

United States Attorneys Bulletin



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UNITED STATES DEPARTMENT OF JUSTICE

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APPENDIX: FEDERAL RULES OF CRIMINAL PROCEDURE

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These pages should be placed on permanent file, by Rule, in each United States Attorney's office Library.

Citations for the slip opinions are available on FTS 739-3754.

APPENDIX: FEDERAL RULES OF EVIDENCE

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These pages should be placed on permanent file, by Rule, in each United States Attorney's office Library.

Citations for the slip opinions are available on FTS 739-3754.

COMMENDATIONS

Assistant United States Attorney Michael L. Schleich, District of Nebraska, has been commended by Clarence M. Kelly, Director, Federal Bureau of Investigation, for the successful prosecution in United States v. John Sutton and Tom Buffington an interstate transportation of stolen property case which resulted in a criminal forfeiture of the defendants business.

Assistant United States Attorney Ed Kolker, Southern District of California, has been commended by Dorothy Kulig, Director of Litigation, Administrator of National Banks, for his excellent brief in the case of F.D.I.C. v. I.N.A. v. United States, a complex bank failure suit.

Assistant United States Attorney Michael Lipman and his secretary Michelle Dunn, Southern District of California, have been commended by John Traczyk, Office of Program Integrity, Department of Health, Education and Welfare, for their efforts in the case United States v. Boyer, et.al.

Assistant United States Attorney Jack Kane, Eastern District of Virginia, has been commended by William B. Cummings, United States Attorney, and Captain Kurzenhauser, Commander, Norfolk Naval Shipyard for his successful prosecution of a fraudulent hearing loss claim.

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POINTS TO REMEMBER

UNITED STATES ATTORNEY APPOINTMENTS

The following Presidentially-appointed United States Attorneys have entered on duty. The Executive Office staff takes this opportunity to extend its hearty welcome.

<u>DISTRICT</u>	<u>UNITED STATES ATTORNEY</u>	<u>ENTERED ON DUTY</u>
Nebraska	Edward G. Warin	1/3/78
California, S.	Michael H. Walsh	1/3/78
Oklahoma, E.	Julian Fite	1/3/78
Arkansas, W.	Larry R. McCord	1/4/78

(Executive Office)

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REVISED FORM 792 (REPORT ON CONVICTED PRISONER BY U.S. ATTORNEY)

The Department has issued a revised form 792 for completion by prosecuting attorneys in cases where a defendant is given a sentence of more than one year (and is thus eligible for parole). Completion of the form ensures that the Parole Commission is given a concise, accurate account of the offense behavior which led to the conviction, and of any other circumstance (mitigating or aggravating) which should be made known to the Commission. It is especially important that the Commission be apprised of the specific data it needs for decision making under its guidelines (dollar values involved, drug amounts, extent of a conspiracy, etc.). In addition, the new form contains precise instructions permitting a decision as to pre-hearing disclosure of this form under Title 18 U.S.C. Code, section 4208(c). All Assistant United States Attorneys are urged to complete the report as an essential, concluding step in a just prosecutorial effort.

Additional explanatory information on the use of this form may be found in the U.S. Attorneys' Manual, Title 9-34.220.

The new form will be available from stock, on or about February 15, 1978. Old forms should be disposed of.

(Executive Office)

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ATTENTION! SYSTEM IMPROVEMENTS: Beginning Monday, February 6, JURIS will search only the opinion portion of cases in the F2D, FSUP, US, and SLIPS files unless the user instructs otherwise in the search expression. (Until now, the entire case was routinely searched, with the exception of headnotes). This system modification will reduce search time and increase the efficiency of research.

Other sections of cases can be searched using segments similar to those previously available. Depending on the file selected, any or all of the following segments can be searched:

CITE	Case name, volume, and page numbers
DATE	Case dates (date argued, decided, etc.)
CIRCUIT	Circuit where case decided (F2D files only)
COURT	Court where case decided
MISC	Combines CITE, DATE, CIRCUIT, and COURT segments and includes the style of the case, case syllabus, and attorney names
HDNTS	West headnote paragraphs and key numbers
OPINION	Majority, concurring, and dissenting opinions
ALLSEGS	Combination of all segments listed above (entire case)

Press DISPLAY SEGMENTS for a list of segment names and descriptions with sample search expressions.

NEW FILES: Many new files have been added to the JURIS database during the past few months.

