



FEDERALLY SPEAKING



by Barry J. Lipson

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Welcome to *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 51st 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>.

LIBERTY’S CORNER

SHOLOM ALEICHEM, A LAME DUCK AND CONSTITUTIONAL TRADITIONS

Many say our present President is a “*Lame Duck*,” but for differing reasons. Some say it is because he is playing, with lives and liberties, a game he can not win. Other say, using this designation in its oldest sense, it is because he is accruing debts that can not be repaid. Still others because he has and keeps shooting himself in the foot/feet. But all seem to acknowledge that he is a “*Lame Duck*” because his party does not control *Congress* and/or because he can not be re-elected at the end of his current term. However, this latter *Lame Duckism* both enhances his *impotency* and his *potency*. Enhanced *impotency* as others may see less reason to defer to him, and enhanced *potency* as he may see less reason to defer to others (including the electorate).

However, even a *Lame Duck* President can persist in fiddling with and bushwhacking our civil liberties, our essential *Constitutional Traditions*. Does he not continue to have the power of the *Veto*, and continue to control a vast *Federal Bureaucracy* with police powers (some say in a half-vast manner)? Does he not continue to be “*Commander-in-Chief of the Army and Navy of the United States*, and of the Militia of the several States, when called into the actual Service of the United States” (*U.S. Constitution, Article II, Section 2*; the *Air Force* was added by *Act of Congress* in 1947), with even the inherent power to take command on the battlefield, as President George Washington did in leading approximately 70,000 Federalized troops to still the *Whiskey Rebellion* and tax the stills in Western Pennsylvania, and as President James Madison did during the War of 1812, in taking command of a Naval battery on August 24, 1814, in an unsuccessful attempt to quench the British burning of the Nation’s Capital? Interestingly, it was not until a year after 9-11, on October 24, 2002, that the current Administration through then Secretary of Defense Donald Rumsfeld announced that the designation “*Commander-in-Chief*” would henceforth be the exclusive province of the President (previously there had been regional Commander-in-Chiefs).

Then too, while the factual statement “Democratic Congressional Majority” makes a great “sound bite,” Democratic majority control is not a bit that sound or secure. First, it is nowhere near large enough to overcome a *Presidential Veto* or a *Senatorial Filibuster* (see *Federally Speaking*, Nos. 44 & 50). Indeed, in the Senate it is but a one vote majority. Lose only one Democratic Senator, such as by death or defection (as *visa versa* happened to the Republicans in the early part of the present Republican Administration), or if there be any other slippage in

Democratic control, the Republican *Vice President of the United States*, as the Constitutional *President of the Senate Ex Officio*, is just waiting there with his tie-breaking vote.

So *deadlock* is virtually grimly certain, and *gridlock* is almost a dead certainty -- unless *Sholom Aleichemesque-type Solutions* can be utilized. What are they? They were explored in the 2003 *Corplaw® Commentaries* Column "ADR, *Sholom Aleichem and the Oak*," in the context of "commercial, non-profit, fraternal and religious institutions' organizational governance, and the infighting and '*Lashon Harah*' (evil talk) that all too often threatens the derailment of too many of these organizations," through the proffering of the parable of "*Sholom Aleichem and the Oak*."

Who is this *Sholom Aleichem*; and what does an "Oak" have to do with *Congress* (even if ours is an "Oak-Spangled Country") or, indeed, with our *Commander-in-Chief*?

Sholom Aleichem? Mark Twain "considered himself the '*American Sholom Aleichem*'." About life, Sholom Aleichem has observed: "Life is a dream for the wise, a game for the fool, a comedy for the rich, a tragedy for the poor." He was born in 1859 in Pereyaslav, the Ukraine, and is best known here for his folksy poignant piece "*Fiddler on the Roof*," the Fiddler being a metaphor for survival through joyfulness and respect for tradition. But *Sholom Aleichem* also brimmingly filled the breeches of a folk hero, and it is in this guise that we visit with him here to try to breach the gap between the Legislative and Executive Branches of Government.

