FEDERALLY SPEAKING

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by Barry J. Lipson

The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column **FEDERALLY SPEAKING.** *The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA..*

LIBERTY'S CORNER

FEDERAL JUDICIARY KEY TO SUSTAINING LIBERTY! "The rights that **Americans** enjoy as the core of their ***liberty*** would be worthless, mere words on paper, unless an ***independent judiciary*** existed with the authority and ***the will*** to enforce them. … ---the possibility that **Federal Judges** may actually uphold fundamental rights, at whatever cost to the **Judges** themselves, is what, together with many soldiers' blood, has made our ***liberty*** endure. Thus no explosive device can even touch the edifice of ***Justice*** that upholds our ***liberty***. The only way that ***Temple*** can become rubble is if **Judges** themselves allow others to pull its column down" (**U.S. District Judge** Stewart Dalzell of the **Eastern District of Pennsylvania**, January 18, 2002; emphasis added. Read on for the "Rest of the Story").

THE LIGHT OF LIBERTY SHINES THRU! In last month's column we saw the **Statue of Liberty** being encased in a growing series of Brick Walls made up of such overbearing bricks as "Warrant-less Searches," "E-mail Surveillance," "Censorship" and "Secret Military Tribunals," until **America** was blocked from the **"Light of Liberty."** Well we may now be seeing a chink or two in these walls, letting beams of the **"Light of Liberty"** shine through:

> **PRESIDENTIAL PLEDGE:** "**America** will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance" (**President** George W. Bush, **State of the Union Message**, January 29, 2002).
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> **JOHNNY WALKER: 180 PROOF NEEDED!** Sulayman Faris, a/ka/a Sulayman Al-Lindh (per his high school diploma), a convert to Islam, according to **Time Magazine**, was born John Walker Lindh, (having been "named after ***John*** Lennon and Chief Justice ***John*** Marshall"), the son of now separated parents Frank Lindh, a corporate lawyer who had worked "at the **Department of Justice**," and Marilyn Walker, a former practicing Catholic and "stay-at-home mom who kept her maiden name" and converted to Buddhism. Lindh is one of three U.S. citizens who are suspected of allying themselves with the Taliban (literal translation "parochial school students"), and the one who got caught! While in an earlier column we had reported that some representatives of the **Bush Administration** have asserted

that “American citizens fighting with the Taliban” should be tried by **Military Tribunals**, the decision has been made to try Johnny Walker Lindh in a civilian criminal court, the **U.S. District Court** in Alexandria, Virginia, where the **Government** must establish a “180 Proof” case, i.e. that 90% or more of the proof/evidence points towards guilt (the guilty “beyond a reasonable doubt” criminal standard). The **Bush Administration** has charged Lindh “with conspiracy to kill US citizens in Afghanistan” and is asking for life imprisonment instead of the death penalty. Ari Fleischer, **White House** spokesman, advised that **President** Bush supports "the process put in place. He is confident that the process will end in justice." This more civil libertarian approach was “recommended to Bush by the **National Security Council**, which mediated advice from the **Justice Department**, the **Pentagon** and the **State Department**.” **U.S. Prosecutor** Paul McNulty stated: "We're going to make sure as best we possibly can -- and I have great confidence -- that we will afford every right that is present under the law." Defense counsel James Brosnahan charges, however, that Lindh has been denied legal representation. He asserted that Lindh began “requesting a lawyer almost immediately. … For 54 days, the United States government has kept John Lindh away from a lawyer. … For 54 days, he was held incommunicado."

ISLAMIC INDICTMENT OF TERRORISTS! The “**Concepts Liberty**,” while being clothed in different words and forms, appear to be universally honored and respected, if not always adhered to in practice. Islamic scholars Professors Roy P. Mottahedeh of Harvard University, Khaled Abou el Fadl of the University of California at Los Angeles, and John Kelsey of Florida State University (author of “Islam and War”), in conjunction with a recent **Ethics and Public Policy Center Conference on Religion and International Conflict**, held in Key West, Florida, advocated and/or supported the adoption of an “Islamic Indictment” of the 911 Terrorists. “It is not so important who drafts it as who signs on to it [such as well-respected international Islamic jurists],” advised Professor Mottahedeh. The idea is to drive home the point to Moslems that the Terrorists are criminals under Islamic Law, as well as under the laws of all civilized nations. The Counts of the Indictment could include:

HIRABAH – PIRACY. **Hirabah** is the “killing by stealth and targeting a defenseless victim in a way intended to cause terror in society,” stated Professor el Fadl, and under Islamic Law it is ***triable in foreign courts*** as it is equivalent to piracy. The 911 terrorists certainly did kill by “stealth,” did target defenseless victims, and did intend to terrorize America! And it is also certainly an ironic twist that even Islamic Law under **hirabah** appears to authorize trial in a U.S. Court.

