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## Doctor Loses Bid to Force Federal Prosecutors to Retract Press Release

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By JACOB GERSHMAN CONNECT



— Associated Press

It's not uncommon for defense attorneys to complain, unfairly or fairly, about prosecutors defaming their clients in public statements outside the courtroom.

**A ruling handed down** by a federal appeals court Tuesday shows how hard it is to legally compel the government to run a correction.

The case in question stretches back six years to 2009 when a jury **convicted** former InterMune CEO W. Scott Harkonen of wire fraud for making allegedly false and misleading statements in a press release about the effectiveness of the biotech company's Actimmune drug in treating patients with a fatal lung disease.

Dr. Harkonen claims the Department of Justice's **press release on the verdict** contained reputation-damaging errors about the **very press release** that got him in legal trouble. (This case isn't short on irony.)

In court papers, Dr. Harkonen alleged that the Justice Department's press release falsely stated that he "lied to the public about the results of a clinical trial." To the contrary, he says, the government at trial repeatedly "conceded...that no test results were falsified, that the numbers in the press release were accurately stated, and that Dr.

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The Law Blog covers the legal arena's hot cases, emerging trends and big personalities. It's brought to you by lead writer **Jacob Gershman** with contributions from across The Wall Street Journal's staff. Jacob comes here after more than half a decade covering the bare-knuckle politics of New York State. His inside-the-room reporting left him steeped in legal and regulatory issues that continue to grab headlines.



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Harkonen was prosecuted solely for the conclusions drawn from those results.”

At first Dr. Harkonen tried to get the Justice Department to correct its press release by filing requests directly with the agency. He invoked a 2000 law passed by Congress, **called the Information Quality Act**, also known as the Data Quality Act.

The law is supposed to ensure “quality, objectivity, utility, and integrity” of information disseminated to the public, and it sets up a process for allowing people to correct information that falls short of that standard.

After getting nowhere with the agency, according to court papers, Dr. Harkonen **took the government to court** in 2012, accusing the Justice Department of improperly denying his retraction demands.

The Justice Department argued that it was under no obligation to correct press releases, even ones that are allegedly false or defamatory.

In its ruling, the Ninth U.S. Circuit Court of Appeals said that without a statutory provision, principles of sovereign immunity bar individuals from suing the federal government for publishing something defamatory, absent a statutory provision that says otherwise.

So, the question in the case became whether the Information Quality Act gives the public the right to seek corrections of press releases.

The Ninth Circuit said the wording in the original statute is ambiguous, leaving it up to agencies to decide if press releases are correctable. As such, the court declined to strike down guidelines issued by the Office of Management and Budget and the Department of Justice that explicitly exclude information published in press releases.

“Congress left a gap in the [Information Quality Act] for OMB and DOJ to fill regarding the definition of ‘disseminated,’” wrote Ninth Circuit Judge **John T. Noonan, Jr.** “This analysis leads to the conclusion OMB’s and DOJ’s exclusion of press releases was not arbitrary and capricious, or manifestly contrary to the statute.”

The court’s 3-0 decision affirmed a lower-court ruling.

An attorney for Dr. Harkonen, Mark E. Haddad, said the Ninth Circuit was wrong to “read such an exception into” the Information Quality Act.

“A press release is clearly information disseminated by a federal agency,” Mr. Haddad told Law Blog. “It falls within the plain terms of the act.” He said he and his client are considering appeal options.

A spokesman for the U.S. Attorney’s Office in San Francisco, which prosecuted the case, declined to comment.

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