



U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin



**EXECUTIVE
OFFICE FOR
UNITED
STATES
ATTORNEYS**

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COMMENDATIONS

United States Attorney RAYMOND J. DEARIE and Assistant United States Attorneys LARRY J. ZWEIFACH, DIANE F. GIACALONE, BRIAN E. MAAS, AND ALLYNE R. ROSS, Eastern District of New York, were commended by Mr. Ronald C. Whitney, Regional Chief Postal Inspector, U.S. Postal Service, for their contributions in the formulation and presentation of the "Practical and Legal Considerations in a Criminal Investigation" seminar. Their professionalism and knowledge were communicated in their oral presentations to those in attendance in an efficient, interesting, and informative fashion.

Assistant United States Attorney PAUL J. JOHNS, District of Nevada, was commended by Mr. Clifford G. Shane, Regional Food and Drug Director, Department of Health and Human Services, Food and Drug Administration, for his outstanding performance and cooperation in the handling of the recent seizure of "look alike" drugs, consisting of approximately 14 tons of drugs or 30,000,000 dose units.

Assistant United States Attorney ROBERT C. WEAVER, District of Oregon, was commended by Mr. Peter J. Rumore, Assistant Regional Commissioner, Internal Revenue Service, for his outstanding work in the prosecution of Charles Block, a case involving an illegal tax shelter.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Availability and Purpose of the Clearinghouse Section

Many Assistant United States Attorneys have developed ideas or expertise in certain areas of law or are aware of local judicial precedents that could be of help to others but which have not been communicated to attorneys outside their offices. In an attempt to encourage an exchange of such information, a section of the U.S. Attorneys' Bulletin has been set aside for use as a clearinghouse or readers' exchange of information useful to all Assistant United States Attorneys, as well as attorneys within the litigating divisions.

Readers who develop a particular technique with respect to investigation, preparation of indictments, preparation of exhibits, or any other advocacy skills or techniques or who become aware of local judicial precedents which may be of assistance to other Department attorneys are invited to communicate such information for publication in the Clearinghouse Section of the U.S. Attorneys' Bulletin. In this way, the Bulletin can be an effective means of exchanging valuable information that will be of assistance to all readers. Material for inclusion in the Bulletin should be addressed to United States Attorneys' Bulletin Staff, Legal Services, Executive Office for United States Attorneys, Room 1629-Main Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530.

(Executive Office)

Department of Treasury's Right To Recover Benefit Payments
Erroneously Paid

The Department of Treasury's right to recover benefit payments erroneously paid has been and is currently the subject of considerable litigation. These cases typically arise when a surviving spouse or other individual negotiates checks paid after the death of the beneficiary. The government has received favorable decisions in two recent cases, Powderly v. Schweiker, 704 F.2d 1092 (9th Cir. 1983), and Dockstader v. Miller, 719 F.2d 327 (10th Cir. 1983). In addition, Treasury's right under recently promulgated regulations, 31 C.F.R. 240.6 and 240.7, 48

Fed. Reg. 49014 (Oct. 24, 1983), to offset unpaid reclamation amounts from other indebtedness due presenting banks has been challenged in at least one district court and will likely be challenged in other courts as well. Should cases raising these issues arise in your district, we ask that you contact at your earliest opportunity Dennis G. Linder (Telephone: FTS 633-3314) in the Civil Division of the Department of Justice and Jordon Luke, Assistant General Counsel (Enforcement and Operations), Department of Treasury, Washington, D.C. 20220.

(Civil Division)

Teletypes To All United States Attorneys

A listing of the teletypes sent during the period from February 27 through March 9, 1984, is attached as an appendix to this issue of the Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari with the Supreme Court on or before February 21, 1984, in United States v. Cassity. The issues are: (1) whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals and equipment that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home; and (2) whether, under Federal Rules of Criminal Procedure 12, Cassity's codefendants, who did not seek suppression of the fruits of the beeper surveillance prior to trial, may raise the beeper issue for the first time on appeal.

A petition for a writ of certiorari with the Supreme Court on or before February 27, 1984, in Heckler v. Kuehner. The issues are: (1) whether 42 U.S.C. §405(h) precludes the bringing of an action under 28 U.S.C. §1331 against state officials who administer the disability program on behalf of the Secretary of Health and Human Services; and (2) whether plaintiffs must exhaust their administrative remedies before bringing an action under 42 U.S.C. §405(g) and 28 U.S.C. §1361 to challenge the Secretary's policies in terminating disability benefits.

A direct appeal to the Supreme Court on or before March 20, 1984, in Ruckelshaus v. Union Carbide Agricultural Products Co. The issues are: (1) whether the arbitration provision in the Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. §136, et seq., is constitutional; (2) whether the issue of constitutionality is ripe for adjudication; and (3) whether the relief granted by the district court is too broad.

