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

January 13, 1981

Honorable Walter F. Mondale
President of the Senate
United States Senate
Washington, D.C. 20510

My dear Mr. President:

Public Law No. 96-397, by incorporating § 21 of Public Law No. 96-132, 93 Stat. 1049, requires me to "transmit a report to each House of the Congress" in any case in which I establish "a policy to refrain from the enforcement of any provision of law enacted by the Congress, the enforcement of which is the responsibility of the Department of Justice, because of the position of the Department of Justice that such provision of law is not constitutional." I believe that federal court decisions leave no doubt that, at least in certain circumstances, 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) are not constitutional, and I have established a policy to refrain from enforcing them in those circumstances.

The relevant provisions of 18 U.S.C. § 1461 make it a federal crime to mail or deliver: (a) "[e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion . . . ."; (b) "[e]very written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed"; (c) "[e]very paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion . . . ."; and (d) "[e]very description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing . . . ." Persons violating this statute are subject to a $5,000 fine or a term of imprisonment not to exceed five years. The relevant provision

of 39 U.S.C. § 3001(e) prohibits the mailing of any "unsolicited advertisement of matter which is designed, adapted, or intended for preventing contraception," except to a manufacturer, physician, dealer, and certain other employees in the medical field.

At least in cases of truthful and non-deceptive documents containing information on how to obtain a lawful abortion, I believe that there is no doubt that 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) are unconstitutional under the First Amendment. It is well established that the Government cannot base access to a forum--including the mails--on whether it approves of the particular message to be sent. As the Supreme Court stated in 1972, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny it to those wishing to express less favored or more controversial views . . . . Selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone." Police Department v. Mosley, 408 U.S. 92, 95-96 (1972). These principles were recently reiterated in Carey v. Brown, 100 S.Ct. 2286, 2291 (1980). It follows that the Government may not deny access to the mails on the ground that it disapproves of the message communicated, unless that message is directed to inciting and likely to incite imminent lawless action, Brandenburg v. Ohio, 395 U.S. 444 (1969), or falls within some exception to First Amendment doctrine.

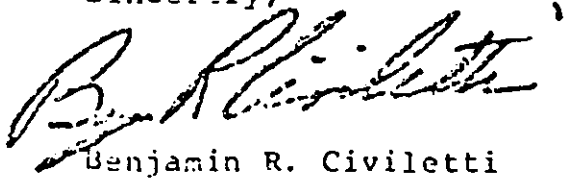
Two three-judge district courts have invalidated 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) under the First Amendment. Noting that the "use of the mails is an important and necessary element of the First Amendment right of free speech," id. at 21, and that the decision whether to procure an abortion is constitutionally protected under Roe v. Wade, 401 U.S. 113 (1973), one court concluded that no sufficient government interest justified the statute, at least with respect to non-commercial mailings. Associated Students, U. of Cal. at Riverside v. Attorney General, 368 F. Supp. 11 (C.D. Cal. 1973). The same result was reached in Atlanta Cooperative News Project v. United States Postal Service, 350 F. Supp. 234 (N.D. 1972). The Solicitor General declined to appeal both of these cases on the ground that 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) were constitutionally indefensible. See also The Stute et al. v. Kleindienst, et al., Civ. No. 1326 (U.S.D.C. D. N.J., April 2, 1973), a case which the Postal Service settled by agreeing not to enforce the relevant statutes. There is no recent decision even arguably contrary to Associated Students, and I am aware of no action taken under the pertinent provisions of § 1461 and § 3001(e)

at least since the decision in Roe v. Wade.

Moreover, after a series of Supreme Court decisions affording constitutional protection to commercial speech, it is plain that the mailing of truthful and non-deceptive information concerning abortion is constitutionally protected even if the documents mailed are sold rather than given to the general public. See Bigelow v. Virginia, 421 U.S. 89 (1975) (reversing conviction of newspaper editor who had violated Virginia statute by publishing an advertisement for an abortion referral service in New York). See generally Central Hudson Gas v. Public Service Com'n of N.Y., 100 S.Ct. 2343 (1980); Bates v. State Bar of Arizona, 433 U.S. 35 (1977); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1975). These decisions suggest, however, that 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) may be constitutional when a sufficiently substantial governmental interest is at stake, as for example when the information to be mailed is demonstrably false or when it is designed to encourage illegal activity. Such cases would raise more difficult constitutional questions, but I would not rule out bringing prosecutions in appropriate circumstances.

I should like to conclude by reiterating my belief that the Attorney General is obliged to defend the constitutionality of Acts of Congress in all but the most unusual circumstances. I also believe, however, that the Department of Justice, in allocating the scarce resources available to it, may decline to institute prosecutions under a statute that is patently or transparently unconstitutional in light of federal decisions that are both unassailable under current law and indistinguishable from the cases at hand. In such situations, the Executive's independent obligation to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, permits the Attorney General not to initiate criminal prosecutions that will undoubtedly prove unsuccessful on constitutional grounds. For reasons stated above, I believe that I have followed this approach in the case of 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e).

Sincerely,



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