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

# United States Attorneys' Bulletin

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## COMMENDATIONS

Assistant United States Attorney VERNE K. ARMSTRONG, Northern District of Ohio, has been commended by Richard J. Flando, Regional Counsel of the Department of Housing and Urban Development in Chicago, Illinois, for her excellent legal representation and successful prosecution of the case Albert J. Blackwood, et al. vs. Secretary of HUD.

Assistant United States Attorneys LYNNE A. BATTAGLIA and JANE W. MOSCOWITZ, District of Maryland, have been commended by G. R. Dickerson, Director of the Department of the Treasury, for their skill and professional knowledge of the new and controversial scientific evidence of explosives identification taggants in the case of the United States of America vs. James L. McFillen.

Assistant United States Attorney and Chief of the Economic Crime Section CHARLES L. CASTEEL, and Assistant United States Attorney SUSAN ROBERTS, District of Colorado, have been commended by William H. Webster, Director of the Federal Bureau of Investigation, for their outstanding efforts and successful prosecution of Kevin Krown and others.

Assistant United States Attorneys STEPHEN M. DICHTER and JOHN G. HAWKINS, District of Arizona, have been commended by William H. Webster, Director of Federal Bureau of Investigation, for their successful prosecution of Donald Charles Cozzetti for embezzling money from the Roman Catholic Diocese of Tucson.

Assistant United States Attorney ROBERT LEVENTHAL, Middle District of Florida, has been commended by Thomas E. Lydon, Jr., United States Attorney for the District of South Carolina, for his excellent work and successful prosecution of the case involving conspiracy to smuggle marijuana in United States vs. Kenneth Bulman, et al.

Assistant United States Attorney VIRGINIA M. MORGAN, Eastern District of Michigan, has been commended by O. Franklin Lowie, Special Agent in Charge of the Federal Bureau of Investigation in Detroit, Michigan, for her successful prosecution of the largest bank heist in the history of Michigan in the case of the United States of America vs. David Allen Daugherty.

Assistant United States Attorney JAN SYMCHYCH, District of Minnesota, has been commended by Richard H. Blay, Special Agent in Charge of the Federal Bureau of Investigation in Minneapolis, Minnesota, for her excellent work and successful prosecution of the bank robbery case involving Joseph Leon Archie.

Assistant United States Attorney E. MONTGOMERY TUCKER, Western District of Virginia, has been commended by R. Jean Gray, Special Agent in Charge of the Federal Bureau of Investigation in Richmond, Virginia, for his professional manner in which he successfully prosecuted a recent case involving numerous bank burglaries by members of the Morris family.

Assistant United States Attorney MARK R. WERDER, Eastern District of Michigan, has been commended by Donald E. Trull, Regional Administrator of the U.S. Department of Transportation in Homewood, Illinois, for his superior efforts and successful prosecution in the Motor Carrier Safety Enforcement case against Faygo Beverages.

United States Attorney DAVID WOOD and his staff in the District of Guam, have been commended by Daniel W. Teehan, Regional Solicitor of the U.S. Department of Labor in San Francisco, California, for their valuable support and assistance provided to the U.S. Department of Labor in the civil matters of Marshall vs. Luis Crisostoma, et al., and Marshall v. Ricardo Quiambao, et al.

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EXECUTIVE OFFICE FOR U.S. ATTORNEYS
William P. Tyson, Acting Director

## POINTS TO REMEMBER

### Banks - Whether or Not Federally Insured

Although federal insurance provides the basis for prosecuting bank robberies in district courts, in an alarming number of recent bank robbery cases the government has been criticized for ignoring its responsibility to furnish easily obtainable proof that the institution was federally insured. E.g., United States v. Maner, 611 F. 2d 107 (5th Cir. 1980); United States v. Brown, 616 F. 2d 844 (5th Cir. 1980). The Chief Judge of a Court of Appeals recently expressed to the Attorney General his concern that the government has been taking unnecessary chances with otherwise unassailable convictions by neglecting to furnish ironclad evidence of federal insurability at the time of the offense.

