

United States Attorneys Bulletin



*Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.*

VOL. 26

JUNE 23, 1978

NO. 12

UNITED STATES DEPARTMENT OF JUSTICE

①
ZRT. G. K.

TABLE OF CONTENTS

	<u>Page</u>
COMMENDATIONS	279
POINTS TO REMEMBER	
UNITED STATES ATTORNEY APPOINTMENT	281
UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS	281
INTERPRETATION OF FEDERAL HOME LOAN BANK BOARD ACCOUNT PRIVACY RULE	282
CUMULATIVE LISTING OF BLUESHEETS	283
CASENOTES	
Civil Division	
FOIA: Exemption 3 and the CIA <u>Baker v. CIA</u>	289
FOIA: Congressionally Originated Documents; Exemption 3 <u>Goland v. CIA</u>	289
Banking: Jurisdiction in District Court <u>Groos National Bank v. Comptroller of the Currency</u>	290
Flood Insurance: Prejudgment Interest <u>West v. Harris</u>	290
Civil Rights Division	
Cutoff of LEAA Funds <u>Capel and United States v. Lamb</u>	291
Teacher Desegregation <u>Kolz v. Board of Education of the City of Chicago</u>	291
Section 5 of the Voting Rights Act <u>United States v. Georgia</u>	292
Attendance Zones, Student Transfers, and Faculty Reassignment <u>United States v. DeSoto Parish School Board</u>	292
Section 5 of the Voting Rights Act <u>Hereford ISD v. Bell</u>	292
Tax Division	
Federal Law Prohibits State From Taxing Austrian Diplomat <u>United States and Heinrich Friedrich v. City of Stamford, et. al.</u>	295

Page

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES 297

APPENDIX: FEDERAL RULES OF CRIMINAL PROCEDURE 301
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 305
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

United States Attorney William B. Cummings, and Assistant United States Attorneys Justin W. Williams and Frank W. Dunham, Eastern District of Virginia, have been commended by Griffin B. Bell, Attorney General of the United States, for successfully prosecuting Ronald L. Humphrey and Truong Dinh Hung for violations of the Espionage Act and related statutes.

Assistant United States Attorney Jeffrey L. Viken, District of South Dakota, has been commended by David F. McAllister, Captain, U.S. Park Police for his excellent presentation at the law enforcement in-service training session.

Assistant United States Attorneys W. Ronald Jennings and Michael B. Scott, District of Arizona, have been commended by Leon M. Gaskill, Special Agent in Charge, Federal Bureau of Investigation, for their prosecution concerning the attempted bombing of the Indian Health Service Facility.

K. Blair (5) K

POINTS TO REMEMBER

UNITED STATES ATTORNEY APPOINTMENT

The following Presidentially-appointed United States Attorney has 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>
Hawaii	Walter M. Heen	6/15/78

(Executive Office)

* * *

UNITED STATES ATTORNEYS' MANUAL--PLUESHEETS

The following Bluesheets have been sent to press in accordance with 1-1.550 since the last issue of the Bulletin.

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
5-22-78	4-12.270	Addition to USAM 4-12.270
6-07-78	9-2.145	Interstate Agreement on Detainers (Supersedes Bluesheet 9-2.145 dated December 2, 1977)

(Executive Office)

* * *

INTERPRETATION OF FEDERAL HOME LOAN BANK BOARD
ACCOUNT PRIVACY RULE

The Federal Home Loan Bank Board (FHLBB) which regulates federal savings and loan institutions has issued new rules (effective July 1, 1978) relating to electronic fund transfers through Remote Service Units (RSUs). Subsection (1) of the new rules, 12 CFR 545.4-2, prohibits disclosure of RSU "account data to third parties unless express written consent of the user [depositor] is given, or applicable law requires." (Emphasis added.)

To clarify the meaning of the "applicable law" exception, the Criminal Division requested and has received from the FHLBB a written opinion stating that "applicable law" as used in the regulation is intended by the Board to mean "applicable legal process . . . [including] grand jury subpoenas, administrative subpoenas and summonses duly served upon the institution . . ."

For further information or for copies of the FHLBB opinion letters, contact the Legislative and Special Projects Section at FTS 739-3675.