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Ganadera Industrial, S.A., v. John R. Block, No. 82-2366
(D.C. Cir. Feb. 7, 1984). D.J. #98-16-31.

D.C. CIRCUIT UPHOLDS BAN ON IMPORTATION
OF MEAT FROM COSTA RICAN PLANT.

This is the first challenge by a foreign national to an import ban imposed by the Secretary of Agriculture under the Federal Meat Inspection Act, 21 U.S.C. 601, et seq. The Secretary of Agriculture revoked plaintiff's authorization to import meat and meat food products into this country from plaintiff's Costa Rican meat processing plant. The Secretary took this action because of concern that adulterated and misbranded meat was entering this country. The Secretary proceeded under regulations which provide no notice nor opportunity for a hearing at any time for the banned plant.

Plaintiff sued seeking reinstatement of the authorization which had been worth \$10 million per year to it. The district court found that the Secretary's action met the requirements of the Administrative Procedure Act, the Federal Meat Inspection Act and a treaty between the United States and Costa Rica. The court ruled that the danger to public health warranted revocation of the import authorization prior to a hearing. Plaintiff appealed.

The court of appeals upheld the Secretary's action in its entirety. The court found that the Secretary's action was in accordance with law and neither arbitrary nor capricious. The court ruled that the absence of notice and a hearing was permissible because the import authorization did not create a property interest protected by the due process clause.

Attorneys: Michael Hertz
FTS 633-3602

Susan Sleater
FTS 633-3925

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

New England Apple Council v. Donovan, (1st Cir. Jan. 18, 1984). D.J. # 145-10-1349.

FIRST CIRCUIT HOLDS THAT NAMES OF
INVESTIGATIVE AGENTS IN THE LABOR
DEPARTMENT'S OFFICE OF THE INSPECTOR
GENERAL FALL WITHIN EXEMPTION 7(C) OF
THE FREEDOM OF INFORMATION ACT.

In 1979-80, the Labor Department participated in a criminal investigation into the activities of the New England Apple Council, a trade association of east coast apple growers. Criminal charges were, however, never brought. Subsequently, the New England Apple Council made a FOIA request for documents in the possession of the Labor Department concerning this criminal investigation. Some documents were released, but the Labor Department deleted the names of the Office of Inspector General investigative agents who had participated in the investigation, as well as the names of individuals who had provided information during the course of the investigation.

The district court ordered release of the names of the investigative agents and the name of one of the individuals who had provided information. The First Circuit has just reversed the district court's order requiring disclosure. The court first held that exemption 7(C) (which protects against unwarranted invasions of privacy) protects the identity of these agents. In reaching this result, the court relied on the decisions of other circuits holding that exemption 7(C) permits withholding of the identity of FBI agents. Additionally, the court held that the name of the individual who had provided information to the Labor Department was properly withheld under exemption 7(C). In so doing, the court joined the other circuits that have held that exemption 7(C) may be a basis for withholding the identity of an individual who provided information during the course of a law enforcement investigation. The case is especially important because it is the first extending the protection afforded FBI agents under exemption 7(C) to other law enforcement agents, and thus should be helpful in future litigation concerning the privacy protections afforded law enforcement officials.

Attorneys: Leonard Schaitman
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Nicholas Zeppos
FTS 633-5431

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Mayoral, et al. v. The Jeffco American Baptist Residences, Inc. and the U.S. Dept. of Housing and Urban Development,
Nos. 81-2108 & 81-2167 (10th Cir. Feb. 6, 1984). D.J. # 145-17-3182.

TENTH CIRCUIT UPHOLDS HUD AUTHORITY
REGARDING MANDATORY MEAL PLANS.

Section 8 of the United States Housing Act provides that participating tenants may not be charged more than 30 percent of their income for rent. Eaton Terraces, a church-sponsored project for the elderly, instituted a mandatory meal program requiring all tenants to purchase at least 24 meals per month in the project's dining room. This program was designed to ensure good nutrition and social contact, and it was made mandatory after a voluntary program resulted in large economic losses because of low tenant utilization.

The tenants sued the project sponsor and HUD, which had approved the program, and argued that the mandatory meal charge was "rent" for purposes of the 30 percent ceiling of Section 8. The district court agreed and enjoined implementation of the program unless HUD subsidized the meal charges under Section 8.

On our appeal the Tenth Circuit reversed. It held that, even though payment of the meal charges was a requirement for occupying the project, they were not "rent." The court deferred to HUD's construction that "rent" is limited to charges for shelter.

