the subject of promotional broadcasts for the New York City Off-Track Betting Corporation.38 In view of the avowed dual purpose of Off-Track Betting—raising revenue and crippling illegal gambling—the Commission decided that the Corporation's promotional campaign was permissible because it served legitimate public needs.

Moreover, in the area of horseracing broadcasts, the F.C.C. deems itself incapable of formulating rules which delineate what practices are clearly improper but which, at the same time, do not interfere with broadcasts of horseracing information which serve public needs.39 Instead, the Commission places the initial burden of deciding the propriety of the broadcast upon the individual licensees, who have the responsibility "to serve the public interest, and to avoid giving assistance to illegal gambling interests."40

In dealing with state lotteries, however, F.C.C. policy has been to disregard the possibility of service to a legitimate public interest, and to focus instead upon the promotional aspect of a lottery broadcast, a one-step test, unlike the dual criteria applied to horseracing.41 Fur-

36. 36 F.C.C. 1571, 1573 (1964).
37. An example of one way in which a broadcast can aid illegal gambling and thus run afoul of the first part of the formula is found in 32 F.C.C.2d 705 (1971): promotional advertisements for legal off-track betting would be of benefit to illegal gambling activities in that they encourage people to engage in equine wagering.
40. Id. at 1575.
41. See 36 F.C.C. 93 (1964).
thermore, the Commission has been disinclined to defer to the editorial judgment of licensees in deciding the scope of permissible lottery broadcasts.

Apparently, the rationale for this divergent treatment rests upon the difference between the derivation of the F.C.C.'s authority to control lottery broadcasts and the source of its jurisdiction in the area of horseracing information. The power of the F.C.C. to regulate horseracing broadcasts and other such gambling information derives from its statutory duty to regulate licensees in the public interest. Authority to oversee broadcasts of lottery information, however, is founded not upon an amorphous public interest mandate, but rather upon the supposed congressional policy embodied in section 1304.

Consequently, the reason why the Commission has taken a somewhat more liberal approach toward what will be permissible with regard to horseracing than it has in the area of state lotteries seems to be that it views the more flexible public interest criterion as providing it with a greater degree of freedom to engage in a process of balancing the competing factors of aid to gambling and service to a legitimate public need.

In contrast to the public interest criterion, the specific statutory mandate of section 1304 forecloses any such balancing by the F.C.C. because, theoretically, the legislature has previously determined that a lottery never serves a public need sufficient to outweigh its pernicious effects. As this article has demonstrated, it is questionable whether Congress has ever actually made this determination with respect to state lotteries. Nonetheless, the F.C.C.'s appraisal of its limited authority to assess a lottery's benefit to the public is probably correct in light of the more specific mandate of section 1304.

42. The F.C.C. seems to hint as much at 41 F.C.C.2d 172, 174 n.8 (1973).
45. For those who question the idea that a lottery can ever be so noxious as to be the subject of such reproach, consider the following from Adam Smith:
   The world neither ever saw, nor ever will see, a perfectly fair lottery; or one in which the whole gain compensated the whole loss; because the undertaker could make nothing by it. . . . There is not, however, a more certain proposition in mathematics, than that the more tickets you adventure upon, the more likely you are to be a loser. Adventure upon all the tickets in the lottery, and you lose for certain.
This conclusion alone, however, does not end the consideration of F.C.C. policy on horseracing broadcasts. Indeed, aside from the Commission's view of its various statutory mandates, its divergent approach towards horseracing and state lotteries has significance on a wholly different level, that of the first amendment. As aforementioned, while recognizing the potential danger of abetting illegal gambling, the F.C.C. still evidences an intent to respect the protected nature of "appropriate news." It appears, therefore, that even though the Commission may feel there is a public need to discourage gambling, that need does not, in the area of horseracing, outweigh the first amendment interests of broadcasters and listeners. Consequently, even some horseracing broadcasts which may aid illegal gambling are permitted because they are deemed by the Commission to be appropriate news, and therefore within the ambit of the first amendment's protection.