(Criminal Division)

*

*

*

POINTS TO REMEMBER

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following is a 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. In the future, we will provide this cumulative listing on a quarterly basis. It 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. As in the past, we will continue to list in each Bulletin those bluesheets which have been sent to press during each two-week period.

<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

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
1-25-78	1-5.600	Notice of Subject to Investigation
4-28-77	1-6.200	Representation of DOJ Attorneys by the Department: A.G. Order 633-77
8-30-77	1-9.000	Case Processing by Teletype with Social Security Administration
1-03-78	2-3.210	Appeals in Tax Case
Undtd	3-4.000	Sealing and Expungement of Case Files Under 21 U.S.C. 844
4-03-78	4-1.216	Designation of Mr. Dennis G. Linder as Chief of the Economic Litigation Section, Civil Division
5-01-78	4-1.216	Designation of Messrs. David Epstein and C. Max Vassanelli as Deputy Chief and Assistant Chief, respectively, of the Economic Litigation Section, Civil Division
4-03-78	4-1.218	Designation of Mr. Robert L. Ashbaugh as an additional Assistant Chief of the Frauds Section, Civil Division
4-03-78	4-1.219	Designation of Ms Carolyn B. Lamm as an Assistant Chief of the Commerical Litigation Section, Civil Division, replacing Ms. Patricia Blair
4-10-78	4-1.222	Designation of Mr. Vincent M. Garvey as Deputy Chief of the Information and Privacy Section, Civil Division
4-10-78	4-1.224	Designation of Ms. Martha E. Metford as Legislative Officer for the Civil Division
4-10-78	4-1.226	Designation of Mr. Bruce E. Titus as Deputy Chief of the Torts Section, Civil Division
5-05-78	4-1.313	Addition of "Direct Referral Cases" to USAM 4-1.313

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
2-22-78	4-2.320	Memoranda Containing the United States Attorney's Recommendations for the Compromising or Closing of Claims Beyond His Authority
5-05-78	4-3.210	Payment of judgments by GAO
6-01-78	4-3.210	New telephone number for GAO office handling payment of judgments
5-22-78	4-12.270	Addition to USAM 4-12.270
9-06-77	5-2.310(a) and (b); 5-2.312	Representation of the Environmental Protection Agency
9-06-77	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
9-08-77	6-3.356	Judicial Review of Jeopardy Assesment 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, Procedures for Receiving Comments by Private Parties
6-21-77	8-2.000	Part 55-Implemenation 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) (11)

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
4-28-77	9-2.020	Controlled Substance Prosecutions-- Referral to State or Local Prosecutions
2-14-78	9-2.031	Prosecutions of Phencyclidine [PCP] Users
11-11-77	9-2.070	Federal-State Law Enforcement Committees
5-05-77	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
6-07-78	9-2.145	Interstate Agreement on Detainers
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)
5-05-77	9-4.205	Mail Covers; Excludability of Evidence Obtained
5-05-77	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
1-12-78	9-4.912	Tax Disclosure: Written Requests Procedure
9-26-77	9-4.950; 9-4.954	New Systems Notice. Requirements Privacy Act--Safeguard Procedures of the Tax Reform Act of 1976

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
1-12-78	9-4.970	Tax Disclosure: Joint Tax - Nontax Cases
1-12-78	9-4.983	Tax Disclosure: Electronic Surveillance Requests
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
2-28-78	9-11.250	Addendum to the U.S. Attorneys' Manual re Grand Jury Practice dated December 16, 1977
6-8-77	9-11.351	Grand Jury; Presence of Government Attorneys
2-10-78	9-20.120	Prosecution of Military Personnel
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
7-19-77	9-42.450	H.E.W. Project Integrity
9-06-77	9-42.450	Fraud Against the Government - Medicaid Fraud
9-06-77	9-42.450	Fraud Against the Government; 18 U.S.C. 287
4-13-77	9-42.510	Referrals of Social Security Violations

