# 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

**USA PATRIOT ACT-INSPIRED RULES CHANGES.** In an unprecedented action, at least in the last decade, the **U.S. Supreme Court** by a 7-2 vote refused to adopt a proposed **Federal Judiciary Rule** change submitted to it by the **U.S. Judicial Conference**. This proposal was among those drafted by the **Judicial Conference** in conformity with the 911 terrorism-inspired **USA Patriot Act**. The proposal was to permit the "video-conferencing" of witness testimony to allow greater access to international witnesses at criminal trials, especially at anti-terrorism trials. Speaking for the majority, Justice Antonin Scalia advised of concerns over violation of the **Sixth Amendment's** right to confrontation. "Virtual confrontation might be sufficient to protect virtual **constitutional** rights," he explained, but "I doubt whether it is sufficient to protect real ones." Proposals that were accepted by the **U.S. Supreme Court** and forwarded to **Congress** for objection, included the permitting of: a) video-conferencing of arraignments and first appearances (so long as defendants consent); b) the disclosure by lawyers of grand jury information to federal law enforcement agents and national security officials upon the filing of disclosure petition **(Rule 6(e) 3C**, which is pursuant to **Section 203 of the Patriot Act**); and c) magistrates issuing search-and-seizure warrants outside their normal areas of jurisdiction (**Rule 41(a),** which is pursuant to **Section 219 of the Patriot Act**). If there are no **Congressional** objections, the new Rules become effective December 1, 2002.

**JUSTICE AND LIBERTY COVERED!** In the March 2002 **Federally Speaking** column we reported on "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 displeasing "the Earl of Ash … so he ordered her charms sequestered behind a wall of cloth." The month before, we had reported on Working Assets' "Flash" video portraying Minnie Lou's big sister, "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 **Her Statuesqueness** was also blocked from view. Now **Pittsburgh Post-Gazette** political cartoonist Rob Rogers has combined the two. In a recent editorial cartoon he portrays **Attorney General** Asncroft standing in front of the **Statue of Liberty,** while she is being covered up Minnie Lou-style. He is holding a document entitled "Expanded Spying Powers." In the background we see the words "**Civil Liberties**" on her skirt ready to disappear behind her covering. The **Attorney General**, as he points to **Miss Liberty,** boldly announces: "In the interest of the American people … we found it necessary to cover another statue." (That's "statue," not "statute!") One might think that the **Pittsburgh Tribune-Review's** plea with regard to Minnie Lou, might be just as apropos here: "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 [and her sister, too!]"

