



Number 20

# Federally Speaking



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.*

## **THE WHISKEY REBELLION FOLLOWS SACCO & VANZETTI TRIAL!**

**WHISKEY REBELLION!** Be there on Wednesday, November 6, 2002, when the FBA West Penn Chapter keeps alive the “**Whiskey Rebellion**” tradition. There will be whiskey-related CLE followed by a Whiskey Rebellion Reception in the grand old style of the Engineers Society Ballroom. The Presiding Justice, our own **Judge Judy**. This “Blast from the Past,” is annual once again! Watch out for the Original George W’s **Federal Troops** and the Unabashed Revenuers (please don’t “bash” them!). Support the Honest Western Pennsylvanian Rebel Farmers, while enjoying their Corn Whiskey Punch (included), Bourbon Meat Tastes and other Revolutionary Vitals. All this plus Kolonial Karaoke, Sing-A-Longs and Surprises! Come all ye true “Sons and Daughters of the Bar” (and Bench) at the cost of a mere \$12.00 each (except that the cost for each “Unabashed Revenuer” is \$52.00, plus a round of drinks for all at the cash bar). An expanded two hour/credit CLE (including one hour of ethics), *“Law On The Rocks: The Legal Aspects of the Whiskey Rebellion,”* will immediately precede the “Blast,” at the meager stipend of \$42.00 (including Blast). CLE starts at 2:45 pm, followed by the reception at 5 pm. In addition, Legal Eagles who join the FBA between now and the arrival of **George Washington’s Federal Troops**, will be the guests of the Chapter at the CLE and receive free admission to the Blast. However, *reservations* are a *must*. Please contact Susan Santiago, SB&P, 603 Stanwix Street, Pittsburgh, PA 15222-1447 (412/281-4900).

**BUT FIRST SACCO & VANZETTI!** Before joining the West Penn Corn Farmers’ Rebellion in November, on Tuesday, October 15, 2002 join the FBA West Penn Chapter for another historic two hour/credit CLE (including Luncheon and one hour of ethics), with a Pittsburgh connection, the trial of the “radical rebels” Nicola and Bartolomeo. The date was April 15, 1920. A paymaster and his guard were “iced” and the \$15,776 Slater & Morrill Shoe Factory payroll plundered. Three weeks later Nicola Sacco and Bartolomeo Vanzetti, Italian immigrants and known anarchists, were arrested as they went to pick up a car the police believed to be associated with the crime. Vanzetti had been previously convicted of attempted robbery. At the conclusion of a seven-week trial, on circumstantial evidence alone, both were found guilty of committing this heist and slaughter, and were sentenced to death. Following this “ultimate sentence,” Judge Webster Thayer, their Boston-area trial judge, reportedly boasted: “Did you see what I did with those anarchist bastards the other day?” Seven years later, after many appeals and much public outcry, both

“anarchist bastards” were executed. In light of Sacco and Vanzetti’s Italian immigrant and anarchist status, could they have received a fair trial in this era of the “Red Scare,” bombings by radicals, the “Palmer” anti-radical aliens raids (ordered by a “bomb target” himself, U.S. Attorney General Alexander Mitchell Palmer), predictions of a domestic communist revolution, and expulsions of elected Socialists from the legislature? “Beyond a reasonable doubt” this trial and the resulting executions constitute one of the most controversial legal proceedings in our history, and raises issues that are still being debated today. At this FBA CLE, James A. Prozzi, a partner in the Pittsburgh office of Jackson Lewis LLP, will discuss the social and political background of the case; the major issues which emerged from the trial; the events leading up to the execution; the last-minute efforts of Michael Musmanno, then a young Pittsburgh attorney, to prevent the executions; and the applicability of this “debate” and these “issues” to Post-9/11 America. See you at the Engineers Society at Noon for lunch, followed by CLE from 12:30 pm to 2:30 pm. The cost: \$48.00 for members, \$54.00 for non-members (including a tasty Engineers Society Lunch). Contact Susan Santiago, SB&P, 603 Stanwix Street, Pittsburgh, PA 15222-1447 (412/281-4900) for reservations.

