FEDERALLY SPEAKING

by Barry J. Lipson

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Welcome to ***Federally Speaking*****,** an editorial column for **ALL** interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the Federal arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 48th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm **.**

LIBERTY'S CORNER

"As American as Apple Pie" -- Our Constitution?

It's just plain "***WRONG***" to introduce foreign "views" into U.S. Constitutional Jurisprudence! ….. Or so says U.S. Supreme Court Justice Antonin Scalia. And, in support of this so called American Apple Pie view of U.S. Constitutional Jurisprudence, ***à la the mode*** of Justice Clarence Thomas, discussions of "foreign moods, fads, or fashions" have no place!

But, as discussed in ***Federally Speaking No. 30,*** in ***United States v. Alvarez-Machain***, 504 U.S. 655, 669 (1992), the U .S. Supreme Court did, in fact, considered "***general international law principles***," and had, indeed, found it appropriate to examine whether or not these principles provided a "basis for … respondent's argument" (emphasis added).

Is then and/or should our Constitutional Jurisprudence, like our Antitrust Jurisprudence, be "as American as Apple Pie," or perchance is it already?

Your columnist in previously examining this issue in the latter context in "***Antitrust Problems in Foreign Commerce,"*** **The Practical Lawyer's Manual on Trade Regulation** (ALI-ABA, 1985), found that while viewing "apple pie" and Constitutional and Antitrust Jurisprudences "as

exclusively American institutions, not to be found elsewhere … appears to be a common notion" held by many, the truth is that none of them "in its origin, is native to the United States."

To paraphrase this deep cut into the heart of the pie, and let the four and twenty blackbirds out, "a more correct formulation" would appear to be that the basis of our Constitutional Jurisprudence "is as American as a piece of good French apple pie" ***à la mode*** "from Le Pavillon in New York," which is enhanced by such essential traditional spices as Cinnamon and Nutmeg, both being imported from foreign plantations in Central America, China, Grenada, Indonesia, the Moluccas, Sri Lanka (Ceylon), Trinidad and Vietnam, and none being native to the U.S. of A.

Most recently the U.S. Supreme Court in ***Hamdan v. Rumsfeld,*** 548 U. S. ____ (2006), with due process, showed due deference to international law by reversing the U.S. Court Of Appeals for the DC Circuit's finding that Hamdan, a prisoner held by the U.S. at Guantanamo Bay, Cuba., and "charged with one count of conspiracy 'to commit . . . offenses triable by military commission'," was not entitled to relief as the Geneva Conventions are not judicially enforceable. "[W]e granted certiorari, 546 U. S. ___ (2005) … [r]ecognizing, as we did over a half-century ago, that trial by military commission is an extraordinary measure raising important questions about ***the balance of powers in our constitutional structure, Ex parte Quirin***, 317 U. S. 1, 19 (1942)," and because, as Justices Kennedy, Souter, Ginsberg and Breyer remind us, the "***Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment***." Emphasis added.

In ***Hamdan***, writing for the Court, Justice John Paul Stevens, with the concurrence of Justices Souter, Ginsburg and Breyer, found that constitutionally the Executive needed Congressional authorization and that such authorization needed to comply with both Common Article 3 of the Geneva Conventions and Article 75 of Protocol I to the Geneva Conventions ("notwithstanding the earlier decision by our Government not to accede to the Protocol"). Justice Stevens explained that "Common Article 3, then, is applicable here and … requires that Hamdan be tried by a 'regularly constituted court ***affording all the judicial guarantees which are recognized as indispensable by civilized peoples***.' 6 U. S. T., at 3320 ([Common] Art. 3, 1 (d))…. [T]his phrase … must be understood to incorporate at least the barest of those trial protections that have been ***recognized by customary international law***. … We agree with Justice Kennedy that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any 'evident practical need' … and for that reason, at least, fail to afford the requisite guarantees. … We add only that … various provisions of [U.S.] Commission Order No. 1 dispense with the principles, articulated in Article 75 and ***indisputably part of the customary international law***, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him." (Emphasis added.)

But is ***Hamdan*** an exception as it dealt with International Conventions and Treaties, which are enforceable as "contracts" between Nations? It would appear not so as the U.S. had not even "signed on" to Protocol I; as "***customary international law"*** and not the explicit written language of the "contract" was relied on; and, most importantly, as the U.S. Supreme Court has a long and necessary history of calling upon foreign jurisprudence to aid in the interpretation of our Constitution.

Indeed, as history reveals, in drafting the U.S. Constitution, our founding fathers, in many instances, were "not breaking new ground but were simply nurturing and encouraging the further development of the English common law," as similarly done in the antitrust and trade regulation area which likewise had "its genesis in the common law, and its legal import and significance is

declared again and again in the decisions of English courts, both before and after the date of our independence" (***United States v. American Medical Ass'n***, 110 F.2d 703 (D.C. Cir. 1940; emphasis added).

