



E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

May 21, 2012

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

We, the undersigned Attorneys General, write to express our strong desire that the U.S. Food and Drug Administration appeal the decision of the United States District Court for the District of Columbia in *Beaty v. FDA, et al.*, No. 11-289 (RJL)(March 27, 2012). The *Beaty* decision should be appealed because (1) it is at odds with longstanding federal policy, (2) it was wrongly decided, and (3) it could be construed to significantly impair the States' ability to enforce their laws through capital punishment.

Prior to the *Beaty* decision, the FDA's practice was to exercise enforcement discretion and to defer to law enforcement with respect to matters involving pharmaceuticals for lethal injection. The United States Supreme Court upheld the FDA's policy in this regard in *Heckler v. Chaney*, 470 U.S. 821 (1985). Pursuant to that policy, the FDA has routinely released imported thiopental to state departments of correction for use in executions, a practice that the FDA continued as recently as January 2011.

The FDA's recent reversal of course was not prompted by any change in federal policy, but rather by the flawed decision of the *Beaty* court. But as the FDA argued in that case, the FDA's decisions not to refuse admission to imports of thiopental are "committed to agency discretion by law," and are not subject to judicial review. 5 U.S.C. § 701(a)(2). The *Beaty* case cannot fairly be distinguished from the Supreme Court's decision in *Heckler*, which held that federal law precluded judicial review of the FDA's decisions not to take investigative and enforcement action regarding thiopental for lethal injection. 470 U.S. at 837-38. As a result, *Beaty* stands contrary to controlling Supreme Court precedent, and is nothing more than an aberrant decision by a lone district court that should not form the basis for a nationwide change in federal policy.

But to the extent the FDA views the Beaty decision as requiring just such a nationwide change in policy, it must be appealed. At the very core of the States' police powers are their powers to enact laws to protect their citizens against violent crimes. As state Attorneys General, we are tasked with enforcing those laws, including in instances where capital punishment is authorized for the most heinous of crimes. Implicit in that obligation to our citizens is the need for the means by which to carry out executions. Given that the United States itself utilizes lethal injection as a means of executing federal death row inmates, surely you understand the unfortunate position we have been put in by the FDA's decision to treat the Beaty decision as a nationally-binding precedent.

We respectfully request that you appeal the Beaty decision. If the Beaty decision is not overturned, we as state Attorneys General will be forced to take actions to ensure execution by lethal injection remains a viable option.

If you have any questions regarding this letter, please contact Attorney General E. Scott Pruitt or Sheila Harder at 405-522-4396.

Respectfully,



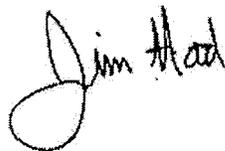
E. Scott Pruitt
Oklahoma Attorney General



Marty J. Jackley
South Dakota Attorney General



Alabama Attorney General



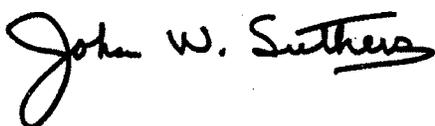
Mississippi Attorney General



Arkansas Attorney General



Missouri Attorney General



Colorado Attorney General



Nebraska Attorney General



Florida Attorney General



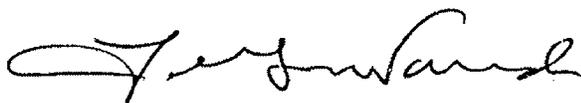
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Washington Attorney General



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