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
3-29-78	9-63.517	Enhanced Punishment Under 18 U.S.C. §924(c) Not Available Where Sentence is Imposed Under §2113(d)
3-29-78	9-63.680	Effect of State Pardons and Expungement Statutes on Defendant's Status as a Prior Convicted Felon
5-05-77	9-75.140	Obscenity: Prosecutive Priority
6-06-77	9-90.320	Communication or Receipt of Classified Information Prohibited; 50 U.S.C. 783(b)
6-06-77	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)
6-06-77	9-90.700	Selective Service Act
5-25-78	9-100.211	Identification of Cocaine Isomers
4-28-77	9-101.000	Domestic Operations Guidelines for the Drug Enforcement Administration: Comments on Selective Provisions
5-11-78	9-120.160	Fines in Youth Corrections Act Cases
5-05-77	9-131.030	Hobbs Act: Authorizing Prosecution
5-25-78	9-131.200	Proof of "Racketeering" Involvement is Not an Element of a Hobbs Act Violation

CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Baker v. CIA, No. 77-1228 (C.A.D.C., May 24, 1978) DJ 145-1-482

FOIA: Exemption 3 and the CIA

Plaintiffs requested disclosure of certain CIA personnel regulations and job vacancy notices. The CIA declined to make public such materials pursuant to 50 U.S.C. 403g, which protects from disclosure, in the interest of protecting intelligence sources and methods, the organization, functions, names, titles, salaries, or numbers of CIA personnel. The court of appeals reaffirmed previous rulings that section 403g is an "Exemption 3" statute, and held, on the basis of a CIA affidavit, that the requested materials would reveal the organization, functions, etc. of CIA personnel. The court further held that the CIA need not demonstrate in particular cases a direct adverse effect on the Agency's intelligence sources and methods in order to invoke section 403g. The court reasoned that Congress, in enacting the section, had already concluded that, as a general matter, it was necessary to protect the organization, functions, etc. of CIA personnel in order to fully protect intelligence sources and methods.

Attorney: John Cordes (Civil Division)
FTS 739-3426

Goland v. CIA, No. 76-1800 (C.A.D.C., May 23, 1978) DJ 145-1-469

FOIA: Congressionally Originated Documents; Exemption 3

The plaintiffs in this FOIA case sought the "legislative history" of the CIA's authorizing statutes. The CIA turned over several documents, but declined to disclose a transcript of a hearing before a congressional committee sitting in executive session. The CIA also withheld portions of a statement of a former CIA director pursuant to Exemptions 1 and 3 of the FOIA. The court of appeals adopted our argument that the hearing transcript remained a congressional document not subject to the FOIA because, even though the CIA had possession of the document for reference purposes, Congress had never indicated any intent to give up its exclusive control over the disclosure of the transcript. With regard to the deleted portions of the director's statement, the court relied on the CIA's affidavits in holding that disclosure would compromise intelligence sources and methods, and accordingly, that the documents were exempt pursuant to 50 U.S.C. 403(d)(3) and 403g. These

CIA statutes were held to be "Exemption 3" statutes under both the amended and prior versions of the Exemption. A rehearing petition has been filed by plaintiffs.

Attorney: John Cordes (Civil Division)
FTS 739-3426

Groos National Bank v. Comptroller of the Currency, Nos. 76-4065,
77-1398 (5th Cir., May 26, 1978) DJ 145-3-1637

Banking: Jurisdiction in District Court

As the Comptroller of the Currency was preparing to bring cease and desist proceedings against a national bank, the bank went into district court to seek declaratory and injunctive relief against the Comptroller. The district court held that it lacked jurisdiction to issue injunctions or declaratory judgments. The Fifth Circuit has just affirmed, holding that exclusive jurisdiction to review the Comptroller's cease and desist powers lies in the court of appeals on a petition for review (and with a substantial evidence test).

Attorney: Ronald R. Glancz (Civil Division)
FTS 739-3424

West v. Harris, No. 76-2531 (5th Cir., May 26, 1978)
DJ 145-17-1979

Flood Insurance: Prejudgment Interest

During a flood, the water table rose so high that plaintiffs' houses, built on a slab foundation, rose slightly. When the water receded, the water table dropped, and the houses settled unevenly, causing extensive cracking damage. The Fifth Circuit held that, under the language of the standard flood insurance policy issued by the National Flood Insurers Association and now taken over by HUD, the damage to the houses was indeed caused by a flood, but that it also fits into the exclusion for earth movements, since the only earth movement covered is mudslide. The court thus disallowed recovery except to the extent that plaintiffs sustained direct water damage. The court also refused to apply state law on penalties, attorney's fees and interest, holding that federal law applies to the policy. Under federal law, it held that penalties and attorney's fees are barred, but that prejudgment interest is allowed to make plaintiff whole.

