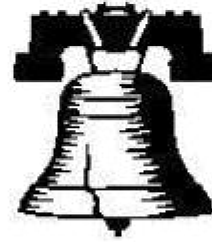
FEDERALLY SPEAKING



by Barry J. Lipson

Number 31

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 ups" 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 31st 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

THE CONSTITUTIONAL "SEARCH FOR GREATER FREEDOM." *Saith the Supreme Court of the United States at the close of Its Latest Term:* "Had those who drew and ratified the **Due Process Clauses** of the **Fifth Amendment** or the **Fourteenth Amendment** known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the **Constitution** endures, ***persons in every generation can invoke its principles in their own search for greater freedom***" ***Lawrence v. Texas***, 539 U.S. ___ (2003); emphasis added.

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TAKE TWO TABLETS AND GO TO THE SUPREME COURT? An initial perusal seems to foreshadow the possibility of "splitting headaches" arising from the two recent seemingly diverging **3rd** and **11th Circuit** "tablet" cases of ***Freethought Society of Greater Philadelphia v. Chester County,*** No. 02-1765 (3rd Cir. June 26, 2003)*; and* ***Glassroth v. Moore,*** Nos. 02-16708 & 02-16949 (11th Cir. July 1, 2003). Such an apparent "**split between Circuits**" could give rise to split **U.S. Supreme Court** decisions over the displaying in or about Judicial Buildings of tablets depicting the **Ten Commandments**, and might set the **High Court** up to make what could prove to be the biggest **Establishment Clause** decision(s) in recent memory. However, as noted in the unanimous decision of the **11th Circuit** panel in *Glassroth*: "The **3rd Circuit** issued an opinion just days before this one holding that the inaction of county commissioners with respect to a plaque [tablet] that had been on the outside wall of a historically significant courthouse for more than 80 years, … away from the main entrance of the courthouse near a permanently closed door where visitors have no reason to go; and the text of the plaque is not visible to passersby on the sidewalk, who can see only the title 'The Commandments' [thus, not even entitled '**The *Ten* Commandments**"] … did ***not*** violate the **Establishment Clause**" (emphasis added). In contrast, our **11th Circuit** case '***is readily distinguishable***" from this **3rd Circuit** case, involving, as it does, the ***contemporary*** installation in the Alabama State Judicial

Building rotunda, by Alabama Supreme Court's Chief Justice Roy S. Moore, of a "5280-pound granite monument [which] is approximately three feet wide by three feet deep by four feet tall," where "[t]wo tablets with rounded tops are carved into the sloping top of the monument," and "[e]xcerpts from Exodus 20:2-17 of the King James Version of the Holy Bible, the **Ten Commandments**, are chiseled into the tablets;" and additionally where: "Chief Justice Moore testified candidly that ***his purpose*** in placing the monument in the Judicial Building ***was to acknowledge the law and sovereignty of the God of the Holy Scriptures,***" presumably King James version (emphasis added). Significantly, this **3rd Circuit** panel in ***Freethought*** had advised that: "A ***contemporary*** decision to erect such a plaque could ***not*** be motivated by historic preservation; rather it would appear much more likely that the county commissioners ***were [improperly] motivated by religion***" (emphasis added). Interestingly, the **3rd Circuit** panel had relied, in part, on the **11th Circuit** decision the month before **in *King v. Richmond County***, No. 02-14146 (11th Cir. May 30, 2003), which "upheld the use of an official seal depicting the **Ten Commandments**" that "involved the use of an official seal for more than 130 years by the Superior Court of Richmond County, Georgia, depicting two rectangular tablets with rounded tops [containing "the Roman numerals I through X"] and meant to represent the **Ten Commandments**. …The ***King*** panel found significant 'the size and placement' of the seal 'near the bottom or on the last page of legal documents' because the reasonable observer would be less inclined to believe that the government was endorsing religion." The **11th Circuit** panel in ***Glassroth*** further explained that ***King*** and ***Glassroth*** (and ***Freethought***) are consistent, as "**Establishment Clause** challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." In both ***Freethought*** and ***Glassroth*** rehearings ***en banc*** are being sought, before seeking ***certiorari*** to the ***U.S. Supreme Court.***