In the CASELAW file group, District Court cases and slip opinions from the District Courts and Circuit Courts of Appeals are now available. FSUP files contain District Court cases from January, 1970 to edited slip opinions. SLIPS files contain Circuit Court and District Court cases as edited by West Publishing Company, the supplier of the files. Slip opinions are also searched when the appropriate F2D and FSUP files are selected. These cases are transferred from the SLIPS files soon after assignment of citations by West.

State level cases (headnotes only) from West's General Digest are now available in our database through the addition of a new file, STWEST, in the DIGEST file group.

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Another new file is COMGEN in the newly created file group ADMIN. COMGEN contains Comptroller General Decisions, Volumes 1 to 54, covering the period from July, 1921 to June, 1975.

SAVING RESEARCH: Many users have been unnecessarily saving research by turning off the JURIS terminal without first signing off. This exhausts computer storage space and sometimes necessitates erasure of legitimate research. Please following the proper END SEARCH procedure so that restrictions on saving research will not be needed.

(Executive Office)

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UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following is the annual cumulative listing of all current bluesheets which have been issued pursuant to USAM 1-1.550. Those sent to press since the last issue of the Bulletin have been marked with an asterisk. This may be removed from the Bulletin and used as a check list to assure that your U. S. Attorneys' Manual contains all bluesheets in effect.

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
Undtd	1-1.200	Authority of Manual; A.G. Order 665-76
9/30/76	1-2.200	Advisory Committee of U.S. Attorneys; Subcommittee on Indian Affairs
6/21/77	1-3.100	Assigning Functions to the Associate Attorney General
6/21/77	1-3.102	Assignment of Responsibility to DAG re INTERPOL
6/21/77	1-3.105	Reorganize and Redesignate Office of Policy and Planning as Office for Improvements in the Administration of Justice
4/22/77	1-3.108	Selective Service Pardons
6/21/77	1-3.113	Redesignate Freedom of Information Appeals Unit as Office of Privacy and Information Appeals
6/21/77	1-3.301	Director, Bureau of Prisons; Authority to Promulgate Rules
6/21/77	1-3.402	U.S. Parole Commission to replace U.S. Board of Parole
Undtd	1-5.000	Privacy Act Annual Fed. Reg. Notice; Errata
4/28/77	1-6.200	Representation of DOJ Attorneys by the Department: A.G. Order 693-77
8/30/77	1-9.000	Case Processing by Teletype with Social Security Administration
Undtd	3-4.000	Sealing and Expungement of Case Files Under 21 U.S.C. 844

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
9/6/77	5-2.310(a) and (b); 5-2.312	Representation of the Environmental Protection Agency
9/6/77	5-3.321; 5-3.322	Category 1 Matters and Category 2 Matters - Land Acquisition Cases
5/26/77	6-3.181	Order for Entry to Effect Levy
5/31/77	6-3.355	Suits to Review Jeopardy and Termination Assessments Under Section 7429
9/8/77	6-3.356	Judicial Review of Jeopardy Assessment Procedures
5/26/77	6-3.380	Suits Against U. S. Officers and Employees; 26 U.S.C. 7217
6/21/77	7-2.000	Part 25-Recommendations to President on Civil Aeronautic Board Decisions, Pro- cedures for Receiving Comments by Private Parties
6/21/77	8-2.000	Part 55-Implementation of Provisions of Voting Rights Act re Language Minority Groups (interpretive guidelines)
6/21/77	8-2.000	Part 42-Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs
10/18/77	8-2.220	Suits Against the Secretary of Commerce Challenging the 10% Minority Business Set-Aside of the Public Works Employment Act of 1977 P.L. 95-28 (May 13, 1977)
4/28/77	9-2.020	Controlled Substance Prosecutions-- Referral to State or Local Prosecutions
11/11/77	9-2.070	Federal-State Law Enforcement Committees
5/5/77	9-2.133	Policy Limitations on Institution of Proceedings: Hobbs Act
7/28/77	9-2.140	Compromise of Civil or Tax Liability
9/30/77	9-2.142	Dual Prosecution