As to *Congress, Article I, Section 8 of the U.S. Constitution* does grant *Congress* the power to "provide for ... disciplining the Militia," which one guesses, in addition to utilizing *Impeachment*, could utilize oak boughs and oaken staffs. Moreover, thanks to the British, Oak Leaves are insignias of rank of U.S. Military Middle Management, gold for Majors and silver for Lieutenant Colonels (we will not deal here with why silver outranks gold in the U.S. Military), and Admirals, Generals and other senior officers wear oak leaf and acorn gold braids on their caps, mimicking Roman Victory Wreaths. But, perhaps, more apropos here is the research of Raymond Oliver, McClellan Aviation Museum Curator, which reveals that one "story traces the British use of oak leaves to King Charles II who escaped from his enemies in 1650 by hiding in an oak tree," as our parable gleams much truth from *Sholom Aleichem* also being hidden in an oak tree (in allegory he was a silent "Fiddler in the Oak"). As to the *Commander-in-Chief*, we will fiddle here later.

While this parable on its surface is apparently directed to the private sector, its basic metaphoric message should be as applicable and readily apparent to the Executive and Legislative Branches of the Federal Government, and is most applicable at this point in American history. True, it is highly unlikely that Congress and/or the current Administration would avail themselves of the services of trained neutrals performing the roles of Facilitators, Conciliators, Mediators or Arbitrators. Yet, --- as in an organizational matter I was involved with not that long ago ---, through the allegorical services of that beloved "neutral" and folk hero Sholom Aleichem, help may, indeed, be available.

But how can allegory resolve the problems of Government, you ask? Why the failure to resolve such problems are, in reality, interpersonal dysfunctions. Throughout history allegory and parables, through the use of symbolic fictionalized truths about human nature and relationships, have been an effective tool in successfully resolving such interpersonal conflicts. The organization involved here was religious in nature, but there be no problem of "*Separation of Church and State*" now as the basic principles are as applicable to Government as to sectarian, for-profit, religious and fraternal organizations. In the underlying case a report in the form of a *Sholom Aleichemesque* parable was first submitted to the organizations' governing body, and then circulated to the membership in general, with the message that:

"Hopefully, with the aid of the wit and wisdom of Sholom Aleichem and the guidance of the All Mighty, who is the only entity from whom perfection can be expected, we can all gain insight and wisdom [well, maybe, this particular message may not be entirely apropos for the Feds Church/State-wise]."

Following this atypical "non-legalistic" humanistic action, the *Lashon Harah* within the organization seemed to die down, the disputes no longer seemed to be as intense, as stubborn and/or as irresolvable as they had been, and the organizational train seemed to move out of the station more smoothly. Here, then, is the parable of:

SHOLOM ALEICHEM AND THE OAK

Three score and chai years ago, in the township of Libni, Province of Poltava, a very special acorn was planted. Now the pious people of Libni knew that this acorn needed fresh, sweet water to grow like a mensch and survive to become a Hallowed Ancient Oak, with roots extending to God-knows-where. Worse yet, they knew that water putrefied with Lashon Harah, with the stench of human bile and ill humor, would kill the Oak.

The townsmen - the women of that time stayed at home - brought fresh, sweet water and nurtured the acorn into a sapling. Well not all the water was sweet and fresh - but most was and the Oak grew. Time passed and some of the townsmen moved away and some lines died out. But they were replaced by new townfolk - the women now came too - who moved in, and by folk from neighboring Oak Lands who had lost their Oaks. They continued to bring sweet, fresh water. Well, not as sweet and not as fresh, but the Oak still grew, spreading its branches towards God on high, while sheltering its Waterers and the robust world renowned ruffled truffle fungi flourishing amongst its roots below.

More time passed, and the Oak certainly looked like it was firmly rooted and hardy enough to survive, even though most of the Oak's folk now watered it only on holidays and festivals and when the children came to listen to Sholom Aleichem spin his wise and witty tales under its peacefully spreading branches. Sholom, when he could, did do so weekly, though never weakly.

