



FEDERALLY SPEAKING



by Barry J. Lipson

Number 41

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 41st 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>.

 TOMORROW'S
TRIALS  TODAY!!!

There are only nanoseconds left to experience first hand *Tomorrow's Trials Today!!!* Span leagues with the *Futuristic League* of your colleagues from *Cleveland, Erie, Harrisburg, Pittsburgh, & ?*, and embark on the *FBA West Penn Chapter's June 11, 2004* whirlwind tour of this mind-bending electronic **World of Wonder. Science Fiction?** No, much of it is *Science Fact*, in practice or on the drawing board! And with "*real-time*" technology you will learn about the normally unavailable "*second bite of the apple!*" All this, a delightful City Deli Lunch (with apple), and 7 hours CLE (including one ethics hour), for \$99 (\$79 for current & new FBA members). For reservations contact: Carmine DiPaolo, Fifteenth Floor, Two Gateway Center, Pittsburgh, PA 15222-1447 (412/281-4900; carmind@springerlaw.com). Program details available at *WDPA Website, above.*

LIBERTY'S CORNER

THE SILENCE OF THE LAMBS. *Isaiah 53.7:* “He was oppressed, and he was afflicted, yet he opened not his mouth; he is brought as a lamb to the slaughter, and as a sheep before her shearers is dumb, so he openeth not his mouth.” So sayth the ACLU about all of you Internet users who are or may be “brought” *lamblike* before the **FBI** through their Internet records, under that **Governmental Agency's** “unchecked authority to issue ‘**National Security Letters**’ (NSLs), which demand sensitive customer records from Internet Service Providers and other businesses without **judicial** oversight;” and “*dumbly*” so, as you can not utilize your cognizant abilities to understand or react for, as the ACLU further sayth in filed Court Papers, **Patriot Act “Section 2709** includes a provision that prohibits any entity served with a **National Security Letter** from ‘disclos[ing] to any person that the **Federal Bureau of Investigation** has sought or obtained information or records under this section.’ **Id Section 2709(c).**” The ACLU additionally reveals that before “the **Patriot Act**, the **FBI** could use the NSL authority *only* against suspected terrorists and spies. Thanks to **Section 505** of the **Patriot Act**, the **FBI** can now use NSLs to obtain information *about anyone at all*” (emphasis added). To speak for these “silenced Lambs,” and yet help the plaintiff Internet Service Provider (ISP) “to avoid penalties for violating the NSL statute's broad gag provision,” the ACLU and plaintiff ISP filed *under seal* a **Motion for Declaratory Judgment and Injunctive Relief**, in the **U.S. District Court for the Southern District of New York**, to declare **Section 2709 unconstitutional** in violation of the **First, Fourth and Fifth Amendments**, and enjoin its use (*[Redacted]* and *ACLU v. Ashcroft, Mueller and Bowman*, 04 Civ _____ (SDNY, April 6, 2004)). Shades of the now “*Special Agent*” **Hannibal Lecter** lambasting, manipulating and

cannibalizing the **Bill of Rights** a la Thomas Harris' gruesome novel, *'The Silence of the Lambs?'* **But, doesn't each ISP's and similarly legislatively "gagged" bank, etc., have fiduciary duties to their lambs, their flocks, their clients, or must each "openeth not his mouth"?**

