



# Federally Speaking



Number 6

by Barry J. Lipson

*The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column **Federally Speaking***

## **Fed-pourri™**

**WYATT EARP: THE MARSHALL WHO WASN'T!** When we think of the Wild Wild West, Tombstone (named after a “Silver Claim”), and OK Corral, we think of the **U.S. Marshall**, the fastest gun in the territory, keeping “Law and Order.” And when we think of the epitome of a **U.S. Marshall** we think of **Wyatt Earp**. The problem is that the **U.S. Marshall** in the Earp family was Virgil, not Wyatt. When they arrived together in Goose Flats (Tombstone), Arizona Territory (until 1863 New Mexico Territory), on November 29, 1879, Virgil was the only lawman present, having picked up his **Deputy United States Marshal Commission** at Tucson in the Arizona territory (a *pro bono* position). Later, before the 1881 OK Corral shootout, Wyatt did become a Deputy Sheriff of Pima County (where Tombstone was located), and also a “special” officer for the City of Tombstone, appointed by the “Acting City Marshal,” his brother Virgil, but Wyatt **never** did become a U.S. Marshal. The offices of **U.S. Marshal** and **Deputy U. S. Marshals** were created by the **First U.S. Congress** in the **Judiciary Act of 1789** (the same legislation that established the **Federal Judicial System**); and the first George W. appointed the first **U.S. Marshal**. The **Marshals** were given extensive authority to support the **Federal Courts** within their **Judicial Districts** (originally 13, now 94), and to carry out all lawful orders issued by **Judges, Congress, and the President**. Today they pursue and arrest 55 percent of all federal fugitives, more than all other **Federal Agencies** combined. Over the past two centuries, in addition to their regular duties, **Congress** and the **President** have called on the **Marshals** to carry out unusual and extraordinary (if not always “historically correct”) missions, such as registering “enemy aliens” in time of war, capturing “fugitive slaves,” sealing the American border against armed expeditions from foreign countries, and swapping spies with the former Soviet Union. The **Marshals Service**, we are advised, “needs qualified men and women capable of carrying out a broad range of responsibilities in every imaginable setting; in major urban areas as well as small towns.” If the practice of law is not exciting enough, you can still support your **Federal Judiciary**, and now even be compensated, by contacting the **U.S. Marshals Service**, Law Enforcement Recruiting, 600 Army Navy Drive, Arlington, VA. 22202-4210 (Phone: (202) 307-9437). But, need Wyatt Earp apply?

**stars and strips forever!** The perennial debate over the flag burning/desecration amendment has become an annual event in Washington, with the proposal usually passing

in the **House** and failing in the **Senate**. In recent years, however, the margin of support for the amendment in the **House** has been steadily decreasing. Indeed, if the margin continues to shrink, who knows, even this annual tradition might “burn itself out.” The proposed amendment would give the government the power to prohibit the physical desecration of the American Flag. But, would this have included George, Senior physically wrapping himself in the American Flag during his presidential campaign? American war heroes **U.S. Secretary of State and former U.S. Armed Forces Joint Chief of Staff General Colin Powell**, and **former U.S. Senator and Astronaut John Glenn**, strongly oppose this amendment. **Senator Glenn** cautions that, “it would be a hollow victory indeed if we preserved the symbol of freedoms by chopping away at those fundamental freedoms themselves.” The **U.S. Supreme Court** has repeatedly ruled that flag desecration, including burning, is speech and as such is protected.

**HOW KNOW BROWN COW?** This term’s **U.S. Supreme Court Fourth Amendment** decisions, according to some commentators, have not exhibited any discernable pattern. For example, the **High Court** has ruled that police *may stop* drivers for burnt-out taillights or for not wearing seat belts and then arrest them without a warrant, the effect of which is to permit “a legal search incident to the arrest.” But, because of the lack of a warrant, police *may not just stop* cars at roadblocks for the purpose of searching them for drugs. Simple, you may say, you need a prerequisite offense, no matter how slight, before there can be a warrant-less search. How about police *being permitted* to detain an individual outside of his trailer home for two hours while they obtain a search warrant based on the suspicion of drugs being present within the home; while *not permitting* police, without a warrant, to aim a heat-detecting devices at a home, from outside the home, to detect the presence of heat readings in or about the home indicative of drug related activities, or to test pregnant women for drugs in a public hospital, even for the asserted special purpose of protecting fetal health. The bottom line appears to be that the **High Court** is sending a signal to law enforcement that search warrants are still necessary, laudable motives notwithstanding (in the detainee case a warrant was actually obtained), unless there has been a lawful arrest, even if it only be a mere “custodial arrest” for a fine-only offense. But then again, “how now brown cow?”