One bright sunny Spring day, after the children had left, Sholom Aleichem stayed to think deep thoughts and ponder the State of the Oak and the Oak's Land. And where is the best place to ponder, you ask? Why high up lost amongst its leaves and branches, where no one would disturb his meditations. As he pondered and meditated, meditated and pondered, he realized that somehow things seemed amiss. The greens were not quite green enough, the browns were not quite brown enough, and there was even the hint of putrefaction in the air.

While he sat in concealed meditation, high up *out* on a limb, the Board in Charge of Planning, Directing and Fostering the Watering of the Oak - the Board of Waterers - congregated in ones and twos under the sheltering branches of their charge and benefactor, unaware that more than the Holy One and the Oak were overhead. As they milled about, enjoying their tea with sweet truffles and trifles baked by the chairlady of the Oak's kitchen, sunlight glittered off the jars of water they were carrying to partially feed the Oak in symbolic ritualistic fraternalism. The Caretaker was there, as were the First and Second Vice Caretakers, the Bearer of the Oaken Quill (Secretary), the Keeper of the Golden Acorns (Treasurer) and most of the other officers, members and committee chairs. The Dryad, however, was not present! He had just boarded the newfangled train on his first holy pilgrimage to the original Oakland, the Ancestral Home of the Oaks.

Dryads, who are they, you ask? Every Oak has or wants one, or thinks it does. Some might claim that a Dryad is just a wood nymph, who like his cousin, Naiad, the water nymph, merely whiles away his time. The Dryads referred to here have been, until recently, mostly male, and are bound to their Oaks

by fraternalism, dedication and contract. They are the revered elders and spiritual leaders of those who congregate around the Oaks - the Oak's Congregation, or so Sholom Aleichem thought

Sholom Aleichem, high overhead, overheard the Caretaker speak first. He was trying to inspire the Board into accepting his self-fulfilling prophecy that good things were happening and would continue to happen - and the Oak would continue to grow and prosper - if the Board and Congregation believed this was true and conducted themselves accordingly. Whereupon, the Caretaker lovingly emptied his jar, larger than most, of fresh, sweet water onto the roots of the Oaks. The greens and browns seemed to brighten in the sun.

The Caretaker then read the report of the Dryad. The report told of the Dryad's excitement over his first pilgrimage to holy Oakland, of his future plans for the nurturing of the Oak, and of the need for greater donations of jars of fresh, sweet water to properly feed their precious Oak. He stressed he could not do it alone; he needed their wholehearted help and support.

Ominously, the sky darkened just as a most respected congregant, putting aside the tantalizing trifle she was picking at, arose to remind the others that while she was not one to pick at trifles, she had *never* trusted the Dryad and *never* would, that there must be something fishy about his absence, and that he must be trifling with them. Whereupon, with great force, she hurled her jar to the ground, far from the thirsty Oak, shattering it into a thousand pieces.

The next speaker accused the Dryad of usurping authority, and facing away from the Oak towards Oakland, threw his jar in the direction he imagined the Dryad had traveled. The Dryad was then tarred with the offenses of over enthusiasms and of introducing new/old or was it old/new traditions, and more jars were broken far from the Oak. Finally, on mere suspicion, and without investigation or confirmation, the Dryad's honesty was placed in question and he was charged with drinking secretively from the Oak's jars. Ironically, in the same instant the last of the jars were wastefully smashed.

These anger-bearing spilled waters, slowly trickled down to the far-flung roots of the Oak, heavily lacing them with that deadly arsenious poison "Lashon Harah." This "Evil Talk" not only further weakened the once mighty monumental monolithic tree, but also ruffled, ruined and rendered worthless the highly prized ruffled truffles cash crop, the Oak's non-trifling and God-given gift to its congregants.

The stench around the Oak became so strong that Sholom Aleichem choked, gagged and passed out - his last thought being: "What Chutzpah! From here, up high, this 'Lashon Harah,' this 'Evil Talk,' these thoughtless accusations, certainly place them much further *out* on a limb - and a rotten one at that - than I ever have been."