BUSH BUSHWHACKED IN THE BURGH! Just a week after **President George W. Bush** came to Pennsylvania to extol the virtues of the **USA Patriot Act**, the **Burgh's City Council** agreed that the **"healthH"** of the **Bill of Rights**, which now apparently appeared to them under the **Patriot Act** to be more like the **"Bill of Rites,"** was seriously on the decline. So they brushed up on their **Constitutional Law** and bushwhacked Bush's efforts here by **unanimously** voting to put the **"H"** back in the **Bill of RigHts** (**"Bill of Rithes"** would be lisping). By so doing, Pittsburgh, Pennsylvania became the 296th community nationwide (there are now over 300) to resolve to so return our **Bill of Rights** to a state of **healthH**. As summed up by one sponsor, Councilman Bill Peduto: "This was a grassroots effort. The people of Pittsburgh stated that certain provisions of the **Patriot Act** traded essential liberty for temporary safety. As Ben Franklin stated over 200 years ago, **those who would accept that trade deserve neither liberty or safety.**" According to the Greater Pittsburgh ACLU Chapter, this **Resolution** "requests that Pittsburgh Police refrain from participating in **unlawful and illegal searches** or engage in **racial profiling**; that Pittsburghers be informed when their **library records**, business transactions, and other personal records are monitored; and asks that City police refrain from enforcing **immigration laws** that are the responsibility of the **Federal Government.**" With traditional Pittsburgh judiciousness, when a somewhat milder version of the **Resolution** was introduced at the last moment, "both **pro-civil liberties** motions were approved with a joint vote." This is not the first time the **"Burgh-O-King"** resisted the **Feds** attempt to tamper with the **"H."** The **U.S. Board on Geographic Names** with the **U.S. Post Office's** complicity tried to **"de-H" Pittsburg** from 1890 to 1911, but the **Burgh** fought back, **as now**, and prevailed. Today, there are 16 **"Pittsburg's"** in the U.S., but only one **"Pittsburgh."**

FED-POURRI™

BURN WITCH BURN! Shades of the Salem Witch Trials; Ray Bradbury's book-burning science fiction classic **"Fahrenheit 451"** (the temperature at which paper ignites); and/or the virtual **burning** of Michael Moore's film **Fahrenheit 911** in today's America? **Moore** or less! The All-American Walt Disney Company, in apparently true **"Mickey Mouse"** fashion, reportedly fearing **Governmental reprisals**, has banned the distribution by its "subsidiary, Miramax Film Corp," **in the United States but not abroad**, of **"Fahrenheit 911."** According to Disney's **SEC 10-K** filing, Miramax, acquired by it in 1993, "acquires and produces motion pictures that are distributed under the Miramax and Dimension banners." **Fahrenheit 911**, whose title appears intended to invoke the spectre of the world of **"Fahrenheit 451"** where all information is controlled by the Government, is said to highlight the "foremath" and aftermath of the fiery destructions of September 11, 2001, allegedly casting the Bush Administration in a bad light, and linking the families of Presidents Bush and Osama bin Laden. As reported by the **New York Times**, Disney has "particular concern" that this film, which "harshly criticizes President Bush ... would endanger tax breaks Disney receives for its theme park, hotels and other ventures in Florida, where Mr. Bush's brother, Jeb, is governor." A **Merrittorous** position? (A. Merritt wrote **"Burn Witch Burn."**) One would hope not! But one suspects that the **"Goofy"** real results would be **"Burn DVD Burn,"** as many more Americans than otherwise would view pirated copies thanks to **"Radio Free al Qada"** or otherwise downloaded from the Internet. And now such action by Disney would probably permit with impunity maximum distribution in the U.S., while burning more Bush bridges, for how could the Bush family now refute that they would not have done what they have not done, or even sanely do what they otherwise may well have done? **[FLASH** – After these reports sparked the above, Miramax's Co-Chairs Bob & Harvey Weinstein announced they have also kindled negotiations with Disney to enable independent U.S. distribution of **Fahrenheit 911**, while helping to erect a firewall around Disney's fears of politically **"burnt fingers"** and **"Burning Bush"** intimidations. A **CAPITALism** solution!]

ARBITRATION RUMINATIONS. The Virgin Islands, the Caribbean pearl of the **Third Circuit**, has become the source for arbitration [or arbitrary?] pearls of wisdom for the entire **Third Circuit**, and possibly the rest of the **Nation**. Two important cases from these tropical isles were handed down on May 13, 2004 by

