



# FEDERALLY SPEAKING



by Barry J. Lipson

Number 34

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 34th 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**

**SAFE ACT TO ENCASE PATRIOT ACT?** Four Republican Senators (Larry Craig (R-Id.), John Sununu (R-NH), Mike Crapo (R-ID) and Lisa Murkowski (R-AK)), and four Democratic Senators (Dick Durbin (D-IL), Russell Feingold (D-WI), Jeff Bingaman (D-NM) and Ron Wyden (D-OR)), acting bipartisanship, have moved to prophylactically encase the **USA PATRIOT Act** in the **SAFE Act**. All but Democratic Senator Feingold had initially acceded to the **Administration's** wishes, and had voted for the enactment of the **PATRIOT Act** in the immediate aftermath of 9/11. **Republican Senator Craig**, in introducing **Senate Bill 1709**, the “**Security and Freedom Ensured Act of 2003**” or “**SAFE Act**,” advised that this “bill is aimed at addressing some specific concerns that have been raised about the **USA PATRIOT Act**. We believe this is a measured, reasonable, and appropriate response that would ensure the liberties of law-abiding individuals are protected in our **Nation's** fight against terrorism, without in any way impeding that fight. ... The **SAFE Act** is intended to do just that -- make some commonsense changes that help to safeguard our freedoms, without sacrificing our security. It focuses on areas of activity that have been particularly controversial -- delayed notice warrants, which are also referred to as ‘sneak and peek’ warrants; wiretaps that do not require specificity as to either person or place; the impact of the new law on libraries; and nationwide search warrants. Our bill would amend, not eliminate these tools or repeal the **USA PATRIOT Act** in these areas.” **Democratic Senator Durbin**, the **Bill's** co-author, expectedly, put the case for the **SAFE Act** even more strongly: “However, the **PATRIOT Act** contains several controversial provisions that I and many of my colleagues believe went too far. The **Bush Administration** placed **Congress** in a very difficult situation by insisting on including these provisions in the bill. We were able to amend or sunset some of the most troubling components of the bill. However, many remained in the final version. As a result, the **PATRIOT Act** makes it much easier for the **FBI** to monitor the innocent activities of American citizens *with minimal or no judicial oversight*. ... Unfortunately, the **Justice Department** has reneged on their commitment to **Congress**, frustrating oversight on the **PATRIOT Act** at every turn. ... On the anniversary of the 9/11 attacks, **President Bush** proposed new legislation that would give the **Justice Department** the authority to issue so-called administrative subpoenas, *without judicial review*, create 15 new federal death penalty crimes, and mandate pretrial detention for defendants accused of a laundry list of crimes, many of them unrelated to terrorism. These proposals continue the **Administration's** pattern of seeking *to limit judicial oversight and grant broad, unchecked authority to law enforcement*.... It is unacceptable to dismiss those who raise legitimate concerns about civil liberties as terrorist sympathizers. For the American people, the

**PATRIOT Act** has become a potent symbol of the **Justice Department's** poor record on **civil liberties**. In fact, three states, Alaska, Hawaii, and Vermont, and over 180 cities and counties across the country, including Chicago in my home State of Illinois, have passed resolutions opposing provisions of the **PATRIOT Act.**” Emphasis added. Groups as diverse as Gun Owners of America, the American Conservative Union, the American Library Association, the Center for Democracy and Technology, the Electronic Frontier Foundation, the American Booksellers Foundation for Free Expression, the American Civil Liberties Union, etc., are seeking safety for the American way of life under the **SAFE Act**. The **SAFE Act** was sent to the **Senate Committee on the Judiciary** for further action.

