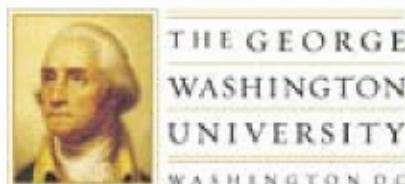


The Burger Court Opinion Writing Database

United States v. New Jersey Lottery Commission

420 U.S. 371 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1975

PERSONAL

Re: 73-1471 - United States v. New Jersey Lottery Commission

Dear Lewis:

As you may remember, I did not sit on this case at oral argument and (if it is still a live case) I think I will not participate. However, I thought I should send you a comment on the draft you circulated.

I agree with your conclusion and your rejection of the theory advanced by the government that information about "suppressible activity" may be totally banned from the airwaves.

Nevertheless, I am concerned about several points in the opinion which conceivably may be a source of future trouble. First, I read footnote 17 to imply that the FCC could prohibit commercial advertising of illegal activities. I think that is clearly correct -- perhaps so clearly correct that a case may not arise because no broadcaster would be so unwise -- and I think a majority if not all the Court would agree. The problem here is that at the bottom of page 11 the opinion lists "the narrow restrictions placed on the press." The list reads as one intended to be exhaustive but an advertisement promoting illegal activity would not fall into any of the categories. It would not necessarily be libelous, obscene, inciting, or an invasion of privacy. Thus it seems to me the list should not be exhaustive; otherwise, the list may be difficult to distinguish in a future case.

Second, on page 11, line seven, the opinion notes that the editorial judgment here was "abundantly supported by the facts." That is undoubtedly true but I wonder if it is irrelevant. Editorial judgments decide what goes into a newspaper or a broadcast and what does not. Once a decision fairly may be called an editorial judgment I think our cases make it clear that the basis for the judgment is beyond our ken, as we said recently in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 117 (1973), and in Miami Herald Publishing Co. v. Tornillo, No. 73-797, Slip Op. at 13-14. You may, of course, disregard all this.

Regards,

Mr. Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1975

Re: 73-1471 - U. S. v. New Jersey State Lottery Comm.

Dear Lewis:

I did not hear any of the arguments in this case
and I conclude that you should show me as having not
participated.

Regards,



Mr. Justice Powell

Copies to the Conference

Lewis

TB-1471

Tellam

I should be
shown as not
participating in
the consideration
or decision.

WBB

↓

Chief Justice

✓
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Douglas; J.

Circulate: 2/10

Recirculate: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1471

United States et al.,
Petitioners,
v.
New Jersey State Lottery
Commission. } On Writ of Certiorari to the
United States Court of
Appeals for the Third
Circuit.

[February —, 1975]

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I do not believe that this case has become moot—certainly not for the reasons given by the Court. The First Amendment provides that Congress shall make no law abridging the freedom of the press. It is to me shocking that a radio station or a newspaper can be regulated by a court or by a Commission, to the extent of being prevented from publishing any item of "news" of the day. So to hold would be a prior restraint of a simple and unadulterated form, barred by constitutional principles. Can anyone doubt that the winner of a lottery is prime news by our press standards?

In our history, Congress has shown at times an appetite for performing the judicial function of finding people guilty. That is the reason why the Constitution contains Art. I, § 9, cl. 3, which outlaws bills of attainder. See *United States v. Brown*, 381 U. S. 437 (1965); *United States v. Lovett*, 328 U. S. 303 (1946). For Congress to hold that the radio station in the present case was or was not guilty of violating 18 U. S. C. § 1304 would be a flagrant usurpation of Art. III functions.

Our decision should rest not on what Congress has done but on the merits of the controversy, which do not seem to me to be substantial. I would not presume that

To : The Chief Justice
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice White
Mr. Justice Powell
Mr. Justice Rehnquist

From : [Redacted]

Circulated:

2nd DRAFT

Recirculated: 2/21/75

SUPREME COURT OF THE UNITED STATES

No. 73-1471

United States et al.,
Petitioners,
v.
New Jersey State Lottery
Commission. } On Writ of Certiorari to the
United States Court of
Appeals for the Third
Circuit.

[February —, 1975]

MR. JUSTICE DOUGLAS, dissenting.

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Our decision should rest not on what Congress has done but on the merits of the controversy, which do not seem to me to be substantial. I would not presume that

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

January 15, 1975

RE: No. 73-1471 United States v. N.J. Lottery
Commission

Dear Lewis:

I agree and would dismiss as moot.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 20, 1975

RE: No. 73-1471 United States v. N.J. State Lottery

Dear Lewis:

I agree with the Per Curiam you have prepared
in the above.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 31, 1974

Re: No. 73-1471, U.S. v. New Jersey State
Lottery Commission

Dear Lewis,

I am glad to join your opinion for the Court in this case. My joining is conditioned, of course, upon the premise that Congress has not shot our horse out from under us.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1975

No. 73-1471, U.S. v. N.J. Lottery Comm.

