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

TRIAL BY TRIBUNAL – A BALANCING ACT. Ever since the announcement of "**Trial by Tribunal**" in the wake of the 911 tragedies, as reported in the January 11, 2002 issue of **Federally Speaking**, the **Pentagon** has been engaged in a balancing act between planning for swift secure "military justice" and maintaining a respect for human rights. The **Pentagon** now believes it has reached "equilibrium" in the **Rules** recently issued by the **U.S. Secretary of Defense**, which while not satisfying everyone show a good faith attempt at seeking such a balance. These **Rules** present a mixed bag of military and civilian "rights" and procedures. First and foremost there is to be a presumption of innocence. Additionally, guilt must be proven "beyond a reasonable doubt," and the accused cannot be required to testify. The accused will have the right to appointed Military legal defense counsel, and the accused may also hire their own civilian defense counsel. Then too, the trial will be open to the public, except when there are concerns of national security or witness safety. Three to seven military officers will serve as judge and jury, with the unanimous verdict of a panel of seven being necessary for the imposition of the death penalty. In all cases, including capital cases, a two-thirds affirmative vote by secret ballot of the entire panel is required to establish guilt. Each Tribunal will be presided over by an appointed Presiding Officer, who on evidentiary matters may be overruled by the other panel members. Appeals will be automatic and to a different three-member review panel made up of three military officers, one of whom is to have judicial experience, and the other two who could possibly be civilian lawyers or experts specially "deputized" as military officers by the **President** for this purpose. The **President** has final approval and may reduce, suspend, commute, etc., sentences, or send the matters back to the Tribunals. The **Anti-Defamation League (ADL)** commends these **Rules** as being "a significant step forward in efforts to balance

national security interests with traditional rights accorded criminal suspects in **American courts**," as they "address many of the **constitutional** concerns raised by the **President's** initial outline of military tribunal procedures last fall." The **ADL** does "urge the **Administration** to consult with **Congress** as these guidelines are further developed and implemented." Conversely, **Amnesty International** still views **President Bush's** November 13, 2001 **Order**, which exempts U.S. citizens from this **"Trial by Tribunal,"** as being "too flawed to fix and should be revoked … That the **Pentagon** has paid lip service to **due process** in its commission guidelines cannot disguise the fact that … selected foreign nationals will receive second-class justice, in violation of international law which prohibits discriminatory treatment, including on the basis of nationality." A twenty-first century **American Trial by Tribunal** has yet to be convened

CREPPY'S CLOSURE OF IMMIGRATION HEARINGS UNCONSTITUTIONAL. "It is important for the public, particularly individuals who feel that they are being targeted by the government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the government is adhering to immigration procedures and respecting individuals' rights." So finding, **Federal District Judge** Nancy Edmunds of the **U.S. District Court for the Eastern District of Michigan**, not only ruled that the immigration deportation hearings of Rabih Haddad, for overstaying a six-month tourist visa issued in 1998, must be open to the press and the public, but that all cases classified as "special interest" by the office of **Chief Immigration Judge** Michael Creppy also must be open. This classification, which was adopted at the behest of the **U.S. Justice Department** by Judge Creppy on September 21, 2001 in a document known unofficially as the "Creppy Directive," has 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. The **DOJ** also argued that the **District Court** lacked jurisdiction to hear this matter as the **Immigration and Nationality Act** ***only*** permits appeals of immigration procedures to the **U.S. Court of Appeals,** and then ***only*** after a removal has been ordered. The **Court** held that the "plain language of the statute ... clearly indicates that is limited to actions challenging 'an **Order of Removal**'," which was not the case here. A **DOJ** appeal is likely.