## **LIBERTY’S CORNER**

**REDEDICATION.** “Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world *that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy.* Today, we reflect our commitment to those democratic values by ensuring that our government is held accountable to the people and that **First Amendment** rights are not impermissibly compromised.” So the **U.S. Court of Appeals for the Sixth Circuit** expresses our rededication to the preservation of the rights and freedoms of our democracy even in light of “the egregious, deplorable, and despicable terrorist attacks of September 11, 2001.” (*Detroit Free Press v. Ashcroft*, No. 02-1437, 6<sup>th</sup> Cir, August 26, 2002; emphasis added.) For “the rest of the story” see **Creppy Directive Revisited** below in **Follow-Up**.

**ANOTHER WALL TO BE BREACHED?** In the August 2002 *Federally Speaking* column we explored Jefferson’s Church/State Wall. This month we explore another wall, the **FISA** wall, also erected for our protection. **FISA** is the **Foreign Intelligence Surveillance Act of 1978** (50 U.S.C. 1801, et seq.), which was enacted to curb alleged abuses of the rights of American citizens by **Federal Agencies**, without crippling the nation’s ability to obtain “foreign intelligence information.” To do so, **Congress** established the **U.S. Foreign Intelligence Surveillance Court** (the **FISA Court**) to in secret review, permit and limit, as necessary, first “electronic surveillance” (50 USC §1803), and then “physical search” (50 USC §1822(c)), conducted in the name of “national security,” and do so under *lessened* standards of probable cause. Opponents of **FISA** have, however, claimed that this **Act** itself actually circumvents “explicit **Constitutional** guarantees expressed in the **First, Fourth, Fifth and Sixth Amendments to the Constitution**,” and have charged that “not a single application has been denied” by this secret court. But times may be a changing. Secretly, on May 17, 2002, then Presiding **FISA Court** Judge Royce Lamberth signed a ruling, *unanimously* concurred in by all seven judges of this court, forbidding “law enforcement officials” from commandeering intelligence officials and intelligence investigations, or subverting the purpose of such investigations that have been authorized under abridged constitutional standards. Thus, the Court forbid law enforcement officials from: a) “directing or controlling the investigation using **FISA** searches or surveillances toward law enforcement objectives;” b) directing or controlling “the use of the **FISA** procedures to enhance criminal prosecution;” or c) making “recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of **FISA** searches or surveillances.” The Court *unanimously* disagreed with **Attorney General Ashcroft**’s position that the ‘**USA Patriot Act** allows **FISA** to be used for ‘a significant purpose,’ rather than the primary purpose, of obtaining foreign intelligence information,” so as to allow ‘**FISA** to be used primarily for a law enforcement purpose, as long as a significant foreign intelligence purpose remains” (Ashcroft citing “50 U.S.C. §§ 1804(a)(7)(B),

1823(a)(7)(B);”emphasis not added). Why this stern action after years of never turning down an application? The Court concluded that the “**wall**” between intelligence and criminal investigations was still firmly in place, and was very distressed that “in an alarming number of instances” this “**wall**” had been breached. For example, the Court noted, in “September 2000 the government came forward to confess error in some 75 **FISA** applications related to major terrorist attacks directed against the United States,” and then in “March of 2001, the government reported similar misstatements in another series of **FISA** applications in which there was supposedly a ‘**wall**’ between separate intelligence and criminal squads in **FBI** field offices to screen **FISA** intercepts, when in fact all of the **FBI** agents were on the same squad and all of the screening was done by the one supervisor overseeing both investigations.” The **FISA Court**, therefore, apparently deciding “enough is enough” refused to further extend the government’s “powers” in its “war on terrorism,” in a way that would permit the misuse of intelligence information in criminal cases or enable criminal prosecutors to have too much control over national security investigations. Unremarkably, **Attorney General** John Ashcroft, for the first time in the Court’s history, formally appealed its ruling, and the new Presiding Judge Colleen Kollar-Kotelly (the “eighth” judge; and the current **U.S. v Microsoft** U.S. District Court Judge) then released this ruling. Some may say that the release of this “secret rebuke” of the **Attorney General** may itself be a “breach” in the **wall** of secrecy under the **FISA**, but the Court appears to be simply complying with the July 31, 2002 request of the **Senate Judiciary Committee**, to Presiding Judge Kollar-Kotelly, signed by Senators Leahy, Grassley and Specter, that “any unclassified memorandum opinions should be made accessible to the public, as are judicial opinions in other matters that come before the courts.” To learn “**How the FISA Courts Functions**” see “**Fed-Pourri**,” below.