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
6/21/77	9-2.166	Grand Jury Subpoenas for Telephone Toll Records; Certifications
9/15/77	9-4.110	Federal Telephone Search Warrant System (Cross Reference to USAM 9-27.000--same subject)
5/5/77	9-4.205	Mail Covers; Excludability of Evidence Obtained
5/5/77	9-4.541	Guide to Practice Under the Treaty on Mutual Assistance in Criminal Matters Between the U. S. and Switzerland
6/21/77	9-4.541	Designation of Assistant Attorney General, Criminal Division, as Central Authority Under Treaty on Mutual Assistance with Switzerland
9/26/77	9-4.950; 9-4.954	New Systems Notice. Requirements of Privacy Act--Safeguard Procedures of the Tax Reform Act of 1976
7/12/77	9-7.012	Electronic Surveillance; Scope of Title III
7/12/77	9-7.013	Consensual Monitoring
6/17/77	9-8.100	Diversion of Juvenile Cases to State Authorities
12/16/77	9-11.000	Grand Jury Practice
5/31/77	9-11.230	Grand Jury Subpoena for Telephone Toll Records
6/8/77	9-11.351	Grand Jury; Presence of Government Attorneys
8/16/77	9-27.000	Amendments to the Federal Rules of Criminal Procedure--H. R. 5864
9/15/77	9-27.000	Federal Telephone Search Warrant System
2/18/77	9-42.000	Coordination of Fraud Against the Government Cases

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
7/19/77	9-42.450	H.E.W. Project Integrity
9/6/77	9-42.450	Fraud Against the Government - Medicaid Fraud
9/6/77	9-42.450	Fraud Against the Government; 18 U.S.C. 287
4/13/77	9-42.510	Referral of Social Security Violations
5/5/77	9-75.140	Obscenity: Prosecutive Priority
6/6/77	9-90.320	Communication or Receipt of Classified Information Prohibited; 50 U.S.C. 783(b)
6/6/77	9-90.500	Fishery Conservation and Management Act of 1976
4/22/77	9-90.700	Selective Service Pardons (Cross Reference to USAM 1-3.108)
6/6/77	9-90.700	Selective Service Act
4/28/77	9-101.000	Domestic Operations Guidelines for the Drug Enforcement Administration: Comments on Selective Provisions
5/5/77	9-131.030	Hobbs Act: Authorizing Prosecution

(Executive Office)

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UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500. This monthly listing may be removed from the Bulletin and used as a check list to assure that your Manual is up to date.

Transmittal Affecting Title	Transmittal No. / Date Mo/Day/Yr	Date of Text	Contents	
1	1	8/20/76	8/31/76	Ch. 1,2&3
	2	9/3/76	9/15/76	Ch.5
	3	9/14/76	9/24/76	Ch.8
	4	9/16/76	10/1/76	Ch.4
	5	2/4/77	1/10/77	Ch.6,10&12
	6	3/10/77	1/14/77	Ch.11
2	7	6/24/77	6/15/77	Ch.13
	1	6/25/76	7/4/76	Ch. 1 to 4
	2	8/11/76	7/4/76	Index
3	1	7/23/76	7/30/76	Ch.1 to 7
	2	11/19/76	7/30/76	Index
4	1	1/3/77	1/3/77	Ch.3 to 15
	2	1/21/77	1/3/77	Ch.1 & 2
	3	3/15/77	1/3/77	Index
	4	11/28/77	11/1/77	Revisions to Ch. 1-6, 11-15. Index
5	1	2/4/77	1/11/77	Ch.1 to 9
	2	3/17/77	1/11/77	Ch.10 to 12
	3	6/22/77	4/5/77	Revisions to Ch. 1 - 8

6	1	3/31/77	1/19/77	Ch.1 to 6
	2	4/26/77	1/19/77	Index
7	1	11/18/76	11/22/76	Ch.1 to 6
	2	3/16/77	11/22/76	Index
8	1	1/4/77	1/7/77	Ch.4 & 5
	2	1/21/77	9/30/77	Ch.1 to 3
	3	5/13/77	1/7/77	Index
	4	6/21/77	9/30/76	Ch.3 (pp 3-6)
9	1	1/12/77	1/10/77	Ch.4,11,17,18, 34,37,38
	2	1/15/77	1/10/77	Ch.7,100,122
	3	1/18/77	1/17/77	Ch.12,14,16, 40,41,42,43
	4	1/31/77	1/17/77	Ch. 130 to 139
	5	2/2/77	1/10/77	Ch.1,2,8,10,15, 101,102,104, 120,121
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	7	9/8/77	8/1/77	Ch. 4 (pp 81-129) Ch. 9, 39
	8	10/17/77	10/1/77	Revisions to Ch. 1

(Executive Office)

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CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Abrams v. Cleland, No. 77-3029 (6th Cir. December 14, 1977)
DJ 170-57-39

Civil Rights Act; Attorney's Fees.