**A NEWDOW-NER OR UPPER FOR THE PLEDGE?** Some see Michael Newdow’s **First Amendment “Establishment Clause”** victory in the **Ninth Circuit** removing the relatively recently added words “under God” from public school (though not private school) recitations of the **Pledge of Allegiance**, as an ungodly “new-downer.” Others see it as an uplifting “upper” for the esteemed **“Establishment Clause”** and the **Constitutional** requirement of **Separation of Church and State** (*Newdow v. U.S. Congress* (292 F. 3d. 597 (9th Cir. 2002); see also *Federally Speaking*, Nos. 18 and 27). As Newdow sees it: "The reason we don't have the conflicts and bloodshed seen throughout other parts of the world is due in large measure to the **Establishment Clause**," referring undoubtedly to the “bloody conflicts” between **Roman Catholics** and **Protestants** in Northern Ireland, **Hindus** and **Muslims** in Kashmir, **Russian Orthodox Christians** and **Muslims** in Chechnya, **Buddhists** and **Hindus** in Sri Lanka, **Serbian Orthodox Christians** and **Roman Catholics** in Serbia, **Muslims** and **Jews** in the Holy Land, **Shi'ite Muslims** and **Suni Muslims** throughout the Middle East, etc. Now, by **Zeus**, the **U.S. Supreme Court** has granted **certiorari**, but “limited to the following Questions: 1. Whether respondent has **standing** to challenge as **unconstitutional** a public school district policy that requires teachers to lead willing students in reciting the **Pledge of Allegiance**. 2. Whether a public school district policy that requires teachers to lead willing students in reciting the **Pledge of Allegiance**, which includes the words ‘**under God**,’ violates the **Establishment Clause** of the **First Amendment**, as applicable through the **Fourteenth Amendment**” (*Elk Grove Unified School District and David W. Gordon v. Michael A. Newdow, et al.*, No. 02-1624 (2003)). In recent times, the **U.S. Supreme Court** has both **banned** all public school sponsored prayer and **permitted** states to adopt school voucher programs (where there is an alleged non-religious valid public purpose for so doing, even if most of the funds may find their way to the coffers of religious schools). The former was just three years ago in the 6-3 high school football decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), where the **Court** advised: “The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.” The latter, last year’s nearly split 5-4 school voucher decision in *Zelman V. Simmons-Harris*, 536 U.S. 639 (2002). See *Federally Speaking*, No. 18. An interesting twist is that **Justice Antonin Scalia** has recused himself, a decision which was his alone, after Newdow requested he do so based on certain comments critical to the **Ninth Circuit’s** ruling **Justice Scalia** allegedly made to the Knights of Columbus, the Catholic men’s club that in 1954 was primarily responsible for the inserting of these words in the first place. (But see **Justice Scalia’s** recent majority opinion in the 5-4 decision in *Republican Party Of Minnesota V. White*, 536 U.S. 765 (2002), finding a **First Amendment** violation where a State “Canon of Conduct” prohibited judicial candidates *in an election* from announcing their views on disputed issues.) A finding of **lack of standing** here would be an easy way to dispose of this politically hot potato for now. A split 4-4 decision of the **High Court** would uphold the **Ninth Circuit** ban.

## **FED-POURRI™**

**ON THE BRINK WITH BRINKEMA.** **U.S. District Judge Leonie Brinkema** of the **Eastern District of Virginia**, finds herself on the brink between liberty and security in two 9/11 related terrorist cases that are currently before her. The most prominent is **Zacarias Moussaoui**, a French citizen of Moroccan descent, who was the suspect whom **FBI** staff attorney Coleen Rowley sent **FBI Director Mueller** a [pre-9/11] memo ‘about how the bureau brushed off pleas from her Minneapolis, Minn., field office that Zacarias