There is no doubt that the government has the burden of proving beyond a reasonable doubt the existence of current FDIC coverage. In some instances defense counsel will stipulate to the federally insured status, to avoid prolonging a trial by requiring the government to offer such noncontroversial evidence. In the absence of a stipulation, proof of insurability can be satisfied by the testimony of a bank official who is custodian of the bank's records, coupled with his production of the FDIC certificate and a cancelled check showing payment for federal insurance for the period that includes the date of the robbery. In addition, an FDIC official might be summoned to testify that a search of the records has confirmed the insured status and has failed to produce a termination notice.

The testimony of just any bank officer or FDIC official regarding insurability is vulnerable because (1) his statement is hearsay; (2) the best evidence of insurance is documentary; and (3) the witness may not be competent to testify.

Bank robbery convictions which usually involve individuals who have displayed or used weapons and which customarily result in lengthy sentences, should not be jeopardized because the jurisdictional element was overlooked.

(Executive Office)

Speedy Trial Act - Interdistrict Transportation of Defendants

When a defendant is arrested outside of the district in which charges have been filed, under the Speedy Trial Act that defendant is to arrive in the charging district within ten days of the issuance of a removal order (Speedy Trial Act §3161 (h) (1) (H). Similarly, when a mental competency or physical capacity examination is ordered, transportation time to or from the examination facility is not to exceed ten days (Judicial Conference Guidelines, December 1979 revision, p. 39). In order for these time limits to be met, it is important for the U.S. Attorney in the charging district to consult with the U.S. Marshal in the charging district as soon as possible after learning of an arrest in another district or that an examination will be ordered. This will allow the Marshal to be informed of the exact date by which the defendant's transportation is required to be completed, and thereby will enable the Marshal to make the best use of the transportation resources available to the Marshal's Service. Where unusual circumstances exist, the U.S. Attorney should consider seeking an exclusion order under the Act from a judge or magistrate to allow more than ten days for transportation. The statute establishes a rebuttable presumption that ten days is sufficient. In these matters the Marshal in the charging district should handle communications with the Marshal in the district in which the arrest was made or the examination is to be conducted and the U.S. Attorney should handle communications with the U.S. Attorney in the other district.

(Executive Office)

Effect of Bankruptcy Reform Act on Criminal Fines

Criminal fines, as well as penalties and forfeitures, are now recoverable in bankruptcy proceedings. The Bankruptcy Reform Act of 1978 (PL 95-598), which took effect last year, did away with the old bankruptcy code's proscription against the allowance of claims based on criminal debts by broadly defining the term "claim" to include "a right to payment" of any kind. See 11 U.S.C. 101(4). See also 11 U.S.C. 523(a)(7) and 726(a)(4). Those United States Attorneys who were unaware of this change in the law should take steps to insure that notice of filings by criminal debtors is received and that proofs of claims are submitted as required.

(Criminal Division)

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## AVOID UNNECESSARY PUBLICITY IN CASES INVOLVING THREATS AGAINST SECRET SERVICE PROTECTEES

The Department of the Treasury recently requested that the Criminal Division caution United States Attorneys against the release of information which might generate unnecessary publicity in cases involving threats against the President (18 U.S.C. 871).

### I. THE "CONTAGION HYPOTHESIS"

The United States Secret Service is charged with protecting the President, Vice President, major presidential candidates, and others. It subscribes to the "contagion hypothesis," which is the theory that media attention given to certain kinds of criminal activity spawns further criminal activity. Of the individuals who come to the Service's attention as creating a possible danger to protectees, approximately seventy-five percent are mentally ill. The Service is particularly concerned that media attention may provide an irresistible lure to violence for such persons.

Available data seems to confirm Sercret Service's concern. For example, the average number of threats investigated by the Service increased byeighty-five percent during the six month period following the attacks by Lynnette Fromme and Sara Jane Moore on President Ford.

### II. CONCLUSION

The Criminal Division shares Secret Service's concerns. Therefore we request that United States Attorneys carefully consider the possible adverse effect before releasing information to the public concerning cases and matters involving threats against the President (18 U.S.C. 871) as well as other Secret Service protectees (18 U.S.C. 245).

(Criminal Division)

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Warning - Counterfeit Surety Bonds

The Treasury Department recently advised all federal bond-approving officers that counterfeit surety bonds may have been accepted by Government agencies. The counterfeit bonds discovered thus far were written using the name of the General Insurance Company of America with the initials "N.A." or "S.N." following and showing a business address of 1211 Chestnut Street, Philadelphia, Pennsylvania. Neither the "General Insurance Company of America, S.N." nor the "General Insurance Company of America, N.A." have any connection with the Seattle based General Insurance Company of America, which holds a certificate of authority as an acceptable surety on federal bonds.