the same unanimous panel of the **U.S. Court of Appeals for the Third Circuit**, with both opinions written by Senior U.S. Circuit Judge Walter K. Stapleton. In *Parilla v. IAP Worldwide Services VI Inc.*, ___ F.3d ___ (3d Cir. 2004), brought under **Title VII of the Civil Rights Act of 1964** (42 USC Section 2000e), which prohibits employment discrimination based on race, color, religion, sex and national origin, the **Third Circuit** while finding that several of the provisions of the Arbitration Agreement are *unconscionable*, held that the “existence of *multiple unconscionable provisions* will not always evidence *'serious moral turpitude'* or serious misconduct, precluding enforcement of the agreement to arbitrate,” but that “will depend on whether the number of such provisions and the degree of unfairness support the inference that the employer was not seeking a *bona fide* mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage” (emphasis added). See also *'Arbitrate Or Ruinate,' Federally Speaking* No.3, reporting on *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), where the **U.S. Supreme Court** ruled that “under the **Federal Arbitration Act of 1925** (9 U. S. C. §1)” an employee “was bound by his written agreement in his employment contract to ‘settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding *arbitration* before a neutral Arbitrator [emphasis in original],” including “‘Title VII of the Civil Rights Act of 1964, as amended.’” In the other case, *Lloyd v. Hovensa LLC*, ___ F.3d ___ (3d Cir. 2004), the **Third Circuit** held that “the plain language of **Section 3** [of the **Federal Arbitration Act**] affords a **District Court** no discretion to **dismiss** a case where one of the parties applies for a **stay** pending arbitration,” as the statute, whether applied in the Virgin Islands or elsewhere, virginally, plainly and “clearly states, without exception, that whenever suit is brought on an arbitrable claim, the court *'shall'* upon application *stay* the litigation until arbitration has been concluded” (emphasis added). *Now let's ruminare!* Do you see here any tension between the **Courts'** desire to support “*alternate dispute resolution*” by vigorous enforcement of *arbitration clauses* even in employment agreements where the power most often resides with the employer, both generally (*Circuit City, supra*), and now even when these employer-drafted agreements may contain “*multiple unconscionable provisions*” (*Parilla, supra*); and the desire to maintain a degree of *judicial oversight* (*Lloyd, supra*; for if the case is **dismissed** instead of **stayed** “the parties will have to file a new action each time the court's assistance is required, with the attendant risk of having their case assigned to a new judge”)? Perchance, are there spectres here of “*power abuse*” and/or “*impermissible advantage*”? Your choices, chew on these, **dismiss** these ruminations or **stay tuned** for future developments!

\$\$\$ AND ARBITRATEES RUMINATE ON THIS \$\$\$ Is any legal service ever worth over a Billion Dollars? **YES**, if the **Arbitrators** say so! *The “Arbitrary Traitors” say so?* No, no, the “**Arbitrators**,” or so said a unanimous five Justice panel of the Appellate Division of the New York Supreme Court, First Judicial Department, regarding the California segment of the **1998 National Tobacco Litigation Settlement** (*In re Application of Brown & Williamson*, No.1284N (May 18, 2004)).“It is beyond cavil that the scope of judicial review of an **arbitration proceeding** is extremely limited,” advised the Court in “finding that the **Arbitrators** did not exceed their power” and restoring the **Arbitrators** (2-1) \$1.3 Billion attorney fee award. And why a New York Court ruled on the California segment of a **National Settlement**? *Ruminate on that!*

ONLY IN AMERICA! In the old **USSR** if it was news it was propaganda! In today's **USA** if it's propaganda it's news! And in the **US of A** the **Government** tattles on the **Government!** *Federally Speaking* No 14 reported that “the existence of the short-lived **Pentagon Office of Strategic Influence**, setup in the wake of the 911 attacks, was exposed to the light of public opinion and was apparently abruptly axed with the terse and great sounding **Presidential** statement: *'We'll tell the American people the truth'*.” Now the **General Accounting Office (GAO)**, the **Congressional** investigative instrument, has determined that the **Bush Administration** produced and provided broadcasters with illegal “covert propaganda” to espouse the benefits of the Republican-touted new **Medicare Law**. According to the **GAO** the tapes so provided were “not strictly factual news stories” and contained “notable omissions and weaknesses,” though the tapes greatest failing was that they were “misleading as to source.” The **GAO Decision** advised that the **Centers for Medicare & Medicaid Services (CMS)**, an agency in the **Department of Health and Human Services (HHS)**, in using “appropriated funds to pay for the production and distribution of story packages *that were*