In dealing with state lotteries, however, even news broadcasts, normally entitled to first amendment protection, are, in the Commission's view, considered capable of regulation because the amendment is not so absolute a safeguard that it protects all categories of communication. It seems unlikely that the more hospitable first amendment treatment accorded to horseracing broadcasts can be explained in terms of a lower degree of countervailing policy interests. As stated by the New Jersey State Lottery Commission:

If the concern over the promotion of illegal gambling does not outweigh the legitimate public interests served by off-track betting, this conclusion should be even more evident with respect to a legal state lottery. It is common knowledge that horse racing is the subject of illegal gambling operations, and that off-track betting information may potentially aid illegal gambling operations. There are no indications, however, that the results of legal state lotteries are being used for comparable purposes. Thus, the only adverse consideration which the F.C.C. has deemed significant in connection with the broadcasting of horserace results is absent here. Therefore, whatever arguments might be advanced . . . that prevention of gambling outweighs the free speech guarantees of the First Amendment, it is manifest from the F.C.C.'s own enforcement policies that the public interest in keeping com-

---

46. The mandates referred to here are those of 47 U.S.C. § 307 (see text accompanying note 18 supra) and 47 U.S.C. § 312(a)(6). The duty to enforce 18 U.S.C. § 1304 is delegated to the F.C.C. by 47 U.S.C. § 312(a)(6), and, of course, the Justice Department has concurrent jurisdiction to enforce the statute as a penal provision.

47. See text accompanying note 36 supra.


Communications concerning legal state gambling away from the American public is simply non-existent.\textsuperscript{50}

If, therefore, there is an interest in closing the airwaves to any information which may aid illegal gambling, it seems that there is a greater probability that this interest may be transgressed by horseracing broadcasts than by lottery news.

More recent interpretations and applications of section 1304 must now be examined.

CONSTRUCTION AND CONSTITUTIONALITY

Whether section 1304 is construed to reach program content or merely promotions is also significant in the first amendment context. The interference by the government with program content raises the issue of prior restraint.

The constitutionality of section 1304 was upheld, but the F.C.C. construction of it invalidated, in American Broadcasting Co. v. United States.\textsuperscript{51} There, the court determined that the Commission's rules, by purporting to label television give-away programs as lotteries, transcended the permissible scope of section 1304. Thus, these rules were "considered as a form of 'censorship' . . . in violation of the First Amendment."\textsuperscript{52} It was made clear, however, that section 1304 does not penetrate the media's first amendment shield so long as it is applied "for the protection of the general public."\textsuperscript{53} On appeal, the Supreme Court in American Broadcasting Co. stated:

If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. . . . [The proposed construction] would do violence to the well-established principle that penal statutes are to be construed strictly.\textsuperscript{54}

What emerges from American Broadcasting Co., then, is a dual reason for construing section 1304 as narrowly as possible. A narrow construction of 18 U.S.C. § 1304 is mandated both by its potential for application to constitutionally protected speech, and by the custom established for construction of criminal statutes. From this early

\begin{footnotes}
\item[52] 110 F. Supp. at 389.
\item[53] \textit{Id.}
\item[54] 347 U.S. at 296.
\end{footnotes}
treatment of the statute, therefore, it seems apparent that section 1304 is a law whose validity depends upon a strict interpretation of what it dictates.

To answer the question of whether the wisdom of *American Broadcasting Co.* has been faithfully followed, it is necessary to analyze the most recent cases involving section 1304 with an eye to whether the F.C.C. has been consistent in strictly construing the statute, and whether the Commission and the courts have given the same regard to keeping the camel's nose out of the tent of a free press as the *American Broadcasting Co.* Court.