Dear Lewis,

I agree with you that in view of the new amendments to the law, this case should now be disposed of as moot. I suppose a Per Curiam containing a brief recital would be in order.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 16, 1975

Re: No. 73-1471, United States v. N. J. State
Lottery Commission

Dear Lewis,

I agree with your proposed per curiam circulated today.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 19, 1975

Re: No. 73-1471, United States v. N. J. State
Lottery Comm'n

Dear Lewis,

I agree with your proposed Per Curiam
as recirculated February 19.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 20, 1975

73-1471

Re: No. ~~72-1371~~ - United States v. New Jersey
State Lottery Comm'n

Dear Lewis:

I agree.

Sincerely,



Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 15, 1975

Re: No. 73-1471 -- United States v. New Jersey Lottery
Comm.

Dear Lewis:

I agree to your suggested dismissal as moot.

Sincerely,



T. M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1975

Re: No. 73-1471 - United States v. New Jersey
State Lottery Commission

Dear Lewis:

I agree that this case has become moot and that
a very short per curiam to the usual effect is indicated.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1974

Re: No. 73-1471 - United States v. New Jersey
State Lottery Commission

Dear Lewis:

Please join me in your per curiam opinion as
circulated on January 16.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 19, 1975

Re: No. 73-1471 - United States v. New Jersey
State Lottery Commission

Dear Lewis:

I am pleased to join your recirculation of February 19.

Sincerely,



Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackman
Mr. Justice Johnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1471

Circulated: DEC 20 1974

Recirculated:

United States et al.,
Petitioners,
v.
New Jersey State Lottery
Commission. } On Writ of Certiorari to the
United States Court of
Appeals for the Third
Circuit.

[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Federal Communications Commission (FCC) has ruled that 18 U. S. C. § 1304 prohibits a licensed radio broadcaster in New Jersey from reporting the winning number in a state lottery which is lawful in that State. We are called upon to decide whether that ruling violates the First Amendment.

I

In 1934, at a time when lotteries were universally illegal in this country,¹ Congress enacted what is now 18 U. S. C. § 1304, which 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

¹ Congress was well aware of this fact. See H. R. Rep. No. 221, 72d Cong., 1st Sess., at 8; S. Rep. No. 1004, 72d Cong., 2d Sess., at 12; S. Rep. No. 1045, 72d Cong., 2d Sess., at 11; 75 Cong. Rec. 3683, 3704.

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

CHAMBERS OF
LEWIS F. POWELL, JR.

January 14, 1975

No. 73-1471 United States v. New Jersey Lottery Comm.

MEMORANDUM TO THE CONFERENCE:

In view of the passage of the attached bill,
the issue in this case is now moot.

I suggest that we dismiss the case on this
ground since nothing remains for decision. I see no
purpose to a remand.

Sincerely,

Enclosure

L. Powell

LIBRARY
SUPREME COURT, U. S.
WASHINGTON, D. C. 20540

Calendar No. 1329

93d CONGRESS
2d SESSION

S. 544

[Report No. 93-1404]

IN THE SENATE OF THE UNITED STATES

JANUARY 23, 1973

Mr. HART (for himself and Mr. GRIFFIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

DECEMBER 18, 1974

Reported by Mr. EASTLAND, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend title 18 of the United States Code to permit the transportation, mailing, and broadcasting of advertising, information, and materials concerning lotteries authorized by law and conducted by a State, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
- 2 *That chapter 61, of title 18 of the United States Code (re-*
- 3 *lating to lotteries) is amended by adding at the end thereof*
- 4 *the following new section:*
- 5 *§ 1307. State-conducted lotteries*
- 6 *“(a) The provisions of sections 1301, 1302, 1303, and*
- 7 *1304 shall not apply to an advertisement, list of prizes, or in-*

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Stanford, California 94305-6000



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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
—Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

STATES Circulated: JAN 16 1975

No. 73-1471

Recirculated:

United States et al.,
Petitioners,
v.
New Jersey State Lottery
Commission. } On Writ of Certiorari to the
United States Court of
Appeals for the Third
Circuit.

[January —, 1975]

PER CURIAM.

This case involves a question regarding the applicability of 18 U. S. C. § 1304, which 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."

