



# FEDERALLY SPEAKING



by Barry J. Lipson

Number 53

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 53rd 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**

### **Civil Liberties Board: Eye Candy or Yankee Doodle Dandy?**

“*Eye Candy* is something that is most remarkable for its visual appeal” which “often adds little to the overall plot, game play, or interface ..., implying that the object relies solely upon its visual appeal for any value it may have” (*Wikipedia*).

The song and backwoodsmen observations of “*Yankee Doodle Dandy*,” which originated as a derogatory British ditty (such as: “Yankee Doodle came to town, For to buy a firelock; We will tar and feather him, And so we will John Hancock”), were adopted by us “Yankees ... as a point of pride,” symbolizing what is special about America such as our zealous regard for our Civil Liberties. Our Founding Father forbearers may have banded together as “a ragtag army, badly uniformed, under equipped, rarely paid, but they beat back the force of an empire. Their exuberance shows in the verse that the original Yankee Doodle Dandies used to round off their song: ‘Yankee Doodle is the tune, That we all delight in, It suits for feasts, it suits for fun, And just as well for fightin’” (*Himes, yourDictionary.com*).

So which is the *Civil Liberties Board*, the *Privacy and Civil Liberties Oversight Board (PCLOB)*, “Eye Candy” or a legitimate effort to evoke the spirit of our “Yankee Doodle Dandy” forbearers and *clobber* those who try to trifle with our Civil Liberties. While, according to the first *PCLOB* member to resign, Lanny J. Davis, Esq., the original *PCLOB* was more “eye candy” than *Yankee Doodle Dandy*, has the revised legislation signed into law on August 3, 2007 actually and finally put the “*CLOB*” into *PCLOB*?

*The Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission Report)*, issued on July 22, 2004, recommended with regard to Civil Liberties that:

**“Recommendation #23:** The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.

**Recommendation #24:** At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.”

On August 27, 2004, in response to Recommendation #24, Executive Order No. 13353 established the **President's Board on Safeguarding Americans' Civil Liberties (PBSACL)**, “to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions,” chaired by the U.S. Deputy Attorney General, and with the Department of Homeland Security Under Secretary for Border and Transportation Security as the Vice-Chair.

Then on December 17, 2004, also in response to Recommendation #24, **Section 1061** of the **Intelligence Reform and Terrorism Prevention Act** (Public Law 108–458) replaced the **PBSACL** with the original **Privacy and Civil Liberties Oversight Board (PCLOB)**, still within and under the control of the Executive Office of the President, and consisting of five members appointed by and serving at the pleasure of the President, with the Chair and Vice Chair subject to confirmation by the Senate. The role of this **PCLOB** was to advise “the President and other senior executive branch officials to ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of all laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism.”

This Board was then comprised of part-time members, four Republicans and one Democrat; operating by fiat in deep secrecy; and lacking any real power, including lacking subpoena power. Moreover, there appeared to be no rush to actually activate this Board as the **PCLOB** did not meet until March 14, 2006, and its first public meeting was not until December 5, 2006. Board Member Davis even reported that the White House went so far as “to extensively edit the final report to Congress of the **PCLOB**, due on March 31, 2007 and ultimately delivered on April 20 -- the most important reason why I chose to tender my resignation.”

Indeed, Mr. Davis continues, “a supervised and controlled **PCLOB** was not what the 9-11 Commission had in mind when it recommended in its final report an independent **PCLOB** in the executive branch, with subpoena power -- such as the FTC or even such as Inspectors General within executive departments. But the White House opposed that concept at the time. The final compromise, as part of the **Intelligence Reform Act**, created in effect the ‘square peg in a round hole’ concept -- an ‘oversight’ entity (that was, after all, the word congress chose to put into the Board's name); yet placing that ‘oversight’ board inside the Office of the President, and thus, part of the White House,” where there is “the vast array of alphabet soup agencies and bureaucracies in the national security apparatus who would resist that concept of independence, or at least, be unable to resist the temptation to control and modify the Board's public utterances so long as they were able to -- i.e., so long as the Board was seen as part of the White House staffing structure....