**The F.C.C. and the Second Circuit**

The State of New York, in an effort to increase the somewhat disappointing volume of lottery ticket sales, sought to publicize the state lottery on radio and television. The members of the New York State Broadcasters Association were eager to broadcast lottery news. Aware, however, of the existence of section 1304 and fearful of license revocation, the Association petitioned the F.C.C. for a declaratory ruling that the sanctions of the statute were not applicable to the broadcasts they wished to make. Although the Commission declined to answer specific questions concerning the kinds of broadcasts which would be prohibited, it did for the first time construe the phrase "any advertisement or information concerning." The F.C.C. announced that any promotion or encouragement of a lottery over the air was proscribed. News reports were exempted, apparently in deference to the first amendment, but the Commission's definition of news was limited. A news report was considered anything broadcast in normal good faith coverage and reasonably related to the public's right to know about community events.

On appeal, the Second Circuit Court of Appeals simultaneously narrowed and broadened this construction of section 1304. The court limited the interpretation of "information concerning" to information that *directly promotes* a lottery, and defined direct promotion as the broadcast of information which has "essentially the same effect as conducting it" on the air. The problem with the court's seemingly

---

55. This eloquent bit of phraseology is borrowed from Justice Stewart's dissent in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 402 (1973).
57. Id.
58. *New York State Broadcasters Association v. United States*, 414 F.2d 990, 997
very narrow construction of the statute is that even good faith news coverage, previously exempted by the F.C.C., could be banned if it directly promotes a lottery. The court, apparently recognizing the first amendment implications inherent in this reading of section 1304, attempted to explain its departure from the constitutional and criminal law rules which dictate strict construction of statutes. The court reasoned that the non-absolute protection of the first amendment permits an "official" government view on communications which promote undesirable ends like swindling schemes and the sale of narcotics. Accordingly, since Congress has adopted a view with respect to lottery information, an interpretation of section 1304 which limits restraint of lottery news broadcasts to those which are directly promotional is constitutional.\(^5\)

It seems questionable whether this construction is indeed as strict as that intended by the Supreme Court in *American Broadcasting Co.*\(^6\) The answer to this question, however, becomes insignificant at this point because the Second Circuit remanded the case to the Commission, and, although relying upon the "direct promotion" test in its later argument before another circuit court,\(^6\) the F.C.C. applied the "direct promotion" test on remand in a way so convoluted as to make it unrecognizable.

Gladly accepting the hint of the Second Circuit to apply its expertise in this area, the F.C.C., in a supplemental ruling,\(^6\) applied the directness test as follows: legitimate news appropriate to broadcasting is permissible; news not within the scope of "ordinary broadcast journalism," however, is seemingly equated with direct promotional material and therefore prohibited.\(^6\) Specifically, the F.C.C. prohibited information concerning where, how, and when the winning number is to be drawn, the amounts of the prizes, and lists of the winners. A steadfast adherence to the Second Circuit's opinion, of course, would make the legitimacy or ordinariness of the news irrelevant, since the crux of the test is not the news value of an item, but rather the directness of its promotional effect. It seems, therefore, that at this point the F.C.C. had altered the court's direct promotion test, itself

---

59. Id. at 996-99.
60. See text accompanying notes 52 through 54 supra.
61. See note 66 infra.
63. Id. at 848.
arguably something more than a narrow construction, into a brand new “bona fide-ness of news” test which cannot reasonably be gleaned from even a liberal construction of section 1304.\textsuperscript{64}

\textit{The F.C.C. and the Third Circuit}

The Commission’s obfuscation of the test to be applied and its inconsistency in construing section 1304 did not, however, end with its consideration of the New York lottery. When first called upon to rule on the permissibility of proposed New Jersey broadcasts (notably the announcement of the winning number on a news program, totally unadorned with any other lottery information), the F.C.C. responded negatively by reading the Second Circuit’s opinion to distinguish between news and direct promotion, the latter being identified with information of interest to only a limited audience and hence not bona fide news.\textsuperscript{65} At this point, then, it could not have been clear to potential broadcasters of lottery information whether something which was clearly bona fide news and yet also a direct promotion would have been permissible as news, prohibited as a direct promotion, or classified as non-news due to its promotional nature.

