

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.

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COMMENDATIONS

United States Attorney G. William Hunter and Assistant United States Attorney Francis B. Boone, Northern District of California, have been commended by Guy H. McMichael III, General Counsel, Veterans Administration, for their successful efforts in Alvina E. Schwartz v. United States.

Assistant United States Attorney Rod Snow, District of Colorado, has been commended by Joseph F. Dolan, United States Attorney, District of Colorado and Jed Rosack, Special Agent in Charge, Denver Field Office, Federal Bureau of Investigation for the successful prosecution in United States v. Alberico a case involving stolen plastic explosives and government checks sold to an undercover FBI fencing operation.

Assistant United States Attorney William J. Hibsher, Southern District of New York, has been commended by Jeffrey Axelrad, Chief, Torts Section, Civil Division for his efforts in Lemus v. American Export Isbrandtsen Lines, Inc. et. al.

Assistant United States Attorney John C. Carver, Southern District of Illinois, has been commended by Peter B. Bensinger, Administrator, Drug Enforcement Administration and R. N. Moore, Inspector in Charge, Postal Service for the successful prosecution of four defendants in a cocaine conspiracy case.

Assistant United States Attorney James A. Moss, Southern District of New York, has been commended by Peter B. Bensinger, Administrator, Drug Enforcement Administration for his outstanding work in a complex heroin conspiracy case.

POINTS TO REMEMBER

UNITED STATES ATTORNEYS' MANUAL--DIRECTIVE FROM THE ATTORNEY GENERAL

The following directive from the Attorney General has been to press in accordance with 1-1.550 since the last issue of the Bulletin. This directive should be incorporated in the U.S. Attorneys' Manual in the same manner as a Bluesheet. This policy directive is issued by the Attorney General and does not expire pursuant to USAM 1-1.550.

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
1/25/78	1.5-600	Notice of Subjects of Investigations
		(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
	7	6/24/77	6/15/77	Ch.13
	*8	1/18/78	2/1/78	Ch.14
2	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
	6	3/16/77	1/17/77	Ch.20,60,61,63, 64,65,66,69,70, 71,72,73,75,77, 78,85,90,110
	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

*Transmittals to be distributed to Manual Holders soon.

(Executive Office)

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CIVIL DIVISION

Assistant Attorney General Barbara Allen Babcock

Chicago Title Insurance Co. v. Sherred Villages Associates,
F.2d ___, No. 77-1157 (1st Cir. January 5, 1978) DJ 101-34-33

Federal Lien Priorities; Choateness Test

This suit sought a declaratory judgment that a mortgage, insured by and assigned to HUD, was superior to a mechanic's lien arising from construction done on the property which had priority under State law. In affirming the district court's ruling that the federal mortgage was superior, the First Circuit has adopted the majority rule that in order to be prior to a federal lien, a competing lien must be first in time and be choate before the federal lien attaches.

Attorney: Thomas G. Wilson (Civil Division)
FTS 739-3395

Lunsford v. United States, ___ F.2d ___, No. 76-1984 (8th Cir. December 31, 1977) DJ 157-69-97

Federal Tort Claims Act; Class Actions

Plaintiffs brought this action under the Tort Claims Act seeking to recover flood damages allegedly caused by a government cloud seeding program. The district court dismissed the class action and the Eighth Circuit has just affirmed. The Court held that before a class action may be brought under the Tort Claims Act, each member must have satisfied the jurisdictional requirement of having filed an administrative claim for a sum certain, or alternatively, a class claim must have been filed at the administrative level by authorized agents of the class which states the total amount claimed for the class.

Attorneys: Donald Etra (Formerly of the Civil Division) and Robert E. Kopp (Civil Division) FTS 739-3389

United States v. Ford Motor Co., ___ F.2d ___, Nos. 76-2062, 76-2063 and 77-1378 (D.C. Cir. January 6, 1978) DJ 145-18-338

National Traffic and Motor Vehicle Safety Act

After the district court rejected Ford Motor Company's challenge of a defective car recall order issued by the National Highway Traffic Safety Administration, Ford appealed to the C.A.D.C. While the appeal was pending, Ford moved for a stay pending appeal of the recall order, and offered to distribute an "interim" recall notice during the pendency of its appeal.

We opposed the language of Ford's "interim" notice, and the C.A.D.C. ruled in our favor, and ordered Ford to distribute an "interim" notice which we drafted. Rather than do that, Ford abandoned its effort to obtain a stay pending appeal and conducted a full final recall. Nevertheless, Ford maintained its appeal on the merits. The C.A.D.C. has just held that Ford's full final recall moots its appeal, and that the underlying district court judgment in the Government's favor remains valid and still stands.