AMAN – VIOLATION OF SAFE PASSAGE. According to Professor el Fadl, when “the terrorists entered the United States on visas and when they got aboard those airplanes, they were asking for **aman**” or “safe passage.” When they then “turned around and did harm,” they violated the **aman** they had been granted, and were thus “committing treachery, which is forbidden.” By doing so, the 911 terrorists violated a well-established principle of Islamic Law.

HADITH – KILLING CIVILIANS. The **“hadath”** or “sayings” in the Koran clearly forbid the killing of non-combatant civilians, such as: “Do not cheat or commit treachery, nor should you mutilate or kill children, women or old men,” advised Professor Mottahedeh. No Moslem “fighting in an Islamic cause should ever intentionally target non-combatants,” observed Professor Kelsey. Islamic jurists Shaibani and Sarkhsi, from the Eighth and Eleventh Centuries, respectively, respectfully concur. Here again, the 911 terrorists’

"cheating" and "treachery," by deceiving the airlines and even their fellow terrorists as to the true "kamikaze" nature of their missions, and their mutilating and killing of non-combatant "children, women and old men," violated basic Islamic Law.

FATWA - ULTRA VIRES. While there is no Islamic "Pope" to issue a **"Fatwa,"** or "Religious Judgment," binding on all Moslems, such Decrees are from time to time issued by "learned" Islamic Religious Leaders, sometimes known as "Ayatollahs," which may be accepted by certain fractional factions of the "faithful." However, according to Professor Kelsey, Osama bin Laden, who according to most sources is a "religious illiterate," by issuing his **Fatwa** for "Moslems to kill Americans Everywhere," grossly exceeded any authority he may have had for he had "nowhere near the degree of learning" necessary to issue such Decrees and/or even to have earned the status of "Ayatollah."

ESTÚPIDO - POOR JUDGMENT. And as a final Count, Professor Kelsey formulated this intriguing possibility: "Through your errors of judgment you have brought down the wrath of faraway powers and brought harm on innocent Moslems."

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CONSUMERS UNION CONFIRMS OUR FTC CHALLENGE! Four **Federally Speaking** columns back we "exposed" the prevalent pervasive practices of sellers adding extraordinary and unexpected charges, many of them disguised and/or hidden, to consumer products and services, and challenged the **FTC** to protect consumers from these "clearly deceptive and 'unfair trade practices'." Consumers Union has now conducted a study reaching similar conclusions. Added to our growing list this month are local auto repairer Era Automotive, Inc. ("We add $1.00 to every invoice."), and the national chain Monro Muffler Brake & Service ("The Telephone Company does it, so can we."). But if this conduct is now to be justified as being agreed to industry practices, we are not only looking at violations of **Section 5** of the **Federal Trade Commission Act**, but also potential violations of **Section 1** of the **Federal Sherman Antitrust Act**, which are prosecutable both civilly and criminally. These prevalent pervasive practices are not only misleading and deceptive, but they also make it impossible for consumers to compare the true costs of competitive products and services. While we have been continuously calling this to the attention of the **Federal Trade Commission**, we still have not received ***any*** response!

"FREE MINNIE LOU!" So demands the headline in a recent **Pittsburgh Tribune-Review** Editorial. Rumor has it that "Minnie Lou," the exquisite 1936 C. Paul Jennewein Art Deco statuary rendition of the **"Spirit of Justice,"** which presides over the **Great Hall** of the **U.S. Department of Justice**, somehow displeased the Earl of Ash and so he ordered her charms sequestered behind a wall of cloth. But **Justice** should always be fully exposed and open to public scrutiny, should she not? Nonetheless, according to the **Tribune-Review**, her "exposed right mammary" jutting out "over his serious brow" while he was "being photographed expounding on the war against terror" apparently went to far! (At least he wasn't being memorialized before her issuing a Pornography Report as then **Attorney General** Ed Meese had been in 1986.) "Yes sacrifices must be made during wartime," editorialized the **Tribune-Review**, "but please, sir, reconsider. This is more than a nation can bear. Free Minnie Lou." The daily "non-scientific" KQV listener poll overwhelming concurs.

RULE 11 OBJECTIVELY REASONABLE. So none of us are "patently" in violation of **Rule 11** of the **Federal Rules of Civil Procedure**, the **U.S. Court of Appeals for the Federal Circuit** reminds us that every paper filed in a Federal lawsuit "must be signed by at least one attorney of record"

(Fed. R. Civ. P. 11(a)), and that by presenting a signed paper to the court, the attorney certifies that he has performed "an inquiry reasonable under the circumstances" and "has come to three conclusions: (1) that the pleading or motion 'is not being presented for any improper purpose'; (2) that 'the claims … and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law'; and (3) that the 'allegations and other factual contentions have evidentiary support.' Fed. R. Civ. P. 11(b)(1)-(3). When a court finds that an attorney or law firm ***has failed to comply with any one of these requirements***, the court may impose sanctions. Fed. R. Civ. P. 11(c)." Antonious v. Spalding & Evenflo Cos., 2002 WL 13352 (Fed. Cir. 2002), emphasis added. Antonious is a patent infringement case where counsel is in jeopardy of paying $30,000 in what he finds to be objectionable sanctions, if the **U.S. District Court** determines that counsel's "factual conclusions regarding the infringement assertions" were not "objectively reasonable."