United States Attorneys with questions concerning the authenticity of bail bonds written in the name of the General Insurance Company of America are asked to contact the company. If a bogus bond has been accepted, the matter should be brought to the immediate attention of Charles McMannus of the U.S. Postal Inspector's Office, P.O. Box 7500, Philadelphia, Pennsylvania 19100 (FTS 596-5208).

For further information, see the Federal Register/Vol. 45, No. 207/Thursday, October 23, 1980/Notices.

(Criminal Division)

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CIVIL DIVISION
Assistant Attorney General Alice Daniel

Wilmington United Neighborhoods, et al. v. HEW, et al., Sup. Ct., No. 79-1767 (October 6, 1980) D.J. # 137-15-64

MEDICARE ACT; JUDICIAL REVIEW: SUPREME COURT LEAVES STANDING THIRD CIRCUIT DECISION THAT COURTS ARE PRECLUDED FROM REVIEWING NON-CONSTITUTIONAL DETERMINATIONS MADE BY HEW AND STATE AGENCIES UNDER 42 U.S.C. 1320a-1.

This case concerned an attempt by several individuals and organizations to force the Department of Health, Education and Welfare to effectively halt the construction of a $90,000,000 hospital complex. Plaintiffs argued that HEW and state health planning agencies had violated the provisions of section 1122 of the Social Security Act, 42 U.S.C. 1320a-1. This statute makes a hospital's eligibility for Medicare reimbursement dependent upon certification by state health planning agencies. Section 1122(f) states that judicial review of HEW determinations under this statute are precluded.

The Third Circuit accepted our position that 1122(f) precludes review of HEW determinations of any sort, procedural or substantive. A majority of the court also accepted our position that review of the state agencies' determinations, although not expressly precluded by the statute, was implicitly precluded. The majority agreed that it would be incongruous to assume that Congress intended review of the state determinations under this program but not of the federal determinations. The court also agreed that to permit review would be inconsistent with the streamlined proceedings envisaged by the statute. On this latter point particularly, this case should provide a valuable precedent because few cases have held that judicial review is implicitly precluded by a statutory scheme. The Supreme Court has now denied certiorari, and the precedent stands.

Attorney: Alfred R. Mollin (Civil Division)
FTS 633-4020

Melong, et al. v. Micronesian Claims Commission, No. 79-1063 and Mister Ralpho v. J. Raymond Bell, et al., D.C. Cir., No. 79-1064 (October 20, 1980) D.J. # 145-0-588 &145-0-614

MICRONESIAN CLAIMS ACT; CLASS ACTION CERTIFICATION: D.C. CIRCUIT DECLINES TO BROADLY REOPEN DETERMINATION OF MICRONESIAN CLAIMS COMMISSION

Plaintiffs are residents of Micronesia who challenged the sufficiency of certain awards made to them by the Micronesian Claims Commission. In an earlier appeal, the court of appeals rejected the Commission's contentions that the Micronesian Claims Act precluded review of the plaintiffs' claims, and that the plaintiffs' suits were no longer justifiable in view of the fact that the Commission completed its activities in 1973, and there were no funds with which to pay any increased awards.

On remand for further proceedings, the plaintiffs renewed their request for class certification of all of the thousands of Micronesians who had received awards by the Commission. The district court denied class certification, and the court of appeals has affirmed, holding that the great majority of members of the proposed class had executed releases of their claims, and that plaintiffs -- who had not -- lack the identity of interest ("typicality") to represent the class. This decision should put an end to a five-year effort by the plaintiffs to reopen the entire Micronesian claims program.

