



# FEDERALLY SPEAKING



by Barry J. Lipson

PATRIOT ACT COMPILATION ISSUE  
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Compiled for the **KIWANIS CLUB OF PITTSBURGH**, the **NUMBER 3 KIWANIS CLUB** chartered January 19, 1916. Federally Speaking, an editorial column, prepared for the members of the **WESTERN PENNSYLVANIA CHAPTER OF THE FEDERAL BAR ASSOCIATION** and all **FBA** members for the purpose of keeping the reader abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a “heads up” to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. *The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author.* Prior columns are available on the U.S. District Court for the Western District of Pennsylvania website:  
<http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

## LIBERTY’S CORNER

**“TRADING LIBERTY FOR SAFETY”** *The Federal Lawyer* for January 2003, in its cover story “*Constitutional Issues After 9/11: Trading Liberty for Safety*,” by Michael Linz and Sarah Meltzer, sums up many **governmental** actions that have previously been reported in *Federally Speaking’s “Liberty’s Corner,”* and which they refer to as having “needlessly placed in jeopardy fundamental liberties that are embodied in the **Constitution.**” These actions include the passage of **USA PATRIOT Act** (“an acronym for ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism’”), Military Tribunals, Denial of Counsel, Secret Imprisonments without Charges, Governmental Spying, the Palmer-style Ashcroft Raids, the Creppy Directive, etc. They conclude that history “*shall judge*” whether those “who would dare question its [the **Administration’s**] judgments ... ‘only aid terrorists’” by, as the **U.S. Attorney General** cautioned **Congress**, scaring “peace-loving people with phantoms of lost liberty;” or “if the government’s actions ... like the **Palmer Raids** and the **internment** of America’s Japanese citizens, [constitute] reprehensible conduct unbefitting our great nation.” [25] (**U.S. Attorney General** Palmer acted similarly after “anarchist” bombings in 1919 [20]).

**SAFE AND FREE FOR “U” AND ME!** In the October 2002 *Federally Speaking* column [21] we reported that “so far” George Washington Law Professor Jeffrey Rosen has given American Society, though not the current **Administration**, a passing grade in protecting our liberty. “So far,” he advised, “in the face of great stress, the system has worked relatively well. The **Executive Branch** tried to increase its own authority across the board, but the **Courts** and **Congress** are insisting on a more reasoned balance between liberty and security.” The American Civil Liberties Union (ACLU), however, is concerned with what it characterizes as the **Administration’s “Just Say No’ policy — no judicial review, no counsel, no public disclosure, no open hearings, essentially no due**

**process**” (emphasis added). They believe that without a broad grass roots involvement, these ongoing “anti-liberties” actions of the **Executive Branch** will seriously erode our hard won liberties. Therefore, the ACLU has launched nationally “**Keep America Safe and Free, The ACLU Campaign to Defend the Constitution,**” with an initial funding of \$3.5 million. This campaign will focus on keeping the “American people [informed] of actions taken by the **Administration** and **Congress** that have the effect of unnecessarily restricting **free speech**, withholding **due process**, or challenging the **right of judicial review**,” including, for the first time in its over eighty-year history, airing TV “infomercials,” these showing the **Attorney General** re-writing and cutting-up the **Constitution** to implement the Administrations “**Just Say No**” policies. This campaign will also monitor the implementation of the **USA Patriot Act**; file civil liberties lawsuits in state and **federal courts**; lobby local and state jurisdictions in specific areas of civil liberties; and organize pro-civil liberties activities at the grass-roots level. Why? It would seem obvious! To do its perceived job of safeguarding your liberties, while being mindful of your safety, and while, they say, helping you to realize that you are the “**U**” in **ACLU**. That it is *your* liberties at stake here! (See also “*The Outer Limits?*”, reprinted below [22].) [23 & 21]

