



FEDERALLY SPEAKING



by Barry J. Lipson

Number 52

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 52nd 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

“*** To Restore Law and Justice”

While not the size of a “Million Man March,” the *Day of Action to Restore Law & Justice* was about treble the size of the original Selma March, and was not limited to “men,” but included representatives of just about all walks of life, backgrounds, faiths and ethnicities. “Over eighty organizations, led by the American Civil Liberties Union, Amnesty International USA, the Leadership Conference on Civil Rights, and the National Religious Campaign Against Torture,” on June 26, 2007 brought together for a Capitol Hill Rally and “lobby visits to Congress ... [t]housands of Americans.” They had “traveled from across the nation” in defense of the *Grand Writ of Habeas Corpus* and “to demand that Congress restore due process rights, and the rule of law as enshrined in the *Constitution*.”

The nearly full bus from Pittsburgh, PA included a diverse group of men and women of just about all ages, and religious (Judeo-Christian and non-Judeo-Christian), ethnic and economic backgrounds. They ranged from high school through retirement, and included the long and short haired of both sexes, the unintentionally and intentionally bald, and even a very elaborate Mohawk coiffure. Your columnist was very happy to see many new faces (but regretted the absence of the familiar ones).

These patriotic Pittsburghers gathered enthusiastically, though sleepily, at 6 AM at Monroeville Mall (re-named for the day “Runnymede Mall” in honor of it being the Burgh’s launching point to regain the “Grand Writ”), fired up on Bagels and Cream Cheese, and left expecting to be in the Nation’s Capital by 11:30 AM for the Grand Capital Hill Rally to right the “Writ” wrong. Two breakdowns later the Pittsburghers finally arrived in DC at 1:30 PM on a replacement bus, too late

for the Rally, but just in time for the meeting with Senator Arlen Specter's staff, and the meetings to follow with each individual's Representative.

Why did such a large diverse group of Pittsburghers (and many similar groups from all over the Country) get up in the wee hours, or earlier, to converge on the American Seat of Power? Why did the Pittsburghers stay with it through stifling heat, dangerous roadside disembarkments, and the impossibility of making the grand main event? It was certainly *not* for the too large (2X) "T" shirts!!!

The reason goes all the way back to 1215 AD, Runnymede and King John.

At that place and on that day, a George W. Bush-like King John (some would say), was forced by the Nobles of the Land to sign the *Magna Carta* whereby the English Crown "pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.... Executive imprisonment has been considered oppressive and *lawless* since John, at Runnymede." *Rasul v. Bush*, 542 U.S. 466 (2004); emphasis added.

To implement this, the U.S. Supreme Court in *Rasul v. Bush*, further advises the "judges of England developed the *Writ of Habeas Corpus* largely to preserve these immunities from executive restraint. *Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206, 218-219 (1953) ([Jackson, J.,] dissenting opinion). ... *Habeas Corpus* is ... 'a writ antecedent to statute, ... throwing its root deep into the genius of our [English] common law.' *Williams v. Kaiser*, 323 U. S. 471, 484, n. 2 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago [see, for example, *Petition of Right of 1628*, whereby, by assenting thereto, King Charles for the Crown again acknowledged that he could not impose martial law on civilians, imprison them without due process, or quarter troops in their homes, nor levy taxes without Parliament's consent, language subsequently appearing at least in part in the *U.S. Constitution*], became 'an integral part of our common-law heritage' by the time the Colonies achieved independence, *Preiser v. Rodriguez*, 411 U. S. 475, 485 (1973), and received explicit recognition in the *Constitution*... Art. I, §9, cl. 2." See also *Federally Speaking*, No. 48.

That's right, the *U.S. Constitution* specifically forbids suspension of "[t]he Privilege of the *Writ of Habeas Corpus* ... unless when in Cases of Rebellion or Invasion the public Safety may require it" (*US Const*, Art. I, §9, cl. 2), and I believe the last Rebellion of such magnitude was the uncivil *Civil War*, the last Invasion of such magnitude was the *War of 1812*, and there has not even been the issuance by Congress of a *Declaration of War* so as to legally activate any wartime powers. Calling something a "*War on Drugs*," or a "*War on Porn*," or a "*War on Terror*" does not elevate it to such a Declared War unless a formal Congressional Declaration of War has been issued.

The *U.S. Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), and the holding of citizens and others incommunicado as alleged Enemy Combatants, has whittled away at the Grand Writ of Habeas Corpus and, in the absence of the prerequisite magnitude of Rebellion or Invasion, is, therefore, "*lawless*." This *Day of Action to Restore Law & Justice* accordingly has generated and delivered over 250,000 petition signatures to Congressional lawmakers, "urging them to:

1. Restore habeas corpus and due process.
2. Pass the Restoring the Constitution Act of 2007.
3. End torture and abuse in secret prisons.