Attorneys: Bruno A. Ristau (Civil Division)
FTS 724-7179
Robert S. Greenspan (Civil Division)
FTS 633-3359

Abramson v. FBI, D.C. Cir., No. 79-2500 (October 24, 1980) D.J. # 145-12-3504

FOIA; PRIVACY; LAW ENFORCEMENT PURPOSE: D.C. CIRCUIT HOLDS THAT FBI "NAME CHECK" SUMMARIES, COMPILED IN RESPONSE TO WHITE HOUSE REQUESTS, ARE NOT DOCUMENTS COMPILED FOR LAW ENFORCEMENT PURPOSES SO THAT FOIA EXEMPTION 7(C) CANNOT BE INVOKED TO WITHHOLD SUCH DOCUMENTS FROM DISCLOSURE

Howard Abramson, a journalist, requested from the FBI certain documents which it had compiled in response to name check requests from the Nixon White House. These "name check" requests, which are a routine function of the FBI, require the

FBI to search its files for material pertaining to particular individuals. The FBI then summarizes the material and sends the summary to the requestor -- here, the White House. The request at issue here pertained to eleven specific individuals who had been prominently associated with liberal causes or who had been outspoken in their opposition to the Viet Nam War.

The district court, in a two-page order, ruled that the summaries were not compiled for law enforcement purposes but, notwithstanding that ruling, then found, without explanation, that exemption 7(C) was validly invoked because disclosure would constitute an unwarranted invasion of personal privacy.

The court of appeals reversed as to the summaries. The court held that 7(C) pertains to documents, not "information," and that, as the district court had found, the summaries were not documents compiled for law enforcement purposes. (We did not appeal the district court's determination on the summaries). Therefore, 7(C) could not be invoked.

The court did remand, however, as to the applicability of 7(C) with respect to attachments to the summaries. The court stated that, if the attachments were original documents from the FBI files compiled prior to the White House request and if they were compiled pursuant to a law enforcement investigation, then a determination by the district court would be necessary to determine whether 7(C) would apply.

Attorneys: Howard S. Scher (Civil Division)
FTS 633-5055
Leonard Schaitman (Civil Division)
FTS 633-3332

Pacific Legal Foundation v. Council on Environmental Quality, D.C. Cir., Nos. 79-1689, 79-1846 (October 27, 1980) D.J. # 145-1-718

SUNSHINE ACT; CEQ "MEETINGS": D.C. CIRCUIT HOLDS THAT ALL MEETINGS OF THE COUNCIL ON ENVIRONMENTAL QUALITY ARE SUBJECT TO THE SUNSHINE ACT

The Council on Environmental Quality, in the Executive Office of the President, advises the President on environmental matters. This function is handled on an informal, ad hoc basis. However, the CEQ also drafts regulations in certain fields and, when performing that function, operates like a regulatory agency, with formal voting required. By regulation, the CEQ adopted procedures for complying with the Sunshine Act when it performs its formal regulatory functions but declared in the regulations that it was not subject to the Sunshine Act when performing its advisory functions since that business is not

handled collegially. This would allow two or all three Council members to discuss advisory matters without announcing a formal meeting or having to either open it to the public or close it under the exemptions to the Sunshine Act. The D.C. Circuit, however, has just invalidated the regulations in a petition for review filed by the Pacific Legal Foundation, a pro-industry group. The Court held that since the CEQ is admittedly an agency under the definition in the Act for some purposes, it is an agency for all purposes. The Court also rejected our main argument, namely, that meetings related to agency activity which is not performed in a formal collegial manner are not within the Act's definition of meeting. The Court read the definition of meeting -- deliberations which "determine or result in the joint conduct or disposition of official agency business" -- as very broad.

Attorney: Frank A. Rosenfeld (Civil Division)
FTS 633-3969

United States v. Westinghouse, 3d Cir., No. 80-1269 (October 21, 1980) D.J. # 80-1269

NIOSH SUBPOENA POWER; PRIVACY OF MEDICAL RECORDS; THIRD CIRCUIT REJECTS CONSTITUTIONAL AND STATUTORY CHALLENGES TO ADMINISTRATIVE SUBPOENA OF EMPLOYEE MEDICAL RECORDS

In this case, the National Institute for Occupational Safety and Health had issued an administrative subpoena directing Westinghouse to produce the medical records they had kept concerning certain of their employees. The subpoena was issued in connection with NIOSH's investigation of possible health hazards in the Westinghouse workplace. Westinghouse refused to produce the records. The district court entered an order directing compliance, and Westinghouse took this appeal, arguing that NIOSH lacked statutory authority to issue subpoenas, that the subpoena was overbroad, and that it violated the employees constitutional right to privacy.

