



FEDERALLY SPEAKING



by Barry J. Lipson
Number 50

Welcome to the *Fiftieth Issue* of *Federally Speaking*, an editorial column for **ALL** interested in the **Federal Scene**, originally 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 in the Federal arena, 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 and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 50th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: <http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm>.

FED-POURRI™ - THE LABYRINTH OF LANGUAGE

Henry Trueman W. Wood, no relation to Harry Truman as far as we know, but apparently a man of truth nonetheless, in his 1870 dissertation “*Changes in the English Language*,” examined the “woodenization” of the language since the introduction of the Gutenberg moveable metal type printing press, and observed that the “*the great effect of printing was shown in its rendering the language uniform and fixed, and thereby causing future changes in it to be a matter of considerable difficulty.*” Thus language-wise it could be said that the *seen* affect of snaky Medusa on the body corporeal, and the *sneaky* affect of solid Gutenberg on the body linguistic, were the same -- rigidifying solidification. The “seen” one mythical, and the “sneaky” one all too real.

In discussing with our Number 2 Son, sometimes affectionately called since a wee lad “Sonny Twoy,” the mind boggling fact that the *Fiftieth Federally Speaking Column* was next up, and the fun we had in playing with language in this and its companion column *Corplaw® Commentaries*, in order to offer and convey concepts, and proffer purported, proposed and projected points, positions and propositions, he decided that this then must be the subject matter for the *Fiftieth Anniversary Issue*, an issue with which we would not be permitted to take even wee issue. [Note the wee use of the “editorial we” here.]

So putting aside such tempting topics as: a) the medically documented hallucinations and highs of a former **Chief Justice of the U.S. Supreme Court** while a member of that **High Court Bench**; b) two Republican Presidents ordering **FBI** criminal checks of those opposing their **U.S. Supreme Court** Confirmations; c) all this coming to light thanks to the *Freedom of Information Act*; and/or d) a U.S. citizen enemy combatant designee-detainee taking the side of his captors, the **U.S. Government**, while his attorneys cry foul under the construct of a Stockholm Syndrome Synthesis, we will defer to Sonny Twoy. Sneakily, we have already started doing so in the construction of these opening paragraphs.

False Starts

As a youth I prided myself in having coined the word “punster,” a word still not found in a dictionary search. But, much to my chagrin a quick Google search showed **U.S. Supreme Court** Justice Oliver Wendell Holmes’s father (of the same name) had used “punster” in January 1861, in *The Atlantic*

Monthly, sexistly alerting us that “there is no such thing as a female punster ... though I have once or twice heard a woman make a single detached pun, as I have known a hen to crow.” Then too, my Wharton penultimate thesis (using “ultimate” in its “finest,” not “last,” sense here), having then only been topped by an Asian intellect, was entitled “*Are Advertising Ideas Protectable?*” I could not then, *nor can I now*, find “protectable” in any dictionary. Even today spellcheck rejects “protectable,” wanting to substitute its antonym “prosecutable.” *But, interestingly, I can now find it in actual use all over the Internet.* Similarly, in reporting in *Issue No. 4* on the *Electronic Signatures in Global and National Commerce Act*, or *E-Sign Act*, I thought I had created “a brilliant original lead [to wit, “*An E-Sign of the Times*”], only to find, upon surfing the Web, that it had already been previously ‘e-stolen’ (well almost, not the ‘An’). *Certainly, an ‘e-sign of the times’.*” These anecdotes help focus on the possibility, indeed probability, that the computer age, with its quick searches, electronic publishing and interactive online dictionaries, will “de-rigidify” the language, though not to the pre-Gutenberg state of affairs, adding an enticing effervescence to the *English e-language*. [Note personal “I” here.]

State Of Affairs

The State of Affairs of *Federally Speaking* and its older sibling *Corplaw® Commentaries* is that they have always treated English as a living, breathing, growing vibrant language, with words and phrases always ready to bend and evolve, to amend old concepts and convey new conceptualizations, in novel and unique ways. And the more intellectually stimulating, the more fun, the better.

Even in *Federally Speaking* No. 1 we bit right into the rind and exclaimed “*Holey Cheese*,” not merely descriptively, but as a better way than “*Holy Cheese*” to express “extreme astonishment” and “utter shock” over the **USDA** denying Americans larger holes in their Swiss Cheeses (in retrospect, if a Xmas specialty pressed curd product had been involved we may have exclaimed “*Holly Cheese*,” or if it had happened in Kurdistan, “*Holy Curd*.”).

