



Office of the Attorney General
Washington, D. C. 20530

February 9, 1996

Honorable Albert Gore, Jr.
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

On February 7, 1996, a lawsuit was filed challenging the constitutionality of a provision of 18 U.S.C. § 1462, as amended by section 507(a)(1) of the Telecommunications Act of 1996. Sanger, et al. v. Reno, Civ. No. 96-0526 (E.D.N.Y.). Yesterday, a second lawsuit was filed, raising the same challenge to § 1462 along with claims that several other provisions of the Telecommunications Act are unconstitutional. American Civil Liberties Union, et al. v. Reno, Civ. No. 96-963 (E.D. Pa.). This letter relates solely to the claims regarding § 1462, as amended. Plaintiffs in both cases allege that § 1462, as amended, violates the First Amendment insofar as it prohibits the interstate transmission of certain communications regarding abortion via common carrier or via an interactive computer service.

This is to inform you that the Department of Justice will not defend the constitutionality of the abortion-related speech provision of § 1462 in those cases, in light of the Department's longstanding policy to decline to enforce the abortion-related speech prohibitions in § 1462 (and in related statutes, i.e., 18 U.S.C. § 1461 and 39 U.S.C. § 3001) because they are unconstitutional under the First Amendment.

In 1981, Attorney General Civiletti informed the Speaker of the House and the President of the Senate that it was the policy of the Department of Justice to refrain from enforcing similar speech prohibitions in two cognate statutes -- 39 U.S.C. § 3001 and 18 U.S.C. § 1461 -- with respect to "cases of truthful and non-deceptive documents containing information on how to obtain a lawful abortion." Letter of Attorney General Benjamin R. Civiletti to the Hon. Thomas P. O'Neill, Jr., at 2 (Jan. 13, 1981). According to the Attorney General, there was "no doubt" that those statutes were unconstitutional as applied to such speech. Id. at 1. The Attorney General left open the possibility that the two statutes might still be applied to certain abortion-related commercial speech. Id. at 3. Two years later, the Supreme Court held that § 3001 cannot constitutionally be applied to commercial speech concerning contraception, at

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least not where the speech in question is truthful and not misleading. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). The holding in Bolger would apply equally with respect to abortion-related commercial speech. See Bigelow v. Virginia, 421 U.S. 809 (1975).

Section 1462 is subject to the same constitutional defect as §§ 1461 and 3001 with respect to its application to abortion-related speech and information.¹ As a result of the Department's conclusion that prosecution of abortion-related speech under § 1462 and related statutes would violate the First Amendment, the Department's longstanding policy has been to decline to enforce those statutes with respect to that speech. What is more, we are not aware of any reported decision reflecting a prosecution of abortion-related speech under § 1462.

Nothing in the Telecommunications Act provides any reason to alter the Department of Justice's nonenforcement policy. In his signing statement yesterday, the President stated:

I . . . object to the provision in the Act concerning the transmittal of abortion-related speech and information. Current law, 18 U.S.C. 1462, prohibits transmittal of this information by certain means, and the Act would extend that law to cover transmittal by interactive computer services. The Department of Justice has advised me of its longstanding policy that this and related abortion provisions in current law are unconstitutional and will not be enforced because they violate the First Amendment. The Department has reviewed this provision of S. 652 and advises me that it provides no basis for altering that policy. Therefore, the Department will continue to decline to enforce that provision of current law, amended by this legislation, as applied to abortion-related speech.

The principal function of § 1462 is to prohibit the interstate carriage of "obscene, lewd, lascivious, . . . filthy . . . [and] indecent" materials. See § 1462(a). The Supreme Court has construed this prohibition to be limited to materials that meet the test of "obscenity" announced in Miller v.

¹ The only material difference between § 1462 and the cognate prohibitions in §§ 1461 and 3001 is that § 1462 regulates interstate "carriage" of information by common carrier, rather than dissemination of that information through the mail. This distinction is not material to the constitutional issue in this context.

California, 413 U.S. 15 (1973).² Congress's express purpose in enacting the amendment to § 1462 in Telecommunications Act § 507 was to "clarify[]" that obscene materials cannot be transmitted interstate via interactive computer services.³ In this respect, § 1462 and its amendment in § 507 are constitutionally unobjectionable, and the Department will continue to enforce § 1462 with respect to the transmittal of obscenity.