**THE DEBATE IN A DUCK’S BILL.** Two recent quotes from the same Editorial Page of the Pittsburgh Tribune-Review sum-up the current post-9/11 debate in a “duck’s bill.” On the right-wing, Bruce Tinsley has Mallard Fillmore Duck quip, in his popular conservative political cartoon strip: “Have you heard about the teacher in North Carolina whose school system accused her of something she didn’t do ... Then forced her to apologize for it, and sent her for ‘re-education’ so she won’t do it again? If you haven’t, don’t be too hard on the media ... *They’ve got their hands full worrying about the suspected terrorists’ rights.*” On the opposite wing, Reuters News Service is reported as noting under a photograph of “Ground Zero,” in an article entitled: “**Rights the First Victim of ‘War on Terror’**,” that: “*Human rights ... have been a casualty of the U.S. ‘war on terror’ since Sept. 11.*” (Emphasis added.) That’s both wings in a duck’s bill! (But, Mallard did not for long duck the fact that the “media” had, in fact, actually reported on this “poor judgment” teacher incident. The very next day, Mallard quacked the admission that he had seen from his birds-eye view the Wilmington Star report of the North Carolina teacher who was forced by school officials “to apologize and undergo ‘sensitivity training’ for explaining the ... Norwegian origin ... word ‘niggardly,’ which means ‘stingy,’ to her class.”) [21]

## **THE USA PATRIOT ACT**

**AT WAR!** The major provisions of the “**USA Patriot Act**,” a/k/a the **Anti-Terrorism Legislation**, which curtail civil liberties, are in effect through December 31, 2005. This legislation, enacted as a direct response to the events of September 11, 2001, which has been referred to by some as “draconian,” certainly places our **Federal Justice System** on a war footing. It eases the government’s detention of some suspects without charges, and allows the government to secretly search the homes of suspects, tap their home and cell telephones and track their use of the Internet. The **American Civil Liberties Union (ACLU)** is concerned that this legislation supports “the **Administration’s ‘Just Say No’ policy — no judicial review, no counsel, no public disclosure, no open hearings, essentially no due process**” (emphasis added)[23]. However, the most “draconian” provisions do “sunsetting” after four years, and the **Attorney General’s** power to detain/incarcerate non-citizens based on mere suspicion is limited to seven days (if deportation proceedings have **NOT** been commenced); and the use of “Carnivore” devices, which scan “through tens of millions of emails and other communications from innocent Internet users as well as the targeted suspect,” as reported in the October, 2001 **Federally Speaking** column [8], is regulated by excluding general access to the “content” of the messages and by requiring **Carnivore Reports** to **Congress**. Additionally, the

**Inspector General** of the **U.S. Department of Justice (DOJ)** is required to designate an official who shall review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the **DOJ**; publicize the responsibilities and functions of and how to contact this official; and semi-annually submit Reports to **Congress** on the implementation of this requirement and the details of the abuse complaints received. Hopefully, this is done and we will not re-visit the subsequently “**Constitutionally condemned**” internment of “ethnically objectionable groups,” as was the fate of ethnic Japanese during the Second World War. [10]

**SON OF USA PATRIOT ACT.** We apparently have, however, not yet seen the end of the **Administration’s** attempts to continue the diminution of our civil rights. On the drawing board right now is “**Patriot Act II,**” officially called the “**Domestic Security Enhancement Act.**” According to the ACLU, this **Son of Patriot** “contains a multitude of new and sweeping law enforcement and intelligence gathering powers -- many of which are not related to terrorism -- that would severely undermine basic constitutional rights and checks and balances. If adopted, the bill would diminish personal privacy by removing important checks on government surveillance authority, reduce the accountability of government to the public by increasing official secrecy and expand on the definition of ‘terrorism’ in a manner that threatens the constitutionally protected rights of Americans. ... The new legislation would allow government to spy on First Amendment-protected activities. ... The new act would radically diminish personal privacy by removing checks on government power. ... The new bill would increase government secrecy while diminishing public accountability.” The ACLU urges that “rather than passing this new Act ... **Congress** should instead investigate and oversee ways in which this **Administration** has already used or misused new powers.” [29]