## FED-POURRI™

**SEC OUT OF THE WOODS!** It all started with the Woods in Maryland. The elderly William Wood and his intellectually challenged daughter, Diane Wood Okstulski, had apparently given the persuasive Maryland broker Charles Zandford, permission to open a joint investment account for them in the amount of $419,255, the discretion to manage the account, and a general power of attorney to engage in securities transactions without their prior approval. By the time Mr. Wood passed away a few short years later, the cupboard was bare. The "zandy" Charlie was found with his hand in the cookie jar and convicted of **federal wire fraud**, for selling **securities** in the Woods' account and making personal use of the proceeds. He was ordered to serve 52 months in **federal prison** and pay $10,800 in restitution by the **U.S. District Court for the District of Maryland** (***U.S. v. Zandford***, Criminal Action No.WN-94-0165 (DMD 1995)). The **Securities and Exchange Commission (SEC)**, to recover the remainder of the stolen funds, then filed a civil suit, alleging violations of **§10 of the Securities Exchange Act of 1934 (Act)** and **SEC Rule 10b-5**, for engaging in a scheme to defraud the Woods and misappropriating their securities without their knowledge or consent. Based on the criminal conviction, the **U.S. District Court** granted the **SEC's** motion for summary judgment in the civil case. But was Charlie's scheme to steal the Woods' assets generally, or was it a scheme to manipulate a particular security? The **U.S. Court of Appeals for the Fourth Circuit** thought this was critical, and so was most critical of the **District Court**. Instead of affirming the **District Court**, this appellate court, finding the former to be true, dismissed the civil complaint, holding that the **federal securities law** does not apply in general fraud cases, which, the **Court** said, have no relationship to market integrity or investor understanding, but only applies to the manipulation of a particular security. Therefore, there was no **§10(b)** violation as neither the criminal conviction, nor the allegations in the civil complaint, established that there was fraud "in connection with the purchase or sale of any security." End of story? Not quite! "I have not yet begun to fight," was the echo from the past of "Justice John Paul Jones" (oops! Stevens). Loading his mighty quill, Justice Stevens wrote for a unanimous **U.S. Supreme Court,** that assuming the **SEC** allegations true, Zanderford's conduct was "in connection with the purchase or sale of any security," for among "**Congress** objectives in passing the **Act** was to ensure honest securities markets and thereby promote investor confidence after the market crash of 1929," by substituting "a philosophy of full disclosure for the philosophy of ***caveat emptor*** and thus to achieve a high standard of business ethics in the securities industry." Here, he then scribed, "the **SEC** complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore in connection with the securities sales within the meaning of **§10(b).** Accordingly, the judgment of the Court of Appeals is reversed." ***Securities and Exchange Commission v. Zandford,*** No. 01-147 (Sup. Ct., June 3, 2002). An obviously reinvigorated **SEC** Chairman Harvey Pitt "zandily" remarked: "We are gratified that the **Supreme Court** ... endorsed the **SEC's** long-standing position and enabled the **SEC** to continue aggressive enforcement action against brokers who abuse their clients' trust in securities transactions." Yes, the **SEC** now certainly appears to be out of the woods!

**FEDERAL DEATH PENALTY UNCONSTITUTIONAL?** So concluded **U.S. District Court** Judge Jed S. Rakoff of **the Southern District of New York**, in ***U.S. v. Quinones*** (2002 U.S. Dist. Lexis 7320 (SDNY, 2002)), under the **Fifth Amendment** to the **U.S. Constitution**, on the grounds that innocent people are being sentenced to death "with a frequency far greater than previously supposed." But before making his **Order** final, he challenged the **Government** to refute this conclusion. Judge Rakoff explained: "We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible. That innocent people are convicted of capital crimes with some frequency. Fortunately, as DNA testing illustrates, scientific developments and other innovative measures (including some not yet even known) may enable us not only to prevent future mistakes but also to rectify past ones by releasing wrongfully-convicted persons -- but only if such persons are still alive to be

released. If, instead, we sanction execution, with full recognition that the probable result will be the state sponsored death of a meaningful number of innocent people, have we not thereby deprived these people of the process that is their due?" In 1972 the **U.S. Supreme Court** had prohibited capital punishment, but reversed itself four years later. The **High Court** in the past had based its upholding of the death penalty on the belief that the execution of persons later found to be innocent would be unlikely, which basis has now been seriously questioned. This debate is far from over.

**SUPREMES STRENGTHEN PATENT MONOPOLY.** A unanimous **U.S. Supreme Court** recently strengthened the **constitutionally** granted **patent monopoly**. In ***Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*** 520 U.S. 17, 29 (1997), the **High Court** had held that competitors could rely on a patent's "prosecution history" to "estop" the patent holder from claiming subject matter under its patent that it had surrendered through the "claims narrowing" amendment process, as a condition of obtaining the consent of the **Patent and Trademark Office (PTO)** to its proposed "pending" patent. Now, in ***Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.,*** No. 00-1543 (Sup. Ct., May 28, 2002), the **High Court** has backed off from this holding. Justice Anthony Kennedy, writing for a unanimous **Court**, advised that the **U.S. Supreme Court's** revised holding is that "**prosecution history estoppel**" does not bar the asserting of infringement against ***every*** equivalent, and the patentee should have the opportunity to rebut this presumption that "**prosecution history estoppel**" bars a finding of equivalence, by demonstrating that at the time of the claim narrowing one skilled in the art could ***not*** reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent. Under the **Doctrine of Equivalents**, one cannot simply take the patented engineering and design of another, change, for example, a clamp to a screw, and call it new. Festo, a German industrial equipment manufacturer, sued Shoketsu (SMC), a Japanese pneumatics maker, for infringing two of its **patents** for "rodless cylinders." When the patent examiner rejected Festo's patent applications because of alleged defects in description (35 U.S. C. §112), Festo amended the first application by adding a new limitation that the outer sleeve of its "rodless cylinders" would contain "magnetizable" material, and narrowed the claims of both applications by adding a pair of "one-way sealing rings." SMC allegedly eliminated the second ring, by substituting one "two-way sealing ring," eliminated the use of magnetic material in the sleeve, and claimed it as its own. Festo sued, claiming that under the **Doctrine of Equivalents**, SMC's device was so similar as to infringe its patents. The **High Court** reversed the ***en banc*** holding of the **U.S. Court of Appeals for the Federal Circuit** (234 F.3d 558), that "prosecution history estoppel applied" unconditionally, and remanded the case for the lower court to give Festo the opportunity to rebut this presumption.