Attorney: Marta W. Berkley (Civil Division)
FTS 739-4630

CIVIL RIGHTS DIVISION
Assistant Attorney General Drew S. Days, III

Capel and United States v. Lamb, F. Supp. _____, No. LV-77-118RDF (D. Nev., May 23, 1978) DJ 168-46-3

Cutoff of LEAA Funds

On May 23, 1978 Judge Roger Foley issued formal findings of fact, conclusions of law and order regarding the cutoff of LEAA funds in the above styled case. Capel alleges that the jail facilities in Clark County, Nevada, operated by the Las Vegas Metropolitan Police Department, are racially segregated and house inmates in an unconstitutional manner under unconstitutional conditions. The findings of fact and conclusions of law provide the first judicial interpretation of the scope and operations of the 1976 anti-discrimination amendments to the LEAA Act. The Court held that under the Act and its implementing regulations, "program or activity" means recipient. The Court stated that the movants' burden in obtaining the preliminary injunction was the four-fold balancing test. Finally, the Court held that loss of LEAA funds could not in and of itself be considered "irreparable injury".

Attorney: Charles Ory (Civil Rights Division)
FTS 739-5314

Kolz v. Board of Education of the City of Chicago, F.2d _____, No. 77-1894 (7th Cir., June 1, 1978)

Teacher Desegregation

In the above styled case the Seventh Circuit affirmed the district court's denial of a preliminary injunction which, if granted, would have frustrated Chicago's plan of teacher desegregation. Appellants were teachers who had been transferred pursuant to the plan. The court noted that the district court judge had "correctly focused on the requirement of a property interest and distinguished teachers who are being discharged altogether from those who are merely being transferred to a different school." The court also found that neither an equal burden (all must be equally inconvenienced) argument nor an age discrimination argument (the plan exempted teachers over 55) had a reasonable probability of success on the merits.

Attorney: Craig Crenshaw (Civil Rights Division)
FTS 739-3840

United States v. Georgia (No. 77-1376) June 5, 1978, DJ 166-0-6

Section 5 of the Voting Rights Act

On June 5, 1978 the Supreme Court summarily affirmed the three-judge court decision in the above styled case which held that Georgia's statewide mandatory majority vote and numbered post provisions governing primaries and elections of county commissioners had been submitted to the Attorney General under Section 5 of the Voting Rights Act and that the Attorney General had failed to interpose an objection within 60 days. We had appealed from the three-judge court decision, arguing that the provisions at issue had not been submitted to the Attorney General because Georgia had not asked the Attorney General to clear these provisions and had not put him on notice that the provisions were contained within laws submitted to him.

Attorney: John Hoyle (Civil Rights Division)
FTS 739-2195

United States v. DeSoto Parish School Board, ___ F.2d ___, No. 76-3471 (5th Cir., June 2, 1978) DJ 169-33-31

Attendance Zones, Student Transfers, and
Faculty Reassignment

On June 2, 1978 the Court of Appeals for the Fifth Circuit entered its opinion in the above styled case. The court affirmed that part of the district court opinion which found the schools still to be segregated, but reversed the district court on the issue of the appropriate remedy. The district court had ordered only revision of segregated transportation routes; the court of appeals held this to be inadequate, and reversed and remanded the case for implementation of a new desegregation plan holding that existing racially-drawn attendance zones, and a free-transfer option for students residing outside zones areas, must be eliminated. The court also ordered faculty reassignment in strict compliance with Singleton provisions.

