# FEDERALLY SPEAKING

by Barry J. Lipson

Number 39

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 39th 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.

## LIBERTY'S CORNER

***SENATOR/ASTRONAUT JOHN GLENN ON CONSTITUTIONAL AMENDMENT.*** Those "who died following that banner, did not give up their lives for a red, white and blue piece of cloth. It would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at those **fundamental freedoms** themselves." His message would appear equally applicable to any efforts to amend the **Bill of Rights** and the **Constitution** to ***restrict*** **fundamental freedoms** and/or ***whittle away*** at our **civil liberties.**

**FEDERALLY SPEAKING**, ***ARE WE PROCEEDING RATIONALLY?*** **Epictetus,** the freed Roman Slave and Philosopher (circa 55-135 AD), ignited a guiding light of rationality that may, perhaps, in such troubled times as these, illuminate our way through the briers and brambles bristling between us and our fundamental freedoms. With "Spocian Logic" he differentiated between such things as the constitutionally rational (***"the rational is endurable"***), and the irrationality of fear and avarice ***("the irrational is unendurable")***. And what is rational and endurable or irrational and unendurable in the context of our Twenty-First Century **Constitutional Democracy**? After experiencing both **Nazi Germany** and **Democratic America**, the internationally renowned German-born naturalized American psychologist and humanistic philosopher **Erich Fromm** (1900-1980), in ***"To Have or to Be?"*** (Harper & Row, 1976), brought this **Epictetusian** illumination into modern-day focus through his contrasting of rational and irrational authority, the former being endurable and supportive of **Liberty**, and the latter being unendurable and destructive, as: "**Rational Authority** is based on competence, and it helps the person," while "**Irrational Authority** is based on power and serves to exploit the person subjected to it." Or paraphrasing the farsighted caution of **America's** first **Statesmen, Ben Franklin,** it would be irrational to "give up essential **liberty** to obtain a little temporary safety," and those who do so act irrationally and "deserve neither **liberty** nor safety." Perhaps this is why **U.S. District Judge Jeffrey White** of the **Northern District of California**, a post-9/11 Bush appointee, ruled that a post-9/11 **Department of Homeland Security (DHS) Regulation** could ***not*** empower the **Government** to unilaterally and **automatically stay** an **Immigration Judge's Order** releasing on **Bond** an alien pending the results of his **Deportation Proceedings**, as the "**Regulation**, which permits unilateral detention of individuals without a case-by-case determination ***after a reasoned finding*** that they do not pose a threat to safety or a risk of flight, violates the **Due Process Clause** because no special justification exists that outweighs the individual's **constitutionally** protected interest in avoiding physical restraint" (see ***Zavala v. Ridge***, No. 04-00253 ((N.D. Cal. 2004), involving a **Mexican** national). See also ***Federally Speaking*** No. 37, ***"Check Box Justice: 'Raggedy Ann' Or 'Attila The Hun'***!," reporting on **U.S. District Judge Faith Hochberg,** of the **District of New Jersey,** causing the **DHS** to back off from so similarly "automatically" jailing an **El Salvadorian**. Indeed, would not **Epictetus, Fromm, Franklin** and **Glenn** speak out against such **Federal** mandates, and/or their non-terrorist use, as being illustrative of the malignant melanomatous black light of "**Irrational Authority,"** and as being **constitutionally** "irrational" **and** "unreasoned"**?**