Attorneys: Anthony Steinmeyer
FTS 633-3388

Bruce G. Forrest
FTS 633-3542

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell
SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES
FEBRUARY 2, 1984 - FEBRUARY 29, 1984

HIGHLIGHTS

The President's Entire Anti-Crime Legislative Package Has Now Passed the Senate. Following Senate passage (91-1) on February 2 of the Comprehensive Crime Control Act, S. 1762, the Senate proceeded to the remaining anti-crime legislation.

On February 6, the Senate passed S. 1763 (habeas corpus reform) by a vote of 67-9. On February 7, the Senate passed S. 1764 (exclusionary rule) by a vote of 63-24. The Senate passed the death penalty bill, S. 1765 on February 22 by a vote of 63-32.

Missing Children's Assistance Act (S. 2014). On February 21, Assistant FBI Director Oliver B. Revell testified before the Senate Judiciary Subcommittee on Juvenile Justice concerning the FBI's implementation of the Missing Children Act of 1982. The Department declined to provide a witness to testify on S. 2014, as our position on the bill is still under review within the Administration. Consequently, Subcommittee Chairman Spector has requested Department testimony regarding S. 2014 on March 8. S. 2014 would reauthorize the Juvenile Justice and Delinquency Prevention Act and add new provisions intended to provide federal assistance in locating missing children.

D.C. Judges. On February 22, the House passed the Senate bill authorizing the creation of seven additional Superior Court judges for the District of Columbia. However, the bill returns to the Senate for approval of a House-added amendment giving the D.C. Judicial Nomination Commission an additional sixty days to send the three names for each vacancy to the President. Senate approval is, at the moment, virtually certain.

Hearing on Law Enforcement Coordinating Committees (LECC's). On February 28, the House Government Operations Subcommittee on Government Information, Justice and Agriculture chaired by Glen English held a hearing on the LECC Program. Associate Attorney General Lowell Jensen testified before the Committee. He stressed that the

response of the state and local law enforcement community to this initiative has been excellent and that its achievements to date far outpace similar efforts in the past by previous Administrations.

S. 979 - Export Administration Act. S. 979 contains a provision which, apparently inadvertently, would restrict the government's ability to inspect containers and packages at the point of exit so as to determine whether the export control laws have been violated. The Department has submitted an amendment which would alleviate this problem. Senate action on S. 979 is imminent.

Terrorism Hearing. On February 8, FBI Director Webster testified before the House Judiciary Subcommittee on Civil and Constitutional Rights concerning domestic security measures related to terrorist activities. The Director's testimony outlined FBI actions taken to deal with terrorism including successful terrorism investigations by the FBI and other law enforcement agencies and coordination with other agencies with regard to special events such as the Summer Olympics, the Worlds Fair, and the Democratic and Republican National Conventions.

Inspector General. The House of Representatives has passed H.R. 3625, a bill to extend the Inspector General Act of 1978 to the Departments of Justice and Treasury. The Department opposes strongly H.R. 3625 as passed by the House as it would disrupt the core functions of the Department and undermine the accountability of the Department's officials.

Antitrust/Small Business. On February 7, J. Paul McGrath, Assistant Attorney General, Antitrust Division, appeared before the Senate Small Business Committee. Mr. McGrath discussed antitrust enforcement policy and its relationship to small business.

Federal Rules of Criminal Procedure

Rule 11. Pleas

Because of his categorical rule not to accept single count pleas to multiple count indictments, the district court judge refused to approve defendant's plea bargain to one count. Defendant then pled guilty to two counts of armed bank robbery. On appeal, defendant argues that the rejection of his plea agreement exceeded the district court's authority under Rule 11, which sets forth procedures for judicial scrutiny of guilty pleas.

The Court of Appeals held that categorical rules for charge bargains are impermissible. The very fact that the rule grants discretion requires that it be exercised, which such a categorical rule precludes. The judiciary should remain independent of executive affairs, and charging decisions are generally within the prosecutor's exclusive domain. In addition, the Federal Rules themselves suggest that courts must show proper respect for prosecutorial choices; while Rule 11 grants the courts broad discretion with regard to plea bargains, Rule 48(a) governs prosecutorial charging decisions and gives the courts only a limited supervisory power over such decisions. The trial court must examine the propriety of the charge bargain in this particular case and set forth its decision on the record.

(Vacated and remanded.)

United States v. Robert James Miller, 722 F.2d 562
(9th Cir., December 28, 1983)

Federal Rules of Criminal Procedure

Rule 48(b). Dismissal. By court.

Two years after being arrested for conspiring to manufacture methamphetamine, a complaint which was later dismissed, defendants were indicted for drug related offenses arising out of the same events. From a denial of their motion for dismissal based on preindictment delay, defendants contend that the district court abused its discretion under Rule 48(b) which provides for dismissal if there is unnecessary delay in presenting the charge to the district court. Defendants argue, inter alia, that the delay time should be measured from the earlier arrest. Defendants further contend that the four-prong test prescribed in Barker v. Wingo, 407 U.S. 514 (1972) for determining a violation of the Sixth Amendment right of a speedy trial should be applied and that proffered evidence of personal hardship caused by delay should be admitted.