## **CONSEQUENCES OF PATRIOT ACT-TYPE CONDONED ACTIONS**

**THE OUTER LIMITS?** "There is nothing wrong with your television set. Do not attempt to adjust the picture. ... You are about to experience the awe and mystery which reaches from the inner mind [of the **U.S. Attorney General**] to the Outer Limits” of **Government** conduct. Or so says the ACLU! At its recent “**Keep America Safe and Free**” Press Conference, the **American Civil Liberties Union** detailed three alleged episodes of what they view as the **Government** stepping beyond the “Outer Limits” of our **Constitution** and thereby “terrorizing” American citizens, in the name of anti-terrorism. *Episode One: Sister Virgine Lawinger*, a nun, is a member of a “Wisconsin group called **Peace Action**. Last April, she was among a group of 20 activists who were barred from boarding a domestic flight and detained for questioning. The group was going to Washington to demonstrate against the School of the Americas and to learn how to lobby. To this day, no official involved has told them why they were detained and barred from flying.” *Episode Two: Miss B. J. Brown*, a first year college co-ed, was visited by the “**SS,**” the “**Secret Service** because someone anonymously reported she had in her possession a poster critical of President Bush. The **Secret Service** interrogated her at length. Even after they concluded that the poster was harmless, they wanted to know whether she had any maps of Afghanistan or ‘pro-Taliban stuff’ in her apartment.” *Episode Three: Danny Miller*, last November, on a regular visit to the post office with a colleague, “attempted to purchase 4,000 stamps for a mailing they were doing. They requested stamps without the American flag. The clerk asked if **Statue of Liberty** stamps were OK and they replied, ‘Yes, we love liberty.’ The clerk called the police, and Danny and his colleague were questioned about their patriotism. They were unable to purchase stamps that day. The next day when Danny’s colleague returned to the post office he was asked to meet with the **Postal Inspector**, who quizzed him at length about the **Voices in the Wilderness** group... a group that opposes economic sanctions against Iraq,” and a group for whom “Danny has traveled the world.” **You be the Judge!** Were the “outer limits” breached? [22]

**FISA: "COMES CLOSE" TO MINIMUM FOURTH AMENDMENT STANDARDS.** Curt Anderson of Associated Press reported that in *In Re: Sealed Case No. 02-001* (FISCR 2002), "a trio of ... semi-retired judge[s] on the **U.S. Court of Appeals** ... appointed by President Reagan" and "named by **U.S. Supreme Court** Chief Justice William Rehnquist" to the "**U.S. Foreign Intelligence Surveillance Court of Review**," overturned the unanimous decision of seven (7) other Federal Judges (later joined by an eighth) forbidding "law enforcement officials" from "directing or controlling ... the use of the **FISA** procedures to enhance [non-espionage] criminal prosecution" (see *Federally Speaking*, No. 20). They based their determination, at least in part, on the expanded powers given to the **Executive Branch** in the **USA Patriot Act**. Thus, the **FISA** wall (50 U.S.C. 1801, et seq), erected to curb alleged **Federal Agencies'** abuses of the rights of American citizens, seems to have been torpedoed. Even though these apparently "hand picked" judges acknowledged that the **U.S. Supreme Court** in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) "cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable," they allegedly so ruled because they had "learned" that "effective counterintelligence ... requires the wholehearted cooperation of all the government's personnel who can be brought to the task," and that a "standard which punishes such cooperation could well be thought dangerous to **national security**." They also promulgated the novel "come close" rule that as "the procedures and government showings required under **FISA** ... come close" to meeting "the minimum **Fourth Amendment** warrant standards ... **FISA** as amended is **constitutional** because the surveillances it authorizes are reasonable." Thus, if we "come close" to obeying the law we're okay, right? According to Anderson, while the "government has sole right of appeal ... attorneys were exploring other ways of getting the case to the **High Court**," and have filed for **certiorari** to the **U.S. Supreme Court**. [20, 24 & 27]

