



FEDERALLY SPEAKING



by Barry J. Lipson

Number 29

Welcome to **FEDERALLY SPEAKING**, an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening 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. This is the 29th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

LIBERTY’S CORNER

SON OF USA PATRIOT ACT. We apparently have, however, not yet seen the end of the **Administration’s** attempts to continue to revise 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.”

DOJ INSPECTOR GENERAL’S DETAINEES REPORT. Hot off the presses, without editorial comment, are excerpts from the *Conclusion* and *Recommendations* of the “*Report on the September 11 Detainees*” of Glenn A. Fine, **Inspector General** of the **U.S. Department of Justice (Department)**, dated April 29, 2003, and released June 2, 2003: “While recognizing the difficult circumstances confronting the **Department** in responding to the terrorist attacks, we found significant problems in the way the September 11 detainees were treated. The **INS** did not serve notices of the immigration charges on these detainees within the specified timeframes. This delay affected the detainees in several ways, from their ability to understand why they were being held, to their ability to obtain legal counsel, to their ability to request a bond hearing. In addition, the **Department** instituted a policy that these detainees would be held until cleared by the **FBI**. Although not communicated in writing, this *‘hold until cleared’* policy was clearly understood and applied throughout the **Department**. ...Without diminishing their contributions in any way, we believe the **Department** can learn from the experience in the aftermath of the September 11 attacks, and we therefore offer a series of recommendations to address the issues we examined in our review. **I. UNIFORM ARREST AND DETAINEE CLASSIFICATION POLICIES** ...We believe the **Department** and the **FBI** should develop clearer and more objective criteria to guide its classification

decisions in future cases involving mass arrests of illegal aliens in connection with terrorism investigations. ...The **FBI** should provide immigration authorities (now part of the **Department of Homeland Security (DHS)**) and the **BOP [Bureau of Prisons]** with a written assessment of an alien's likely association with terrorism shortly after an arrest (preferably within 24 hours). ...Unless the **FBI** labels an alien 'of interest' to its terrorism investigation within a limited period of time, we believe the alien should be treated as a 'regular' immigration detainee and processed according to routine procedures. ... **II. INTER-AGENCY COOPERATION ON DETAINEE ISSUES** ... At a minimum, we recommend that immigration officials in the **DHS** enter into an Memorandum of Understanding (MOU) with the **Department** and the **FBI** to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees.... **III. FBI CLEARANCE PROCESS**.... We believe it critical for the **FBI** to devote sufficient resources in its field offices and at Headquarters to conduct timely clearance investigations on immigration detainees, especially if the **Department** institutes a '*hold until cleared*' policy. ... We recommend that the **Department** develop a process that forces it to reassess early decisions made during a crisis situation and consider any improvements to those policies. **IV. NOTICES TO APPEAR [NTA]** ... We recommend that the immigration authorities in the **DHS** issue instructions that clarify, for future events requiring centralized approvals at a Headquarters' level, which District or office is responsible for serving NTAs on transferred detainees. ...We recommend that the **DHS** document when the charging determination is made, in order to determine compliance with the "48-hour rule." We also recommend that the **DHS** convert the 72-hour NTA service objective to a formal requirement. Further, we recommend that the **DHS** specify the 'extraordinary circumstances' and the 'reasonable period of time' when circumstances prevent the charging determination within 48 hours. We also recommend that the **DHS** provide, on a case-by-case basis, written justification for imposing the 'extraordinary circumstances' exception and place a copy of this justification in the detainee's A-File. **V. RAISING ISSUES OF CONCERN TO SENIOR DEPARTMENT OFFICIALS** ...We recommend that **Offices of General Counsel** throughout the **Department** establish formal processes for identifying legal issues of concern – like the perceived conflict between the **Department's** "*hold until cleared*" policy and immigration laws and regulations – and formally raise significant concerns, in writing, to agency senior management and eventually **Department** senior management for resolution. ... **VI. BOP HOUSING OF DETAINEES** ... We recommend that the **BOP** establish a unique Special Management Category other than WITSEC for aliens arrested on immigration charges who are suspected of having ties to terrorism. Such a classification should identify procedures that permit detainees' reasonable access to telephones more in keeping with the detainees' status as immigration detainees who may not have retained legal representation by the time they are confined rather than as pre-trial inmates who most likely have counsel. ... The **BOP** must be vigilant to ensure that individuals in its custody are not subjected to harassment or more force than necessary to accomplish appropriate correctional objectives. ...**VII. OVERSIGHT OF DETAINEES HOUSED IN CONTRACT FACILITIES** ... **DHS** should ensure that the detainees have adequate access to counsel, legal telephone calls, and visitation privileges consistent with their classification. **VIII. OTHER ISSUES** ... We recommend that the **DHS** ensure that its field offices consistently conduct **Post-Order Custody Reviews** for all detainees who remain in its custody after the 90-day removal period." In an appendix to this **Report**, Larry D. Thompson, **Deputy U.S. Attorney General**, reminds us that my "staff understood that the immigration authorities of the **Department** should be used to keep such people in custody until we could satisfy ourselves – by the **FBI** clearance process -- that they did not mean to do us harm. Given those circumstances, I respectfully submit that it is unfair to criticize the conduct of members of my staff during this period. ...When the issue was squarely presented, it is apparent that they promptly did the right thing: they changed the policy."

