



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

July 13, 2011

The Honorable John A. Boehner  
Speaker  
United States House of Representatives  
Washington, DC 20515

Re: *United States v. Scott A. Holencik*, No. 10-00017-VAP (C.D. Cal.)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that in this criminal case pending in the United States District Court for the Central District of California, the Department of Justice has decided not to appeal the district court's dismissal of four misdemeanor counts of unauthorized disclosure of information, in violation of 18 U.S.C. 1905. Although the district court characterized its ruling as a determination that Section 1905 is unconstitutional as applied to the defendant's alleged conduct, the court's holding is essentially statutory (not constitutional) in nature. Moreover, appeal of that non-precedential ruling would risk more damaging adverse precedent, and further prosecution of the defendant on the Section 1905 counts would require reindictment in light of other defects. For those reasons, the government has decided to proceed only on the remaining two felony counts of making false statements, in violation of 18 U.S.C. 1001, on which the government's proof is considerably stronger.

Defendant, a federal prison warden, posted on the Internet four statements relating to ongoing investigations at the prison. After initially denying responsibility for the posts to federal agents, defendant eventually admitted that he had made them. A grand jury indicted defendant on two felony counts of making false statements, in violation of 18 U.S.C. 1001; and four misdemeanor counts of unauthorized disclosure of information, in violation of 18 U.S.C. 1905. Section 1905, entitled "Disclosure of confidential information generally," prohibits "an officer or employee of the United States" from disclosing without authorization "any information coming to him in the course of his employment or official duties \* \* \* , which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association."

In an unpublished minute order, the district court granted the defendant's motion to dismiss the Section 1905 counts. Relying on the Fifth Circuit's decision in *United States v. Wallington*, 889 F.2d 573 (1989), the court held that, to avoid facial invalidity under the First Amendment, Fifth Amendment, or both, "the statute necessarily must be interpreted to prohibit only the disclosure of information deemed confidential pursuant to an official policy of the agency \* \* \* , or by statute or regulation." The court found that the government had failed to identify an official agency policy or a statute or regulation deeming confidential the information at issue. The court then stated, without further explanation, that Section 1905 is "unconstitutionally vague and overbroad as applied in this case."

In dismissing the Section 1905 counts, the district court may have interpreted Section 1905 too narrowly as prohibiting only disclosure of information deemed confidential pursuant to a formal written policy. But the court's resolution of that issue, even if influenced by the canon of constitutional avoidance, involves a question of statutory construction. The district court's determination that the government had not proffered a sufficient policy of confidentiality is thus more accurately viewed as a determination that an element of the statute could not be satisfied, not as a determination that the statute is unconstitutional as applied in this case.

Not only is the district court's unpublished ruling essentially statutory in nature, it is also non-precedential. See, e.g., *Camreta v. Green*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1][d], at 134-26 (3d ed. 2011)). An appeal on the facts of this case would risk a more damaging circuit precedent.

Moreover, even if the government were to prevail on appeal, further prosecution of the Section 1905 counts would require reindictment. Those counts, as currently indicted, allege the unauthorized disclosure of information of "the Bureau of Prisons" (Indictment 4-7), not of information of "any person, firm, partnership, corporation, or association" (18 U.S.C. 1905). Because the Bureau of Prisons likely does not qualify as a "person, firm, partnership, corporation, or association," Section 1905 does not appear to cover the indicted conduct. And it is unclear whether the government could prove a violation of Section 1905 on the facts of this case if it were reindicted under a theory covered by the statute.

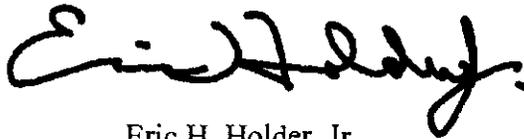
Finally, it would be more efficient for the government to proceed forthwith on the remaining two counts of the indictment for making false statements, in violation of 18 U.S.C. 1001. In contrast to the Section 1905 misdemeanor counts, those are felony charges that carry more substantial penalties and that the government has a greater likelihood of proving at trial.

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The court of appeals has granted a stay of proceedings until August 15, 2011, at which time the government would have to file a brief or a further motion.

Please let me know if we can be of further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", written in a cursive style.

Eric H. Holder, Jr.  
Attorney General