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INs SOP A "snafu!" The current Standard Operating Procedure (SOP) of the **Immigration and Naturalization Service (INS)** appear to be the epitome of a classical ***SNAFU***, a military-derived term formed from the initial letters of the words "***S***ituation ***N***ormal, ***A***ll ***F***ouled ***U***p" (or something like that), or so cry ("sob") **Congressional Republicans and Democrats** alike**,** who seek a conciliatory solution (or "sop") to the current **INS** SOP. You will remember that last month we reported on how the **INS** had formally granted **U.S. M-1 Student Visas** to two of the presumed dead 911 kamikaze terrorists. Now both **U.S. House of Representative Republicans and Democrats** have agreed that the **INS** should be "dismembered." While, yes, the proposed dismembering was fired by this particular **M-1** "snafu" that "stunned" the President and the Nation, it is really grounded in a more basic all-encompassing SNAFU, the inherently schizophrenic SOP of this **Federal Agency**. You see, on the one hand, the **INS** is charged with the duties of assisting "desirable" (legal) immigrants in entering this country and in making America their home. But, on the other hand, the **INS** is required to bar, repel and expel "undesirable" (illegal) immigrants. Accordingly, these conflicting directives tell the **INS** to first distinguish between these two groups and then to welcome the former and banish the latter, and only the Almighty, and **"Private Bills"** in **Congress**, can help those caught in the middle. Nowadays, not only do long backlogs exist in the aiding of legal immigrants to become permanent residents and citizens, but it is also clear that the **INS** has been unable to stem the flood of illegal immigration into this country. Certainly, this is enough to make the

Nation sob for a better SOP! The new proposed SOP (or sop) is to break the **INS** into two separate **Federal Agencies**, one to **service legal immigrants** and the other to enforce the **Immigration Laws** against illegals, with both **Agencies** reporting to a new Number 3 official in the **U.S. Department of Justice**, the **"Assistant Attorney General for Immigration Affairs."** Who knows, this new **AAG** may even become the **"Ombudsman"** for **Immigration Affairs,** bringing equity to the administration of our **Immigration Laws,** without the necessity of resorting to **Private Congressional Bills. A** "SNAZÉ" (snazzy) solution! Indeed, in the future we hope to be able to report: "***S***ituation ***N***ormal, ***A***ll ***Fixed U***p!"

AVIAR: A BIRD'S EYE VIEW OF MICROSOFT. We have head from **Federal Judges**, we have heard from the **'Feds**," we have heard from the States and we have heard from old "Microsofty" itself. It's about time we hear from a silent "true party in interest," a Microsoft customer and a "wanabe" competitor of Microsoft. Enter John J. Urbaniak, a software development CEO, who presides over Aviar, Inc. He is such a person. From his bird's eye view high atop the Aviar Aviary, he let fly at Microsoft, in a recent Pittsburgh Tribune-Review Commentary, the following "blue bird of happiness" tersely packed packets: ***ON MICROSOFT'S ACTUAL PERFORMANCE*:** A) "I challenge" you "to name one piece of software or system that Microsoft has innovated." B) Microsoft "stock currently sells at a p/e [price/earnings] ratio of approximately 55 to 1" which is "far in excess of historical norms." C) "Microsoft has never paid a cent in stockholder dividends." D) As Microsoft has "paid no federal taxes … for the last two years," it has "made no profit … during this period." ***ON MICROSOFT AS A COMPETITOR:*** A) "It was Microsoft that stated its goal was to 'cut off (their competitor's) air supply,' that acted illegally to destroy every competitor: their products, their employees, their stockholders and their partners." B) "It is Microsoft's monopoly that allows it to undersell its competition. In the case of Netscape, Microsoft was able to give away its browser for free…. Netscape was forced out of existence." C) It is Microsoft who "will not allow free choice to the consumer … will break the law to prevent such free choice … and will sue any upstart that threatens it." ***ON MICROSOFT AND THE ROLE OF THE ANTITRUST LAWS:*** A) "We need true competition in the computer industry," so the **Federal Courts** "must act in a manner that restores the free market in computing." B) "We need to be able to buy … an Intel-based computer … [without] Windows!" C) "We need to be able to buy a computer with Linux, or BeOS, or OS/2 Warp" and "choose from a host of word processors, spreadsheets, financial applications, games," etc. **Federally Speaking** welcomes Microsoft's response.