**CITIZENSHIP DAY: LEST WE FORGET!** On September 17, 2002, yours truly and Joe Perry, President of the FBA West Penn Chapter, at the invitation of Chief Judge D. Brooks Smith of the U.S. District Court for the Western District of Pennsylvania, who presided, and Clerk of Court Robert (Bob) Barth, welcomed the newly sworn-in U.S. citizens, at Pittsburgh’s First Annual Citizenship Day Ceremonies sponsored by the FBA West Penn Chapter. It all goes way back to 1939 when Randolph Hearst gave the “movement” national prominence through his chain of daily newspapers. The “movement” was to recognize new citizens of these United States. In 1940, Congress designated the third Sunday in May, as “I am an American Day,” and many cities continue to observe this day. On February 29, 1952, President Harry Truman signed a bill establishing September 17 as Citizenship Day, replacing the May observance, and moving the date to the one on which the U.S. Constitution was signed in 1787. The intent of the bill was to give recognition to those who had become American Citizens during the preceding year, while, at the same time, celebrating our “Supreme Law of the Land,” the oldest working Constitution in the world. The day’s celebrations include pageantry and speeches to impress Americans with the privileges and responsibilities of U.S. citizenship. “The purpose of this holiday is to honor both, native-born and naturalized foreign-born citizens,” advised Bob Barth, and, accordingly “Citizenship Day focuses on the rights and responsibilities of U.S. citizens both native-born and naturalized.” And that we not forget both “the rights and responsibilities” of U.S. citizenship is even more important now, in light of the abominations of September 11, 2001, and the aftermaths thereof. (It was most fitting that this was one of Judge Smith’s last ceremonial acts as Chief U.S. District Court Judge. On September 23, 2002 he was sworn in as a Judge of the U.S. Court of Appeals for the Third Circuit. Congratulation!)

**“LADY JUSTICE IS BLIND.”** “**Lady Justice** is blind. Sometimes she’s deaf. Sometimes the wheels of justice grind very slow. Sometimes they grind in reverse. Today the wheels are grinding forward.” To whom can we credit this wisdom, to which some may say applies to “**Lady Justice**” post-9/11? Jefferson? Franklin? Nostradamus? The ACLU? The ACLJ? Clinton? Bush? Ashcroft? Palmer? None of the above? If you chose the latter, you are correct. This is the wisdom of Eddie Joe Lloyd as reported by Schmitt and Hackney in the Detroit Free Press on the day **Lady Justice** gave him back his life. For “the rest of the story” see “**Innocence Project**” below in “**Follow-Up**.”

## **Fed-pourri™**

**HOW THE FISA COURTS FUNCTIONS.** OK, in “Another Wall To Be Breached?,” above, we observed the delicate balancing acts required of these secret courts, but how do they actually function? The **Foreign Intelligence Surveillance Act** spells it out. First, the **Chief Justice of the United States Supreme Court** (currently Chief Justice Rehnquist) “publicly” designates seven district court judges from seven of the U.S. judicial circuits for up to seven-year terms to sit in secret as the **FISA Court**, with “jurisdiction to hear applications for and grant orders approving electronic surveillance [and physical searches] anywhere within the **United States.**” He also “publicly” designates the Presiding Judge. If any **FISA Judge** denies such an application for an order authorizing electronic surveillance, on motion of the **United States**, the matter is transmitted, under seal, to the **FISA Review Court** which is comprised of three judges “publicly” designated by the Chief Justice from the U.S. district courts or courts of appeals, one of whom has been “publicly” designated by the Chief Justice as the Presiding Judge. Sitting “together” they “comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a **writ of certiorari**, the record shall be transmitted under seal to the **Supreme Court**, which shall have jurisdiction to review such decision.” As it goes by **writ of certiorari**, the **Supreme Court** need not hear this appeal and if not the affirmance by the **FISA Court of Review** would stand and the sought after search or surveillance would be illegal. To date only the matter discussed in “**Liberty’s Corner**” has or is actually progressing beyond the initial court stage.