**A REALLY CREPPY DIRECTIVE?** The **Third Circuit** two-judge majority in *North Jersey Media Group v. Ashcroft* (3rd Cir 2002; No. 02-2524), in reversing the lower court's ruling that a blanket directive for closed "undercover" deportation hearings was **unconstitutional**, cautioned that they "are keenly aware of the dangers presented by deference to the **executive branch** when **constitutional liberties** are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy." As of this writing seven (7) **Article 3 U.S. Federal Judges** have found the **Creppy Directive's** blanket closure of all special interest deportation hearings to be **unconstitutional**, and only the above two have found it **constitutional**. Those finding it **unconstitutional** are **U.S. Circuit Judges** Daughtrey, Keith and Scirica, and **U.S. District Judges** Bissell, Carr, Edmunds and Kessler. Moreover, according to the **Third Circuit** majority opinion in *North Jersey Media Group, supra.*, such "**unconstitutional**" findings were done with such "eloquent language" as "Democracies die behind closed doors . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation;" to which Judge Kessler added, "secret arrests are a concept odious to a democratic society" (see *Federally Speaking*, Nos. 15, 17 and 20). These **Article 3** Judges believe that **constitutionally** deportation hearings may only be closed on a case-by-case basis, and by the Immigration Judge hearing the matter, not by a general "directive" (see *Detroit Free Press v. Ashcroft*, 2002 U.S. App. LEXIS 17646 (6th Cir. 2002)). Interestingly, the **Third Circuit** decision upholding the **Creppy Directive** was handed down only after the rulings by the **U.S. District Court for the District of New Jersey** and the **Third Circuit**, itself, denying the Government's motion for a stay pending appellate review of the **District Court's** finding of **unconstitutionality**, were overturned by the **U.S. Supreme Court** granting this stay (*Ashcroft v. North Jersey Media Group*, 536 U.S.\_\_\_\_, No. 01A991, June 28, 2002). The two-judge Third Circuit majority apparently based this reversal on a finding that "openness" does not "plays a positive role" in immigration proceedings because they believed "the Government presented substantial evidence that open deportation

hearings would threaten **national security**.” They also apparently found some solace in their belief that even without an open hearing “these aliens are given a heavy measure of **due process** -- the right to appeal the decision of the Immigration Judge (following the closed hearing) to the **Board of Immigration Appeals (BIA)** and the right to petition for review of the **BIA** decision to the **Regional Court of Appeals**. See also *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (noting that because the Constitution ‘provides the **Writ of Habeas Corpus** shall not be suspended, . . . some **judicial** intervention in deportation cases is unquestionably required by the **Constitution**’).” However, **Third Circuit** Judge Scirica strongly dissented, finding that for “these” people, and for “all of the people,” “the requirements of the test [in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)] are met. . . . Deportation hearings have a consistent history of openness” and the “**Supreme Court** . . . in both *South Carolina Port Authority [FMC v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002)] and *Butz [Butz v. Economou*, 438 U.S. 478, 513 (1978)] concluded that **constitutional** principles applicable to civil cases were relevant to the administrative proceedings at issue. . . . Accordingly, the demands of **national security** under the logic prong of **Richmond Newspapers** do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general. . . . There must be ‘**a substantial probability**’ that openness will interfere with these interests . . . [and] deference is not a basis for abdicating our responsibilities under the **First Amendment**. . . . *United States v. Robel*, 389 U.S. 258, 264 (1967) (. . . ‘Implicit in the term **national defense** is the notion of defending those values and ideals which set this Nation apart.’). . . . But a case-by-case approach would permit an Immigration Judge to independently assess the balance of these fundamental values. Because this is a reasonable alternative, the **Creppy Directive’s** blanket closure rule is **constitutionally infirm**. As the **Supreme Court** reasoned in *Globe Newspaper* . . . ‘a mandatory rule requiring no particularized determinations in individual cases, is **unconstitutional**.’” (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)). One wonders whether the granting of the stay by the **U.S. Supreme Court** influenced or even re-directed the outcome in the **Third Circuit**. In any event, with such a “conflict between the circuits,” this question is certainly ripe for the granting of **certiorari** by the **U.S. Supreme Court**. [22 & 24]

**A GIANT STEP (BACKWARD) FOR MANKIND?** The **President**, without **Congressional** authority or a formal **Declaration of War**, recently signed an **Executive Order** authorizing the government to use **Special Military Tribunals** in the trial of “accused” non-citizen “terrorists,” thus apparently permitting secret trials without a jury, without the requirement of a unanimous verdict, and with only limited opportunities to confront the evidence against oneself and/or to choose one’s own lawyer, even where the “terrified accused” may be a U. S. resident and/or facing the death penalty. And the stated purpose of all this? To put alleged terrorists on trial in greater secrecy and faster than is ordinarily allowed under our **Constitution**. Indeed, to prevent such “Three Ring Circuses” as “**Constitutional Trials**” allegedly cause, representatives of the **Administration** have asserted that even American citizens fighting with the Taliban should be tried by such **Tribunals**. [11]