**OPERATION CANDYMAN.** We first learned about the "Candyman" in 1971 from "Willy Wonka and the Chocolate Factory," as a purveyor of "goodies to children." Well, the **U.S. Department of Justice** recently appropriated the "Candyman" and converted him into an "Operation" to deter purveyors of "children as goodies," by focusing in on the alleged illegal activities of Internet "child-pornography" chat groups. ``A new marketplace for child pornography has opened in the dark corners of cyberspace," but there "will be no free rides on the Internet for those who traffic in child pornography," announced **U.S. Attorney General** John Ashcroft. Hitching on to this Candy Wagon, Alan Sekulow, the ACLJ's Chief Counsel and self-styled opponent of "threats to Christian freedom," now asserts that "**Operation Candyman**" unmistakably shows the need for the enactment of the new **Child Obscenity and Pornography Protection Act of 2002**, "that would make the depiction of children - virtual or real - engaging in sexual acts **ILLEGAL**," and solicits support from his followers "because of the **Supreme Court's** decision this spring" overturning the **Child Pornography Prevention Act of 1996 (CPPA),** which, according to Counselor Sekulow, "effectively **LEGALIZE CHILD PORNOGRAPHY**" (***Ashcroft v. The Free Speech Coalition***, No. 00-795 (Sup. Ct. 2002)), and "because the ACLU and other organizations are lobbying in Washington to protect the so-called '**free speech rights**' of pornographers" (**CAPITALIZED** emphasis **NOT** added). The **CPPA** had tried to ban a wide variety of artistic techniques, including the use of child-like adults and computer created pictures, to portray the appearance of explicit youthful sexuality

(including “a la Romeo and Juliet”). Justice Anthony Kennedy, writing for the 6-3 majority, found that the main provisions of the **CPPA** were "overbroad," thus violating the **First Amendment** guarantee of **Freedom of Speech**. Ironically, Mr. Sekulow, the **FBI** advises that the **Government** in proceeding with its **Operation Candyman** prosecutions ***under present law*** has so far netted at least eight members of the clergy, including two Catholic priests (and a law enforcement employee). The more relevant questions, therefore, appear to be: ”Whose houses really need cleaning?” and “Do we really need more legislation that very well will not survive **Constitutional** muster, or just proper enforcement of existing laws? (Interestingly, the same latter question is being asked with regard to our “War Against Terrorism.”) For more on the “Wars Against Pornography and Free Speech,” see “Internet Censorship – Page Three,” below.