## **FOLLOW-UP**

**CREPPY DIRECTIVE REVISITED.** In the May and July, 2002 *Federally Speaking* columns we reported on Chief U.S. District Judge John W. Bissell, of the **U.S. District Court for New Jersey**, joining with 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, for were it to be otherwise “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.**” U.S. District Judge Gladys Kessler of the **U.S. District Court for the District of Columbia** subsequently also joined and ordered that the identities of most of those detained be made public under the **Freedom of Information Act**, advising that “secret arrests are a concept odious to a democratic society.” This “special interest” classification, which was adopted at the behest of the **U.S. Justice Department (DOJ)** by Judge Creppy on September 21, 2001, and memorialized in a document known generally as the “**Creppy Directive**,” had led to the closure of hundreds of immigration hearings. The first appellate court, the **U.S. Court of Appeals for the Sixth Circuit**, has now spoken and has strongly affirmed the action taken by the U.S. District Court (*Detroit Free Press v. Ashcroft*, No. 02-1437, 6<sup>th</sup> Cir, August 26, 2002). The **Sixth Circuit** cautions: “Today, the Executive Branch seeks to take this safeguard [of free press] away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them ‘special interest’ cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. *Democracies de behind closed doors.* The **First Amendment**, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and

accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the **First Amendment** ‘did not trust any government to separate the true from the false for us.’ *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (Jackson, J., concurring)). They protected the people against secret government. ... *Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy*” (emphasis added). For the rest of this quote, see **Rededication**, in **Liberty’s Corner**, above.

**THE INNOCENCE PROJECT.** In the August 2002 *Federally Speaking* column, we reported on the introduction into Congress of the “**Innocence Protection Act**,” by **U.S. Senator** Patrick Leahy a former prosecutor and Democrat from Vermont, with 25 **Senators** co-sponsoring (**Senate Bill S. 486**), and **U.S. Representative** William Delahunt, Democrat from Maine, with 234 **Representatives** co-sponsoring (**House Bill H.R. 912**). The primary purpose of this proposed Act is to allow prisoners on death row (but apparently not “lifers”), to request DNA testing on evidence from their cases that is still in the **Government’s** possession. Well, the **Innocence Project**, a non-profit legal clinic at the Benjamin N. Cardozo School of Law in New York City, cannot wait! Established in 1992, and not limited to “prisoners on death row,” this Project “handles cases where post-conviction **DNA** testing of evidence can yield conclusive proof of innocence.” According to Project personnel “thousands currently await our evaluation of their cases.” One such client, *convicted upon his own confession* of raping and murdering 16-year-old Michelle Jackson, was Eddie Joe Lloyd. The sentencing judge, Wayne County (Michigan) Circuit Judge Leonard Townsend, is reported to have advised at the time of sentencing that he believed there was only one justifiable sentence, death by hanging, or as he called it “*extreme constriction*.” This judge apparently regretted that under Michigan law he could not impose the death penalty and, therefore, he could only sentenced Eddie Joe to life imprisonment. Luckily for Eddie Joe and society, Michigan had prohibited Judge Townsend from committing such “irreversible error.” Seventeen long years later **DNA** evidence conclusively proved that the “lifer,” Eddie Joe Lloyd, was wrongly convicted, and a reportedly “unrepentant” Judge Townsend himself was the one who ordered Lloyd released from prison. Thus, Eddie Joe Lloyd’s “Lady Justice” observations quoted above in “Liberty’s Corner.” And his “confession”? Lloyd was on medication in a mental hospital at the time of the confession, and his current counsel contend that the police had induced the “confession” by providing him with details and asking him to help “smoke out” the real murderer. What every actually happened, the confession was clearly a fantasy. According to the **Innocence Project**, Lloyd is the 110th person in the **United States** to be exonerated *after conviction*, by **DNA** testing.