not attributed to CMS violated the restriction on using appropriated funds for publicity or propaganda purposes in the **Consolidated Appropriations Resolution of 2003;**” and that “CMS, in using appropriations in violation of the publicity or propaganda prohibition, incurred obligations in excess of appropriations available for that purpose” and thereby “violated the **Antideficiency Act**, 31 U.S.C. § 1341 ... Neither the story packages nor scripts identified **HHS** or **CMS** as the source to the targeted television audience, and the content of the news reports *was attributed to individuals purporting to be reporters*, but actually hired by an **HHS** subcontractor.” **GAO Decision B-302710** (May 19, 2004), emphasis added. *And the punishment?* Ironically, that **CMS** report itself to “*Congress and the President*” (31 U.S.C. § 1351). *Only in America!*

FOLLOW UP

JUSTICE STEVENS: DEATH PENALTY CONSTITUTIONAL BUT ILL-ADVISED! The **U.S. Supreme Court** in 1972 “excised” the **death penalty** by holding it **unconstitutional**, but recanted and reincarnated it in 1976. Now **U.S. Supreme Court Justice John Paul Stevens** has incanted publicly at a **Seventh Circuit** Bar “enclave” the ill-advisedness of this *irreversible* penalty: “I think this country would be much better off if we did not have **capital punishment**. ... We cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.” He continued, while I believe it is still **constitutional**, “I really think it's a very unfortunate part of our judicial system and I would feel much, much better if more states would really consider whether they think the benefits outweigh the very serious potential injustice, because in these cases the emotions are very, very high on both sides and to have stakes as high as you do in these cases, there is the special potential for error.” Likewise, the late **U.S. Supreme Court Justice Harry Blackmun** in 1994 “condemned” **death, the supreme penalty**, with the incantation: “*From this day forward, I no longer shall tinker with the machinery of death.*” At the same **Seventh Circuit** “conclave” fellow **Justice Stephen Breyer** merely observed: “Every case that we have in the criminal area I think raises serious difficulties about the criminal process and we try to solve them. A lot is up to the legislatures. A lot is up to the prosecutors. A lot is up to the defense bar.” Previously, in 2002 **Justice Stevens** had authored the **U.S. Supreme Court anti-death penalty** decision in *Atkins v. Virginia*, 536 U. S. 304 (2002), in which, as reported in *Federally Speaking* No.18, “the **U.S. Supreme Court** in a 6-3 ruling, involving a defendant with an IQ of 59, has held that the execution of the mentally retarded is ‘**cruel and unusual punishment**’ under the **Eighth Amendment** to the **U.S. Constitution, based on evolving currently prevailing standards of decency**” (emphasis added). See also *Federally Speaking* Nos. 4, 12, 14, 17, 21, 26 and the *U.S. Supreme Court Compilation Issue* for other **death penalty** reports. So, is this penalty “*just retribution*,” balancing the scales *with death* and deterring future desperadoes; or does it just evidence an ill-advised “*ill*” society, rife with “*serious potential injustice*,” and the inevitable perpetration of “*irreversible errors*” and unprincipled official killings to obtain *just retribution*, merely, solely, simply, and in “*disturbing number*” misdirected?

“DO-NOT-CALL” SHARING ANTI-SPAM. In light of the upholding of the **constitutionality** of the **FTC “Do-Not-Call”** list by a unanimous three-judge panel of the **U.S. Court of Appeals for the Tenth Circuit** (*Mainstream Marketing Services, Inc. v. FTC*, No. 03-1429 (10th Cir. Feb. 17, 2004)), Pennsylvania announced it would be sharing with the **Federal Trade Commission** its 3.2 million no-call roster, which action is authorized by the “*anti-spam*” Pennsylvania Telemarketer Registration Act (see “*Can The Ham – No Spam*”?, *Federally Speaking*, No. 33). To date the Pennsylvania Bureau of Consumer Protection, has brought approximately 48 legal proceedings under this Pennsylvania Act, which became effective November 1, 2002, against **spamming** telemarketers; has obtained over \$500,000 in civil penalties and costs; and has in the neighborhood of 45 open investigations. Pennsylvania Attorney General Jerry Pappert advised that this “sharing” between the States and the Feds adds “another layer of protection against unwanted telephone solicitations at home.” But can he can those Spammers and throw away the key?

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