Since the defendants did not show prejudice to their ability to defend themselves or establish that the delay was intentional and designed as a tactical advantage, the Court of Appeals held that dismissal under Rule 48(b) or under the Sixth Amendment is unwarranted. The court cited U.S. v. MacDonald, 456 U.S. 1, (1982) where the Supreme Court stated that the Sixth Amendment right to a speedy trial does not apply to the period between the dismissal of charges and the institution of new charges. The court recognized the application of Barker to Rule 48(b) cases but refused to apply it when the defendants were not incarcerated or subject to heavy bail requirements. Regarding the evidence, the court noted that the defendants, like the defendant in MacDonald, were in the same position as if no charges had been made and therefore the district court properly excluded the evidence.

(Affirmed.)

United States v. Sabatino Ciammitti, 720 F. Supp
927 (6th Cir., November 7, 1983)

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

Teletypes To All United States Attorneys

- 03/01/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Order OBD-2110, Which is a Final Draft for the Direct Deposit of Cash Collections"
- 03/01/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Personnel Office Service Questionnaire"
- 03/01/84--From Sarah Evans Barker, United States Attorney, Southern District of Indiana, re: "Investigation of Arson/Tax RICO"
- 03/01/84--From William A. Kolibash, United States Attorney, Northern District of West Virginia, re: "Prosecution of RICO and the CCE Case"
- 03/05/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Videotape of President Reagan with United States Attorneys"
- 03/06/84--From J. Alan Johnson, Chairman, Attorney General's Advisory Committee of United States Attorneys, re: "Polling Circuits by Members of Committee"
- 03/07/84--From Richard K. Willard, Acting Assistant Attorney General, Civil Division, re: "Fourth Update Regarding Nationwide Injunction Against Farmer Program Foreclosures by Farmers Home Administration in Coleman v. Block, Civ # Al-83-47 (District of North Dakota)"

UNITED STATES ATTORNEYS' LIST

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Alabama, N	Frank W. Donaldson
Alabama, M	John C. Bell
Alabama, S	J. B. Sessions III
Alaska	Michael R. Spaan
Arizona	A. Melvin McDonald
Arkansas, E	George W. Proctor
Arkansas, W	W. Asa Hutchinson
California, N	Joseph P. Russoniello
California, E	Donald B. Ayer
California, C	Robert C. Bonner
California, S	Peter K. Nunez
Colorado	Robert N. Miller
Connecticut	Alan H. Nevas
Delaware	Joseph J. Farnan, Jr.
District of Columbia	Joseph E. diGenova
Florida, N	W. Thomas Dillard
Florida, M	Robert W. Merkle, Jr.
Florida, S	Stanley Marcus
Georgia, N	Larry D. Thompson
Georgia, M	Joe D. Whitley
Georgia, S	Hinton R. Pierce
Guam	David T. Wood
Hawaii	Daniel A. Bent
Idaho	Guy G. Hurlbutt
Illinois, N	Dan K. Webb
Illinois, S	Frederick J. Hess
Illinois, C	Gerald D. Fines
Indiana, N	R. Lawrence Steele, Jr.
Indiana, S	Sarah Evans Barker
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Iowa, S	Richard C. Turner
Kansas	Benjamin Burgess
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Kentucky, W	Ronald E. Meredith
Louisiana, E	John Volz
Louisiana, M	Stanford O. Bardwell, Jr.
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	J. Frederick Motz
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Michigan, W	John A. Smietanka
Minnesota	James M. Rosenbaum
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Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich

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Nevada	Lamond R. Mills
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New Jersey	W. Hunt Dumont
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	Rudolph W. Giuliani
New York, E	Raymond J. Dearie
New York, W	Salvatore R. Martoche
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North Carolina, M	Kenneth W. McAllister
North Carolina, W	Charles R. Brewer
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Ohio, S	Christopher K. Barnes
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Oklahoma, E	Gary L. Richardson
Oklahoma, W	William S. Price
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Pennsylvania, E	Edward S. G. Dennis, Jr.
Pennsylvania, M	David D. Queen
Pennsylvania, W	J. Alan Johnson
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	Henry Dargan McMaster
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Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
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Texas, S	Daniel K. Hedges
Texas, E	Robert J. Wortham
Texas, W	Edward C. Prado
Utah	Brent D. Ward
Vermont	George W. F. Cook
Virgin Islands	James W. Diehm
Virginia, E	Elsie L. Munsell
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	David A. Faber
Wisconsin, E	Joseph P. Stadtmueller
Wisconsin, W	John R. Byrnes
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North Mariana Islands	David T. Wood