***IS THE CAT RATIONALLY IN THE HAT?*** ***Federally Speaking*** No. 37 ***("Melodramatic Soap Operas Reach High Court"*** and ***"MKB: 'Manuscript Kept Blind'")*** reported on **U.S. Solicitor General** Theodore B. Olson submitting "'under seal' the **Feds** response to the **High Court** in the **Habeas Corpus** appeal of **Mohamed Kamel Bellahouel (MKB),"** appealing among other things, "the **U.S. District Court** and the **Eleventh Circuit** keeping secretly 'off the public record' these **Habeas Corpus** files and opinions, the ***'Cat"*** here, coding them only '***M.K.B. v. Warden***, No. 03-6747'." Well, now parts of this ***"Cat"*** the **Feds** have kept in the ***hat*** have been revealed, reports the ***Miami Daily Business Review,*** in the "heavily ***redacted*** **Reply Brief** filed [with the **High Court]** by the **Miami Federal Public Defender's Office.**" Even though heavily edited, this ***redacted*** **Reply Brief** "discloses the government's main assertion that **federal grand jury secrecy** can be stretched to cover up even 'ancillary proceedings that may touch on **grand jury** matters'," and "also discloses for the first time at least some of the issues kept under wraps by the **courts**," to wit, "claims that **Bellahouel's Fourth, Fifth** and **Eighth Amendment rights** were violated because the **Government** 'abused the immigration process to improperly detain him' in its zeal to transport him to Virginia to testify before the grand jury." The **Federal Defender** asserted that "the **government** could not identify a single case in which a court clerk was permitted to completely remove a case from the public docket," and that the **Government's** cases "actually 'undermine its argument that the docket and court filings must be completely sealed to satisfy tradition or rules. For example, a 1998 **U.S. Court of Appeals for the D.C. Circuit** decision cited by Olson, ***In re Motions of Dow Jones & Co.***, 'specifically refutes any claim that court rules require complete sealing of ancillary proceedings that may touch on grand jury matters'." After reviewing the redacted **Reply Brief,** Floyd Abrams, Esq., of ***Pentagon Papers*** fame, who has reportedly argued more **Freedom of the Press** cases before the **U.S Supreme Court** than anyone else, advised the ***Miami Review:*** "It seems to me we have to be very careful not to let the notion of ancillary or supplementary or connected proceedings so expand the rules relating to grand juries that they sweep up filings that have historically and invariably been public…. I haven't heard arguments as sweepingly broad as these made by the government before." While denying ***certiorari*** here, which is not supposed to have any precedential significance, the **U.S. Supreme Court** did grant permission to the **Federal Defender** to file on the public record this ***redacted*** **Reply Brief.** But was the complete and utter secrecy route of the Government the **constitutionally** "rational" approach (according to the ***Miami Review*** the only reason the case was at all known to the public prior to the seeking of **High Court** review was because "a court clerk's mistake briefly included it on the appellate court's public docket")? The **Federal Defender** says ***"NO!",*** contrasting the **High Court's "**handling of the **Bellahouel Appeal**, [which] showed precisely how cases could be publicly docketed while protecting sensitive information …'with a public docket describing generally the filings in the proceeding'," thus placing "'the public and media on notice that a sealed proceeding exists and allows them to then make a proper legal challenge in an individual case'." So we now know a ***Thing's*** a hidden in that ***Hat***! But can ***Who*** with rationality say that that ***'Cat in the Hat"*** must in that ***Hat*** stay? What ***Cat*** would openly in open Court sport such a horridly horrid ***hat***? Imagine that!

## FED-POURRI™

***TURN BACK THE CLOCK!*** In **the Judiciary Act of 1789**, **Congress** gave the **U.S. Supreme Court** the new and additional authority to "issue **Rites of Mandamus** ... to any persons holding office under the authority of the **United States**." The **Constitution**, however, confined the **Supreme Court's** original jurisdiction, as contrasted with its appellate jurisdiction, it held, to only hearing cases in the first instance "affecting ambassadors, other public ministers and consuls, and those in which a state be a party. In all other cases the **Supreme Court** shall have appellate jurisdiction." Accordingly, on February 24, 1803, in ***Marbury v. Madison***, the **High Court**, ***limiting its own jurisdiction***, unanimous held (6-0) the **Judiciary Act of 1789** to be **unconstitutional** in that **Congress** had no power to so alter the **Court's** original jurisdiction, even by increasing it. "It is emphatically the province and duty of the **judicial department** to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the **courts** must decide on the operation of each," advised Chief Justice John Marshall for the unanimous Court. Now Representative Ron Lewis, Republican from Kentucky, has introduced in the **House of Representatives** Bill No. HR 3920, which would empower **Congress** to override **Court Rulings** on the **constitutionality** of **Acts of Congress** by two-thirds votes of both the **House** and **Senate**. "I am a strong supporter of numerous legislative measures currently being considered by this **Congress**, aiming to define marriage as an exclusive union between one man and one woman," advises Rep. Lewis. "**America's judicial branch** has become increasingly overreaching and disconnected from

the values of everyday Americans… Clearly, this issue is one about power, not in the raw political sense but in terms of the allocation of **government authority** between each **branch of government**, specifically between **Congress** and the **Judiciary,** in a federal system that relies on checks and balances to protect our liberty. … I am introducing legislation today to address these serious, pressing issues in a direct and forceful manner. The bill that I have authored, if enacted, will allow **Congress,** by a two-thirds majority of each **House**, to reverse a judgment of the **Supreme Court**." Several thoughts initially come to mind. First, would this so-called "**check and balance"** adequately protect our **Constitutional Democracy** of ***"Rule by the Majority with Due Regard to the Minorities"*** (see ***Federalist Papers***, No.10 (1787))," or would we revert to the old **Athenian Democracy model** of ***"Rule by the Mob"*** (see ***Federalist Papers***, No. 10, 55 and 63)? Who would prevent the majority (or even super-Majority) from, for example, forbidding the wearing of Veils, a la France, or Turbans, or, even, forbidding working, shopping, driving or singing on **"Holy Days"?** Second, is not the choosing of **U.S. Supreme Court Justices** by the **Administrative Branch**, but only with the "***advice and consent"*** of the **Legislative Branch,** sufficient checks and balances vis-à-vis the **Judicial Branch**? And, oh yes, under present precedents, if passed, would not the **U.S. Supreme Court** itself be the final arbiter of the **constitutionality** of this **Act**? Quills, anyone?