**BIG BROTHER’S MAGIC LANTERN.** 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 21<sup>st</sup> Century “Magic Lantern” will now refer to a “Trojan Horse” type computer program. According to **PC World**, Magic Lantern is being developed by Big Brother (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” (*Federally Speaking*, No. 8), and how the **USA PATRIOT Act**, while usually expanding the powers of the **Executive Branch**, tries here, to some extent, to regulate their use “by excluding general access to the ‘content’ of the messages and by requiring Carnivore Reports to **Congress**” (*Federally Speaking*, No. 10). Perhaps what is truly needed is the light of the “Magic Lantern” of **judicial supervision** to keep out the darkness of the Trojan Horses of the overzealous? [13]

**Denial of ATTORNEY/CLIENT PRIVILEGE.** It has been asserted that the **U.S. Attorney General** has tried to seize the reins of power from the **Judicial Branch**, for example. by usurping the **High Court’s** authority and “reversing” the **U.S. Supreme Court’s** holding in *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), that communications between a client and his attorney must be "safely and readily availed of" and "free from consequences of apprehension of disclosure." The **AG** has done this in the name of anti-terrorism, by authorizing the eavesdropping on **Attorney/client** telephone conversations, and the monitoring of **attorney/client** mail, when he concludes that there is a "reasonable suspicion" that such communications related to future terrorist acts (which authorization became effective even before it was published in the **Federal Register** on October 31, 2001). In defense of this action, the **U.S. Attorney General** appeared before *King Larry Live* on November 2, 2001 and pled his case to the Court of Public Opinion. “We're talking,” he stated, only “about 13 prisoners nationally in the United States of America whom we have reason to believe would be seeking to continue with criminal activity while they are in jail,” though apparently acknowledging later, that of “the 13” only “some are terrorists.” However, he apparently failed to recognize that all that is need here is to utilize a long-standing exception to the **attorney-client privilege**, which allows a **judge** to permit such actions if he/she finds that such communication is aimed at furthering criminal activity. Not only would this preserve our **liberty**, but also it would allow the **Judiciary** to fulfill its role of protecting our **Constitutional** due process rights. [11]

## **NEED FOR JUDICIAL SUPERVISION**

**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.) We have also previously quoted in this column **United States Supreme Court** Justice Sandra Day O’Connor, quoting Margaret Thatcher: “Where law ends, tyranny begins” (see *infra*). There is now one more quote to add, a direct quote from **United States Supreme Court** Justice David H. Souter: “When you are dealing with people, be careful!” At the post-9/11 **2001 Third Circuit Judicial Conference**, Justice Souter thus cautioned, using an extensive discussion of the Japanese **internment** litigation and the surrounding

subsequently **Constitutionally** condemned **Governmental** actions, as illustrative of what disregard for this caution, and presumably the cautions of Prime Minister Thatcher (*supra*), Statesman Franklin and Historian Santayana (*infra*), could cause. (Former Pennsylvania Governor, **Homeland Security Director**, and now **Secretary of Homeland Security**, Tom Ridge, as he left for the **Nation's Capital** stated, quoting Benjamin Franklin: "Those that can give up essential **liberty** to purchase a little temporary safety deserve neither **liberty** nor safety;" and George Santayana has cautioned: "Those who cannot remember the past are condemned to repeat it.") [13 & 11]