In *Issue No. 1* we also introduced to our readership the coined word “**LearnAbout™**” for a monthly series of FBA Continuing Legal Education Luncheons, with the motto “*Eat Your Way Through Your CLE*” (Pennsylvania requiring 12 credits annually), which we protected by *Common Law Trademark*. Similarly we protected the coined fun word **FED-POURRI™**, introduced in *Issue No. 4*, which is our heading, as above, for the miscellaneous and mischievous section of this column. Another coined word, **CorpLaw®**, is protect as a *Federally Registered Trademark*, which was obtained, as more fully described in a two-part 1995 *CorpLaw® Commentaries* column, entitled “*The Corplaw Saga*,” from the **U.S. Patent and Trademark Office** “only after many skirmishes and counter-attacks.”

Doppelganger Protection Act

Webster defines a doppelganger as “a ghostly copy of a living person.” A **U.S. Supreme Court** decision inspired us to conjure up the illusionary *Doppelganger Protection Act* in *Issue No. 7*, which we defined as protecting a “non-material or ‘ghostly’ electronic copy of a ‘living’ (still under *Copyright*) paper article.” Justice Ginsburg, writing for the 7-2 majority of the **U.S. Supreme Court**, had “rejected the notion that such a ‘Doppelganger,’ also know less colorfully as an ‘electronic database copy,’ remains covered by the *Copyright* on the print edition of the newspaper or magazine, as being still part of a statutorily permitted revision of that original print edition. She based her finding primarily on the fact that the typical database user, such as LEXIS/NEXIS users, did not retrieve an entire newspaper or magazine, but merely the individual article that was sought. Materializing from the Nether Realm the nebulous ‘*Doppelganger Protection Act*,’ the **High Court** therefore held that, *without the author's permission*, a newspaper or magazine publisher is barred by the *Copyright Act* from distributing such Doppelgangers of its freelance print articles through electronic databases (*New York Times v. Tasini*, 533 U.S. 483 (2001)).”

Senator Phil E. Buster

In *Issue 44* we “birthed” the famous/infamous “Senator Phil E. Buster,” to explain the U.S. Senate’s *Institution of Filibustering*. “The longest serving member of the U.S. Senate is Senator Phil E. Buster, who joined that august body in 1806 when the ‘previous question motion’ rule, that required only a simple majority to cut off debate, was eliminated. ‘*Vrijbuitter*’ or ‘*Vrybuitter*’ (‘pirate/freebooter’) was Senator Buster’s ancestral Dutch moniker, later ‘Franconized’ *Flibustier* and then ‘Spanishized’ *Filibustero*. By the mid-1850’s it had devolved to ‘*Filibuster*’ and became his Senate *nom de plume* for him being prone to ‘pirate’ that Chamber with his endless speeches to prevent votes on bills he disfavored, and in so doing allegedly protecting the rights of minorities. Indeed, it became a hallowed Senate tradition ‘that any senator should have the right to speak as long as necessary on any issue’ ... This Republican (and Democratic) proclaimed ‘pillar of American Democracy’ is nicely summed up in the 1939 American movie classic ‘*Mr. Smith Goes to Washington*’ where it is reported, ‘half of official Washington is here to see democracy’s finest show, the *filibuster*. The right to talk your head off! The American privilege of free speech in its most dramatic form!’”

Just The Fax

In “*The Fax, Just The Fax, Ma'am - An Update Y'all*” we had a “hoot” of an item. You may not be aware, as reported in *Issues No. 6 and 40*, that the *Telephone Consumer Protection Act* (47 U.S.C. 227) provides that: “No person may transmit an advertisement describing the commercial availability or quality of any property, goods or services to fax machine without express permission or invitation” and that “in addition to FCC fines, consumers can seek from broadcasters of junk faxes, in state court, up to \$1,500 for each violation, and do so as Class Actions. ... We can now report ‘peachy’ actions under this Act in Georgia, y'all! For example, Georgia attorney Sam Nicholson was faxed 6 unsolicited Hooters' Lunch Coupons. Resisting the allure of hooting hooters at Hooters, he instead sued! His class action certification on behalf of 1,321 non-requesting ‘hootless’ fax recipients was upheld by the Georgia Court of Appeals (*Hooters of Augusta v. Nicholson*, 245 Ct. App. Ga. 363 (2000)), and it was a real ‘hoot’ when this class was subsequently awarded an \$11.9 million verdict against Hooters, of which \$3.9 million was for Class Action Counsel, and \$15,000 for ‘Sam the Man’ himself as Class Rep (*Sam Nicholson v. Hooters of Augusta*, No. 95RCCV616 (Richmond Super. March 21, 2001)).”