In its treatment of the New Jersey State Lottery Commission’s Petition for Reconsideration, the F.C.C. finally embraced the directness test as the proper interpretation of section 1304, three years after its initial formulation by the Second Circuit Court of Appeals.\textsuperscript{66} This change by the Commission seems, however, to have been motivated less by a desire to be faithful to judicial construction of the statute than by the necessity to meet the reasoning of the lottery proponents. Faced with the argument that announcing the winning number is indeed “ordinary broadcast journalism,” and a bona fide news story of widespread interest, the F.C.C. stated unequivocally that newsworthiness is not the proper test. The Commission concluded, rather, that directness is the touchstone and stated:

\begin{quote}
The public demand may be “truly staggering” but it cannot change
\end{quote}

\textsuperscript{64} In its brief to the Supreme Court, the New Jersey State Lottery Commission similarly noted the F.C.C.’s confusing application of 18 U.S.C. § 1304: It is impossible to resist the conclusion, . . . that the agency has not given Section 1304 even the literal interpretation espoused in its own brief. Rather, in the guise of interpretation, it has simply adopted its own version of a lottery prohibition.


\textsuperscript{65} 30 F.C.C.2d 794, 795 (1971).

\textsuperscript{66} 36 F.C.C.2d 93 (1972).
the law to permit the broadcast of information directly promoting a lottery. 67

The Commission's New Jersey decision was reviewed by the Third Circuit Court of Appeals in New Jersey State Lottery Commission v. United States. 68 The court applied the free speech mandate of 47 U.S.C. § 326 69 to lotteries, which had not even been discussed by either the F.C.C. or the Second Circuit. The court concluded:

[T]he F.C.C. misconstrued the congressional mandate in the Communications Act of 1934. Nothing in that statute was intended to permit the exercise by the F.C.C. of control over editorial decisions of broadcast journalists. On the contrary as 47 U.S.C. § 326 makes clear, Congress expected the F.C.C.'s actions to be consistent with the first amendment. 70

The court in New Jersey State Lottery Commission, recognized an inconsistency between the F.C.C.'s actions and the protections of the first amendment insofar as a construction of section 1304 which bans bona fide news of a lottery is a prior restraint upon the programming judgment of broadcasters. The court then scrutinized and repudiated two possible justifications for this restraint. Labelling the winning number as "hot news," 71 the court rejected the argument that such information is not deserving of first amendment protection, regardless of the size of the class of persons interested:

[The broadcast news media] at least as much as the other news media should be left free to make their own editorial decisions as to what news will best serve their public. The only restraints on information by which, in the news context, the broadcast media may

---

67.  Id. at 97. In fairness to the F.C.C., there seems to have been every intention at this point to permanently adhere to the direct promotion test, as its dictates form a major part of the Commission's argument before the Third Circuit Court of Appeals. Brief for Respondent, supra note 29, at 4.
68.  491 F.2d 219 (3d Cir. 1974), vacated and remanded, 95 S. Ct. 941 (1975).
69.  See note 25 supra.
70.  491 F.2d at 222. This interpretation of section 326 is apparently consistent with earlier Supreme Court opinions that dealt with the same section. In Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 382 (1969), the Court stated:

[T]he FCC is free to implement [the requirement of equal time for discussion of public issues] by reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.

71.  Once the court has labelled such lottery broadcasts as "hot news," the F.C.C. can no longer retreat to either of the positions it held before the final New Jersey declaratory ruling. If the F.C.C. sees a dichotomy between what is news and what is a direct promotion, this judicial opinion states clearly that such information is to be in the former category; and if the test is to be whether something is ordinary broadcast journalism, the broadcasting of information classed as "hot news" surely meets this criterion.
constitutionally be bound are those imposed by what little is left of the law of libel . . . and by the law of obscenity . . . .