Moussaoui, who is now indicted as a Sept. 11 co-conspirator, was a man who must be investigated” [25], for which Ms. Rowley was named by *Time Magazine* one of the three lady whistleblowing “Persons of the Year.” In July 2002 Judge Brinkema rejected Moussaoui’s emotional self-representation guilty plea and told him to take a week to think about pleading guilty to **Federal charges** that carried with them the **death penalty**. More recently, in response to the **Federal prosecutor’s** refusal to allow Moussaoui access to al-Qaida members in U.S. custody, whom he claims would clear him, Judge Brinkema ruled that for its failure to produce them, the **Government** can not seek the **death penalty** and can not introduce evidence that Moussaoui had knowledge of or was involved in the 9/11 terrorist attacks (reportedly with regard to which unnamed **FBI** sources now say he was not directly involved). This is now on appeal. The other “brink” case involves **Iyman Faris** and the Brooklyn Bridge, not “selling,” but “destroying,” with regard to which Faris, a Kashmir born U.S. citizen, according to **U.S. Attorney General Ashcroft**, in early 2003 advised al-Qaida “the weather is too hot,” which “conveyed the defendant’s assessment that the bridge plot was unlikely to succeed ... because of the bridge’s security and structure.” Faris, in his guilty plea agreement, also set forth additional acts of material support to al-Qaida, to all of which his counsel acknowledged: “To my knowledge, his decision to stipulate to these facts is an informed and voluntary one.” Subsequently, the same counsel advised Judge Brinkema by **Motion**: “Mr. Faris has stated to counsel he wishes to withdraw his plea of guilty for reasons not yet fully explained to counsel by Mr. Faris.” She denied the **Motion**, stating: “He thoroughly understood what he was doing,” but preserved his right to appeal this denial, and sentenced him to 15 years for aiding and abetting terrorism, plus an additional five years for conspiracy. Thus Judge Brinkema balances on the brink of liberty and security.

**WHISTLING “SECRET SQUIRREL” UNCAGED!** Did you know a squirrel could whistle? “Secret Squirrel ... maliciously bombarded the computer system of an El Segundo computer messaging company [Tornado Development Inc.] with thousands of email messages,” or so asserted the March 25, 2003 Press Release of the **U.S. Department of Justice**, for which Secret Squirrel was squirreled away in 2002 for “16 months in federal prison ... under the ‘**Computer Fraud and Abuse Act**,’” and was required to submit “to unannounced searches of his computers, to advise future employers about this conviction and ... to receive psychological counseling.” Secret Squirrel is the computer handle of Bret McDanel. Now, in response to McDanel’s post-incarceration appeal on **First Amendment** grounds and on grounds of lack of “intent” to “maliciously bombarded the computer system” by e-mailing warnings of security flaws, the **DOJ** has deleted this **Press Release** and “confessed error” in this case to the **U.S Ninth Circuit Court of Appeals**, admitting that it had no proof that McDanel intended to impair the integrity of Tornado’s system, and asking the **Ninth Circuit** to reverse the Secret Squirrel’s conviction. The **Computer Fraud and Abuse Act** makes it criminal to “knowingly cause the transmission of information and as a result of such conduct, intentionally cause any impairment to the integrity or availability of data, a program, a system, or information without authorization,” and is meant to punish those who intend to disrupt computer systems through the introduction of computer viruses, Trojan horses, mail bombs, and the like. Here, apparently, the **Feds** went “nuts” in their whirlwind desire to cage Tornado’s whining whistling Secret Squirrel. Reportedly, the **Assistant U.S. Attorney** “confessing error,” has acknowledged that this prosecution occurred because the whistleblowing McDanel had engaged in “three e-mail attacks” for the purpose of warning customers that hackers could get into Tornado’s computer system, and doing so only after McDanel asked Tornado to fix the system, “but Tornado declined to do so,” which resulted in Tornado’s system crashing and “caused \$5,000 in loss.” It has been suggested that cards be printed for all **Federal prosecutors** reminding them that: *“Whistleblowing good! Whistle-Squelching and Cover-Ups bad!”*

**ANTITRUST “DISGORGEMENTS” ORDAINED.** In its most basic and crudest sense “economic disgorgement” is the “upchucking of ill-gotten gains.” The **Federal Trade Commission (FTC)** has recently issued a unanimous **Policy Statement** (<http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>) specifically ordaining and encouraging the use of **disgorgement** and the related monetary equitable remedy of **restitution** in cases involving clear-cut **Antitrust** and **Competition** violations, “specifically those involving violations of the **Hart-Scott-Rodino (HSR) Premerger Notification Act**, the **FTC Act**, and the **Clayton**