And that is why I have changed my mind and now support ... complete independence and subpoena power as a separate agency within the Executive Branch but outside of the White House. ... And in any

event, it is my opinion that the scope of oversight should extend not only to ‘U.S. persons’ but to U.S. officials, operating under the authority of our constitution and our laws, who abuse and torture non-U.S. persons contrary to law and U.S. policy and who deprive detainees (in non-battlefield conditions) of basic human rights to counsel and to a fair trial to determine their guilt or innocence. ... I just wish the culture of this administration was more bent towards transparency and getting the story out -- without, of course, compromising national security or classified sources or methods that would allow the bad guys to figure out a way around our programs.”

So far so much Eye Candy, squandering our precious and scarce Civil Liberties. Or in Yankee Doodle Dandyeze: “And there we saw thousand' men, As rich as Squire David, And what they wasted ev'ry day, I wish it could be saved.”

However, refraining from exercising his alluded to veto power, on August 3, 2007 the President signed into law the *Implementing Recommendations of the 9/11 Commission Act of 2007* (Public Law 110-53), establishing a new independent *PCLOB* more in tune with Recommendation #24, but with a “transition period” of not more than six months (concluding January 30, 2008). At that time the old *White House PCLOB* will terminate and an independent new Board (of the same name – *PCLOB*) within the Executive Branch, with subpoena power enforceable through the U.S Justice Department, will come into existence. It will be comprised of five members appointed by the President, but not serving at his pleasure, and confirmed by the Senate, with staggered six year terms. It will make mandated reports directly to Congress (presumably not edited by the White House). Other government agencies are also directed to appoint Privacy and Civil Liberties Officers who will be accountable to Congress and to this new Board.

The stated purpose of the new *PCLOB* is to: “(1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and (2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.”

Shortly before the new Board Legislation was signed into law, a “Libertarian Conservative” Member of Congress had a copy of this Legislation sent to your columnist and advised that they would be interested in hearing his “thoughts on the ... section that revises the ‘Privacy and Civil Liberties’ title.” The reply to this request was as follows:

“With regard to your question, providing persons who honor the caution of our Founding Fathers, as aptly expressed by Benjamin Franklin, that: ‘Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety’ [see *Federally Speaking No. 32, Point And Counterpoint*], fill these positions and diligently perform their Congressionally assigned duties, including making their Congressionally mandated Reports in a timely manner, this is unquestionably a significant step in the right direction, especially the upgrade from a Presidentially established, pleasure-of-the-President, office.

I would like to see, however, additional improvements such as:

a) Giving similar ‘whistle blower’ protections to persons appointed under this legislation, including Privacy Officers and Civil Liberties Officers, as are given to those who confide in them.

b) Permitting subpoenas to be issued to all members of the Executive Branch, and all persons, 'to the extent permitted by applicable law' (which should be all the protection that the personnel in the Executive Branch need).

c) Permitting and encouraging members of the Executive Branch, the Congress, the Judiciary and the Public to confidentially bring their concerns in these areas to the Board (and perhaps to the Privacy and Civil Liberties Officers), such confided concerns to be summarized in the mandated Reports.

d) Permit the Board to consult with, and be consulted by, non-governmental members of academia and civil liberty and privacy spokespersons, who have or are issued the appropriate clearances, to the extent of such clearances."

As Yankee Doodle Dandy alludes, "mass hysterical" reactions, as in the aftermath of 9/11, gets us quickly mired "thick as hasty puddin'," unworthily causing us to "give up essential Liberty" for the illusion of "a little temporary Safety." Here "the proof is in the pudding" only after the up to six months transition period has past, the Administration has not again dragged its feet in activating the new Board, and the Board has had the time, resources and cooperation "to prove the worth of its pudding," properly cooking the pudding being far superior to the instant hasty puddings we have been served in the prior "Eye Candy" versions of this Board.