Dealing next with the contention that the status of broadcasters as federal licensees makes this prior restraint permissible, the court, realizing that program content can indeed sometimes be permissibly restrained, pointed out the only two areas where this has occurred. One such area is the commercial promotion of products deemed by Congress to be unworthy of promotion, e.g., cigarettes. The other is the area of equal access for the dissemination of competing ideas. The court, however, found both these situations inapposite to lottery broadcasts, and decided that prior restraints imposed in the past are not analogous to that proposed by the F.C.C. in the present situation. The court reasoned:

If Congress may condition the grant of a license upon submission to prior restraint against broadcast of this news item, how would one distinguish a condition imposing a prior restraint on the broadcast of stock market or commodity future prices, or indeed of any subject matter?

The Third Circuit then concluded with an opinion which evinces a desire to go as far as possible to protect the first amendment rights of broadcasters. So as to avoid any inconsistency between agency action and the first amendment which might be caused by prior restraint of news, the court suggested that the F.C.C. apply the statute only to promotions for which the licensee receives compensation.

This suggestion stands in sharp contrast to the decision of the Second Circuit calling for a ban of all directly promotional material. Two circuit courts of appeal, then, attempting to give meaning to the ambiguous words of the same statute, reached inconsistent conclusions. The emphasis of the Second Circuit was on the ability of an expert agency to discern just what is a promotion of more than indirect proportions, and that of the Third Circuit on the journalistic discretion of the news media as totally protected, in a news context, by the first amendment.

72. 491 F.2d at 223.
75. 491 F.2d at 223-24.
76. With a nod toward its sister circuit, the court acknowledged the decision in the New York State Broadcasters case that some so-called news may be so far outside the realm of journalism that it might be classed as promotional rather than news. However, the court carefully declined to take a stand on that issue here, since the proposed announcement before them—the winning number—is unadulterated broadcast journalism. 491 F.2d at 224.
The Third Circuit's reference to the F.C.C.'s action as a prior restraint seems to be justified when such action is contrasted with the few exceptions which have been carved into the broadcast media's freedom from prior restraint. In *Banzhaft v. Federal Communications Commission*, the court upheld a Commission ruling that stations which carry cigarette advertisements must devote broadcast time to the case against smoking. In reaching this conclusion, the court offered two reasons why it felt that the intrusion into program content was permissible. First, since no speech was actually banned by the ruling, any prior restraint would have to be the result of a chilling effect of some sort on the broadcasters. Such chilling effect in *Banzhaft* could only have effect on the broadcaster's choice of advertisements, which are commercial speech, traditionally less rigorously protected by the first amendment. Secondly, the *Banzhaft* court saw the first amendment gain which would result from the F.C.C. mandate to grant access to those who wish to speak against smoking as being greater than any supposed loss. In the context of lottery broadcasting, however, non-commercial speech faces an absolute ban, and no enhancement of others' rights to air their views is evident. Therefore, the rationale of *Banzhaft* as a justification for prior restraint seems inapplicable.

Another restraint upon total broadcast freedom is the equal access doctrine upheld in *Red Lion Broadcasting Co. v. Federal Communications Commission*. The rationale of the Court's decision in *Red Lion* was that the first amendment right of broadcasters to control the programming of their stations is outweighed by the public's right to receive informed discussion on all issues of public importance. This reasoning would seem to bolster, rather than weaken, the Third Circuit's opinion of the impermissible nature of the F.C.C.'s proposed restraint on lottery information, since lottery information could be viewed as a matter of public importance.

The F.C.C., however, took the position that there is no prior restraint on protected speech, relying upon the very cases, *Banzhaft* and

---

Red Lion, which the Third Circuit used to support precisely the opposite view. The basic difference between the positions is that the court cited these cases for the proposition that prior restraint of lottery information is not analogous to the prior restraints on broadcasting that these earlier cases had permitted. The Commission, however, observed that prior restraint of lottery information is not the kind of prior restraint these cases specifically banned. The F.C.C. supported its view by positing that the broadcast of the winning number, like the broadcast of cigarette advertisements in Banzhaff, "does not provide information on matters of public importance. . . . [T]he importance of such information is limited to lottery ticketholders and only in direct connection with the lottery's operation." 81