LIBRARIES, THE INTERNET AND FREE SPEECH. The third **Congressional** attempt to censor the Internet is now before a Three-Judge **U.S. District Court Panel** in Philadelphia, headed by Chief Judge Edward R. Becker of the **U.S. Court of Appeals for the Third Circuit**. Also on the panel are U.S. District Judges Harvey Bartle, III and John P. Fullam. An appeal from this panel will go directly to the **U.S. Supreme Court.** Under attack this time is the **Children's Internet Protection Act of 2000 (CIPA),** the federal law that requires libraries to install Internet filtering software in order to receive **Federal** technology funding to provide library users with Internet access. The **Communications Decency Act of 1996**, **Congress's** first attempt to control pornography on the Internet, was thrown out by the **U.S. Supreme Court** as being an **unconstitutional** infringement of **free speech**. The enforcement of **Congress's** second attempt, the **Child Online Protection Act of 1998**, has been enjoined pending the decision of **U.S. Supreme** Court, which is expected later this year. Both the 1996 and 1998 **Acts** imposed criminal penalties. A coalition of libraries, library users, Web site operators and the American Civil Liberties Union is seeking a permanent injunction against this latest attempt at censorship, as a violation of **free speech rights.** Additionally, the **CIPA** is under attack as imposing costly monetary burdens on libraries that are forced to comply or lose funding. Proponents of the **CIPA** believe that as this legislation only withholds funding and does not impose criminal sanctions, and as it permits adults to ask for the filtering software to be turned off for "bona

fide research" reasons, it is the "**government's** best shot yet" at controlling Internet access without being held to be in violation of the **free speech** guarantees of the **First Amendment to the U.S. Constitution**. Conversely, opponents believe that these threats of withholding funding, and the embarrassing necessity of having to ask, and of having to give a "bona fide" reason, to have these filters turned off, have **unconstitutional** "chilling" affects on **free speech**. Whatever the outcome, we know that the "price" for **free speech** is constant vigilance.

SHOOT-OUT AT THE M-F CORRAL! After a hard fought shoot-out at the McCain-Feingold Corral, the campaign to reform Campaign Finance was won when **Congress** enacted and the Gentleman from Texas, in a reversal of his 2000 campaign position, signed into law the **Campaign Finance Reform Bill**, or was it? Gentleman George stated that while the **Bill** has flaws, it "improves the current system of financing for federal campaigns." Rumor has it, that he particularly liked the part of the **Bill** that will increase individual contributions from $1000.00 to $2000.00, where is from whence a kingly portion of his 2000 Presidential Campaign funds came. So that's it, this saga actually ends here? Not by a long shot! Cow-folk in all colors of hats are gathering, with such diverse groups as the **National Rifle Association (NRA),** the **American Center for Law and Justice (ACLJ),** and the **American Civil Liberties Union (ACLU)** all taking pot shots at the **constitutionality** of this legislation, apparently because of the restrictions it places on "issue ads" and the campaigning by such organizations near **Federal** election times. According to the Christian rightists of the ACLJ, this "new law is a SLAP IN THE FACE to our right to **free speech**. It is absolutely, blatantly **UNCONSTITUTIONAL** [emphasis NOT added]!" And so also say the "straight shooters" of the NRA ("this law cannot be allowed to stand, not even for a moment"), and the civil libertarians of the ACLU. The ACLJ continues: "In spite of all the propaganda in the media, this legislation actually silences Christian and conservative [and "shooter" and "civil libertarian"] organizations - banning them from commenting on key moral issues during election campaigns." Fear not though, this legislation is "severable," and if part of it is shot down, the rest remains. But, by the byway, since it does not become effective until after the next **Congressional** elections, the Gentleman from Texas is out there, riding the campaign trails, rounding up "bucks" and "doe" for Republican **Congressional** candidates under the "Old Code of the West." As he exclaimed/explained to reporters: "I'm not going to lay down my arms. I'm going to participate in the system."