The Department has decided to acquiesce in the holding of the D.C. Circuit in Parker v. Califano, 561 F.2d 320 (C.A.D.C. 1977) (see 25 USAB 315 (July 22, 1977)) that Title VII of the Civil Rights Act of 1964 gives the district courts the discretionary authority to award attorney's fees for legal services performed on behalf of federal employees at the administrative level. The Department therefore has just dismissed its appeal in Abrams v. Cleland challenging this position in the Sixth Circuit.

Attorney: Robert E. Kopp (Civil Division)
FTS 739-3389

Black v. Sheraton Corp. of America, _____ F.2d _____, No. 75-2039
(D.C. Cir. August 22, 1977) DJ 157-16-2381

Federal Torts Claims Act; Invasion of Privacy and
Executive Privilege

Plaintiff, Fred Black, is a former Washington lobbyist who was affiliated with "Bobby" Baker and was convicted in 1964 of income tax evasion. Unable to obtain employment in his former line of work, Black sued the United States in 1967 for money damages under the FTCA. He contended that the Government had invaded his privacy and injured his reputation in conducting a concededly illegal surveillance operation against him and allegedly disseminating information obtained as a result of that activity. The district court rejected the Government's claim of executive privilege as to a number of investigation documents and, as a sanction for the Government's refusal to turn them over to plaintiff, the court deemed admitted a number of plaintiff's substantive allegations and awarded him over \$900,000 in damages after trial. On appeal, the District of Columbia Circuit has held that an action for tortious invasion of privacy is allowable under the FTCA and is not barred under the libel and slander exception. However, the court reversed the judgment of liability, recognizing the Government's claim of executive privilege based on legitimate law enforcement needs, the court agreed with our argument that the district court should have subjected the documents at issue to an in camera inspection. The court of appeals consequently remanded with specific instructions to reconsider

the case and severely narrow the scope of the damage calculations if the plaintiff prevails.

Attorney: Neil R. Peterson (Civil Division)
FTS 739-3994

DeVries v. Acree, _____ F.2d _____, No. 76-3238 (9th Cir. November 30, 1977) DJ 145-3-1564

Customs Searches; Mail Originating Abroad.

The district court held in this case that customs officers are statutorily and constitutionally entitled to search all first class letters from abroad without notice to or consent of the addressees, regardless of whether there is "cause to suspect" that such letters contain contraband or dutiable merchandise. In a split decision, the Ninth Circuit has reversed on the grounds that the searches so conducted were in violation of 19 U.S.C. 482 and outside the scope of 19 U.S.C. 1582, which, according to the majority, authorizes customs searches without "reason to suspect" only if packages are transported on seagoing vessels.

Attorney: Dzintra Janavs (Assistant United States Attorney, C.D. Cal.)
FTS 798-2434

Trinity Memorial Hospital of Cudahy, Inc. v. Associated Hospital Service, Inc., d/b/a The Wisconsin Blue Cross Plan, Blue Cross Assoc., and Joseph Califano, Secretary of Health, Education and Welfare, No. 77-1069 (7th Cir. December 16, 1977) DJ 137-85-148

Medicare Act; Jurisdiction.

Plaintiff, the provider of services under the Medicare Act, brought this action in the district court challenging the Secretary's determination to disallow certain pre-1973 costs as reimbursable under the Medicare program. The district court entered judgment for the provider, but on our appeal, the court of appeals reversed, holding that 42 U.S.C. 405(h), which is incorporated into the Medicare Act, bars the district court from exercising jurisdiction. The court of appeals noted that this result followed notwithstanding that the provider's complaint presented constitutional issues. However, the court of appeals concluded that § 405(h) would not bar judicial review of constitutional contentions in the Court of Claims. Consequently, the Court directed dismissal of the suit without prejudice to plaintiff's proceeding in the Court of Claims.

Attorney: Richard A. Olderman (Civil Division)
FTS 739-3647

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General James W. Moorman

Enfield v. Kleppe, _____ F.2d _____ No. 76-1737 (10th Cir.
December 16, 1977). D.J. 90-1-18-1122.

Estoppel inapplicable where regulation conflicts with statute.

The district court was reversed on the grounds that a defective regulation regarding extension of non-competitive oil and gas leases was void because it conflicted with the statute limiting leases and, therefore, could not continue to apply to leases issued before the regulation was amended. The Tenth Circuit rejected the arguments that the Government was estopped from changing the erroneous regulation and that the lessee had relied on the regulation to its detriment, holding instead, that the invalid regulation was never enforceable.