ARE WE ALL LIVING IN THE LAND OF OZ? "Beware the **Land of Oz**. For it is only in the **Land of Oz** that ... the Grand Wizard [can] erode basic **civil rights** and call it **enhanced security**. ... Expose the Grand Wizard; this is our **America**, not **Oz**." So says five-term former **U.S. Congresswoman**, Cynthia McKinney, in a recent full page *Washington Post* advertisement placed by "*From The Wilderness*" (*FTW*), which was first published on May 16, 2003 under the **Ozian** headline "*Pay no attention to that*"

man behind the curtain...” According to FTW, this “ad is gratefully placed while Americans still have the right to speak publicly.” FTW continues: “Since 9/11 **five amendments** of our cherished **Bill of Rights** (the **1st, 4th, 5th, 6th** and **8th**) have either been completely or partially nullified by provisions of the **Patriot Act, The Homeland Security Bill** and **Administration policy**. A law secretly drafted by the **Administration** and pending introduction, **Patriot Act II**, seeks further major revocations of our liberties. Some 30 major cities and the State of New Mexico have passed resolutions opposing the **Patriot Act.**” This, presumably, is the encroaching “wilderness” facing our society as perceived by “*From The Wilderness.*” (See http://www.fromthewilderness.com/PDF/Washpost_2003_05_16_p25.pdf.) Moreover, FTW and its adherents suggests that this ad, as originally submitted for publication on April 23, 2003, which then “contained two sections of well-supported text that were sharply critical of **Army Secretary Thomas White,**” may have been leaked and on April 26, 2003 caused him to be “suddenly fired by **Defense Secretary Donald Rumsfeld** three days after the ad reached the *Post.*” Indeed, they further suggest that perhaps this ad even influenced the departures of Ari Fleischer, **White House Press Secretary**, on May 17, 2003, Mitch Daniels, **Budget Director**, on May 6, 2003, and Christie Todd Whitman, **EPA Administrator**, on May 21, 2003. Whether or not FTW had any hand in these departures, or is itself living in the Land of Oz, it now appears that FTW is enamored with the “Ozian Power of the Press.”

