FEDERALLY SPEAKING

by Barry J. Lipson

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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 36th 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

BILL OF ATTAINDER: "TRIAL BY LEGISLATURE." The **U.S. Constitution, Article I, § 9, ¶ 3**, provides that: "No **Bill of Attainder** or **ex post facto Law** will be passed." According to the **U.S. Supreme Court**, the "**Bill of Attainder Clause** was intended … as an implementation of the **separation of powers**, a general safeguard against **legislative** exercise of the **judicial** function or more simply – [no] **trial by legislature**" (***U.S. v. Brown,*** 381 U.S. 437, 440 (1965)). Or as explained by **Chief Justice Rehnquist** (who on **New Year's Day 2004** bawled out **Congress** for enacting **Sentencing Guidelines** which impinged on judicial independence and could "intimidate individual judges"), the enactment by the legislature of **Bills of Attainder** "were regarded as ***odious*** by the framers of the **Constitution** because it was the traditional role of a court, judging an individual case, to impose punishment," so therefore the **Constitution** prohibits such "legislative act that singled out one or more persons and imposed punishment on them, ***without benefit of trial***"(***The Supreme Court,*** 1987, p.166; emphasis added)**.** See also **James Madison**, ***The Federalist***, Number 44 (1788): '**Bills of attainder**, **ex post facto laws**, and laws impairing the obligations of contracts, are contrary to the first principles of the **social compact**, and to every principle of sound legislation." In 1996 the **U.S. Congress** passed the **"Elizabeth Morgan Act,"** Dr. Elizabeth Morgan being the mother of Hilary a/k/a Ellen Morgan, a child born to her and Dr. Eric Foretich, whom she has been accusing of child abuse for the past 20 years. This **Bill** denied Foretich even supervised visitation with Hilary. On December 16, 2003 the **U.S. the Court of Appeals for the D.C. Circuit** ruled that **Congress** had passed **an unconstitutional Bill of Attainder** for, by denying even supervised visitation where no abuse could occur, the **legislature** had labeled him a sex offender and punished him as such. (***Foretich v. United States*** (DC Cir, 2003)). As Hilary is now over 21, this ruling is moot, but it does raise an interesting question. If under "**separation of powers,"** punishing individuals is "the **judicial** function," would not, to adapt ***Brown's*** language "the **executive** exercise of the **judicial** function or more simply – **trial by executive,**" to wit **"Star Chamber"** proceedings, be just as bad? If so, "how now" **Administrative Tribunals**?

1984 + 10 + 10 = 2004. The lead character in George Orwell's ***1984*** (published in 1949), shared with us his private "thought of the telescreen with its never-sleeping ear. They could spy upon you night and day, but if you kept your head you could still outwit them." The year 1984 has come and gone and yet Orwell's **"Big Brother"** predications have not come to pass, or was he only wrong about the year? Ten years after 1984, the **United States Congress** enacted the **Communications Assistance for Law Enforcement Act of 1994 (CALEA)**, a/k/a the **Digital Telephony Act**, which requires telecommunications carriers to "ensure" that "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of … expeditiously isolating and enabling the government, pursuant to a ***Court Order*** or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and

electronic communications carried by the carrier…," pursuant to Regulations issued by the **Federal Communications Commission (FCC)**. That is the telephone service providers were required to facilitate wiretapping by the Government (**Congress** wisely also provided compensation to the industry for making these changes, thus apparently nipping in the bud a **"due process"** attack). Skip ahead another ten years to the Post-9/11 World and its watered-down ***search warrant*** requirements (see ***"FISA Appeals Court Torpedoes Wall," Federally Speaking,*** No. 24), and we find the **FCC** acceding to the **FBI's** request to expand **CALEA** to cell phones so that wireless telephone service providers are now required to install technology capable of both tracking and locating cell phone users and eavesdropping in on their conversations. Now the **FBI** is asking the **FCC** to again expand the **CALEA** by enlarging the definition of "telecommunications carriers" to include Internet telephone service providers, so as to require them "to develop intercept solutions for lawful electronic surveillance." In addition to such calls being difficult and expensive to capture (as such transmissions are broken down into digital packets, transmitted like e-mail through the Internet, and then re-combined into speech), the questions present themselves of compensation, the worldwide nature of the Internet and the **U.S. Constitutional rights** of **due process** and **privacy.** In a related matter, the **Court of Appeals for the Ninth Circuit** recently, in ***The Company v. United States***, 02-15635 (Nov. 18, 2003) - [and we thought ***"The Company"*** was an agency of the ***United States***] - under the **Omnibus Crime Control and Safe Streets Act of 1968,** both "endorsed" the **FBI's** right with a "probable cause" **Court Order** to eavesdrop**,** and found a reason why the **FBI** could not do so here. This case involved non-terrorist bribery eavesdropping and a cell phone technology extension for automobiles, known as "on-board navigation systems," which provides satellite road directions and emergency assistance. **U.S. Circuit Court Judge** Marsha S. Berzon, writing for the 2-1 majority, explained that the "**FBI**, however well-intentioned, is not in the business of providing emergency road services, and might well have better things to do when listening in than respond with such services to the electronic signal sent over the line," leaving **"The Company,"** who would be thereby blocked from receiving such signals, in the untenable position of no longer being able to "supply any of the various services it had promised its customer, including assurance of response in an emergency." An elegant irony here, if reversed, where along with your costly purchase of satellite navigation and added personal safety, you are "gifted" with a 1984-style **"Big Brother"** to watch over you.