Though the difference in the interpretations of Banzhaff and Red Lion may rest simply upon a differing attitude toward the first amendment rights of broadcasters, the rectitude of one or the other viewpoint does not appear to be merely a matter of opinion. Indeed, the reply to the F.C.C.'s position that lottery broadcasts provide no information of public importance, and are thus unprotected, came years earlier in American Broadcasting Co., where the court noted:

The merits of the "give-away" programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that "we can see nothing of any possible value to society" in these programs, "they are as much entitled to the protection of free speech as the best of literature" or music. 82

Closely analogous to the position of the F.C.C. that lottery information lacks the public importance requisite to first amendment protection is the argument that section 1304 evinces a congressional intent to treat lottery information in the same manner as obscenity and schemes to defraud. Since these latter two items are communications not worthy of first amendment protection, it follows that lottery information cannot be worthy of such protection. 83 The Commission relied upon the decision of the Second Circuit in the New York State Broadcasters case, where the court declared that "Congress has the power to have a 'view' as to these types of conduct and to take steps to inhibit each." 84

---

80. See text accompanying notes 74 and 75 supra, and 491 F.2d at 223.
82. 110 F. Supp. at 389; accord, Winters v. New York, 333 U.S. 507, 510 (1948), where the Court said, "What is one man's amusement, teaches another's doctrine."
84. 414 F.2d at 997.
What both the F.C.C. and the Second Circuit failed to note in reaching this conclusion, however, is that in the case of each category of communication which has been found to be outside the first amendment's protection (obscenity, fighting words, and the like), some countervailing public interest was asserted to outweigh the amendment’s sanctuary for speech. In light of the Commission's treatment of horseracing broadcasts, it is unlikely that an effective argument can be made that the first amendment interests of the media are overbalanced by a supposed public interest in suppressing the spread of gambling through use of the airwaves. The absence of such a public interest would seem to indicate that the total first amendment security accorded to protected categories of broadcast information should apply to lottery news as well.

A further point which the Commission and the Second Circuit seem to miss is that any broadcast coverage of those things which they use as examples of non-protected speech (the sale of fraudulent securities or narcotics) would be so far outside the ambit of broadcast journalism that they could not be described as news protected by 47 U.S.C. § 326. Moreover, the Third Circuit's opinion leads to this conclusion in its comparison of the winning number to stock market prices and its characterization of the number as "unadulterated broadcast journalism—news—and clearly protected by 47 U.S.C. § 326 and the first amendment."

The F.C.C., therefore, has failed to make a defensible argument that lottery broadcasts are equitable with previously unprotected classes of speech. This failure gives additional support to the Third Circuit's decision that censorship of uncompensated broadcasts of lottery information presents a classic case of prior restraint of news.

**POST-THIRD CIRCUIT DEVELOPMENTS**

State lottery proponents, interested observers of the way in which the F.C.C. applied section 1304, were understandably relieved by the apparent deliverance of the state games from the Commission's bailiwick by the passage of 18 U.S.C. § 1307. It appears, however,
that the new statute may not totally foreclose future F.C.C. application of section 1304 to state lotteries as broadcasters would have liked. Section 1307 negates the application of section 1304 to information concerning a state lottery if broadcast by a station licensed in that state or an adjacent lottery state. The reason why Congress permitted the broadcasting of information concerning a state's lottery by a station located in an adjacent state was summarized in the House debates preceding passage of 18 U.S.C. § 1307:

[T]here are some States, for instance, New Hampshire, that do not have any particular delegated broadcasting stations, but they rely particularly on the television stations in Boston, Mass., which is an adjoining State, and most of the advertising, most of the big television programs come we think from Boston, rather than New Hampshire.\(^9\)

The effect of this provision was explained in the same debates as follows:

Mr. Dennis: . . . .

In other words, if my State is a non-lottery State, but it is adjacent to a lottery State, is a television or radio station in my State now entitled to broadcast . . . ?