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DECORATION OR MEMORIAL, WHICH AND WHEN? “**Decoration Day**” was “officially” instituted on May 5, 1868, when General John A. Logan, as Commander-in-Chief of the **Grand Army of the Republic (GAR)**, a Union Civil War Veterans’ organization (founded just two years earlier on April 6, 1866), issued **General Order No.11** (<http://www.usmemorialday.org/order11.html>), naming May 30, 1868 as a day “for the purpose of strewing with flowers or otherwise **decorating** the graves of comrades who died in defense of their country,” and on that day in 1868 the graves in **Arlington National Cemetery** of fallen Civil War soldiers “were **decorated** with flowers.” General Logan had signed this Order “with the hope that it will be kept up from year to year.” It was not until 14 year latter, in 1882, that the **GAR** decided that it now felt the “proper designation of May 30 is **Memorial Day**,” instead of the traditional **Decoration Day**. (At my home 30 May being my birthday, was always celebrated as “**Decoration Day**,” and, of course, as my birthday and as the non-astronomical start of summer.) Then, 103 years after the issuance of **General Order No.11**, with the passage in 1971 of the “**Monday Holiday Law**” (**National Holiday Act**, P.L. 90 - 363), **Congress** moved the celebration of **Decoration Day** from 30 May to the last Monday in May (and, incidentally merged **Washington** and **Lincoln Birthdays** into **Presidents Day**, changing their birthday celebrations to the third Monday in February). According to Judy Hill, columnist for the *Tampa Tribune*: “Some argue that the change sapped the significance of this most solemn and somber of days.” Thus, past VFW Commander Karl Rohde wants “Americans to celebrate **Memorial Day** on the traditional May 30 and not the weekend before in order to reap a shopping bonanza and three-day holiday. ... ‘**Decoration Day** was celebrated from the days of the Civil War until pressure was exerted on elected officials in Washington in recent years to pass the **Monday Holiday Bill** which allows Americans to extend a weekend to include a national holiday such as **Memorial Day**. To change the day takes away the real meaning of the occasion and patriotic holidays have become nothing more than shopping bonanzas instead of honoring our deceased veterans.’” Ms. Hill observes: “That argument takes on more credence given what seems to be captivating most Americans this [**Decoration Day**] weekend: the Indianapolis 500 and the PGA Tour event in which **LPGA** superstar Annika Sorenstam competed with the guys.” Indeed, in 1999 Senator Inouye introduced **Senate Bill S. 189**, and Representative Gibbons introduced **House Bill H.R.1474**, to restore the observance of this serious holiday back to its traditional day of observance, 30 May, instead of “the last Monday in May.” This **Decoration Day’s** non-scientific Pittsburgh radio station **KQV** poll also strongly supports returning to the traditional day. The vote was over 8 to 1 (676 to 84) in favor of May 30th. Now, how would you vote, day and name? We vote with “tradition” in both instances.

U.S. COMMISSION ON UNCIVIL RIGHTS. *News Of The Weird* has brought to our attention the strange case of the **Equal Employment Opportunity Commission (EEOC)** finding that the **U.S. Commission on Civil Rights (USCCR)** retaliated against Emma Monroig, Esq., who had been employed as Solicitor for the **USCCR**, for filing a complaint with the **EEOC** over a job reassignment, and then for subsequently filing another similar complaint over being reassigned to a non-supervisory position (*Emma Monroig v. Berry*, Appeal No. 07A10012 (4/25/02), 2002 EEOPUB Lexis 2641). Despite Ms. Monroig receiving a performance evaluation rating of "fully successful," she was so demoted. This **EEOC Panel** found that the **USCCR's** staff director's affidavit defending Ms. Monroig's reassignments and demotion, was a "pretext for discrimination" and "lacked credibility." Affirming the ruling of the **EEOC Administrative Judge**, the **Panel** awarded her a total of approximately \$165,000. While the **USCCR** has filed a request for reconsideration of her being ordered retroactively restored to her former Solicitor position, the **USCCR** did not contest this monetary award that consisted of attorney fees, costs and damages. However, this is not the first time *News of the Weird* has brought to our attention the **Federal Government** treating its attorneys poorly. You may remember that in *Federally Speaking* No. 26 we reported, under the heading "**DOJ: Double Books, Double Standard?**," that according "to *News of the Weird*, U.S. Judge Robert H. Hodges Jr., of the **Court of Federal Claims**, " in finding that **Federal Government** attorneys are entitled to overtime pay under the **Federal Employees Pay Act of 1945**, 5 U.S.C. §§ 5541-50a, "observed that the **DOJ** 'apparently years ago simply declared itself immune from overtime-pay law for attorneys and has been maintaining two sets of time sheets (one for pay, one to track work on cases)'." Hopefully, there are no further "mistreated Federal lawyer" cases for *News of the Weird* to alert us about.