Attorney: Mark Gross (Civil Rights Division)
FTS 739-4126

Hereford ISD v. Bell, ___ F. Supp. ___, No. 2-77-14 (N.D., Tex., June 2, 1978) DJ 166-73-9

Section 5 of the Voting Rights Act

On June 2, 1978 the three-judge court (Goldberg, Woodward, and Higginbotham) entered an order in Hereford ISD v. Bell. Six of our Section 5 lawsuits had been consolidated before this

court. The court, relying on Sheffield, held that voting changes enacted or administered by Texas cities and school districts are subject to Section 5 preclearance. The court also rejected the challenge that Section 5 was violative of the ex post facto provision of the Constitution in that it required preclearance of all Texas voting changes since November 1, 1972 but was not extended to Texas until 1975. The Court held that Section 5 is not retroactive but is rather prospective since jurisdictions are only prohibited from utilizing unprecleared voting changes in the future and no past actions are proscribed.

Attorney: Jeremy Schwartz (Civil Rights Division)
FTS 739-4491

18
Blank

TAX DIVISION

Assistant Attorney General M. Carr Ferguson

United States and Heinrich Friedrich v. City of Stamford, et al.,
F. Supp. (USDC Conn., Civil No. B77-308, decided
May 15, 1978). DJ 236517-7-7.

Federal Law Prohibits State from Taxing Austrian Diplomat.

At the request of the Department of State the Tax Division undertook to represent Heinrich Friedrich, an Austrian diplomat stationed in the United States, in a suit against the City of Stamford, Connecticut, for a judgment declaring the official in question to be exempt from taxation by the City of Stamford and the State of Connecticut under a treaty in effect between the United States and the Austrian Government.

On May 15, 1978, at a hearing on the plaintiffs' motion for summary judgment, the Court held that the individual plaintiff, Heinrich Friedrich, an Austrian citizen residing in Stamford, Connecticut, in connection with his employment by the Austrian Consulate General in New York, was not liable for personal property taxes imposed by Stamford by reason of the immunity from such taxation given him by the provisions of two treaties between the United States and Austria. The Court granted declaratory judgment in favor of the plaintiff, an injunction prohibiting the assessment or collection of any such taxes from Mr. Friedrich and other individuals similarly situated, and ordered a refund of all taxes previously paid by Mr. Friedrich under protest, plus interest from the date of payment.

Attorney: William L. Shraberg (Tax Division),
FTS 739-3531.

(21)
Z. B. Clark

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

MAY 30 - JUNE 13, 1978

Heymann Nomination. The Senate Judiciary Committee held a hearing on June 7 on the nomination of Philip Heymann to be Assistant Attorney General for the Criminal Division.

LEAA Reauthorization Bill. Efforts continue to complete preparation for the introduction of the LEAA Reauthorization proposal. Recently various staff members of the Senate Judiciary Committee were briefed on the contents of the bill.

Department Legislative Proposals. On June 12 the House Judiciary Subcommittee on Administrative Law and Governmental Relations reported two of our legislative proposals to the full Judiciary Committee: H.R. 12290, Contract Services for Drug Dependent Persons and H.R. 12393, Nationwide Subpoenas in False Claims Act cases. While these are comparatively minor items in our legislative program, they are of substantial interest to the Bureau of Prisons and the Civil Division respectively.

Department Authorization bill. The Department Authorization for FY 1979, S. 3151, as reported by the Senate Judiciary Committee, contains two items which we have sought for some time: (1) repeal of the limitation of \$75 for compensation of consultants for the Community Relations Service (thus putting CRS on the same basis as other activities regarding consultants) and (2) repeal of the monetary limitation on dues for participation in INTERPOL (which had become outdated due to inflation.)

Antiterrorism. Deputy Assistant Attorney General, Mary Lawton, testified on June 8 before the Senate Foreign Relations Committee on S. 2236, a bill "To Combat International Terrorism". This proposed legislation contains the Department's legislative initiative to implement the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. S. 2236 was previously reported favorably by the Senate Governmental Affairs Committee and then referred jointly to the Committees of Commerce, Science, and Transportation and Foreign Relations for the period through June 22. DAAG Lawton will also testify on June 14 before the House Public Works and Transportation Subcommittee on Aviation on a similar bill, H.R. 10086, the "Antiterrorism Act."