DOCUMENT STONEWALLING CONTINUES! First, as reported two monthly columns ago, the **White House** used the power of an **Executive Order** to overrule **Congress** and protect certain **Reagan-era Presidential Papers**. Then, as reported last month, the **White House** directed the **U.S. Attorney General** not to comply with a **Congressional Subpoena** ordering him to turn over **U.S. Department of Justice Records** pertaining to **Clinton-era** campaign financing and apparently unrelated alleged **FBI** corruption. Now the **White House** has refused to turn over to the **General Accounting Office (GAO)** documents from **President Bush's Energy Task Force**, which was headed by **Vice President** Dick Cheney. This has caused the **GAO** to announce that it will sue the **White House** for access to these documents, in furtherance of its pre-Enron investigations into the funding, conduct and operations of this **Task Force**. "The **President**," advised **White House** spokesperson Ari Fleischer, "will stand on principle and for the right of **Presidents** and this **President** to receive candid advice without it being turned into a news release." Apparently, among these documents is a three-page April 2001 memorandum, given by then Enron chairman Kenneth Lay to the **Vice President**, arguing that: "Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not reached consumers," and, therefore, the **Federal Government** should not impose "price caps" or the other remedies requested by California state officials to stabilize the prices of electricity. An affect of price caps not being imposed may have been, perhaps, to lock California into high price electricity purchase contracts, at what may turn out to have been artificially inflated levels.

MAGIC LANTERN 21ST CENTURY-STYLE. When we think of a "Magic Lantern" we envision a primitive "moving" picture device or, perhaps, Aladdin rubbing his Genie generator. No longer. In the 21st Century "Magic Lantern" will now refer to a "Trojan Horse" type computer program. According to **PC World**, Magic Lantern is being developed by the **FBI** to be planted by an agent "in a specific computer by using a virus-like program." Once planted, this keystroke logger "will render encryption useless on a suspect's computer" by capturing "words and numbers as a subject types them (before encryption kicks in), and will transmit them back to the agent." According to **FBI** spokesperson Paul Bresson: "It's no secret that criminals and terrorists are exploiting technology to further crime. The **FBI** is not asking for any more than to continue to have the ability to conduct lawful intercepts of criminals and terrorists." Jim Dempsey, Deputy Director of the **Center for Democracy and Technology**, is concerned about the lack of prior notice of such "searches and seizures" as required by the **Fourth Amendment** to the **U.S. Constitution**: "In order for the government to seize your diary or read your letters," Dempsey advises, "they have to knock on your door with a search warrant," but Magic Lantern "would allow them to seize these without notice. … The program would not only capture messages you sent, it would capture messages that you wrote but never sent." The main concern here appears not to be the use of new technologies, but the apparent lack of appropriate **judicial supervision**. Previously, **Federally Speaking** has reported on

the use by agencies such as the **FBI** of "Carnivore" devices, which scan "through tens of millions of e-mails and other communications from innocent Internet users as well as the targeted suspect" (October 5, 2001 column), and how the **Patriot Act** tries to regulate their use "by excluding general access to the 'content' of the messages and by requiring Carnivore Reports to **Congress**" (December 14, 2001 column).

THE REST OF THE STORY. **U.S. District Judge** Stewart Dalzell's memorable aforequoted post-911 words are found in a January 18, 2002 opinion, whereby he recused himself from the **Habeas Corpus** proceedings of Lisa Michelle Lambert, relating to her 1992 conviction in the murder of Laurie Show, because of alleged continuing prosecutorial attacks on him which, he asserted, were intended to cloud the true issues. In 1997, he advised, he had ordered Ms Lambert freed based on "clear and convincing evidence, no less than 25 breaches of Lambert's basic rights, including five incidences where the Commonwealth destroyed material evidence, three in which it altered evidence, one in which it tampered with a witness and seven in which it used perjured or fabricated testimony," such "evidence of prosecutorial misconduct" **U.S. Court of Appeals Judge** Jane R. Roth found, in a Statement "joined" by **Judges** Nygaard, Lewis and McKee, "to be truly shocking." These prosecutorial actions, claims Judge Dalzell, violate the "tradition that began in **Edward III's** time, with the codification of **due process** as the immemorial right of free English people" (**Statute of Westminster**, 28 Edw. III c.3 (1354): " … no man, of what state or condition soever he be, shall be put out of his lands, or tenements, nor taken, nor imprisoned, nor indicted, nor put to death, without he be brought in to answer by **due process** of law."). That is "the rest of the story."

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