RULE 11 REVISITED. When **Federal Rule of Civil Procedure 11** first came upon the scene it was wielded as a mighty club each time an "i" went undotted or a "t" uncrossed. I remember emphatically responding to opposing counsel: "Your **Rule 11** accusation is itself a **Rule 11** violation!" Former Chief Judge Donald E. Ziegler of the **U.S. District Court for the Western District of Pennsylvania** has now put **Rule 11** in its proper current perspective, at least in the **Third Circuit**. In his keynote article, "*The Unwritten Rules of Professional Conduct*," in the inaugural issue of the new FBA Western Pennsylvania Chapter publication, "*The Federal Legal Forum*," Judge Ziegler clarified that the "**Court of Appeals** has made clear that **Rule 11** sanctions may be imposed only in the *exceptional circumstance* where the claim is patently unmeritorious or frivolous. *Dura Systems, Inc. v. Rothbury Invest., Ltd.*, 886 F.2d 551, 556 (3d Cir. 1989). Litigants misuse the rule when sanctions are sought against a party whose only sin is being on the unsuccessful side of a ruling or judgment. Equally important is the recommendation of the **Court of Appeals** that, once a violation of **Rule 11** is found, the **District Court** should look to *non-monetary sanctions* such as a warning, an apology or requiring attendance at the Bench-Bar Conference, *without golf, of course*. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987)." Emphasis added. As one who avoids golf, I thank Judge Ziegler for excluding "golf" from the potential sanctions.

"WHAT GOES AROUND COMES AROUND." So says Jon Delano, Political Analyst and Politics Editor for members of the broadcast media, in his "*Government Busters*" opinion column in the *Pittsburgh Business Times*. We all favor a fair and expeditious **U.S. Senate Judicial confirmation process**. However, we are told that the opposition party is putting the kibosh on this. Thus, the ACLJ is filling cyberspace with the cry that the "**Senate's** obstruction of the nomination process is an **OUTRAGEOUS VIOLATION** of the **Senate's** duty under the **U.S. Constitution** to vote on the President's choices" (capitalized emphasis **not** added), and it is clear to which party the ACLJ is referring. However, Mr. Delano reminds us that during "Mr. Clinton's last six years in office not a single judge was confirmed for the **U.S. District Court in Western Pennsylvania**. ... Today, the **Senate** has confirmed four Bush appointees ... and the fifth nomination ... has just been sent to the **Senate**;" as well as "the elevation and confirmation of Judge Brooks Smith to the **U.S. Court of Appeals**" for the **Third Circuit**, and the President's sending of "two more Republican names to the **Senate**" for that **Court**, over which "[n]obody expects much controversy." According to Delano, Republican U. S. Senator "Arlen Specter, a member of the **Senate Judiciary Committee**, got it exactly right. 'When Republicans controlled the **Senate** and President Clinton was in

office, some things were done which shouldn't have been done... And when President Bush took office and the Democrats were in control, there were some things that shouldn't have been done'." Delano goes on to point out that in "28 months in office, Mr. Bush has already had 100 **district judges** confirmed by the **Senate** along with 23 appellate judges. Of the 665 judges on the **federal district courts** across America, there are only 26 vacancies, and the vacancy rate among the 179 judges on the **courts of appeal** is down to 21." Fair is fair, or isn't it?

"ALL COMPETITION ALL THE TIME." According to Gaston Jorré, **Canada's Senior Deputy Commissioner of Competition**, on "the international scene" there is the new **International Competition Network (ICN)**, for international enforcement cooperation, whose "mantra is '*all competition all the time*'." Through "the formal committee system at the **OECD**" (**Organization for Economic Cooperation and Development**), and the "more inclusive" **ICN**, "progress is being made in areas such as cartel enforcement, merger review and the exchange and communication of information for enforcement purposes," and "the **ICN** has made significant progress in the short time since its creation. The membership of the **ICN** currently includes the majority of competition agencies around the world, and we hope that it will include all of them within a reasonably short time." Internationally, **Canada's Competition Bureau** is focusing on "dealing effectively with hard core cartel activity, telemarketing fraud and the negative image for Canada that results from the perpetrators operating in Canada and targeting consumers in other countries. ... Increased deceptive telemarketing is earning Canada an international reputation as a haven for this type of criminal operation. Telemarketing scams often operate in one jurisdiction and target victims in another and it is incumbent on the **Bureau** to take strong action against it." We guess the mantras the thing. "All proper mantras, all the time!"

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