THE INTERNATIONALIZATION OF THE HIGH COURT. Justice Thomas has cautioned that while "**Congress**, as a ***legislature***, may wish to consider the actions of other nations on any issue it likes," the **U.S. Supreme Court** "should not impose foreign moods, fads, or fashions on Americans" (***Foster v. Florida***, 537 U.S. 990 (2002), concurring opinion; emphasis ***not*** added). Then too, Justice Scalia has deemed "irrelevant … the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people"(***Atkins v. Virginia***, 536 U.S. 304 (2002), dissenting opinion); and has baldly asserted that the "**Court's** discussion of … foreign views … is therefore meaningless dicta. Dangerous dicta, however, since 'this **Court** … should not impose foreign moods, fads, or fashions on Americans'," citing Thomas, above (***Lawrence v. Texas***, (539 U.S. ___ (2003); dissenting opinion). Is our **Highest Court**, thus, inhospitable to international precedent? Some have so claimed, but tides may be turning. Justice Scalia's reaction in ***Atkin's*** to the "practices of the world community" was engendered by the Court's Opinion (delivered by Stevens, J, and joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ), giving weight to the proposition that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"(which they gleaned from an Amicus Brief for The European Union). Similarly, Justice Thomas in ***Foster*** was reacting to what he characterized as "Justice Breyer's [international] musings," musings which so sparked Thomas, that Justice Stevens found it necessary to deflagrate the exchange by writing an official "Statement" in "response to Justice Thomas' concurring opinion," to wit, "I think it appropriate once again to emphasize that the denial of a petition for a **writ of certiorari** does not constitute a ruling on the merits." What were these incendiary musings? Justice Breyer's advise to his fellow Justices from "***The Federalist*** No. 63" (by Alexander Hamilton or James Madison, March 1, 1788), to wit: "Just as 'attention to the judgment of other nations' can help **Congress** determine 'the justice and propriety of [America's] measures,' ***The Federalist*** No. 63, so it can help guide this **Court** when it decides whether a particular punishment violates the **Eighth Amendment**" [brackets Breyer's]. While all these 2002 "international" comments were made in the context of the "**Court's Eighth Amendment** jurisprudence" (which Amendment reads in toto: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"), it is clear from the subsequent pronouncements, including Scalia's in ***Lawrence*** (see above), that these are all comments meant for general

application. Thus, in the latest term Scalia was objecting to the majority's refutation of the "sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards" in ***Bowers* v. *Hardwick*,** 478 U.S. 186 (1986) ***not*** taking into account "other authorities pointing in an opposite direction" (***Lawrence v. Texas***, ***supra***; Kennedy, J., delivering the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ, joined). In doing so, the **Court** cited to prior ***British Parliamentary Committee Reports*** and legislative action, and to the **European Court of Human Rights'** case of ***Dudgeon* v. *United Kingdom***, 45 Eur. Ct. H. R. ¶52. (1981), which "held that the laws proscribing the conduct were invalid under the ***European Convention on Human Rights***. … Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now)," which our **High Court** advised "is at odds with the premise in ***Bowers*** that the claim put forward was insubstantial in our Western civilization." Interestingly, just three days earlier, in her concurring opinion in ***Grutter v. Bollinger***, 359 U.S. ___ (2003), Justice Ginsburg, joined by Justice Breyer, had supported the "**Court's** observation that race-conscious programs 'must have a logical end point'," by citing to the ***"International Convention on the Elimination of All Forms of Racial Discrimination***, ratified by the United States in 1994, see **State Dept., Treaties in Force** 422–423 (June 1996)," which provides that "such measures … 'shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.' ***Ibid***; see also … ***Convention on the Elimination of All Forms of Discrimination against Women*** … (authorizing 'temporary special measures aimed at accelerating ***de facto*** equality' that 'shall be discontinued when the objectives of equality of opportunity and treatment have been achieved')." Does this signal a greater openness by the **U.S. Supreme Court** to entertaining international precedent, or is ***Lawrence*** just a reaction to an overbroad "history of Western civilization" assertion by former Chief Justice Burger? The foregoing seems to now suggest 6 "ayes," 2 "nays," and one "question mark," towards having an open ear to international precedent.

UNCIVIL ASSET FORFEITURE: LEGAL PIRACY? **Civil asset forfeiture** "is based on the legal fiction that inanimate objects may be found guilty and condemned," and, therefore, if they were "used in an illicit activity or … purchased with funds from illicit activity," they are "subject to seizure and forfeiture to the government. … The roots of **civil forfeiture** can be traced back to medieval England where kings used the procedure to seize the property of disloyal nobles. The American model for **civil forfeiture** dates back to the eighteenth-century where **forfeiture laws** were used to combat piracy and customs violations. **… Government** authorities must simply satisfy a requirement of **probable cause** that the property was used in an illicit activity or was purchased with funds from illicit activity in order to subject the property to forfeiture … [and] the guilt or innocence of the owner is irrelevant, because the forfeiture action is against the 'object' not the 'owner.' ***In fact, no criminal arrest or conviction is even necessary to subject property to forfeiture.*** " (Strossen testimony, ***infra,*** emphasis added) Doesn't this seem to reek of "legal piracy"? On June 11, 1997, Nadine Strossen, ACLU President, testified before the **U.S. House Judiciary Committee** "that all **civil forfeiture schemes** inherently violate fundamental **constitutional rights**, including the right not to be deprived of property without **due process** of law and the right to be free from punishment that is disproportionate to the offense." In response to such calls for reform, the **Civil Asset Forfeiture Reform Act of 2000** was enacted, providing that the **Government** must now "establish that there was a substantial connection between the property and the offense," and making it somewhat easier and less expensive to reclaim such seized property. Recently, in a case stemming from a 1999 seizure (so still under the old rules), the **U.S. Court of Appeals for the 11th Circuit**, in an apparent break with tradition, ruled against the **Government's** seizure of $242,484.00 from the president of Miami-based Mike's Import & Exports, U.S.A., which was so confiscated because of the size of the stash (of cash, not drugs) she was carrying from New York to Miami. ***U.S. v. $242,484.00/ Stanford,*** No. 01-16485 (11th Cir, June 30, 2003). While the unanimous vote declined to 2-1 between the original ruling on January 22, 2003 and the denial of re-hearing on June 30, 2003, the majority could not find as really probative the "testimony" of a drug-alert dog, brought in after the seizure, as 80% of our currency is tainted with drugs and as "the day after the seizure, the **DEA**