The court of appeals agreed that employees have constitutional rights of privacy in medical records; however, the court accepted our argument that the degree of intrusion was minimal and the public interest in facilitating the medical investigations of NIOSH was substantial and outweighed the employees' general privacy interest in their medical records. The court also affirmed NIOSH's statutory authority to issue such subpoenas, and accepted our arguments regarding the relevance of the scope of the subpoena.

Finally, the court noted that some medical records might contain out of the ordinary information which could be highly sensitive, and might require a different balancing than ordinary medical information contained in employment records. To protect this interest, the court of appeals remanded the case with instructions that notice of the subpoena be given to employees whose records are to be examined, to allow them, on an individual basis, to bring any action necessary to vindicate personal privacy interests arising from extraordinary circumstances, if they so desire. The notice procedure, however, is to be structured so that prompt disposition of NIOSH's evaulation is not hampered.

Attorney: Alfred R. Mollin (Civil Division)
FTS 633-4020

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

Eastern Band of Cherokee Indians v. Lynch, ____ F.2d __, No. (4th Cir., October 10, 1980). DJ 90-6-4-10

Indians; Reservation Indian exempt from State income taxes and county personal property taxes

The court of appeals, reversing the district court judgment, ruled that members of the Eastern Band of Cherokees who live and work on the reservation are not subject to North Carolina state income taxes or county personal property taxes. The United States filed an amicus curiae brief supporting the Eastern Band. The court, after carefully examining the history of the Band, concluded that although the Cherokees had long been citizens of the State, and had not always been subject to federal supervision, their current status as a federally-recognized tribe residing on reservation lands held in trust by the United States was of paramount significance for ascertaining tax liability. The court ruled that the preemption principles set out in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), applied to the Band. Under preemption principles, the fact that the United States had never consented to the taxes at issue required reversal of the district court judgment.

Attorneys: David C. Shilton and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2737/2813

Don't Tear It Down, Inc. v. Pennsylvania Ave. Development Corp., ____ F.2d ____ No. 79-2330 (D.C. Cir., October 2, 1980). DJ 90-1-4-2104

PADC not required to comply with District of Columbia's Historic Landmark and Historic District Protection Act before obtaining a demolition permit

On August 20, 1980, the D.C. Circuit entered judgment in favor of PADC and lifted its injunction which had prohibited PADC, as part of its downtown redevelopment, from demolishing the Munsey Building. This is the court's subsequently filed opinion. The court found that PADC (a federal instrumentality) could not be required to comply with D.C.'s Historic Landmark and Historic District Protection Act before obtaining a permit

to demolish a building within PADC's redevelopment project. In a lengthy analysis (and one that applies broadly to PADC's future operations), the court found that the PADC Act of 1972 preempted any local legislation that would obstruct achievement of Congress' objectives in that Act.

Attorneys: James C. Kilbourne, Larry A. Boggs and Dirk D. Snel (Land and Natural Resources Division) FTS 633-4426/4400

Coalition for Canyon Preservation v. Bowers, ____ F.2d ____, No. 79-4843 (9th Cir., October 9, 1980). DJ 90-1-4-1965

EIS and 4(f) Statement on Highway Ruled Inadequate

The plaintiff environmental group brought this action challenging the adequacy of the EIS on the Montana Department of Highway's plan to upgrade a 10-mile segement of highway from two-lane to four-lane. The district court found against plaintiffs on laches. The Ninth Circuit reversed, holding there was not sufficient prejudice to defendants to justify the application of laches. On the merits, the court also found the EIS inadequate because it did not evaluate in a detailed manner the impacts of the proposed improvement; nor did it discuss an improved two-lane alternative which the court found to be a reasonable alternative. The court also held the Secretary of Transportation's "§ 4(f)" statement inadequate because it did not consider the improved two-lane alternative. Finally, the court held the State Highway Department had failed to strictly comply with pertinent leasing requirements. Although informational hearings were held, they were not within the required three-year period; nor was a transcript of the hearing made. The Ninth Circuit remanded to the district court with instructions to enjoin construction until the state and federal agencies had complied with applicable statutes and regulations.