**THE FAX, JUST THE FAX, MA’AM!** The **Federal Communications Commission (FCC)** is on the offensive against “broadcasters” who send, to private facsimile machines, hundreds of thousands of unsolicited “junk” advertisements each day. Enforcement action is being sought under the **Telephone Consumer Protection Act of 1991**, which 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.” John Winston, the assistant chief of the **FCC Enforcement Bureau**, reported that the number of formal consumer complaints about junk faxes has grown from approximately 300 in 1997 to more than 1,400 last year. We are advised, that under current Federal law, 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.

**SUNNY-SIDE-OVER LEGAL!** I must confess! You may call me a pervert, but I like mine Sunny-Side-Over, not just Over-Easy as they expect around here, but truly Sunny-Side-Over. I even lust after those original Egg McMuffins® with runny centers, that seemed to marry together the tastes of the muffin, the egg and the Canadian-style bacon just right.

Well, I'm happy to report, that contrary to some recent media reports, the **1999 Food and Drug Administration Food Code** does **NOT** prohibit restaurants from serving Sunny-Side-Up, Over-Easy or, even, Sunny-Side-Over Eggs (firm white, liquid yoke). The **Food Code**, which is **FDA** guidance on restaurant safety, merely provides that "if less thoroughly-cooked egg dishes are served in restaurants, consumers should be provided with an advisory -- on menus, brochures or other written materials -- that there is an increased risk associated with eating undercooked eggs especially for vulnerable consumers." While this will not deter me, the less dedicated may say "scramble it, or better yet, make mine into French Toast." But, there also is now a new **FDA Rule** relating to egg handling, requiring that egg cartons sold to consumers must bear safe handling instructions, including an advisory as to the potential of illness from *Salmonella enteritidis*. For more information on the **FDA Egg Safety Action Plan** check out <http://www.foodsafety.gov>.

**FIVE-ONE-ONE GETAWAY.** It's simple – If you're in trouble, if the "baddy" is getting away – dial 911. But if you want fun, if you want to "getaway" (or, I guess, if you're the "baddy" and want a quick "getaway") – dial 511. **Federal Highway Administration** Deputy Executive Director Vincent F. Schimmoller recently placed the nation's historic first telephone call to 511 -- America's new traveler information telephone number. "Ultimately 511 will lead to saved lives, time and money and improve the quality of life for America's travelers," he said. The concept of a national traveler information telephone number was inaugurated in 1999 when the **U.S. Department of Transportation (DOT)** petitioned the **Federal Communications Commission (FCC)** for a three-digit telephone number. On July 21, 2000, the **FCC** assigned 511 for local traveler information. The Northern Kentucky-Cincinnati metropolitan area is the first region in the country to adopt this national travel code. Other areas are expected to do so shortly. "Five-one-one" implementation is eligible for regular **Federal-Aid Highway Funding**, and a special grant program is also available, to assist in implementing and converting to 511. For additional "getaway" implementation information surf to <http://www.its.dot.gov>.

**GENERIC GENETIC TESTING?** Surprise! The Democrats now control the U.S. Senate! OK, I've been scooped on that one (a curse on long pre-publication deadlines!). But did you know that this change may help keep you from failing your genetic tests, by eliminating generic genetic testing in the first place? To explain, the new Democratic Senate majority leader, Thomas Daschle, is seeking the enactment of the **Genetic Nondiscrimination in Health Insurance and Employment Act**, to prohibit discrimination by health insurers and employers based on genetic information. While most States have enacted at least some limitations on genetic discrimination in the workplace and in insurance, federally **Congress** has only enacted the **1996 Health Insurance Portability and Accountability Act**, which is limited to preventing Group Health Insurers from generally setting medical condition coverage exclusions and/or determine insurance eligibility, on the basis of genetic information. This new bill would forbid disclosure of genetic information to employers, insurance companies and other third parties without a legitimate need to know; prohibit employers from using genetic information to discriminate in hiring or in the terms and conditions of employment; and bar insurers from denying coverage, charging higher insurance rates or discriminating in any other way based on genetic test results. A Clinton era **Executive Order** already prohibits genetic discrimination against federal employees.

## **THE FEDERAL CLE CORKBOARD™**

Tues, August 28, 2001- The Ons and Offs of The Electronic Courtroom,  
U.S. District Judge Robert J. Cindrich  
FBA Late Afternoon (4-5:30 PM) Seminar\*

Tues, September 11, 2001—The Federal Mediation and Conciliation Service,  
Jack Yoedt and Fulton Micklos  
FBA LearnAbout™ Monthly Luncheon Series\*

September, 2001 –United States Supreme Court Review – TBA  
FBA All Day Seminar\*

Tues, October 9, 2001—Social Security - What to Know? Where to Go?  
Karl Osterhout and Cynthia Berger  
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\*FBA - For information and reservations call Rick Taylor at 412/566-1626.  
Check this Column each month for possible revisions.

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*The purpose of **Federally Speaking** is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the **Federal CLE Corkboard™**. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail [blipson@wgbglaw.com](mailto:blipson@wgbglaw.com)).*

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