Remember, when the American dream of a new society where civil liberties are sacrosanct blossomed into reality, our birthing Nation was at war with an Empire engaged in world domination and there were even weapons of mass destruction: "And then we saw a swamping gun, Large as a log of maple, Upon a deuced little cart, A load for father's cattle, ... And every time they shoot it off, It takes a horn of powder, It makes a noise like father's gun, *Only a Nation louder.*"

And remember also that if we lose our Civil Liberties the Terrorists have won, and we become them! Thus, we need heed the Civil War "Terrorists" warning that: "Dixie whipped old Yankee Doodle, Early in the morning. Yankeedom had best look out, And take a timely warning," if we are to retain the essence of the revolutionary American experiment.

And that warning? Simple, we must stick to our principles. British Prime Minister Winston Churchill had advocated the "*Summary Execution*" of Nazis with the use of an "*Act of Attainder*" to evade legal impediments. A *Bill* or *Act of Attainder* can legislatively cancel civil rights, declare a person or persons criminally guilty and authorize their execution, all without trial. And a "*Summary Execution*"? It is a "type of extrajudicial punishment in which an accused or reported suspect of criminal activity is killed, often at the time and place of their being discovered" (*Wikipedia*). *Bills of Attainder* and convictions without trials are specifically prohibited by the *U.S. Constitution* (see *Federally Speaking No. 36, Bill Of Attainder: "Trial By Legislature"*). We properly, legally, morally and ethically insisted upon the Nuremberg Trials, instead of resorting to the expedients of *Summary Executions* and *Bills of Attainder*, to preserve the rule of law and what makes us America, the "*Land of Liberty.*" And we must again do so here so that we do not become the "*1984*" Orwellian "*Land of Big Brother*" (see *Federally Speaking No. 36, 1984 + 10 + 10 = 2004*).

Yes, let us not forget that then and now we fight for *liberty* and *freedom*: "Ye gallant *Sons of Liberty*, Who bravely have defended, You're country's rights, by land or sea, And to her cause attended. ... Upon the ocean's wide domain, Our tars are firm and true, sirs, And *Freedom's cause* they will maintain, With Yankee Doodle Doo, sirs." And a Yankee Doodle Dandy verse from the period of the debate over the

adoption of the *U.S Constitution* lets us know it works: “Now politicians of all kinds, Who are not yet decided, May see how Yankees speak their minds, And yet are not divided.” Indeed, part of our treasured liberties are our rights to take verbal pot shots at our Presidents and exalted leaders, which even dates back to the Father of our Country: "There came Gen'ral Washington, Upon a snow-white charger, He looked as big as all outdoors, *And thought that he was larger.*" [And salutary comments too: "*I saw great Washington advance*, With Americans and troops of France; I saw the haughty Britons yield, And stack their muskets on the field" – Martin, *Private Yankee Doodle*, 1830, 1962.] So, "Yankee Doodle, keep it up, Yankee Doodle Dandy, Mind the Music and the step, And with the girls be handy," and don't let our enemies *clobber*, or even doodle away, our way of life. Let's make sure we have put the "*CLOB*" [*some say this is a Rudyard Kipling-type variation of "club"*] into the newly vitalized *PCLOB!!!*

For sure "Eye Candy" is "dandy" in its proper place, and as Yankee Doodle confirms, is hard to resist: "Yankee doodle doodle-doo, Yankee doodle dandy; All the lassies are so smart, And sweet as sugar candy," but must be resisted when it is used to obfuscate attacks on our Civil Liberties.

*N.B.* On second thought, let's stay away from "*CLUB*" and stick with "*CLOB*," as we would not want this to turn it into the "*Privacy and Civil Liberties Undermined Board (PCLUB)*." Or we could further digress and look into the meaning of "*Oversight*," as in *Privacy and Civil Liberties Oversight Board*, as we did in *Federally Speaking No. 50, Fed-Pourri™ -- The Labyrinth Of Language*, under the sub-heading *Oxymorons, Contranymy and Confusoids*: "Another type of confusing verbal communication is a 'contranym,' which ... 'is a word with two (or more) contradictory meanings.'... 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 [?]," and end up with the *Privacy and Civil Liberties Overlooking Board (PCLOB)*, which just may be what we had had up until the latest enactment, "*a la 'eye candy'.*"

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

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