Attorneys: James C. Kilbourne and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4426/2762

United States v. Molt, ____ F.2d ____, Nos. 80-1234, 80-1235 (3rd Cir., October 9, 1980). DJ 90-8-1-7

Lacy Act conviction sustained

The court of appeals affirmed the conviction of Henry Molt, an importer and trader of wildlife, on multiple counts of violating the Lacey Act, 18 U.S.C. 43-44, and an act prohibiting smuggling goods into the United States, 18 U.S.C. 545. The court rejected, without discussion, Molt's contentions that (1) the sentence should be vacated because of alleged prosecutorial misconduct at the sentencing hearing; (2) the Lacey Act is unconstitutionally vague because it makes it a crime to do an act in violation of the laws of any foreign country, and an ordinary person cannot be expected to be familiar with all such laws; (3) the conviction violated the double jeopardy clause because the same evidence was used to convict him in this case as in an earlier case; and (4) the testimony of a co-defendant should have been suppressed as the fruit of an illegal search. The court did discuss in detail its reasons for denying Molt's primary contention, that the government failed to comply with the requirements of the Speedy Trial Act. The district court had not reached the question of whether the applicable period of 120 days between arraignment and trial was exceeded, since the court found that the statutory sanction of dismissal would not be available where, as here, the indictment was filed prior to the July 1, 1979, effective date of the sanction provisions. The court of appeals did not reach the sanction issue, finding instead that the 120-day period had not been exceeded. The court rejected Molt's contention that only one 30-day period may be excluded as the period when a motion is "actually under advisement." 18 U.S.C. 3161(h)(1)(G). It also rejected his contention that a continuance under 18 U.S.C. 3161(h)(8)(A) could only exclude time for purposes of the indictment assigned to the judge granting that continuance, but not for related indictments assigned to other judges.

Attorneys: David C. Shilton and Dirk D. Snel
(Land and Natural Resources Division)
FTS 633-2737/4400

Mount Joy Construction Co. v. Schramm, ____ F.2d ____, Nos. 80-1277, 80-1278 (3rd Cir., October 7, 1980). DJ 90-5-1-6-195

EPA's regulations sustained

A general contractor under an EPA water treatment construction grant brought this action challenging the EPA's interpretation of the agency's own regulations. These regulations created an administrative procedure for resolving dis-

putes between grantees and contractors. The dispute here involved performance under the contract and the EPA refused to adjudicate it, asserting that the dispute procedure is limited to issues arising from the award of a contract. The district court dismissed the action, citing the plain meaning of the language in the regulation and the principle of judicial deference to an agency's interpretation of its own regulations. The court of appeals affirmed on the basis of the district court opinion.

Attorneys: Jerry Jackson and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2772/2731

Rowell v. Andrus, ____ F.2d ____, No. 78-1466 (10th Cir., October 6, 1980). DJ 90-1-18-1218

Interior's regulations on noncompetitive oil and gas leases

Interior issued regulations raising the rental rate on noncompetitive oil and gas leases. Proposed regulations were published March 18, 1976. Final regulations were filed with the Office of the Federal Register on December 30, 1976, and printed on July 5, 1977. The effective date of the final regulations was February 1, 1977. Individuals who had pending lease applications sued the Secretary, arguing that the regulations were void because their effective date was less than 30 days from the date of publication and also claiming that because different offices of the BLM processed leases at different rates (issuing some leases before February 1 and some after that date), they were denied equal protection for their late-issued leases. The court of appeals held that the regulations were effective 30 days from January 5, 1977, but no earlier. The court remanded the case for the district court to consider the effect of that ruling on the plaintiffs. The court also held that equal protection principles apply to the plaintiffs and, since discovery had not been completed, remanded the case on that issue also.

Attorneys: Edward J. Shawaker and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2813/2731

Sierra Pacific Power Co. v. United States, ____ F.2d ____, No. 78-3640 (9th Cir., October 17, 1980). DJ 90-1-5-1771

Statute of limitations in Quiet Title Act ruled constitutional

The district court held that Sierra Pacific's quiet title action was barred by the statute of limitations. On appeal, Sierra Pacific argued only that, so applied, the statute of limitations was unconstitutional. The court of appeals affirmed without reaching the merits, noting that this argument had not been raised below and could not, therefore, be raised on appeal.