FOLLOW-UP

DANCING BETWEEN THE RAINDROPS. In our last four columns we have followed the attempts of the Bush Administration to dance between the raindrops. To avoid Drop One, an **Executive Order was issued** overruling **Congress** by protecting certain **Reagan-era Presidential Papers**. To avoid Drop Two, the **White House** directs the **Attorney General** not to comply with a **Congressional Subpoena** for documents relating to **Clinton-era** campaign financing and apparently unrelated alleged **FBI** corruption. To avoid Drops Three, Four and Five, the **Administration** resisted the attempts of the **General Accounting Office (GAO),** the **Natural Resources Defense Council (NRDC),** an environmental advocacy group, and **Judicial Watch**, a conservative watchdog group, to obtain the documents from **President Bush's Energy Task Force**, which was headed by **Vice President** Dick Cheney. Well, in these latest dances, the **Administration** collided with the **Federal Judiciary** and, as reported in our last column, was ordered to turn over these **Energy Task Force** documents. So they did. End of story! Not quite, for the documents produced pursuant to the **NRDC's** and **Judicial Watch's Freedom of Information Act (FOIA)** law suits, which appear to be less than half of those ordered to be produced, were heavily redacted (blanked out) and largely unreadable, providing little real information, some merely showing subject headings and the names of

senders and recipients. Involved in these **Production Orders** were the **U.S. Department of Energy, The Environmental Protection Agency (EPA), the U.S. Department of Agriculture, and the White House Office of Management and Budget.** We are advised that production of "a more complete set of less redacted documents" will be vigorously pursued, and that these raindrops will continue to fall.

THE FREE INTERNET CONNECT CON. For half a year we have been exposing hidden charge scams and cons and have been trying to invoke the help of the **"Old Lady on Pennsylvania Avenue" (the "FTC").** Along the way we were happy to learn that a Consumers Union study has reached similar conclusions to ours, to wit, that there exists "prevalent pervasive practices of sellers adding extraordinary and unexpected charges, many of them disguised and/or hidden, to consumer products and services." Our latest exposé is the free Internet connect con. "FreeInternetConnection.com" (FIC), as its name clearly states, brings you to its web page through the promise of a "free internet connection," for which you would actually "pay" through your receipt of banner advertising as part of this "free" connection. But here, as you will see, you will also "pay" in additional ways. Upon arriving there you are first informed that you **must** apply for and be granted an American Express, MasterCard or Visa credit card, or as suggested, why not apply for several? After successfully applying, you may be told that the connect service is temporarily down or the way may then be opened for you to the next surprise, that is that only after applying, being accepted and proceeding through a number of screens, do you learn that there is a hidden "$19.95 setup fee" for this so called "free internet connection." And when confronted with this deceit, what does FIC then have to say? "**Yes** there is a one time set up charge, ***however this is not uncommon in this and many other facets of the internet services industry whether initially divulged or not*** **[shades of Federal Sherman Antitrust Act conspiracies]. …**You are under no obligation to sign up for the free Internet service and/or to keep the ccard you applied for" (emphasis added). Bur what obligations are FIC under? Least you do not believe FIC that this "***is not uncommon***," you need only respond to the tempting offer, as proclaimed from billboards, by "PghConnect.com," of a months internet access for only $6.95. As nowadays most surfers expect paid connections to be without time limits, the first surprise occurs when you are stopped cold at the screen advising only "30 hours monthly service included" (or only one hour a day). But what we are concerned about here this month is being informed several screens later that: "Monthly accounts will be charged a one-time $5.00 setup fee." See also "Access995.com" with unlimited monthly access at $9.95 and such a setup fee of $29.95, and "Libcom.com" with unlimited monthly access also at $9.95 and such a setup fee of $19.95. If you would like to add your voice with regard to these or any other hidden, unexpected or extraordinary charges, the **FTC** file reference is "**FTC Ref. No. 1787101**," and tell us also so we can consider your uncovered scam or con for further exposure in this column.

THE FEDERAL CORKBOARD™

NEW FBA SECTIONS. The FBA West Penn Chapter continues 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.

NEW AND EXCITING CLE. West Penn popular CLE **FBA LearnAbout™ Luncheon Series** (Open to All) continues at:

Noon, Thursday, May 16, 2002, with **Benson From the Bench on Federal Discovery**. Chief U.S. Magistrate Judge Kenneth J. Benson presiding. Call Arnie Steinberg (412/434-1190) for information and reservations.

THE Lunch With A Federal Judge Series, for FBA members, continues. Call Susan Santiago for information and reservations (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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