Accordingly, in ***Rasul v. Bush***, 542 U.S. 466 (2004), the U.S. Supreme Court clearly acknowledges that our Constitutional Jurisprudence grows out of English Common Law roots, which in at least one Constitutional area, the area forbidding suspension of "[t]he Privilege of the Writ of Habeas Corpus ... unless when in Cases of Rebellion or Invasion the public Safety may require it" (US Const, Art. I, §9, cl. 2), goes all the way back to 1215 AD.

The Court in ***Rasul*** explained:
"'Executive imprisonment has been considered oppressive and lawless since John, at Runnymede [on June 15, 1215 AD in the ***Magna Carta***], pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint. ***Shaughnessy v. United States ex rel. Mezei,*** 345 U. S. 206, 218-219 (1953) ([Jackson, J.,] dissenting opinion). … Habeas corpus is … 'a writ antecedent to statute, ... throwing its root deep into the genius of our [English] common law.' ***Williams v. Kaiser,*** 323 U. S. 471, 484, n. 2 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago, became 'an integral part of our [English] common-law heritage' by the time the Colonies achieved independence, ***Preiser v. Rodriguez***, 411 U. S. 475, 485 (1973), and received explicit recognition in the Constitution… Art. I, §9, cl. 2" (emphasis added).

It, therefore, seems inarguable that the decisions of English judges who developed these concepts in the first place (and of judges of other nations who also share our rich English common law heritage, such as Australia, Canada and New Zealand), are proper venues for examination by American Judges and Justices in deciding similar issues arising under these "common" common law doctrines. And this has been reconfirmed by U.S. Supreme Court Justice Stephen Breyer's observations that the U.S. Supreme Court "has long considered as … particularly instructive opinions of former [British] Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own," citing "***Thompson v. Oklahoma,*** [487 U.S. 815 (1988)] supra, at 830-831 (opinion of Stevens, J.) (considering practices of Anglo-American nations regarding executing juveniles); ***Enmund v. Florida***, 458 U.S. 782, 796-797, n. 22 (1982) (noting that the doctrine of felony murder has been eliminated or restricted in England, India, Canada, and a "number of other Commonwealth countries"); … ***Culombe v. Connecticut,*** 367 U.S. 568, 583-584, n. 25, and 588 (1961) (considering English practice concerning police interrogation of suspects); [and] ***Kilbourn v. Thompson***, 103 U.S. 168, 183-189 (1881) (referring to the practices of Parliament in determining whether the House of Representatives has the power to hold a witness in contempt)." ***Knight v. Florida***, 525 US 944 (1998) (Breyer, J., dissenting). See also ***Pennoyer v. Neff,*** 95 U.S. 714 (1877), where the U.S. Supreme Court in 1877 borrowed from "international law" and "common law" concepts to flesh out the concept of "due process" under the U.S. Constitution; or one could say put the ***"à la mode"*** on the "apple" of our Constitutional Rights Pie --- Due Process.

But what of examining the decisions of non-English heritage judges and/or judicial opinions not dealing with common law doctrine subject matter? Here too, Justice Breyer observed generally that the U.S. Supreme Court "has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances," additionally citing "***Coker v. Georgia,*** 433 U.S. 584, 596, n. 10 (1977) (observing that only 3 of 60 nations surveyed in 1965 retained the death penalty for

rape); ***Trop v. Dulles***, 356 U.S. 86, 102-103 (1958) (noting that only 2 of 84 countries surveyed imposed denationalization as a penalty for desertion);" and "***Washington v. Glucksberg,*** 521 U.S. 702, 710, n. 8, and 718-719, n. 16 (1997) (surveying other nations' laws regarding assisted suicide)." ***Knight v. Florida, supra.***

On U.S. federal questions, the law of no other jurisdiction is binding on the U.S Supreme Court, whether it be the 50 other judicial jurisdictions within the United States, the British House of Lords or other common law jurisdictions, the Napoleonic Code jurisdictions, the International Court of Justice, or any other judicial jurisdiction whatsoever and wheresoever in the World. So in examining their decisions, or in citing to them, there can be no harm. The harm comes in placing blinders on the Court, as wisdom in any particular area is not the exclusive property of any one jurisdiction, or solely U.S. domestic jurisdictions; and at any particular time, any one jurisdiction may be on the leading edge of cutting edge issues. Why should our Supreme Court be denied such wisdom and experience in crafting its decisions to the benefit of us all? Certainly Justices Scalia and Thomas can themselves don blinders, but then would they be best serving the Nation or themselves?

The World recognizes the democratic advances embedded by our Founding Fathers into our Constitution. We must recognize and protect these hard won freedoms, while savoring the international spices and à la modes that can enhance the flavor, quality and values, nutritional and other, of both our American Apple Pies and our lives. Yes, Virginia, U.S. Constitutional Jurisprudence is as "American" as that international taste treat "Apple Pie!"

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This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.

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