**Act.**” According to the **FTC**, “**disgorgement** is a monetary remedy ‘designed to deprive the wrongdoer of his unjust enrichment and to deter others from future violations’ and **restitution** ‘is intended to restore the victims of a violation to the position they would have been in without the violation’.... Depriving the violator of any of the benefits of illegal conduct has long been accepted as an appropriate, indeed necessary, element of antitrust remedies. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948);” and the monetary equitable remedies of **disgorgement** and **restitution** have been utilized by the **FTC** in the past. For example, in 2001, in *FTC v. The Hearst Trust*, No.1:01CV00734 (TPJ) (D.D.C. Nov. 9, 2001), involving “alleged anticompetitive acquisition and violation of pre-merger filing requirements,” the “stipulated judgment included \$19 million **disgorgement**,” and in *FTC v. Mylan Labs, Inc.*, No.1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001), involving “alleged monopolization,” the “stipulated judgment included \$100 million **restitution**.” The **FTC** stresses that a “key purpose of the **disgorgement remedy** is to remove the incentive to commit violations by demonstrating to the potential violator that unlawful conduct will not be profitable,” and thus to let these economic gluttons know that if they “gorge” themselves in violation of these laws they will be subject to severely upset stomachs resulting in convulsive **disgorgements**.

**GOVERNATOR TO PRESIDATOR?** Terminator Orrin Hatch, Republican **U.S. Senator** from Utah, a month before Governor Arnold Schwarzenegger threw his hat into the California gubernatorial race, introduced in **Congress** on July 10, 2003 the “**Equal Opportunity to Govern**” amendment to the **U.S. Constitution**, which would terminate the **constitutional** requirement that: “No person except a natural-born citizen ... shall be eligible to the **Office of President**.” Who knows, if the **Constitution** is eventually so amended, the original “Terminator” may become our “Presidator!” But would he be following in Reagan’s or Clinton’s footsteps or, perhaps, one of each?

## **FOLLOW UP**

**THE PATTERSONS MOBILIZE AMERICA!** In the book “*Mobilizing America: Robert P. Patterson and The War Effort, 1940-1945*,” author Keith E. Eiler informs us that “**Robert P. Patterson** resigned from the **United States Court of Appeals** in 1940 to accept a post in the **War Department** and help prepare for the war he knew was coming.” Now six decades later his namesake, **U.S. District Judge Robert P. Patterson, Jr.**, is also entering the fray to aid America in mobilizing for the war he knows is coming, this time not a war against enemies abroad, but an internal “*War to Protect the Integrity and Discretion of the Judiciary*.” This “war” was described in *Federally Speaking*, No. 33, under “*Liberty’s Corner: A Non-Discretionary Judiciary*.” Judge Patterson, finding the **U.S. Sentencing Guidelines** to be fundamentally unfair, rejected them by giving Steven Kim, a U.S. citizen born in **North Korea**, a shorter prison term than permitted by these **Guidelines** for firing bullets at the **United Nations** building in New York City, in protest of **North Korea’s human rights violations**, and even shorter than Kim had agreed to serve under his **guilty plea agreement**. In doing so, he advised: “On the one hand, we must sentence in accordance with the law yet... we must render a fair and just sentence based on the unique facts with which we are sometimes confronted.... It’s the **trial judge**, not the **legislature** that has the opportunity to examine the facts of each case ... The **Court** finds that aiming a gun at 85 degrees in front of an office building is not bound to result in bodily harm ... This act was a political statement to draw the tragic circumstances of **North Korea** to the public’s attention,” and “out of the heartland” of a traditional assault. Judge Patterson characterized the actions of the other **Branches** to restrict **Judicial discretion** as “squeezing” the **Federal Judiciary** and raising the ugly specter that “our system of justice will be considered subservient to our other **Branches** of government.” Kim, in addition to being sentenced to 27 months in **Federal prison**, was ordered to pay \$1,700 for damage to the **UN** building and a \$6,000 fine.

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