Attorney: Neil H. Koslowe (Civil Division)
FTS 739-5325

Young v. Hampton, ___ F.2d ___, No. 76-2265 (7th Cir. December 29, 1977) DJ 35-25-3

Dismissal of Government Employees; Criminal Conduct

Plaintiff was a civilian employee of the Army who was dismissed from his employment after being convicted of a felony, under state law, for off-duty possession of marijuana and controlled substances. On plaintiff's appeal, the Seventh Circuit has overturned the dismissal and ordered reinstatement and back pay on the ground that the dismissal was "arbitrary" and "without a rational basis" because the record failed to demonstrate, in any way, that plaintiff's conduct had impaired "the efficiency of service." In this regard, the court noted that, according to the administrative record: plaintiff had little contact with the public in performing his job; his ability to perform his job was substantially the same when he returned to work following the conviction; his conviction did not decrease his superiors' opinion of his reliability and trustworthiness; there was no demonstrable morale problem or indication that the Government's reputation had been hurt flowing from plaintiff's return to work.

Attorney: Robert J. Kauffman (Assistant United States Attorney, Southern District of Illinois)
FTS 955-4450

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

Adamo Wrecking Co. v. United States, _____ U.S. _____,
No. 76-911 (S. Ct. January 10, 1978) DJ 90-5-2-5-9

Clean Air Act

Section 307(b)(2) of the Clean Air Act does not preclude a defendant, in a criminal prosecution for violation of a hazardous air pollutant emission standard, from raising the defense that the standard on its face is not an emission standard.

Attorneys: Frank H. Easterbrook (Deputy Solicitor General) FTS 739-2036; Raymond N. Zagone (Land and Natural Resources Division) FTS 739-2748; John J. Zimmerman (Land and Natural Resources Division) FTS 739-4519

General Clay Products Corp. v. United States, _____ F.2d _____,
No. 76-1713 (6th Cir. December 28, 1978) DJ 90-1-23-1890
90-1-23-1890

Leases

Where a lease is ambiguous, extrinsic evidence on the parties' true intent is admissible.

Attorneys: Michael A. McCord (Land and Natural Resources Division) FTS 739-2774;
Carl Strass (Land and Natural Resources Division) FTS 739-2720

United States v. District of Columbia, _____ F.2d _____,
Nos. 76-2029, 76-2039 (D.C. Cir. December 29, 1977) DJ
90-1-1-2421

Federal Contractors

Federal contractors are not subject to local regulation when operating within federal areas.

Attorney: Larry A. Boggs (Land and Natural Resources Division) FTS 739-2753

Brown v. EPA, _____ F.2d _____, No. 73-3306 (9th Cir. December 23, 1977) D J 90-5-2-3-473

Clean Air Act

The Clean Air Act does not authorize the Administrator to require states to implement an EPA-promulgated automobile and maintenance program.

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

Portland General Electric v. Kleppe, _____ F.Supp. _____, No. C76-155K (D. Wyo., December 6, 1977) DJ 90-2-4-502

Implied withdrawal authority of Secretary of the Interior

The Secretary of the Interior had "inherent" authority to withdraw lands from the operation of the mining laws which the Pickett Act did not destroy, especially where Congress had acquiesced in such withdrawals.

Attorney: John E. Lindsfold (Land and Natural Resources Division) FTS 739-2778, 2781

Pat Stands Over The Bull v. Bureau of Indian Affairs, _____ F.Supp. _____, Civ. No. 77-98-BLG (D. Mont., December 6, 1977) D J 90-2-4-502

Jurisdiction

A Federal court lacks jurisdiction over a tribal chairman's suit challenging his impeachment.

Attorney: C. David Redmon (Land and Natural Resources Division) FTS 739-2994, 2712

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JANUARY 27 - FEBRUARY 7, 1978

Improvements in Judicial Machinery Hearings. The Senate Judiciary Subcommittee on Improvements in Judicial Machinery has tentatively scheduled hearings during the upcoming months on several bills of interest to the Department of Justice. Among the subjects to be considered are diversity of citizenship jurisdiction (March 21 and 22), arbitration (April 11) and habeas corpus (April 18).