ERA Extension. By a vote of 4 to 3, the House Judiciary Subcommittee on Civil and Constitutional Rights on June 5 approved for full Committee action H.J. Res. 638, to extend for seven additional years the time for ratification of the Equal Rights Amendment. Voting for the extension were Congressmen Edwards, Seiberling, Drinan and Beilenson; voting against it were Congressmen Volkmer, McClory and Butler. A vote is expected at the full Committee level within the next month or so, with the outcome too close to call at the present time.

Pregnancy bill. H.R. 6075, the bill to amend Title VII of the Civil Rights Act to prohibit sex discrimination on the basis of pregnancy, had been scheduled to come before the House on Tuesday, June 6, under suspension of the rules. The bill was removed from the calendar, however, and supporters are conducting a head count to determine support for the bill. At House Committee level, an amendment was added to exclude abortion coverage from the bill; there is no such amendment in S. 995, which passed the Senate by a wide margin last September.

Attorney Fees. The Senate Judiciary Subcommittee on Improvements in Judicial Machinery intends shortly to mark up S. 2354, the Domenici-sponsored bill which the Department strongly opposes. Although the bill will not be reported out in the form to which the Department objects, there are indications that the resulting bill may still present problems. We remain hopeful that the bill can be modified to make it acceptable to the Department, and when joined with S. 270 and H.R. 8798, the public participation bills, could be enacted as a comprehensive attorney-fees package.

Places of Holding Court. On June 2, DAAG Paul Nejelski (Office for Improvements in the Administration of Justice) testified before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice. The hearings dealt with suggested modifications to a number of federal district court boundaries. Mr. Nejelski's testimony suggested various factors which should be taken into account when Congress considers whether federal district boundaries should be adjusted.

GAO Report on the Voting Rights Act. On June 15, AAG Drew S. Days, III (Civil Rights Division) will testify before the House Judiciary Subcommittee on Civil and Constitutional Rights on a February 6, 1978 report regarding activities of the Civil Rights Division in enforcement of the Voting Rights Act. The testimony will discuss the efforts of the Civil Rights

Division's Voting Rights Section in enforcing the Voting Rights Act.

Magistrates Bill. On June 6, the House Judiciary Committee ordered reported our bill to expand the jurisdiction of U.S. Magistrates, S. 1613, by a vote of 23-7. The Committee agreed to an amendment offered by Congressman Edwards which would insert into the bill a recommendation by the Congress that the magistrate selection panels provided for in the bill, in recommending persons to the district courts, "give due consideration to qualified women, blacks, hispanics and other minority individuals." In addition, the Committee agreed to another amendment by Mr. Edwards which would require the Director of the Administrative Office of the U.S. Courts to provide the Congress with biannual reports on the implementation of the bill's provisions.

Immigration Bill. On June 6, the House Judiciary Committee ordered reported H.R. 12508, a bill which would facilitate the admission into the United States of more than two alien adopted children and would also provide for the expeditious naturalization of adopted children. The Department had previously supported this legislation in testimony before the Subcommittee on Immigration, Citizenship, and International Law.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(c). Pleas. Advice to Defendant.

Defendants appealed their convictions contending, inter alia, that their guilty pleas to certain drug violations should be vacated for failure of the district court to advise them of the maximum possible penalties they faced as required by Rule 11(c). The district court has advised them of the minimum mandatory special parole term of two years but had failed to inform them that under 21 U.S.C. §846 a lifetime special parole term could be imposed. Despite the fact that only a two year special parole term was received, that each defendant was represented by experienced counsel, and that both admitted under questioning that they understood and were advised by their attorneys what the mandatory special parole was, the Second Circuit in a per curiam decision vacated their convictions, finding United States v. Alejandro, 569 F.2d 1200 (2d Cir., 1978), 26 U.S.A.B. 95 (No. 5, March 10, 1978) controlling. The Court felt bound to follow Alejandro, as the law of the Circuit, but noted it found "merit" in Judge Hays' dissent in that case.

(Vacated and remanded.)

United States v. Daniel Scott Palter and Andy Castro,
F.2d ___, No. 77-1481, No. 78-1001 (2nd Cir., May 18, 1978)

(27)
28 blank

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 24(c). Trial Jurors. Alternate Jurors.