Attorneys: Joshua I. Schwartz and Dirk D. Snel
(Land and Natural Resources Division)
FTS 633-2754/4400

National Wildlife Federation v. Adams, ____ F.2d ____, No. 79-4223 (9th Cir., October 2, 1980). DJ 90-1-4-1929

EIS ruled adequate; EO 11990 complied with Secretary of Transportation properly provided highway funds under Section 608 of PL 93-552

The Ninth Circuit affirmed an order of the district court denying NWF's motion for a preliminary injunction to restrain further construction of two highway segments approved for federal funding in connection with the Trident Submarine Base. The Ninth Circuit, rejecting NWF's contention that the Secretary of Transportation had not complied with the mandates of E.O. 11990 ("Protection of Wetlands") and NEPA, held that (1) the Secretary had adequately considered the impacts of the proposed highway on wetlands under the E.O., and (2) had adequately addressed the impacts of the action on wetlands and farmlands in the Draft EIS so as to provide the public with a meaningful opportunity to comment. In addition, the court of appeals concluded that the Secretary of Defense had not abused his discretion in providing funds for the highway project under Section 608 of P.L. No. 93-552 (which authorizes the Secretary of Defense to assist communities located near the Trident Base in meeting the cost of providing increased services caused by development of the Base).

Attorneys: Nancy B. Firestone and Carl Strass
(Land and Natural Resources Division)
FTS 633-2757/5244

Commonwealth Edison Co., et al. v. Train, ____ F.2d ____, No. 77-1612 (7th Cir., September 22, 1980). DJ 90-5-1-6-44

EPA's antidegradation regulation under Clean Water Act sustained

The court of appeals (Judge Pell dissenting) affirmed the judgment of the district court, dismissing a suit by 10 utility companies seeking judicial review of EPA's regulation requiring a policy of antidegradation of water quality to be integrated into state water quality control plans on the grounds that the controversy was not ripe for decision and that the utilities lacked standing. The utilities alleged that the antidegradation regulation jeopardizes their ability to secure discharge permits under EPA's NPDES system for utility stations already under construction and for those that will be constructed in the future. The utilities contended that the Act does not authorize an antidegradation policy and that noncompliance with the antidegradation policy cannot be the basis for denial of an NPDES permit. Having concluded that the case was not ripe for review at this stage because any injury to the utilities was merely speculative, the court refused to reach these issues.

Attorneys: Nancy B. Firestone and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2757/2762

Environmental Defense Fund v. Johnson, ____ F.2d ____, No. 79-6206 (2nd Cir., August 13, 1980, reh. denied, October 1, 1980). DJ 90-1-4-2028

Dismissal of suit for lack of ripeness affirmed

The court of appeals (Judge Oakes dissenting) affirmed the judgment of the district court, dismissing a suit by several environmental groups challenging the Corps' attempt to obtain congressional authorization for Phase I of a General Design Study to examine the feasibility and need for a water project to take water from the upper Hudson River to supply New York City without first preparing an EIS, on the ground that the action was not ripe for review. The court of appeals concluded that there was no final agency action to review because the Corps only sought authorization to study a project proposal and that a proposal for legislation which would simply

authorize further study is not a major federal action significantly affecting the quality of the human environment.

Attorneys: Assistant United States Attorney Jane Bloom (S.D.N.Y.), Nancy B. Firestone and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2757/4400

Township of Parsippany-Troy Hills, et al. v. Costle, ____ F.2d ____, No. 80-1166 (3rd Cir., October 7, 1980). DJ 90-1-4-1846

EPA's finding for water sewage treatment plant sustained

Without opinion, the Third Circuit affirmed the decision of the district court holding that EPA did not violate NEPA, the Clean Water Act, the Fish and Wildlife Coordination Act, or the Endangered Species Act in connection with EPA funding of an interceptor sewer and upgrading of an existing sewage treatment plant.

