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

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July 29, 1986

Stephen Ross, Esq.
Federal Counsel to the Clerk
of the House
Room H-105, United States Capitol
Washington, D.C. 20515

Michael Davidson, Esq.
Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510

Re: United States Postal Service v. Hustler Magazine,
No. 85-560 (D.D.C. March 11, 1986)

Gentlemen:

After much reflection and consultation with your offices, the Department of Justice has determined against seeking Supreme Court review of the above referenced decision by the District Court for the District of Columbia. As you know, that court invalidated on Constitutional grounds the application of 39 U.S.C. 3008 to justify the non-delivery of Hustler Magazine to the offices of Congressmen and Senators, upon their request.

At the outset, one should note that the constitutionality of the statute on its face or as a general matter is not in issue, but only its application to one very special circumstance. Thus, the District Court's decision makes clear that it does not deal with the case of a Senator or Representative who wishes to refuse material at his home. It is my conclusion that the very narrow victory that we might win by further pursuit of this case -- vindication of a Senator's or Congressman's right to refuse to receive obscene material at his office -- is significantly outweighed by the several respects in which further pursuit of the case could prove damaging to all concerned except Mr. Flynt.

While the facial constitutionality of 39 U.S.C. 3008 is well established, Rowan v. United States Post Office Department, 397 U.S. 728 (1970), the propriety of applying the statute to mail sent to the public office of an elected representative is at least not free from doubt. Arguably present in this context and absent in Rowan is the First Amendment right to petition the government. Thus, while our position is a credible one, it is possible that we would not prevail, and, more seriously, that a precedent more generally damaging to the effectiveness of Section 3008 could result.

Even if we do prevail, we will have won at best a hollow victory. The issue in the case having been narrowed to the propriety of refusing Hustler Magazine, Mr. Flynt is in a position, even if we win, to send to Congressional offices something other than Hustler Magazine -- perhaps something which purports to be a petition or complaint -- but which is or has material appended to it which is no less offensive than the magazine alone. That case would be still closer on the merits than this, and one in which the risks of pursuing the issue to the Supreme Court would be correspondingly greater.

Finally, one can not discount the extent to which a return visit to the Supreme Court would be just what Mr. Flynt would like, and just what we, the Justices, and, I expect, the legislators, would not like. His behavior during his Supreme Court appearance several years ago was widely publicized and distinctly unedifying.

Obviously, this decision is the result of a legal judgment and certainly indicates no support for Mr. Flynt or Hustler Magazine, nor any lack of sympathy for congressmen who must suffer the imposition of this material.

Should you wish to consider intervention in the case pursuant to 2 U.S.C. 288e, you should be aware that, after one extension, any Jurisdictional Statement must be filed no later than August 6, 1986.

Sincerely,

Edwin Meese III

Edwin Meese III
Attorney General