However, § 1462 also prohibits the interstate transmission of certain communications regarding abortion. As amended by § 507 of the Telecommunications Act, § 1462 provides, in pertinent part, that it shall be a felony to

knowingly use[] any express company or other common carrier or interactive computer service . . . , for carriage in interstate or foreign commerce [of] . . .

(c) any . . . written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any [drug, medicine, article, or thing designed, adapted, or intended for producing abortion] may be obtained or made.

Thus, on its face, § 1462 prohibits the use of an interactive computer service for "carriage in interstate . . . commerce" of any information concerning "any drug, medicine, article, or thing designed, adapted, or intended for producing abortion."⁴

It plainly would be unconstitutional to enforce § 1462 with respect to speech or information concerning abortion, because the

² See Hamling v. United States, 418 U.S. 87, 114 (1974); United States v. Orito, 413 U.S. 139, 145 (1973); United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 130 n.7 (1973).

³ The Conference Committee on the Telecommunications Act noted that § 507 is intended to address the use of computers to sell or distribute "obscene" material. Joint Explanatory Statement of the Committee of Conference at 77, reprinted in 142 Cong. Rec. H1130 (daily ed. Jan. 31, 1996).

⁴ The Conference Committee Report on the Telecommunications Act explicitly notes that the prohibitions in § 1462 apply regardless of whether the purpose for distributing the material in question is commercial or non-commercial in nature. Joint Explanatory Statement of the Committee of Conference at 77, reprinted in 142 Cong. Rec. H1130 (daily ed. Jan. 31, 1996).

restriction on abortion-related speech is impermissibly content-based. This conclusion is confirmed by the judicial and Executive Branch treatment of similar prohibitions on speech concerning abortion and contraception, contained in two cognate statutes, 39 U.S.C. § 3001 and 18 U.S.C. § 1461. Section 3001 provides that abortion- and contraception-related speech is "nonmailable"; and § 1461 makes such mailing subject to criminal sanctions. In 1972, a district court declared that § 3001 was unconstitutional insofar as it rendered abortion-related speech "nonmailable." Atlanta Coop. News Project v. United States Postal Serv., 350 F. Supp. 234, 238-39 (N.D. Ga. 1972).⁵ The next year, another district court declared both § 3001 and § 1461 unconstitutional as applied to noncommercial speech concerning abortion and contraception. Associated Students for Univ. of California at Riverside v. Attorney General, 368 F.Supp. 11, 21-24 (C.D. Calif. 1973). As the Attorney General later explained to the Congress, the Solicitor General declined to appeal the decisions in Atlanta Coop. News Project and Associated Students "on the ground that 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) were constitutionally indefensible" as applied to abortion-related speech. See Letter of Attorney General Benjamin R. Civiletti to the Hon. Thomas P. O'Neill, Jr., at 2 (Jan. 13, 1981). And, as explained above, in 1981 the Attorney General informed the Congress that the Department of Justice would decline to enforce §§ 1461 and 3001 in cases of truthful and non-deceptive documents containing information on how to obtain a lawful abortion.

Nothing in recent Supreme Court law respecting the First Amendment has affected the conclusions reached by the district courts in Atlanta Coop. News Project and Associated Students, the 1981 opinion of Attorney General Civiletti, or the Supreme Court's decision in Bolger. Indeed, the Supreme Court on several recent occasions has strongly reaffirmed the principle that the First Amendment, subject only to narrow and well-understood exceptions not applicable here, "does not countenance governmental control over the content of messages expressed by private individuals." Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2458-59 (1994) (citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989)).

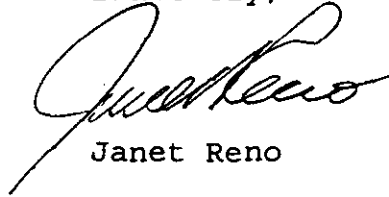
In the Sanger case, Judge Sifton yesterday denied plaintiffs' motion for a temporary restraining order after the United States Attorney represented that the Department's policy is to decline to enforce the pertinent provision of § 1462. Judge Sifton further ruled that a three-judge court hearing on

⁵ That court did not reach the merits of the challenge to the criminal prohibition in § 1461 because the plaintiffs in that case were not threatened with prosecution. Id. at 239.

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any dispositive motions will be convened next month, after briefing. In the ACLU case before Judge Buckwalter, the Government is due to respond to a motion for a TRO on February 14, 1996. In accordance with the practice of the Department, I am informing the Congress that in neither case will the Department of Justice defend the constitutionality of the provision of § 1462 that prohibits speech concerning abortion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet Reno", is written over the typed name.

Janet Reno