***SHHH! – IT'S A SECRET!*** It's ***"Merchandise 7X"*** (earlier ***"Merchandise 5,"*** and joined in 1985 by ***"Merchandise 7X–100"***), reportedly the ***crème de la crème*** of "**trade secrets."** It is the designation for the "final, supposedly top-secret, formula" originally concocted by pharmacist John Styth Pemberton of "lime juice, vanilla, sugar," plus "the oils of orange, lemon, nutmeg, cinnamon, coriander and neroli (derived from orange blossoms)." But what's the big deal about this "***Merchandise,"*** anyway? According to Metzger, ***"Who Put …,"*** http://www.loompanics.com/Articles/WhoPut.htm, this code name for this most hallowed of **trade secret** formulas is for what we now know "as the 'merchandise' that would not die." That's right, it's ***Classic Coke,*** minus the carbonated water, and, of course, the pre-1903 "fluid extract of coca" (or cocaine which, was quietly replaced by denatured coca leaves in response to public pressure, even prior to the **FDA**). Indeed, pre-1903 local vernaculars undoubtedly spoke of drinking "Coke" at the "Coke House," the "term 'dope' [or "Coke," as it is still today] was used frequently in soda fountains to mean Coca-Cola," and some "long-time users called for a 'shot in the arm' to request" this "'pure and wholesome' beverage." ***Merchandise 7X–100*** is also a **"trade secret,"** but who nowadays cares about the formula for 1985's abortive ***New Coke***? **Trade Secrets** are the shakiest leg of the four-legged **Intellectual Property (IP) Pedestal**, the other legs being **Patents, Copyrights** and **Trademarks**. **IP,** or **"Intellectual Monopoly"** as it is conceptualized by some, has been defined as "any product of the human intellect that is unique, novel, and unobvious (and has some value in the marketplace)," and is basically protected by the aforesaid "bundle of intangible property rights" that uphold the **IP Pedestal**. Most of the larger businesses that rest their market position, health and survival on the strength and reliability of the **IP Pedestal,** operate nationally or, indeed, internationally. They are frequently frustrated by the "fluctuating" protection accorded such rights from **State** to **State**. In the **U.S.** the stabiler three of these legs are normally created and/or protected by **Federal Law**. Two, **Patents** and **Copyrights**, being rooted in the **U.S. Constitution**, and the third, **Trademarks**, in **Federal Legislation** denoted the **Lanham Act** (though **Common Law Trademarks** are still protectable under **State Law**). The fourth, however, **Trade Secrets** relies for its existence and effectiveness on the varying **Common Law** or **Legislation** of the various **States,** but still finds favor because **Trade Secret** protection ***can last forever*** and does not require public disclosure as with **Patents** (which eventually do enter the public domain and which can be lost even earlier if the **Patent** is declared invalid). Bolstered by the 1974 **U.S. Supreme Court** decision in ***Kewanee Oil Co. v. Bicron Corp***., 416 U.S. 470 (1974), confirming that neither the **U.S. Constitution's Patent Clause**, nor the **Federal Patent Laws**, preempted **Trade Secret** protection of patentable and/or unpatentable information by the **States,** the **National Conference of Commissioners on Uniform State Laws**, whose purpose is "to promote uniformity in **State Law** on all subjects where uniformity is desirable and practicable," became businesses' champion by on August 9, 1979 issuing for **State** acceptance and adoption the **Uniform Trade Secrets Act** (**UTSA** -- later amended for clarification on August 8, 1985). As of late 2003, forty-three **States** and the **District of Columbia** had modeled statutes after this **Model Act**, Alabama and Massachusetts had their own legislative models, and New Jersey, New York, Pennsylvania, Texas and Wyoming still muddled along under their individual **Common Law Trade Secret Doctrines**. Then, on February 19, 2004, Pennsylvania pulled itself out of the mud/muddle and enacted a souped-up version of the **UTSA**, a business-friendly version on which some my say others should model theirs. It includes within its definition of protectable "restricted" and "safeguarded" information that keeps its "economic value" only if kept secret from competitors, drawing, formula, programs, techniques and ***customer lists*** (normally a fuzzy area because ***customer lists*** are ***not***

usually specifically included). For misappropriations of **Trade Secrets** it provides for injunctions, recoveries of monetary damages and "unjust enrichments," and attorneys' fees. Additionally, for "willful and malicious" misappropriations double damages may be awarded. Further, it goes beyond the scope of the **UTSA**, a model ***civil*** statute, by expanding the prior Pennsylvania criminal law that required showings of **Trade Secrets** being "stolen" through "force or violence" or through the "willfully and maliciously" entering into of physical structures, to now ***also*** making it a second-degree felony to "willfully and maliciously" obtain **Trade Secrets** through a ***computer system*** or ***computer***. So the "uniform" **IP Pedestal** is now stabiler! But, to be most effective, **Trade Secret Laws,** and their **IP** protections, must ***not*** themselves be kept a secret, "trade" or otherwise.