Jersey Cape, a licensed radio station in New Jersey, sued for declaratory relief before the Federal Communications Commission arguing that § 1304 should not apply to the broadcast of the winning number in a lawful state-run lottery such as the one conducted by the State of New Jersey. See N. J. Stat. Ann., 5:9-1 *et seq.* The Commission denied relief to the radio station, 30 F. C. C. 2d

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

CHAMBERS OF
VICE LEWIS F. POWELL, JR.

February 11, 1975

No. 73-1471 U.S. v. New Jersey State
Lottery Commission

MEMORANDUM TO THE CONFERENCE:

Since circulating a proposed Per Curiam "mooting" this case, several briefs have been filed addressing the effect of Pub. L. No. 93-583, which became law on January 2, 1975. The SG urges us to vacate and remand the case with direction that it be dismissed as moot (United States v. Munsingwear, 340 U.S. 36). The Attorney General of New Jersey, however, takes a different view, arguing that the case is not moot. New Jersey is now joined in this position by New Hampshire, which apparently is an "intervenor".

The recent amendment to 18 U.S.C. 1304 allows the broadcast of information concerning a state-authorized lottery "by a radio or television station licensed to a location in that state or [to] an adjacent state which conducts such a lottery." The effect of the statutory language is that the total exemption is applicable only in states which have legal state lotteries. Licensees in states which do not have such lotteries remain subject to the original proscription of § 1304.

New Jersey concedes that the amendment takes care of its problem, but urges us to consider the plight of two of the intervenors in the litigation. One of these, the State of New Hampshire, also has filed a brief in opposition to the suggestion of mootness. In its brief, New Hampshire states:

"Vermont, which is adjacent to New Hampshire, does not conduct such a lottery. Thus, the new section may not exempt from the provisions

- 2 -

of 18 U.S.C. 1304 whoever broadcasts by a radio or television station licensed to a location in Vermont any advertisement, list of prizes, or information concerning the New Hampshire state lottery. Without such broadcasts New Hampshire will continue to suffer injury."

New Hampshire therefore urges us to decide the case "on the merits".

Pennsylvania and New Hampshire were granted permission under Rule 15(d) of the Federal Rules of Appellate Procedure to intervene before the Third Circuit (Pet. at 3a, n. 2), which apparently makes them respondents in the pending case. See our Rule 21(4).

We thus have the present situation: the case is certainly moot as to New Jersey, the principal party in this litigation. New Hampshire, an intervenor, claims it is not moot as to it because the state-authorized lottery may suffer from the inability of radio and television stations in Vermont to broadcast information as to the New Hampshire Lottery. Vermont is not a party, and indeed we have no proof of record that there are in fact radio licensees in Vermont that desire to broadcast the New Hampshire lottery winning numbers. I have little doubt that there are such licensees in Vermont, but I am not sure that we should take judicial notice of this fact.

It also is true that the FCC and CA3 considered only the validity of § 1304 as applied to broadcasts within the State of New Jersey, and not to broadcasts originating in a state (e.g. Vermont) which has no state lottery. A somewhat stronger argument could be made by the FCC in the latter case, although I would not think it would change the result of our decision.

In any event, in view of the briefs now filed on the mootness issue, I suggest we discuss this at Friday's Conference.


L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
 Mr. Justice Marshall
Mr. Associate Justice
Mr. Justice Rehnquist

From: Powell, J.

Circulated:

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Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1471

United States et al.,
Petitioners, } On Writ of Certiorari to the
v. } United States Court of
New Jersey State Lottery Appeals for the Third
Commission. } Circuit.

[January —, 1975]

PER CURIAM.

This case involves a question regarding the applicability of 18 U. S. C. § 1304, which 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."

Jersey Cape, a licensed radio station in New Jersey, sued for declaratory relief before the Federal Communications Commission arguing that § 1304 should not apply to the broadcast of the winning number in a lawful state-run lottery such as the one conducted by the State of New Jersey. See N. J. Stat. Ann., 5:9-1 *et seq.* The Commission denied relief. 30 F. C. C. 2d 794. Upon a petition

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 14, 1975

Re: No. 73-1471 - United States v. New Jersey Lottery Comm.

Dear Lewis:

I agree with the disposition of this case which you propose in your letter of January 14th.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1975

Re: No. 73-1471 - U. S. v. New Jersey State Lottery Comm.

Dear Lewis:

Please join me in the per curiam you circulated today.

Sincerely,

WW

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1975

Re: No. 73-1471 - United States v. New Jersey State
Lottery Commission

Dear Lewis:

Please join me.

Sincerely,

WW

Mr. Justice Powell

Copies to the Conference

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