On rehearing, the Court of Appeals vacated its original judgment reversing defendant's conviction and affirmed. The first opinion, reported at 564 F.2d 1189 (1977) and 26 U.S.A.B. 139 (No. 7, April 14, 1978), had found the substitution of an alternate juror for a juror who on the third day of trial had telephoned the clerk of the court to state he was returning to his job rather than attending the trial, to be an improper substitution under Rule 24(c), since the court had failed to adequately investigate the cause of the juror's absence despite timely and strenuous defense objection. Following rehearing Senior Judge Wyzanski reversed himself and again writing the majority opinion, found that where there is a "sound" basis for the trial court's decision to substitute a juror, that decision is within the discretion of the trial judge. See United States v. Domenech, 476 F.2d 1229 (2nd Cir., 1973).

(Original judgment of Court of Appeals vacated, and judgment of District Court affirmed.)

United States v. Mary Rangel Rodriguez, ___ F.2d ___, No. 76-4055 (5th Cir., May 22, 1978)

FEDERAL RULES OF EVIDENCE

803(6). Hearsay Exceptions; Availability of Declarant Immaterial. Records of Regularly Conducted Activity.

803(8). Hearsay Exceptions; Availability of Declarant Immaterial. Public Records and Reports.

901. Requirement of Authentication or Identification.

Defendant appealed his conviction for having received a firearm that had been shipped or transported in interstate commerce in violation of 18 U.S.C. §922(h). The defendant's primary contention of error concerned two Bureau of Alcohol, Tobacco and Firearm (ATF) forms admitted at trial to prove the interstate shipment of the firearm possessed by the defendant. The first form entitled "Request for Tracing Firearms" was received by the testifying ATF agent following a request made to ATF's Washington office. The response indicated the gun had been bought in Georgia by three successive purchasers. The second form a "Request for Certification of Firearms Record Search" was mailed to and returned by the manufacturers of the revolver, Colt Industries. The handwritten response, filled into the ATF form by a person who purported to be the custodian of records for Colt Industries, identified the revolver as having been manufactured in Connecticut and shipped to a Georgia distributor.

The Fifth Circuit, terming the Government's foundation for the introduction of the two ATF forms "established inartfully, at best," found no hearsay exception justified admission of either of the forms. The Court agreed with the district judge that the documents were inadmissible under the "public records or reports" exception in Rule 803(8). The Government had not properly authenticated the documents as public records or reports under Rule 901 since no testimony had been elicited to demonstrate that these documents were authorized by law to be recorded or filed in a public office or that they were from the public office where items of this nature are kept. Additionally, according to the court, the recitals in the two exhibits, considered together, were tantamount to factual findings from an ATF investigation and inadmissible under 803(8)(c).

Though the district court had admitted the two documents under Rule 803(6) as records of regularly conducted activity, the Court of Appeals rejected this result, finding the unsworn information received from the Colt Industries representative a poor substitute for the presentation of live, sworn courtroom testimony. Without that evidence, the court felt the defendant would have been entitled to a directed verdict of acquittal. Among the

inadequacies the Court noted were the statements failure to detail any information: about Colt Industries record keeping processes beyond stating their very existence; about the extent of involvement of the individual who filled out the form had with the making of entries in the records; and about whether the records were "made at or near the time by, or from information transmitted by a person with knowledge."

(Reversed and remanded.)

United States v. Edwin Tony Davis, ___ F.2d ___, No. 77-5515
(5th Cir., April 27, 1978)

FEDERAL RULES OF EVIDENCE

803(8). Hearsay Exceptions; Availability of Declarant
Immaterial. Public Records and Reports.

See Rule 803(6) this issue of the Bulletin for syllabus.

United States v. Edwin Tony Davis, ___ F.2d ___, No. 77-5515
(5th Cir., April 27, 1978)

34B10 MK
33

FEDERAL RULES OF EVIDENCE

901. Requirement of Authentication or Identification.

See Rule 803(6) this issue of the Bulletin for syllabus.

United States v. Edwin Tony Davis, ___ F.2d ___, No. 77-5515
(5th Cir., April 27, 1978)