**CIRCUITS SPLIT ON RACE AND LAW SCHOOL ADMISSIONS.** A prime reason the **U.S. Court of Appeals for the Sixth Circuit**, heard ***Grutter v. Bollinger*** (Case No. 01-1447 and No. 01-1516 (6th Cir. 2002)) ***en banc*** was because of “the ‘inevitable conflict’ with another federal circuit’s opinion in view of the already conflicting decisions of the Fifth Circuit in ***Hopwood v. Texas,*** 78 F.3d 932 (5th Cir. 1996), and 236 F.3d 256 (5th Cir. 2000), and the Ninth Circuit in ***Smith v. University of Washington Law Sch.***, 233 F.3d 1188 (9th Cir. 2000).” By a 5-4 vote, the Sixth Circuit has upheld the **constitutionality** of Michigan Law School using race as a factor in admissions. Chief Judge Boyce Martin, writing for a majority of the Court, asserted that the Law School's admission process was in accordance with the 1978 **U.S. Supreme Court** divided decision in ***Regents of the University of California v. Bakke***, 438 U.S. 265 (1978), where the **High Court** determined that, while quotas to obtain racial diversity were forbidden, race could be used as a factor in admissions. Thus, Justice Louis Powell, in the only concurring majority opinion, did recognize diversity as a “compelling interest” that promotes "speculation, experiment and creation." Judge Martin, therefore, concluded that: "Because Justice Powell's opinion is binding on this court under Marks v. United States, and because ***Bakke*** remains the law until the **Supreme Court** instructs otherwise, we reject the **District Court's** conclusion [of no compelling state interest] and find that the Law School has a compelling interest in achieving a diverse student body." However, Judge Danny Boggs, in his dissenting opinion asserts that the **Equal Protection Clause** of the **Fourteenth Amendment** governs and by its inclusion "the framers of the **Fourteenth Amendment** decided that our **Government** should abstain from social engineering through explicit racial classifications …The Law School's admissions scheme simply cannot withstand the scrutiny that the **Constitution** demands." As two other **Circuits**, the **Fifth** and the **Eleventh**, also question the current validity of ***Bakke***, while at least one, the **Ninth**, does not, it appears that the **Supreme Court** will be called upon once again to resolve this dispute between **Circuits.**

**DON’T SPILL THE HYDRO!** When I was General Counsel for a multi-national company I naively suggested at a top-level meeting, “Don’t spill the hydro, why not use the excess [water] to generate additional electricity and save it to, to --- storage batteries?” (It was the wrong wattage or amperage or “something-age” to sell to the grid, I had already been told.) I was then not so politely told by the Senior VP, an engineer, that it was not possible and lawyers should stick to giving legal advice. However, a month later, I was sheepishly informed by the self-same VP that he had just read that such technology was now available. Similarly, Republican Governor John Engler of Michigan, in chastising Democrat Al Gore during the 2000 **U.S. Presidential Campaign** for his characterization of the internal combustion engine, in his book “**Earth in the Balance**,” as “a mortal threat to the planet,” stated that Al Gore “thinks he’s smarter than the auto industry, the oil industry, the men and women who build the cars.” Well, wouldn’t you know, the self-same Governor has now unveiled plans to establish an **“Energy Center”** to create technology aimed at making the internal combustion engine obsolete. (Even **President** Bush was recently reported, at least momentarily, as lukewarmly acknowledging that humankind may just have had something to do with global warming.) What goes around comes around! Don’t spill the hydro!

## FOLLOW-UP

**CREPPY DIRECTIVE – STRIKE TWO.** Chief U.S. District Judge John W. Bissell, of the **U.S. District Court for New Jersey**, in ***North Jersey Media Group, Inc. v. Ashcroft*** (DNJ, May 29, 2002), has now joined U.S. District Judge Nancy Edmunds, of the **U.S. District Court for the Eastern District of Michigan**, in ruling that cases classified as "special interest" by the office of **Chief Immigration Judge** Michael Creppy must be open to the press and the public. Judge Edmunds' ruling had been reported in the May 2002 **Federally Speaking** column. Chief Judge Bissell confirmed, that were the **Creppy Directive** to continue in force, "the government could continue to bar the public and press from deportation proceedings without any particularized showing of justification. This presents a clear case of irreparable harm to a right protected by the **First Amendment**." This classification, which was adopted at the behest of the **U.S. Justice Department (DOJ)** by Judge Creppy on September 21, 2001 in a document known unofficially as the "**Creppy Directive**," had led to the closure of hundreds of immigration hearings, and was applied to post-911 cases when the **Justice Department** alleged that an open hearing could jeopardize national security. Ironically, Judge Bissell noted, the Creppy Directive did not protect the secrecy of the hearings, as neither the detainees nor their attorneys were prohibited from making public what was disclosed at the hearings. The **DOJ** is expected to appeal this ruling to the **Third Circuit Court of Appeals**, as it has already appealed Judge Edmunds' ruling to the **Sixth Circuit** (though the **Sixth Circuit** refused to issue a stay pending the outcome of the appeal). Strike Two!