Attorneys: Assistant United States Attorney Valerie F. Mauceri (D.N.J.) and Nancy B. Firestone (Land and Natural Resources Division) FTS 633-2757

Neighborhood Development Corporation, et al. v. Advisory Council on Historic Preservation, et al., ____ F.2d ____, No. 79-3765 (6th Cir., October 20, 1980). DJ 90-1-4-2116

Standing found sufficient to withstand motion to dismiss

The court of appeals reversed the district court's dismissal for lack of jurisdiction and remanded for trial. The rapid course of proceedings in the district court prevented the government from expressing its views on the jurisdictional issues. Even though the plaintiffs, a coalition of preservation groups, had alleged that they used and enjoyed certain national register buildings scheduled for demolition, the district court ruled that plaintiffs had no standing to claim that federal defendants had violated the National Historic Preservation Act. The court of appeals held that under Sierra Club v. Morton, 405 U.S. 727 (1972), plaintiffs had alleged

sufficient injury in fact to survive a motion to dismiss. The court noted that plaintiffs must be prepared at trial to particularize their alleged use of the historial and architectural value of the buildings. The court also ruled that the district court's alternative rationale for dismissal, that plaintiffs had failed to join "indispensable" parties, was incorrect, since the sanction for such failure is not dismissal but an order that the parties be joined.

Attorneys: David C. Shilton, James Tomkovicz and Anne S. Almy (Land and Natural Resources Division) FTS 633-2737/4427

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Alan A. Parker

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

OCTOBER 29, 1980 - NOVEMBER 12, 1980

Post-election Session. The Congress reconvened for its post-election session on November 12, 1980. Attention will be directed toward the major appropriation bills for fiscal year 1981 which are still pending. Activity in other areas, because of the election results, is questionable. Action in these other areas is dependent upon how quickly the appropriation bills are resolved.

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Federal Rules of Criminal Procedure

Rule 11(c)(1). Pleas. Advice to Defendant.

Defendant's plea of guilty to a charge of bank robbery was accepted after the trial court advised defendant of his rights and concluded the plea was knowingly and voluntarily made. On appeal, defendant argued that, pursuant to Rule 11(c)(1), the trial court should have informed him that it lacked the power to order that the federal sentence run concurrently with any state term of imprisonment. In support of this contention, defendant relied on United States v. Myers, 451 F.2d 402 (9th Cir. 1972), which vacated a sentence resulting from a guilty plea where the trial court failed to notify defendant, who was already in state custody, that his federal sentence would not commence until his state sentence had run its course.

The Court first distinguished Myers, noting that defendant there was already in state custody, whereas the defendant in this case was merely on probation for a state offense, so that there was no certainty here as to what action the state would take after defendant received a federal sentence. The Court then noted that the weight of authority holds that, in applying Rule 11(c)(1), consequences which do not relate to the length and nature of a federal sentence are not such direct consequences as need to be addressed prior to the acceptance of a guilty plea, and concluded that Rule 11(c)(1) does not require notification to a defendant who is on probation from a state offense of the trial court's inability to order concurrent state-federal sentences.

(Affirmed)

United States v. Robert Edward Jackson, 677 F.2d 883 (8th Cir. August 22, 1980)

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Rule 6(e)(3). The Grand Jury. Recording and Disclosure of Proceedings. Exceptions.

Rule 54(c). Application and Exception. Application of Terms.

After the completion of a grand jury investigation of ocean shipping which resulted in the return of two indictments charging Sherman Act violations, the Federal Maritime Commission petitioned the district court under Rule 6(e)(3)(C)(i) for disclosure of those grand jury proceedings in preparation for an adjudicatory hearing to be held to determine whether the practices alleged in the indictments violated the Shipping Act. The district court denied the petition, holding that the grand jury materials were not being sought "preliminarily to or in connection with a judicial proceeding" as required by Rule 6(e)(3)(C)(i), since the adjudicatory hearing involved here does not constitute a "judicial proceeding" within the meaning of the Rule.

The Court looked to precedents which distinguished between administrative and judicial proceedings in the application of Rule 6(e)(3)(C)(i), and further noted that the term "attorney for the government" as used in that rule is defined in Rule 54(c) in a limited fashion which excludes attorneys for administrative agencies, and concluded that the district court was correct in holding Rule 6(e)(3)(C)(i) to be inapplicable to the adjudicatory hearing involved here.

(Affirmed)

United States v. Philip E. Bates, 627 F.2d 349 (D.C. Cir. April 18, 1980)

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Rule 54(c). Application and Exception.
Application of Terms.

See Rule 6(e)(3), this issue of the Bulletin for syllabus.

United States v. Philip E. Bates, 627 F.2d 349 (D.C. Cir. April 18, 1980).