***"GOT MILK?" MILKING OF MILKERS A NO NO!*** Do you remember ***Whoopi Goldberg***, ***Oscar de la Hoya***, ***Pete Sampras***, ***the Backstreet Boys***, ***et al***, all sporting "milk mustaches"? That was the ***"Got Milk?"*** advertising campaign, compliments of the **Dairy Promotion Stabilization Act of 1983 (Dairy Act),** 7 U.S.C. §§ 4501-4583, which required the mandatory payment by milk producers of 15 cents per hundredweight of milk sold for the "advertisement and promotion of the sale and consumption of dairy products" and "for research projects related thereto" (commonly labeled by Dairymen and Dairymaids as the **Dairy Act's** "***Dairy Checkoff***"). Milkers Joseph and Brenda Cochran, declaring a darlingly daring "derry-do" against the ***Dairy Checkoff***, refused to be compelled to "**unconstitutionally** … subsidize **speech** with which they disagree," which declaration was decidedly dittoed 3-0 by the **Third Circuit** (***Cochran v. Veneman***, No. 03-2522 (3d Cir. Feb. 24, 2004)). In doing so the **Third Circuit** explained that the Milkers' beefs with the ***Dairy Checkoff*** were equitable to the milking of the Beefers' in its 1989 '***Beef Checkoff***' case (***U.S. v. Frame***, 885 F.2d 1119 (3d. Cir. 1989)), where it held that the Beefer milking "was not ***government speech*** because it required only beef producers to fund it and it attributed the advertising under the program to the beef producers," which conclusion it advised was in effect endorsed in the **High Court's** 2001 Mushers' case (***U.S. v. United Foods, Inc.,*** 533 U.S. 405). Accordingly, the **Third Circuit** explained the inapplicability of the **High Court's** prior 1997 Fruiters' decision (***Glickman v. Wileman Brothers & Elliot, Inc***., 521 U.S. 457), in that the "compelled assessments for generic advertising of California tree fruit" under **Agricultural Marketing Agreement Act of 1937 California Tree Fruit Marketing Orders,** "were ancillary to a comprehensive marketing program, and therefore were 'a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by **Congress**.'" In contrast, the **High Court,** later in ***United Foods,*** stressing that they "have not upheld compelled subsidies for **speech** in the context of a program where the ***principal object*** is **speech** itself," distinguished **Glickman** by "explaining that under the stand-alone **Mushroom Act,**" the Mushers' "'compelled contributions for advertising was itself the ***principal object*** of the **Mushroom Act'** [**Mushroom Promotion, Research, and Consumer Information Act of 1990**, 7 U.S.C.§§ 6101-6112]." So "mooved" by the **free speech** considerations, the **Third Circuit,** tying the bow on Betsy, then concluded that, as with the Mushers (mushroom growers not dog sled drivers), the Milkers were being "milked" pursuant to similar ***"principal object"*** **speech legislation** under which the **Government's** "supervisory responsibilities are not sufficient to transform the dairy industry's self-help program into ***'government speech***,'" so that these forced milkings constituted ***private speech*** and violated the **First Amendment** which prohibits the **Government** "from regulating ***private speech*** based on its content." And the mooey mooving meaningful moral? Beef-up, avoid beefs, don't get milky or mushy, and ***wipe off those silly mustaches***? ***Perhaps!*** But, take heart, of greater note is the "milky smooth" feeling that your commercial "***private speech***" is **constitutionally** sacrosanct, unless ancillary!

***MICROSOFT FOLLOW UP.*** ***Federally Speaking*** No.23 reported on the **U.S.'s *Microsoft Settlement*** and **U.S. District Judge** Colleen Kollar-Kotelly's finding "that the settlement in ***U.S. v. Microsoft***, Civil Action Nos. 98-1232 and 98-1233, ***was not in the public interest*** unless the Court" did "retain the power to 'voluntarily' and of its 'own accord,' monitor the effectiveness of and 'tweak' the settlement." The **European Union** is now going much further, fining Microsoft $613,000,000 (497,000,000 Euros), and ordering Microsoft to unbundle its "digital media player" from Windows. Microsoft cries ***"Euro-Virus,"*** and seeks to have an "***appellate patch"*** applied!

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