**INTERNET CENSORSHIP – PAGE THREE.** Page Three, **Congress'** third attempt to censor the Internet has now unanimously failed before a Three-Judge **U.S. District Court Panel** in Philadelphia, in an opinion written by Chief Judge Edward R. Becker of the **U.S. Court of Appeals for the Third Circuit**, and joined by **U.S. District Court** Judges Harvey Bartle, III and John P. Fullam. An appeal from this panel goes directly to the **U.S. Supreme Court.** As originally reported in the May, 2002 issue of **Federally Speaking**, the **Children's Internet Protection Act of 2000 (CIPA)** required "libraries to install Internet filtering software in order to receive **Federal** technology funding to provide library users with Internet access." The **Three-Judge Panel**, in issuing a **permanent injunction**, found that: "As our extensive findings of fact reflect, the plaintiffs demonstrated that thousands of Web pages containing protected speech are wrongly blocked by the four leading filtering programs, and these pages represent only a fraction of Web pages wrongly blocked by the programs…. In view of the limitations inherent in the filtering technology mandated by **CIPA**, any public library that adheres to **CIPA's** conditions will necessarily restrict patrons' access to a substantial amount of protected speech, in violation of the **First Amendment**" (see the consolidated cases of ***Multnomah County Library vs. U.S.,*** No. 01-CV-1322, and ***American Library Association vs. U.S.,*** No. 01-CV-1303 (EDPA, 2002)). Page One was the **Communications Decency Act of 1996**, **Congress's** first attempt to control pornography on the Internet, which was thrown out by the **U.S. Supreme Court** as being an **unconstitutional** infringement of **free speech**. The enforcement of Page Two, **Congress's** second attempt, the **Child Online Protection Act of 1998**, has been enjoined pending the decision of **U.S. Supreme** Court, which is still expected later this year. For more on the "Wars Against Pornography and Free Speech," and a possible "Page Four," see "Operation Candyman," above.

## POST SCRIPT:

To some readers certain of our news items may appear to be incredible or incredulous. However, Federally Speaking just reports on the Federal legal scene. Will Rogers succinctly summed it up when he quipped: "I don't make jokes. I just watch the government and report the facts."

## **THE FEDERAL CORKBOARD™**

**NEW AND EXCITING CLE.** The officers of the FBA West Penn Chapter have in the works a basket full of new CLE programs and speakers that you will read about in future columns. For example, reserve October 18, 2002 for a half-day **Social Security Seminar** with nationally recognized Administrative Law Judge Kathleen McGraw. West Penn will also be continuing its popular CLE programs such as the **FBA LearnAbout™ Luncheon Series** (Open to All). Call Arnie Steinberg (412/434-1190) for information and reservations.

**LUNCH WITH A FEDERAL JUDGE SERIES,** for FBA members, continues. Call Susan Santiago for information and reservations (412/281-4900).

**NEW FBA SECTIONS.** The FBA West Penn Chapter is in the process of exploring the establishing of new Sections and expanding existing ones in such areas as International Law, Bankruptcy, Alternate Dispute Resolution, Social Security, Non-Citizens Rights and Obligations, Labor Relations, etc. If you are interested in actively participating or chairing any of these Sections, or have suggestions as to other Sections that may be of value to the Western Pennsylvania Federal Bar, please contact President Joe Perry at 412/281-4900.

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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).*** **Federally Speaking** ***thanks*** **LexisNexis** ***for aiding in research.***

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