4. Stop “extraordinary rendition” (secretly kidnapping people and sending them to countries that torture).
5. Close the detention center at Guantánamo Bay and give those held currently access to justice.
6. Investigate wrongdoing and ensure those who broke the law are held accountable.
7. Return to the rule of law.”

But, sterile Petitions are not enough! To encourage our “Nobility,” our Congressional Representatives, to act nobly like their counterparts, the Nobles at Runnymede in 1215, and the Parliamentarians at London in 1628, and counteract the harm done to the *Constitution*, the *Bill of Rights* and the *Grand Writ* over the past six years, face-to-face, one-on-one, personal contacts are necessary. How best to drive home to our Nobility that since **George the First** failed to materialize, at least in this Alternate Universe (as our George Washington refused the Crown of the United Colonies), **George III** does not now reside in the White House or reign over our Democratic Republic/Republican Democracy? Accordingly, Caroline Fredrickson, ACLU Washington Legislative Office Director, stressed: “We’re [personally] here to send a message to Capitol Hill - members of Congress must act now to reverse the damage done by the *Military Commissions Act* and to restore respect for constitutional rights.”

So “yunz Picksburghers” arrived just in time for the most important part of the Day, personal meetings with their Members of Congress (or the Member’s Staff). They made a big hit breathlessly arriving slightly late at Republican Senator Specter’s Staff’s meeting with the Pennsylvania Delegation. The Senator’s Staff seemed for the most part sympathetic. The feeling among some was that the Senator was good at questioning apparent civil rights abuses, and supporting minimum to moderate corrections, but that he folded much too quickly, at least prior to the last Congressional elections. Hopefully, the changing climate will fully bring out his sometimes glimpsed Civil Rights “*Pitt Bull*” within.

For your columnist’s group the main meeting was with Republican Representative Tim Murphy, who one organization categorizes as a “Libertarian Conservative,” and whose record shows him *not* voting a straight party line. On entering his office suite one is greeted by a giant convoluted “Gerrymander” (the map of his Congressional District), whose designing was not his doing, but purportedly aided in his election. He does seem to have supported much, if not all, of the objected to legislation (which regrettably too many Democrats, as part of the apparent “congressional mass hysteria,” also appear to have done).

The Representative met with this group of his constituents personally, individually welcomed each constituent, encouraged substantive discussion, posed thought provoking questions and took personal notes. He included in the discussions his new Chief of Staff Susan Mosychuk, who seems knowledgeable in the area of civil rights and sympathetic with the discussed civil liberties concerns. Rep. Murphy was intellectually and emotionally involved and extended the length of the group’s meeting with him. One argument he raised, that yours truly felt needed correction, was that the original part of the *Constitution*, including the “common defense” provision, takes precedence over the *Bill of Rights*, the first ten amendments. To the contrary, he was advised, historically the original part would not have been enacted but for the understanding that the *Bill of Rights* would be promptly added, and, additionally, no “special circumstances” exist as there is currently no “Rebellion,” no “Invasion,” nor even any formal Declaration of War.

Among his questions he also asked: How do we deal with suicide terrorists who care nothing for continuing living? Your columnist, “thinking quickly, but deeply,” proposed that we need to concentrate on the long view and develop a Marshall Plan-type approach, making what they actually have on Earth (including “prosperity” and possibly even one to four flesh and blood wives

they can truly afford) not worth giving up for the realistically unlikely prospect of 72 hypothetical newly created ectoplasmic virgins, and doing so without demeaning them or deprecating their religious beliefs.

In conclusion, the message of Wade Henderson, President of the Leadership Conference on Civil Rights, that: "America became a great nation by understanding that its power comes from the liberty of its people ...Congress must act now to send a message to the world - and to those who would abuse power – that regardless of what is going on in the world, our civil rights and liberties remain the cornerstone of our democracy," was conveyed. All in all yours truly felt it was a worthwhile meeting, which Rep. Murphy re-enforced the next day when he called your columnist in Pittsburgh to continue these discussions.

The spirited breezy discussions continued on the return bus trip to Pittsburgh, which stopped once at Breezewood to change back to the original bus company, and arrived back at about 11:30 PM at the re-named “Runnymede Mall,” but without the benefit of “running mead” or beer. Oh well, better inspected transportation, and the mind-expanding liberty of liberally running mead (Oh! Honey) or liberal litres of other liberating libations, next time.

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

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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>).

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