Oxymorons, Contranymy and Confusoids

Perhaps the labyrinth of our language is best limelighted in “*Practicing Law Among the Oxymorons, Contranymy and Confusoids*” (*Corplaw® Commentaries*, 1997), where it is postulated that it “is a wonder that you are able to practice law at all, let alone communicate, in a land run amok with *oxymorons*, *contranymy* and other *confusoids*, in a land where ‘*the silence is deafening*’ when help is sought by a seeker seeking to sort between the sense and the nonsense. ... Donald Chain Black, a wordsmith of the first order, points to the **United States Supreme Court’s** 1955 pronouncement of ‘*with all deliberate speed*,’ as ‘a famous example of the *oxymoron*.’ He would probably read this phrase to mean ‘proceed with slow, unhurried and steady swiftness;’ while the **Supreme Court** presumably wrote this to mean ‘proceed as quickly as careful and thorough consideration permits.’ Consider also the **Supreme Court’s** ‘infamous’ *antitrust* formularization of a ‘*not insubstantial*’ effect on competition (apparently inferring, grammatically incorrectly, something less than substantial). ... Another type of confusing verbal communication is a ‘*contranym*,’ which ... ‘is a word with two (or more) contradictory meanings.’... [Consider] ‘*citation*,’ such as in the embarrassing situation where the police officer gave a leading local lawyer a ‘*Citation*’ for speeding, while he was rushing to receive a ‘*Citation*’ from the Western Pennsylvania Chapter of the Federal Bar Association for earning the ‘*Federal Lawyer of the Year*’ award. Consider also the ‘*Oversight Committee*.’ Is the job of this committee to oversee activities to assure proper performance and outlook ... [or] to overlook improper performance [?] ... How can lawyers properly counsel their business clients to avoid

confusion, fraud and deception when, as discussed in the *Corplaw® Commentaries* column entitled '*Equal®: The Unequalled Biography - and Other Tales Fat-Free™*,' (*Pittsburgh Legal Journal*, July 23, 1996), the government [FDA] by regulatory definition permits foods containing fat to be labeled '*fat free*', and foods containing calories to be labeled '*no calories*'."

The Great Middlizer

Greatest fun is coining new words and phrases. Most recently coined in this column are "*Middlizer*," "*Middlization*," and the "*The Great Middlizer*." Google these and all relevant references you will find are to this Column and perhaps references hereto. As introduced in *Issue No. 45* and followed through on in *Issues Nos. 47 and 49*, "the great equalizer in twenty-first century America may well be that mighty political force, '*The Great Middlizer*,' the saving grace of our Democracy, our Republic. Not the force that creates the great 'middle class,' but that seemingly irresistible force that tends to mitigate extremes in the Presidency and the Judiciary, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the middle of the road. Indeed, the extreme right, apparently fearing that the '*Middlizer*' will work, expresses its 'serious concern' that Republican President George W. Bush's **U.S. Supreme Court** appointments may 'pull Earl Warrens' and swing too far to the left ... , while the extreme left is concerned it won't work. ... As to Justice Alito, we must rely on the '*Great Middlizer*,' the great equalizer of modern times, 'that seemingly irresistible force that tends to mitigate extremes in the Presidency and the Judiciary, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the middle of the road' (*Federally Speaking*, No. 47) ... But '*middlization*' with regard to Chief Justice John G. Roberts, Jr. may be considerably further along," as he now understands that an "independent judiciary is one of the keys to safeguarding the rule of law" and "how admired America's Independent Judiciary is by foreign jurists." Indeed, he now counsels conservatives: "And to the extent that attacks on judicial independence emanate from conservative quarters, I would commend to those quarters those words from the leading conservative voice of our time, 'the lonely courage of a patriot.' President Reagan recognized that it was the job of judges to make unpopular decisions; unpopular with the populace at large, unpopular with particular social or professional elites. But he also recognized that the courage required of them was the courage of a patriot because in making those unpopular decisions, they were fulfilling the framers' vision of a society governed by the rule of law" (*Issue No. 49*).

Fact Or Fiction? – “That’s All [For Now] Folks!”

We will conclude this **Fiftieth Anniversary Column** with an inquiry into communication or miscommunication, fact or fiction? Quickly, tell us if we are celebrating our *Fiftieth Year* or *Fiftieth Issue*? Quickly, what does "*Wash. Biol. Surv.*" communicate to you? As reported in *Issue 5, Knight-Ridder News Service* allegedly revealed a letter to the **Fish and Wildlife Service**, apparently corrected for spelling, "from an Arkansas camper, which read ... '*Dear Sirs: While camping last week I shot one of your birds. I think it was a crow. I followed the cooking instructions on the leg tag ["Wash. Biol. Surv.,"] and I want to tell you, it was horrible*.'" Reportedly, these tags have now been revised to read "**Fish and Wildlife Service**" (perhaps with better cooking instructions on their Website??).

This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.

You may contact columnist Barry J. Lipson, Esq., former FBA Third Circuit Vice President, at CorpLaw® Center, 102 Christler Court, Moon Twp., Pennsylvania 15108-1359 (412/264-9417; E-Mail bjlipson@gmail.com). The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author. This and prior issues are available on the United States District Court for the Western District of Pennsylvania website, and Column numbers refer to Columns listed in the Index of Columns on that site: (<http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm>). Copyright© 2007 by Barry J. Lipson