Attorney: Neil T. Proto (Land and Natural Resources Division) FTS 739-3888

United States v. City of Pawhuska, _____ F.2d _____,
Nos. 76-1456 and 76-1457 (10th Cir. November 15, 1977)
DJ 90-2-18-120.

Jurisdiction; in action for damages court cannot vest plaintiff with equitable title.

On cross-appeals following retrial of the Government's claim for damages against the city for its flooding of access to Osage Indian oil rights, the court of appeals reduced the size of the award against the city because of a government stipulation which limited the acreage involved to much less than that which the district court had found to be affected. In addition, the court of appeals also set aside, at the Government's urging the vesting of title in the city to these mineral rights on the grounds that such action was outside the scope of this suit for damages.

Attorney: Glen R. Goodsell (Land and Natural Resources Division) FTS 739-5034

Hyrup v. Kleppe, _____ F.2d _____, Nos. 76-1425 and 76-1767
(10th Cir. November 7, 1977) D J 90-1-2-1028

Right-of-way over public lands.

Affirming the district court, the court of appeals held that the plaintiff, who had constructed a water pipeline over the public lands to convey water from a spring to his own property, was not required to obtain a permit from the Bureau of Land Management because the Act of 1866, 43 U.S.C. sec. 611, granting standing permission to construct such pipelines on the public lands, and the 1866 Act had not been repealed by the Act of February 15, 1901, 43 U.S.C. sec. 959. (Both the 1866 and 1901 Acts are now repealed.) The court further held that the spring at issue had not been reserved under an Executive Order withdrawing all springs and waterholes on the public lands because the spring was tributary to a flowing stream.

Attorney: Robert L. Klarquist (Land and Natural Resources Division) FTS 739-2338

United States v. City of McAlester, Okla. _____ F.2d _____,
No. 76-1455 (10th Cir. November 2, 1977)
D J 90-2-11-6989

Indians.

The Tenth Circuit reversed the judgment of the district court and agreed that an easement for watershed and waterwork purposes over Choctaw and Chickasaw unallotted lands, obtained by the City in a condemnation action in 1903 without joining the United States, was invalid. Various statutes authorizing acquisition of interests in allotted lands were held inapplicable. The court also discussed 25 U.S.C. 177, "under which conveyances [a taking is regarded as a conveyance] from any Indian Nation are invalid absent a treaty or convention." The case was remanded to the district court for further proceedings.

Attorney: Maryann Walsh (Land and Natural Resources Division) FTS 739-5053

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

DECEMBER 13 - JANUARY 10, 1978

Federal Tort Claims Act Amendments. We continue to meet with Congressional staff members and representatives of interest groups in an effort to identify and work out the disagreements with certain aspects of our proposal. As reported earlier, hearings are scheduled to commence on January 26 before the Senate Judiciary Subcommittee on Citizens and Shareholders Rights and Remedies. House hearings are expected soon thereafter.

Pretrial Diversion. Senate staff members indicated that there is a likelihood that an amended version of S. 1819, a bill to establish a federal pretrial diversion program, will be approved early in the next session by the Senate Judiciary Committee.

NOMINATIONS:

On December 15, 1977, the Senate received the following nomination:

Benjamin R. Civiletti, of Maryland, to be Deputy Attorney General.

CONFIRMATIONS:

On December 15, 1977, the Senate confirmed the following nominations:

James K. Logan, of Kansas, to be U.S. Circuit Judge for the 10th Circuit;

Robert S. Vance, of Alabama, to be U.S. Circuit Judge for the 5th Circuit;

John L. Kane, Jr., to be U.S. District Judge for the District of Colorado;

George C. Carr, to be U. S. District Judge for the middle District of Florida;

Julian K. Fite, to be U.S. Attorney for the Eastern District of Oklahoma;

Edward G. Warin, to be U.S. Attorney for the District of Nebraska;

Alexander O. Bryner, to be U.S. Attorney for the District of Alaska;

Confirmations (continued)

Michael H. Walsh, to be U.S. Attorney for the Southern District of California;

Larry R. McCord, to be U.S. Attorney for the Western District of Arkansas;

John H. Cary, to be U.S. Attorney for the Eastern District of Tennessee.