Attorneys' Fees. There seems to be some movement on Capitol Hill to consider attorneys' fee legislation this session and the likely target is attorneys' fee awards against the United States. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice plans to address the subject in hearings tentatively scheduled for the latter part of the week of February 20. In addition, the Senate Judiciary Subcommittee on Improvements in Judicial Machinery tentatively plans to hold hearings on March 13 and 17 on S. 1001 and S. 2354, proposed "Equal Access to Courts" Acts. These bills would subject the United States to the mandatory payment of attorneys' fees in all civil cases (S. 2354 excludes actions sounding in tort) in which a private party or small business, meeting certain economic limitations, prevailed.

Discrimination on the basis of Pregnancy. On February 2 the House Education and Labor Subcommittee on Employment Opportunities favorably reported to the full Committee H.R. 6075, a bill to amend Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy. An amendment to exclude coverage for abortion unless the life of the mother were endangered was defeated by a vote of 5 to 3. An identical bill has already passed the Senate.

Magistrates. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice is expected to complete its markup of the proposed Magistrate Act of 1977, S. 1613, this week. Significant amendments to the Senate bill which have been adopted by the House subcommittee in recent markup sessions are as follows: (1) the dual civil appellate route of the Senate bill was retained but modified to provide

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for a petition for certiorari from a judgment of the district court to the court of appeals; (2) the parties could decide whether they wanted to appeal to the district court or the court of appeals at any time up until the entry of final judgment by the magistrate; (3) the district court in each district would establish magistrate selection panels which would nominate candidates for magistrate positions; (4) a requirement that civil proceedings before magistrates be taken down by court reporters appointed for that purpose unless the parties and the magistrate agree to dispense with the reporter. Other amendments which will be offered include the following: (1) deletion of the mandatory jurisdiction in petty offense cases so that consent would be required for all criminal trials before the magistrates; (2) deletion of the provision which would allow the government to have juveniles in petty offense cases tried as adults when a statement is filed with the court that a term of imprisonment might appropriately be considered in a particular case; (3) modification of selection procedures and standards to make them applicable to part-time magistrates as well as full-time unless a district court cannot meet the procedural requirements for good cause shown, in which case the court must appoint pursuant to its own publicized procedures and explain to the Judicial Conference the reasons for its inability to comply with the normal requirements.

Omnibus Judgeship Legislation. The House version of the omnibus judgeship legislation, H.R. 7843, passed the House on February 7. We anticipate the appointment of a conference committee in the near future to resolve the differences between H.R. 7843 and the Senate-passed bill, S. 11.

Customs Court Legislation Proposal. It is now anticipated that our legislative proposal on Customs Court Reform will be cleared by OMB within the next few weeks.

Judicial Tenure. S. 1423, the proposed Judicial Tenure Act, was reported out of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery on February 1. The full Judiciary Committee is expected to consider the measure by the end of February. The chances of full committee approval are rated as "reasonably good" by cognizant staff members.

FBI Director. The Senate Judiciary Committee will vote February 7 on the nomination of Judge William Webster to be Director of the FBI.

Foreign Intelligence Surveillance. The Senate Select Committee on Intelligence will continue hearings on our proposal, S. 1566, on February 8.

No-Fault Automobile Insurance. The Senate Commerce Committee plans to mark up S. 1381, the national no-fault automobile insurance bill, by the end of February.

Speedy Trial Act. The Senate Judiciary Subcommittee on the Constitution has tentatively scheduled oversight hearings on the operation of the Speedy Trial Act for April 13.

Cigarette Bootlegging. The House Judiciary Subcommittee on Crime has scheduled a hearing on February 15 on H.R. 8853 and H.R. 10066, bills concerning cigarette bootlegging.

FBI Charter. The House Judiciary Subcommittee on Civil and Constitutional Rights has rescheduled the hearing on H.R. 10400, a charter for the FBI, for February 28.

Department Authorization. Voluminous material in explanation and support of the Department's programs was furnished to both Judiciary Committees January 26 for their use in preparing for the upcoming hearings on authorization for appropriations for the Department. We expect the hearings to start in late February in the Senate Judiciary Committee and early March in the House Judiciary Committee.

Federal Criminal Code Reform. Before the Senate passed S. 1437 on January 30 it accepted a surprising number of substantive changes in the bill. These include: (1) a substantial term of imprisonment for crimes committed by persons while released on bail (DOLE). (2) several Hart amendments concerning the composition of the U.S. Sentencing Commission and guidance to it in certain regards. (3) requirements for the FBI to classify arson as a major crime under the Uniform Crime Reports (GLENN). (4) authority for pre-trial detention based upon danger to the community (DOLE). (5) to make "child-snatching" a federal crime (WALLOP).

