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

LIGHT OF LIBERTY. Working Assets, a long-distance telephone provider, has produced a "Flash" video that belongs in "**Liberty's Corner**." This video vividly demonstrates the need for vigilance to ensure that the measures taken to safeguard us from terrorists do not, instead, destroy the very liberties they are seeking to protect. It graphically depicts the **Statue of Liberty** being encased in a growing series of Brick Walls made up of such overbearing bricks as "E-mail Surveillance," "Warrant-less Searches," "Secret Military Tribunals" and "Censorship." And the Walls grow until **America** is blocked from the **"Light of Liberty."** The video may be viewed with Macromedia Flash (standard with most browsers) at http://www.workingassets.com/ladyliberty/flash.html.

THE ACLJ SHOCKED! "I was shocked," exclaimed the ACLJ's Chief Counsel Jay Alan Sekulow, that Bill Goodman, Legal Director of the Center for Constitutional Rights in New York, told the New York Times "that the job of his organization is to protect the **Constitution** from its enemies," and "its main enemies right now," Goodman reportedly advised "are the **Justice Department** and the **White House**." It is also "shocking" to the ACLJ, an organization normally devoted to religious issues and "threats to Christian freedom," that opponents of **Attorney General** John Ashcroft would institute a lawsuit claiming "that his **Department's** new investigative powers were established too quickly without **Congress'** permission; that the civil liberties of detained individuals - held in connection with Sept. 11's terrorist attacks - are being violated; and that the **Attorney General** and the **President** are overstepping their **constitutional** boundaries." Shocking? Yes, something certainly is!

THE JUDICIARY: POST 911. At issue in **Patel v. Zemski** (3d Cir, No. 01-2398, December 19, 2001), are the provisions of the **Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),** and the **Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),** requiring all immigrants serving criminal sentences for crimes that carry with them the possibility of deportation, to remain in detention after they finish serving these criminal sentences, regardless of how long the deportation process may take. Patel, a lawful permanent resident, who collaterally is also appealing his deportation, was convicted upon a plea of guilty in the **U.S. District Court for the**

Eastern District of Missouri of the offense of "harboring an undocumented alien," to wit, providing said alien with employment several years after he had entered the U.S. without "documentation." The **Immigration and Naturalization Service** (**INS)** classification of this conviction as an "aggravated felony" was upheld by the **Immigration Judge**, thus subjecting Patel, under these statutory provisions, upon the completion of his sentence to mandatory detention by the **INS** pending deportation, without an individualized determination to justify this detention. The **U.S. Third Circuit Court of Appeals** rejected this as **unconstitutional,** holding "that mandatory detention of aliens after they have been found subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies, violates their **due process rights** unless they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or danger to the community." The **Third Circuit** also noted that: "Ironically, such a determination [an individualized determination] is provided for lawful permanent residents charged as **alien terrorists** [who, apparently, have not served such a sentence], an accusation that has never been leveled against appellant."

FED-POURRI™

"NEAR MISSES" TO AMERICA'S BLOODLINE! No! This is not another report of "credible" International Terrorist threats to a critical national resource, but, according to the **Food and Drug Administration (FDA**), it is a report of "credible" domestic threats to our nation's critical blood supply. So charges the **FDA** in seeking to hold the **American Red Cross** in **Contempt of Court**, with fines of up to $10,000 per day for each new infraction, for violation of a 1993 **Consent Decree** that requires the Red Cross to comply with **FDA Regulations** in the collection, processing and distribution of human blood. The **FDA** charges "persistent and serious violations" spanning 16 years. The alleged recent "near misses" include accepting blood from high AIDS risk donors and from syphilitic donors; release of blood believed contaminated with cytomegalovirus (harmful to newborns); and possible premature release, due to computer errors, of only partially tested blood. But, we are also told by **FDA Acting Commissioner** Bernard Schwetz that the "risk of not receiving a needed transfusion far outweighs the risk of receiving blood." Buffy, where are you when we need you?

DENOUNCED TREATY DECLARED DEFUNCT. **President Bush** has denounced a 1972 **Treaty** with a defunct "demon" nation and has declared that treaty itself defunct. Nonetheless, instead of simply walking away from the three decades old **Anti-Ballistic Missile (ABM) Treaty** with the "dis-unioned," dismembered, and defunct **Soviet Union**, he has followed the **Treaty's** cancellation provision and given **Russia** the required formal six-months **Notice of Withdrawal**. "I have concluded the **ABM Treaty** hinders our Government's ability to protect our people from future terrorist attacks or rogue-state missile attacks," stated the **President**. The Democrats have, of course, "gone on the attack," asserting that the resumption of ABM testing will cause the resumption of "arms races" (plural), and that the withdrawal itself is premature as actual testing in violation of the **Treaty** would be years away.

BUSH SHIELDS CLINTON! After using the power of an **Executive Order** to overrule **Congress** and protect certain **Reagan-era Presidential Papers**, as reported in last month's

Federally Speaking column, **President Bush** has now 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. "I am concerned that **Congressional** access to prosecutorial decision-making documents of this kind threatens to politicize the criminal justice process," the **President** advised. It's nice to see at least lip service being given to keeping politics out of something, though the Republican chaired **House Government Reform and Oversight Committee**, which is doing the probing, seems confident that "openness always seems to win when the **Courts** get involved, … even **President Clinton** never invoked **Executive Privilege** over these kinds of records." Indeed, on learning of this course of **Presidential** precedential preferential conduct, one concerned citizen cynically commented, "he's really laying the groundwork for protecting his own papers, isn't he?"