Sholom Aleichem, still clinging to his limb, awoke to find his stomach upset, his head splitting, the Oak wilting, the sun gone, and the meeting reconvening - this time with the Dryad present. The Caretaker again emptied a jar of fresh, sweet water - a much larger jar - at the foot of the Oak, and so did a few other officers and members. But then in herd-like fashion a full blown water fight broke out, with members, officers and committee chairs denouncing the Dryad and one another, magnifying imaginary slights and minor mis-communications, and flinging their water offerings at each other, jars and all. "Lashon Harah, Lashon Harah, Desist, Desist!" gasped Sholom Aleichem - but no member of this heedless herd heard or heeded.

Sholom Aleichem, clinging tightly, gagged, fainted and awoke - gagged, fainted and awoke - gagged, fainted and awoke. Each time he awoke, it was darker still, yet the meeting was reconvening; the

bitching about all aspects of the Oak's Land, including even Sholom Aleichem's teaching through story telling and allegory, was worse than the last time; and the stench became even greater than all but the All Mighty could stand.

Finally, all was quiet! Too quiet! The Oaken Quill lay crushed, and the Golden Acorns gone, torn helter-skelter from their oaken casket. No Naiad could cleanse the Oak; no truffle could be nurtured by the Oak; no Dryad would or could bond to the Oak; no congregant remained to approach the Oak, and the Hallowed Oak died!!!

Sholom Aleichem awoke with a start. The darkness was gone! It was a golden oaken day! The sun was again shining, though not quite bright enough; the leaves were again green, though not quite green enough; and a few green acorns even peeked through. But best of all, blessed be the All Mighty, the Caretaker was just then reporting to the Board that the Dryad had this day steamed away on that newfangled train for his *first* holy pilgrimage to Oakland.

"If they would but heed my vision, the hint of stench would go away and stay away," Sholom Aleichem thought, "truffles not trifles would flourish amongst the roots of the Oak, the aching Oak would once again be a living "Live Oak," the Dyad and Oak would be re-united, and we would all awake together one day - may our tribe increase - from a deep dream of peace."

The organization's members were then asked to direct their training and efforts "so that this *Sholom Aleichemesque* tale would remain fiction," and so that all can share in the reality of *Sholom Aleichem's* dream of a peaceful organization, growing and prospering, with congregants/members who nurture their Oak with fresh, sweet water, while protecting it from the putrefying bile and ill-humor of "*Evil Talk*."

SHOLOM ALEICHEM AND THE LONE OAK

I, *Sholom Aleichem*, while sleepily fiddling in my Oak watching Pinocchio's oaken nose grow, dreamed "I have a[nother] dream" (a la Martin Luther King, Jr.). I dreamed I awoke in the State of the Cities of Live Oak and White Oak and Red Oak and Double Oak and, indeed, Lone Oak, where the Texas Red Oaks and "*The Lone Oak*" range. *The Lone Oak?* Yes, that oaken-willed, oaken-attributed "*ex-governator*" (correctly "ex-gubernator") of the Lone Star State, who, even while extending his roots nationally and internationally, in the words of Dr. Lorianne DiSabato, stood steadfast "like a stubborn oak that refuses to bend." But lo and behold, as I watched he fiddlingly bushwhacked our liberties no more, but instead, apparently infused with the goodwill of my, to him, "*Burning Oak*," became the *Terminator* of *Lashon Harah*, bringing about rapprochement throughout the realm. "*To duck doing so would be lame*, and I will not partake in a '*Lame Duck*,'" he quackled. In this way did our "Oak-Spangled Country" burst forth from the bush and reclaim our civil liberties, without ruffling trifles or "trifling with ... truffles." And the "Fiddler in the Oak"? A metaphor here for treating our *Constitutional Traditions*, our *neighbors*, and *ourselves* civilly and with affable respect.

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

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