Civil Rights Hearings. Two civil rights hearings, originally scheduled for last fall, were rescheduled for early February. On February 8, AAG Drew Days III will testify before the Senate Judiciary Subcommittee on the Constitution on S. 35, the Civil Rights Improvements Act. On February 9, Mr. Days will testify before the House Judiciary Subcommittee on Civil and Constitutional Rights on H.R. 3504 and H.R. 7787, two bills dealing with fair housing.

Witness, Marshal Fees. The Senate Judiciary Subcommittee on Improvements in Judicial Machinery will shortly report to the full Judiciary Committee several non-controversial judicial improvements bills. Included in this package are two Justice Department proposals: S. 2016, to establish fees for services performed by United States marshals, and S. 2049, to establish fees and allow per diem and mileage expenses for witnesses before United States courts. We also anticipate early consideration and favorable treatment by the Senate Judiciary Committee on these measures.

Merit Selection of U.S. Attorneys. Chairman Kastenmeier has announced that his House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on March 13 will commence hearings on the method of selection and removal of United States Attorneys and Marshals.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(e)(4). Pleas. Plea Agreement Procedure.
Rejection of a Plea Agreement.

Defendant appealed his conviction alleging in part that the district judge abused his discretion in refusing to accept a plea bargain agreement that defendant had reached with the Government.

The Court of Appeals for the Fifth Circuit held that under Rule 11 the trial court has considerable discretion to accept or reject plea bargains. The Appeals Court rejected the idea of formulating standards for the district court's exercise of discretion. It found the considerations governing review of the trial judge's discretion in plea bargains comparable to the broad standards applied in reviewing sentences; unreviewable "except where arbitrary or capricious action amounting to gross abuse of discretion." The trial judge did not abuse his discretion by refusing to accept a plea to a theft count in exchange for dismissing a charge of burglary of a habitation.

(Affirmed.)

United States v. Edward Lee Bean, 564 F.2d 700, No. 77-5110 (5th Cir. 1977).

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FEDERAL RULES OF EVIDENCE

Rule 102. Purpose and Construction.

Rule 609(b). Impeachment by Evidence of
Conviction of Crime. Time Limit.

Rule 613(b). Prior Statements of Witnesses.
Extrinsic Evidence of Prior
Inconsistent Statement of Witness.

The defendants appealed their convictions for holding four men to involuntary servitude in violation of 18 U.S.C. §2 and §1584. Among the claims presented was that the District Court improperly admitted evidence, given by a Government witness testifying on rebuttal, concerning a subsequent inconsistent statement made by a defense witness. On rebuttal the Government witness indicated that the day after testifying the defense witness told him that she had not testified concerning certain matters, to which she actually had testified.

The Fifth Circuit rejected arguments that the rebuttal testimony was irrelevant, and in any case should have been preceded by a proper foundation based on cross-examination of the defense witness. The Court found defendants' reliance on Rule 613(b) to be misplaced since the Rule only establishes the procedure for impeachment by a prior inconsistent statement. In the case of a subsequent inconsistent statement the trial judge possesses wide latitude and should attempt to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence. Rule 102. Additionally, the court found that even if Rule 613(b) was applicable, it is not necessary that a foundation precede the impeaching witness' testimony. According to the Court, the "traditional" practice of requiring a foundation to be laid for impeachment purposes was based on three objectives: to avoid unfair surprise by giving the opposite party a chance to draw a denial on redirect; to give witness himself an opportunity to deny or explain a discrepancy; and to save time. In the context of subsequent inconsistent statement these three considerations, especially the third are less relevant, and are adequately met by the opportunity for surrebuttal or the reopening of the defendant's case.

Defendant's also raised the argument that the District Court improperly applied Rule 609(b) to exclude evidence of certain victims' criminal convictions which were more than ten years old. At trial the defendants did not claim any purpose more persuasive than impeachment for their questions; such as to show that the

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victims' past activities indicate that they are not the type of persons that could be held in involuntary servitude. Thus, the trial court could properly have determined that the prejudicial effect of the convictions older than ten years outweighed any probative value they might have.

(Affirmed.)

United States v. William James Bibbs, Ivory Lee Wilson, and Roscoe Wilson, 564 F.2d 1165, No. 76-4195 (5th Cir. 1977).

FEDERAL RULES OF EVIDENCE

Rule 609(b). Impeachment by Evidence of
Conviction of Crime. Time Limit.

See Rule 102, this issue of the Bulletin for syllabus.

United States v. William James Bibbs, Ivory Lee Wilson, and
Roscoe Wilson, 564 F.2d 1165, No. 76-4195 (5th Cir. 1977).

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FEDERAL RULES OF EVIDENCE

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