"RESISTANCE IS NOT FEUDAL." So scribed Jim Girard in a recent Lockergnome e-mail column. He was cautioning against the **"Security Systems Standards and Certification Act" (SSSCA)**, a proposed, apparently "Borgian," entertainment industry Bill which would require all new personal computers to have built-in **"policeware"** to prevent apparently even "fair use" copying of **Copyrighted** materials, and which would carry with it **Federal Criminal Penalties** of up to five years in **Federal Prison** and $500,000 in fines, for disabling or tampering with such **"policeware."** Why "Feudal"? Because according to the self-ascribed "scribbles" of this Scribe, if this Bill were to become law "it would represent the first such restriction on the individual use of intellectual property (at least in a Western democracy) since the Middle Ages," where "resistance was futile," for, as he advised, the Medieval Church "controlled what was read and who got to read it. All books were held in church libraries and copied only by monks, and it was necessary to take religious orders even to learn how to read. …The invention of moveable type made it possible for writers and readers to bypass the Church's control of information, and communicate with one another directly," sparking, he asserted, the "Renaissance" and the "Reformation." Scribe Jim views the **SSSCA** as an **"unconstitutional"** and, hopefully futile, return to Freudianism, oops! Feudalism, and directs all Anti-Borgians to go to "StopPoliceware.com" to "Join the Resistance" (http://www.stoppoliceware.com/).

CYBERSQUATTERS BEWARE, JOE CARTOON IS HERE! The **U.S. Congress** has enacted the **Anticybersquatting Consumer Protection Act (ACPA) of 1999** (15 U.S.C. Sec.1125 (d)). Cybersquatting is "the bad faith, abusive registration and use of the distinctive trademarks of others as Internet domain names, with the intent to profit from the goodwill associated with those trademarks" (**Shields v. Zuccarini**, No. 00-2236 (3d Cir. June 15, 2001)). The **ACPA** makes "it illegal for a person to register, or to use with the 'bad faith' intent to profit from, an Internet domain name that is 'identical or confusingly similar' to the distinctive or famous trademark or Internet domain name of another person or company," and imposes a penalty of from $1,000 to $100,000 per domain name (15 U.S.C. Sec.1117 (d)). Now, Joe Cartoon has shown you cannot squat on him! Joe Cartoon, a/k/a Joseph C. Shields, a graphic artist, creates, exhibits and markets cartoons under the names "Joe Cartoon" and "The Joe Cartoon Co.," and does so, in part, on the web through the registered domain name "joecartoon.com." In April 1998 this site won the Macromedia "Shock Site of the Day" Award, whereupon "Joe Cartoon's web traffic increased exponentially, now averaging over 700,000 visits per month." Apparently sensing another

"Jessica Rabbit" bonanza, one Andalusia, Pennsylvania cyber-opportunist and "wholesaler" of Internet domain names, John Zuccarini, "registered five world wide web variations" of Joe's name, "joescartoon.com, joecarton.com, joescartons.com, joescartoons.com and cartoonjoe.com." Upon taking this bait, the unwitting and/or poor spelling surfers were, "in the jargon of the computer world … mousetrapped," or, in regular English, "they were unable to exit without clicking on a succession of advertisements." And each desperate click netted Zuccarini "between ten and twenty-five cents from the advertisers." In affirming the **U.S. District Court's** grant of **Summary Judgment** and award of $50,000 in statutory damages, and "punitive" attorneys' fees, in favor of Joe, the **U.S. Court of Appeals for the Third Circuit** concluded that, while not involving "pornography," the gentleman from Andalusia's "conduct here is a classic example of a specific practice the **ACPA** was designed to prohibit," the registration of domain names that are "confusingly similar," thus clearly including "typosquatting" within the ambit of the **ACPA**. The squatter Zuccarini didn't know "squat," did he?

THREE STRIKES AND YOU'RE … ? It has been reported that at least three times in the past year, the **Federal Courts** have thrown out Pennsylvania death sentences due to improper courtroom procedures and confusing jury instructions. In explaining his decision to throw out the Mumia Abu-Jamal death sentence, **U.S. District Court** Judge William Yohn cited the 2001 unanimous George Banks **U.S. Third Circuit Court of Appeals'** opinion, which threw out the death sentence because the jurors should have been able to consider mitigating circumstances in their deliberations, and wherein the **Third Circuit**, in turn, cited to yet another Pennsylvania death row case, **Hackett v. Price**, where a prisoner's death sentence was voided for the same reason. Judge Yohn advised that the instructions given to the jury did not clearly direct them to consider crucial mitigating circumstances when voting for the death penalty. That is, the Courts' instructions in these cases failed to dispel the juries' erroneous beliefs that in considering mitigating factors they needed to be unanimous in support of a vote against death. Why be so particular? Because they probably want to avoid "irreversible error," which they know is always a possibility, once the execution has been executed

FTC CHALLENGE GOES UNANSWERED! Three **Federally Speaking** columns back we "exposed" the prevalent problem of sellers adding disguised and/or hidden charges to consumer products and services, and challenged the **FTC** to protect consumers from these "clearly deceptive and 'unfair trade practices'." Though, we have again called this to their attention, we have still not received ***any*** response.

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The purpose of **FEDERALLY SPEAKING** *is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the* **FEDERAL CLE CORKBOARD™.** *Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com).*