exchanged this drug-tainted currency for a cashier's check at SunTrust Bank, where the currency was, possibly, placed back into circulation for innocent people to possess." Moreover, the "value in the **probable cause** case" of the '**Narcotics And Dangerous Drug Information System (NADDIS)** report (indicating that a Florida business called Mike's might be a front for money laundering)" was "negligible" as it contained "'raw intelligence' information, not always thoroughly corroborated," and as "the 'Mike's' entity named in NADDIS as 'possibl[y] utilized for money laundering' had a different full name in the report than Ms. Stanford's business: 'Mike's Import and Export USA, Inc.'" Will **civil asset forfeiture** actually become more "civil" and less "piratical" now that **Congress** has begun steering this antiquated ship ***"HMS Legal Fiction"*** out of the waters of "medieval England" and the age of "piracy"?

FOLLOW UP

LIBRARIES CENSORED? They say, "the third time's a charm," but is it? Can purveyors of porn no longer "charm" children into their webs of pornography on public library computers financed by **Federal funds**? With three dissenters, so seems to say the third and final **Court** (***U.S. v American Library Assn., Inc.***, 539 U. S. ____ (2003)), in ruling on **Congress'** third attempt to censor the Internet. Previously the **U.S. Supreme Court** had thrown out the **Communications Decency Act of 1996** as being an **unconstitutional** infringement of **free speech** (***Reno v. American Civil Liberties Union***, 521 U. S. 844 (1997)); and had kept in place the ban on the enforcement of the **Child Online Protection Act of 1998,** while seeking further information (***Ashcroft v. American Civil Liberties Union***, 535 U. S. 564 (2002)). See ***Federally Speaking*** Nos.15 and 17, May and July 2002. Now, in ***American Library*** the **High Court** has found **"facially constitutional"** the **Children's Internet Protection Act of 2000 (CIPA),** which forbids public libraries from receiving Federal monetary assistance for Internet access without installing software to "block" minors from accessing pornographic material "harmful to them," and which contains a provision regarding unblocking upon the request of an adult. What does this mean and not mean? It means the **CIPA** is **constitutional "on its face."** It does not mean that libraries are pornography-free zones or that the viewing of pornography in libraries has been criminalized. (Indeed, in Legislative Libraries the most dog-eared documents are most often the pornography exhibits.) Under the **CIPA**, libraries that do not utilize **Federal funds** for Internet access need not block pornography; and libraries **"may"** permit adults to access pornography upon their request for **"'bona fide research or other lawful purposes,'** 20 U. S. C. §9134(f)(3)'." Then too, as several Justices have clarified, it does **not** mean that this **Act** is "home free," as there is still room for **"as-applied"** challenges: "If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view **constitutionally** protected Internet material is burdened in some other substantial way, that would be the subject for an **as-applied** challenge, not the **facial challenge** made in this case. See *post,* at 5–6 (BREYER, J., concurring in judgment ["We here consider only a **facial challenge** to the **Act** itself"]). KENNEDY, J., concurring in judgment. "If the **Solicitor General's** representation ["that the statute permits individual librarians to disable filtering mechanisms ***whenever*** a patron so requests"] turns out to be honored in the breach by local libraries, it goes without saying that our decision today would not foreclose an **as-applied** challenge. See also *ante*, at 5-6 (BREYER, J., concurring in judgment); *ante*, at 1 (KENNEDY, J., concurring in judgment)." Souter and Stevens, dissenting opinions; emphasis added. So is this **censorship**? According to Stevens, Souter and Ginsburg it is! Why? Because of "overblocking" by the filtering software, and because under the **CIPA** if "a library attempts to provide Internet service for even ***one*** computer through an E-rate discount ["the E-rate program established by the **Telecommunications Act of 1996** entitles qualifying libraries to buy Internet access at a discount"], that library must put filtering software on ***all*** of its computers with Internet access, not just the one computer with E-rate discount" (emphasis **not** added). A library cannot even decide to only "put filtering software on the 5 computers in its children's section." Also because the "unblocking provisions simply cannot be construed, even for **constitutional** avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. …

And of course the statute could simply have provided for unblocking at adult request, with no questions asked. The statute could, in other words, have protected children without blocking access for adults or subjecting adults to anything more than minimal inconvenience… I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's **First** and **Fourteenth Amendment** right to be free of Internet censorship … The abridgment of **speech** is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit. …This **Court** should not permit **federal funds** to be used to enforce this kind of broad restriction of **First Amendment** rights …" Stevens and Souter (joined by Ginsburg), dissenting opinions. Does this then mean that TV's three ***"Charmed Ones"*** themselves may be blocked? Oh, no, not the mermaid scenes!

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