Department Authorization. The full House Judiciary Committee plans to hold several weeks of hearings in February and March on the subject of authorizations for appropriations for the Department of Justice. These will be the first department-wide authorization hearings, and so particularly time consuming for both the Department and the Judiciary Committees. Since these hearings must be held early in the session, the result will be inevitable delay of other pending items in our legislative program.

Magistrates. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice expects to complete markup in January of S. 1613, our bill to increase the jurisdiction of magistrates. The full committee, however, because of its involvement with our appropriation authorization hearings may not be able to consider the measure before March or April.

Diversity of Citizenship. Our bill to reduce the volume of diversity of citizenship cases in district courts has cleared the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice and is ready for full committee consideration. We are working with the cognizant Senate staff to get early hearings on the measure.

Panama Canal. The Department of Justice will be participating in the Administration's Task Force to develop legislative strategy for the forthcoming Senate debate on the Panama Canal Treaty.

Criminal Code Reform. Enactment of this measure will be a major Department of Justice - House goal in the coming session. House hearings begin in January and will proceed through subcommittee-committee markups all spring, hopefully in time for floor action this summer. The Senate version is expected to be scheduled for floor action in February if not delayed by the Panama Canal Treaty.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure.

On the basis of probable cause, the District Court issued an order requiring New York Telephone Co. to provide any required assistance, at a reasonable fee, to agents of the FBI, for the installation of a pen register device on telephones utilized by an illegal gambling enterprise. New York Telephone disputed the Court's authority to require it to actively assist the FBI in installing this device. The Telephone Co. was willing to pinpoint the location of the circuits needed to install the pen register, but refused to furnish and lease facilities or to provide technical assistance for the actual installation of these devices.

The Supreme Court held that the District Court had sufficient power to authorize the installation of the pen register under Rule 41, and to require the Telephone Co., a third party, to assist under the All Writs Act, 28 U.S.C. 1651. The court found items allowed to be "searched" for and "seized" under Rule 41, were not limited to tangible items but included intangibles such as the electronic impulses recorded by pen registers. The Court believed that its holding carried out the Congressional intent that the use of pen registers "be permissible." Congress could not have intended to permit the much greater intrusion done through court-approved electronic surveillance while forbidding this lesser intrusion. The Court also held that there was convincing legislative history indicating that the wiretapping provisions and requirements of Title III do not govern pen registers because they do not actually intercept oral communications. Three Justices dissented on the basis of the majority's expansive interpretation of Rule 41. They believed that since Congress has not specifically provided the Federal Courts with the power to authorize the use of a pen register, it was not for the courts to claim this right for themselves in light of the deep national concerns over who shall have the authority to issue search warrants. These three Justices, joined by a fourth (Justice Stewart), also believed that the District Court lacked power to order the Telephone Co. to assist the Government in installing the pen register.

(Reversed.)

United States v. New York Telephone Co., _____ U.S. _____,
No. 76-835 (46 U.S.L.W. 4033, December 12, 1977).

28 Feb 1978 (27)

FEDERAL RULES OF EVIDENCE

Rule 804(b)(3). Hearsay Exceptions; Declarant Unavailable. Hearsay Exceptions. Statement Against Interest.

Defendants were convicted of various offenses arising from a conspiracy to distribute heroin. On appeal, defendant Minton claimed, in part, that the trial court erred in refusing to admit a statement given by a coconspirator. The coconspirator had previously pled guilty to charges arising from the same transactions. The gist of the unadmitted statement was that Minton did not participate in the conspiracy, and that a weapon seized at the scene of defendant's arrest was never in the defendant's possession, but belonged to the coconspirator.

The Ninth Circuit upheld the District Court's discretionary determination that the statement was inadmissible. In applying a two-part analysis the Appeals Court first considered whether the statement offered was sufficiently contrary to the declarant's own interest to be admissible under the hearsay exception of Rule 804(b)(3). The court felt it was not; that the statement was merely a general assertion of defendant's innocence, not harmful to any of the declarant's interests. More importantly, the statement when judged by the four factors enunciated in United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976), lacked the "necessary indicia of trustworthiness" required for admissibility under Rule 804(b)(3). Evidence supporting defendant's claim of admissibility was at best highly questionable. The factors considered were: the time of the declaration and the party to whom it was made; the existence of corroborating evidence; the extent to which the statement is really against the declarant's penal interest; and the availability of the declarant as a witness.

(Affirmed in part, reversed and remanded in part on other grounds.)

United States v. Jose Luis Oropeza and Mark James Minton,
F.2d _____, No. 77-1291 (9th Cir., November 8, 1977).