Mr. Rodino: No; the advertising and information would be broadcast by stations in that State or in any adjacent State which conducts those lotteries; so it has got to be a State that has already authorized lotteries and is adjacent.\(^{91}\)

In light of this explanation, an obvious problem survives section 1307. If a broadcast outlet in a non-lottery state wishes to air information about the lottery of an adjacent state whose lottery attracts a large number of customers from the non-lottery state, section 1307 has no applicability. Therefore, the broadcaster finds himself in the same position as the New York and New Jersey broadcasters in the two principal cases, inquiring of the F.C.C. exactly what section 1304 does and does not proscribe. Since there has been no Supreme Court settlement of the split between the two federal circuits,\(^{92}\) the question remains whether the F.C.C. will apply the Second Circuit's "directly

---

90. 120 CONG. REC. H12606 (daily ed. Dec. 20, 1974) (remarks of Congressman Smith).

91. Id.

92. The judgment of the appellate court in *New Jersey State Lottery Commission* was vacated by the Supreme Court on February 25, 1975, and the case remanded to the Third Circuit to consider whether or not the adoption of section 1307 has rendered the case moot. The argument against mootness is the Damoclean nature of possible F.C.C. application of section 1304 to broadcasters in non-lottery states adjacent to a lottery state. Intervenor, the State of New Hampshire, makes this argument in relation to the right of Vermont broadcasters to broadcast news of the New Hampshire lottery to their listeners in both Vermont and New Hampshire. 93 S. Ct. 941 (1973).
promotional” test, or will follow the more recent Third Circuit decision that only commercial speech is banned by section 1304.

The Commission gave an indication of its preference in reply to the Maryland State Lottery Agency concerning proposed television coverage of the drawing of the state’s first winning number. This reply came fifteen days after the decision of the Third Circuit in New Jersey State Lottery Commission and, although allowing coverage of the original drawing, stated, inter alia, that “continued broadcasts of this kind during subsequent weeks would raise questions of compliance with the statute under the guidelines set out in New York State Broadcasters Association v. F.C.C.” and the F.C.C. rulings in the New York case. Neither the Third Circuit nor the State of New Jersey were mentioned in the Commission’s letter to the Maryland agency. This omission suggests that the F.C.C., though not the Supreme Court, has already chosen which construction of section 1304 will receive agency approval if any further application of the statute is necessary.

CONCLUSION

It is not readily apparent why Congress did not choose to go further than it did in its formulation of section 1307 so as to avoid the above problem—non-lottery states adjacent to lottery states—by throwing the airwaves open to any broadcaster who determines, in an exercise of journalistic discretion protected by the first amendment, that information concerning another state’s lottery is sufficiently newsworthy to warrant coverage on his station. For whatever reason, such a decision was not made and, therefore, section 1307 does nothing to alter the underlying constitutional problem which surfaced in the lottery cases.

The judiciary has attempted repeatedly to set the parameters of the first amendment’s limitations in a broadcast context, yet even now the obscurity of these boundaries is illustrated by the diverse interpretations of previous broadcast cases in relation to the proscription of lottery broadcasts. Either cases like Banzhaff and Red Lion repre-
sent the proposition that whatever does not in some way contribute to satiation of the public's demand for information is subject to prior governmental restraint (the F.C.C.'s position), or these cases illustrate the view that anything which is not analogous in quality to what has been deemed unworthy of first amendment protection, such as cigarette advertisements, cannot be constitutionally inhibited (the Third Circuit's position).

The narrow issue at stake in New Jersey State Lottery Commission—broadcast of the winning number by an in-state television station—susceptible as it was to preemption by section 1307, did not provide the Supreme Court an adequate forum for clarifying the constitutional controversy.\(^9\) Perhaps the Court will discover an opportunity in the near future to explain further how much of the gamut of first amendment freedoms is withheld from the broadcast media. Indeed, with the proliferation of state lotteries, and the probable desire of broadcasters in non-lottery states to inform their viewers of the information which may make a small few of them moderately wealthy, it would be of little surprise if this opportunity was thrust upon the Court in the same context which has so vexed two judicial circuits: F.C.C. utilization of section 1304.

PETER PETRAKIS

---

97. See note 92 supra.