**"WHERE LAW ENDS, TYRANNY BEGINS!"** "Where law ends, tyranny begins," so said United States Supreme Court Justice Sandra Day O'Connor, quoting Margaret Thatcher, on the occasion of Justice O'Connor being awarded the first "Carol Los Mansmann Award for Distinguished Public Service" by the Western Pennsylvania Chapter of the Federal Bar Association, before a packed house of 1000 well-wishers in the Duquesne University Student Union Ballroom. She was driving home the point that in light of the recent terrorist attacks the rule of law must be maintained. "The need for lawyers does not diminish in times of crisis," she stressed, "it only increases." Your columnist had the honor of presenting her with this award and "pinning" the "Honorable" Honorary FBA Member O'Connor with an FBA recognition pin. The Carol Los Mansmann Award for Distinguished Public Service will be awarded annually by the West Penn Chapter, in conjunction with the Duquesne University School of Law, to "a public figure who has made unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession's highest standards," attributes exemplified by U.S. Court of Appeals Third Circuit Judge Carol Los Mansmann, who passed away shortly thereafter. [9 & 14]

**THIRD CIRCUIT AND WDPA JUDGES SPEAK OUT:** "Good judges ... try and get it right." With these words the newest member of the **U.S. Circuit Court of Appeals for the Third Circuit**, D. Brooks Smith, left behind the exhilaration of the Chief Judgeship of the **U.S. District Court for the Western District of Pennsylvania**, and the acrimony of the **U.S. Senate** confirmation process, and confirmed to all that he places "real people" and their very real particular "cases" above all. After being sworn in and donning his appellate robe, he stressed that "good judges must always keep in mind the sacred trust they hold;" good judges must "decide cases," not broad issues; good judges "must remember real people are affected by our decisions;" good judges must "recognize their own fallibility ... and at the end of the day, try and get it right." He then pledged, "I will try my utmost to be a good judge." Then too, with regard to "trial by jury," **Senior U.S. District Judge** Donald J. Lee stresses: "Trial by jury is a fundamental concept in our American system of justice, and it has been instrumental in the preservation of individual rights while at the same time serving the interests of society in general;" and **U.S. District Judge** Robert J. Cindrich cautions: "Too many people take for granted the great blessings our democracy has bestowed upon us and our children. It is clear to me that you are aware that a democracy is not self-effectuating and that it demands the ongoing, active participation of the citizenry if it is to endure." [21 & 24]

**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 9/11 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. [17]

**Feet cut out from under standing.** A three judge panel of the **Ninth Circuit**, in a case involving the non-citizen Guantanamo Bay 9/11 detainees (*Coalition Of Clergy, Lawyers and Professors v. Bush*, No. 02-55367, DC CV-02-00570-AHM (9<sup>th</sup> Cir. 2002)), while cutting the feet out from under **standing**, showed an understanding of the **constitutional** status of **habeas corpus**. The court, accordingly, vacated “the district court’s determination that there was no jurisdiction in the **Central District of California** and its far-reaching ruling that there is no **United States court** that may entertain any of the **habeas** claims of any of the detainees. The **district court** was without jurisdiction to hold that the **constitutionally** embedded right of **habeas corpus** was suspended for all Guantanamo Bay detainees, without regard for their particular circumstances, whether they petitioned individually or through a true **next friend** on their behalf.” The Court affirmed, however, that because “the Coalition failed to demonstrate any relationship with any of the detainees, it lacks **next-friend** or **third-party standing** to bring a **habeas** petition on their behalf.” Subsequently, **U.S. District Judge** Mukasey, in *Padilla v. Bush*, No. 02 Civ. 4445 (SDNY 2002), held that “dirty bomb” suspect Padilla’s attorney, who had a prior dealing with this **U.S citizen** being held incommunicado after being arrested in the U.S., “may pursue this petition as **next friend** to Padilla” and “may consult” with Padilla. Some may think the **Ninth Circuit** here gavith with one foot and kickith with the other .... [24]

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**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." [17]

**BACK ISSUES.** This column often carries stories continuous in nature, and may “bring issues back” or even “back into issues.” To aid in getting the “whole story,” the **U.S. District Court for the Western District of Pennsylvania** has graciously made all back issues of *Federally Speaking* available on their web site at: <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>. The column numbers and the bracketed [ ] numbers refer to the column numbers in the *Federally Speaking Index* on the **WDPA** website. [24]

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*This **Special Compilation Issue** of the editorial column Federally Speaking brings together, with a modicum re-editing, most of the **USA Patriot Act** related items covered to date. Please send 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](mailto:blipson@wgbglaw.com)).*

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