**ASHCROFT OUT-STONEWALLS RENO.** In a series of six *Federally Speaking* columns running through June 2002, we have followed the attempts of **Attorney General** Ashcroft and the **Bush Administration** to “dance between the raindrops” of document production, including **Congressional** and **Freedom of Information Act** attempts to obtain **FBI**, **Energy Task Force**, **Environmental**, Enron, and prior **Administrations’** documentation. Among these documents, when finally at least partially obtained, some would say appeared to be several of the “smoking gun” variety. Now nationally syndicated columnist Robert Novak advises that “Ashcroft is even more intractable than his predecessor, Janet Reno, in refusing information to the legislative branch” and “**Congressional** investigators generally get no cooperation in seeking answers from this **Justice Department**.” Novak cites the “stonewalling” of “requests by Rep. James Sensenbrenner, Republican chairman of the **House Judiciary Committee**, about **Justice’s** administration of the anti-terrorist **Patriot Act**,” and “Ashcroft’s **Justice Department**” resistance to “surrendering **FBI** files relating to ... **FBI** complicity in the wrongful conviction in 1968 of four men for murder committed by **FBI** informants in Boston,” where to “protect these sources, Director J. Edgar Hoover sent innocent men to prison.” According to Novak, the **Administration** refused to provide documents

pertaining to “this outrage by claiming **Executive Privilege**,” and only “gave up after [Republican Rep. Dan] Burton threatened to cite **President Bush for Contempt of Congress**.” We expect that the “raindrops” and the “dancing” will continue.

**PRESCRIPTION DRUG COVERAGE NOW!** So *barked* AARP (some rhyme with “harp,” some state the initials) recently at its well-attended “Kitchen Table Issues” community meeting and legislative pep rally in Pittsburgh. Such catchy slogans as “Prescription Drugs Aren’t a Luxury – They Just Cost as Much,” and “Get the Job Done! Medicare Coverage of Prescription Drugs,” abounded. Congressional representatives were present. You will remember (we hope) that in the August 2002 *Federally Speaking* column, we reported that senior groups “won’t wait around for their members to be assigned a harp!” Thus, hark; here comes ‘AARP,’ the American Association of Retired People, who is making ‘*federal cases*’ out of such [anti-competitive prescription drug] abuses.... Beware the bark of AARP!” Well, AARP is not only using the courts as previously reported, they are “taking to the streets” (ok – hotels) to create a ground swell of public support for “affordable drugs for seniors,” and to increase their litany of horror stories. Estella Hyde, from the AARP Pennsylvania Executive Council for Community Service started out, revealing her personal drug costs were \$13,000 a month. Other examples included Bus trips to Canada to get more affordable drug prices; importing U.S. drugs back into the U.S. at considerable savings (they said drugs prices in the U.S. were the most expensive, followed by Canada); the huge disparity between the deflated prices insurers pay and the inflated prices uninsured patients pay for the same thing; paying about \$160.00 to a pharmacy for cataract drops for the first eye operated on, and then only \$7.00 to the doctor (his cost) for the drops for the second eye; taking daily dosages every other day (or not at all) to keep expenses down; and, of course, the so-called “marriage penalty” under the Pennsylvania PACE prescription drug program for seniors. Other factors touched upon were the bias of the **U.S. patent system** against generic drugs (also “touched upon” in the August 2002 *Federally Speaking* column); and the “fact” that since prescription drug advertising was de-regulated, advertising and marketing costs have risen from a maximum of 8 percent to a minimum of 30 percent of each prescription drug dollar. However, nobody claimed that “street drugs” were cheaper or admitted that the high cost of prescription drugs had driven them to use the forbidden variety. One thing is clear, though, this dog will not be silenced!

### **THE FEDERAL CORKBOARD™**

*Contact Susan Santiago, SB&P, 603 Stanwix Street, Pittsburgh, PA 15222-1447 (412/281-4900) for reservations and details on all FBA programs. All events at Engineers Society unless otherwise noted.*

**SACCO & VANZETTI TRAIL CLE.** Tues., October 15, 2002, Lunch at Noon followed by two hour/credit CLE from 12:30 pm to 2:30 pm (including one hour of ethics). Cost \$48.00 members, \$54.00 non-members (including Lunch). See write-up above.

**WHISKEY REBELLION CLE.** Wed., November 6, 2002, 2:45 pm. CLE expanded to two hours/credits (including one hour of ethics), "*Law On The Rocks: The Legal Aspects of the Whiskey Rebellion.*" CLE starts at 2:45 pm. “Blast from Past” Reception at 5 pm. CLE \$42.00 (including Blast); Blast alone \$12.00.

**Lunch With A Federal Judge Series,** for FBA members, continues.

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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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Chapter.