FED-POURRI™

ACLJ AND ACLU STOOD SIDE BY SIDE! "You have just helped us win a **VICTORY** at the **Supreme Court of the United States** - The Justices ***unanimously*** ruled to **UPHOLD THE CONSTITUTIONAL RIGHTS OF MINORS** to participate in political campaigns! This portion of the decision in the campaign finance reform case strikes down as **unconstitutional** a ban prohibiting minors from making monetary contributions to political campaigns of their choice. And it sends a strong message: The **First Amendment rights of freedom of speech and association** for people under 18 must be **PROTECTED!"** (Uppercase emphasis above and below **NOT** added.) So recently proclaimed the **American Center for Law & Justice (ACLJ)** to its e-mail supporters. But this elation was sadly clouded for the **ACLJ** as it also advised its supporters, otherwise, in a ***5-4 decision***, "the **High Court** … upheld much of the **Bipartisan Campaign Reform Act [BCRA]** -- including a ban on issue advertisements in the weeks leading up to an election. … Advocacy groups [during this period such as the **ACLJ**, the **ACLU** and the **NRA**] will be effectively **SHUT OUT** of being able to express their opinions and views on the moral and cultural issues that play a key role in elections." In this latter regard, as noted under the caption ***Shoot-Out At The M-F Corral,*** in ***Federally Speaking*** No. 15, "Cow-folk in all colors of hats," including "such diverse groups as the **National Rifle Association (NRA)**, the **American Center for Law and Justice (ACLJ)**, and the **American Civil Liberties Union (ACLU)**," took "pot shots at the **constitutionality** of this [**BCRA] legislation**, apparently because of the restrictions it places on 'issue ads' and the campaigning by such organizations near Federal election times. According to the Christian rightists of the **ACLJ** … 'this legislation actually silences Christian and conservative [and 'shooter' and 'civil libertarian'] organizations - banning them from commenting on key moral issues during election campaigns'." See ***McConnell v Federal Election Commission***, No. 02.1674 (Sup Ct, December 10, 2003). Thus, such normal antagonists as the **ACLU** and its younger "alphabetic cousin" the **ACLJ** (with its apparently intentional "copycat" initials) have stood side by side here, while more often than not the **ACLJ** would be exhorting its "Christian and conservative" minions to "stand fast against the destructive influence of

the **ACLU** in our nation," and the **ACLU** would, of course, be standing ready to defend the **ACLJ's** right to expound such positions. **Only in America!**

CAN SPAM!!! Not everyone is Anti-SPAM! Over 5 billion containers of "Hormel Spiced Ham," quickly **trademarked** SPAM, have been sold since Hormel first canned it in 1937, sixty-five years before the **U.S. Congress** did! It was not until 2003 that **Congress** enacted and **President Bush** signed into law, on December 16, 2003, the **CAN-SPAM Act of 2003**, imposing nationwide standards, limitations and penalties, to be enforced by the **Federal Trade Commission (FTC)**, "on the transmission of unsolicited commercial electronic mail via the Internet." Again the "Spam Doctors" (Oops! "Spin Doctors") have been at work, as the designation **''CAN-SPAM Act of 2003''** is a statutorily-blessed acronym for the "**Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003."** The **Act** defines ***''commercial electronic mail message''*** as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." It also contemplates the introduction by the **FTC**, if technically feasible, of a national **"Do-Not-Spam List"** similar to the **FTC's "Do-Not-Call Registry"** (see ***"Can The Ham - No Spam?"*** in ***Federally Speaking***, **Internet & Copyright Compilation Issue III**, November 14-21, 2003). The ***Coalition Against Unsolicited Commercial Email (CAUCE)*** is unhappy because, in its view, this legislation "neglects to actually tell any marketers not to spam. Instead, it gives each marketer in the United States one free shot at each consumer's e-mail inbox, and will force companies to continue to deploy costly and disruptive anti-spam technologies to block advertising messages," while pre-empting more effective State law such as the "opt-in law set to go into effect in California on January 1, 2004, which was passed after a state opt-out law similar to the current federal legislation was found to be a failure." Sandy Starr, in his June 25, 2003 article entitled "***Spam: Put A Lid On It,"*** states the anti-***CAUCE*** view: "Current reactions to SPAM are out of proportion to the problem. Anti-SPAM legislation and litigation are more damaging to Internet communication than SPAM is." But to paraphrase ***Magnuson's English Idioms, Sayings and Slang,*** unless and until the **U.S. Supreme Court** says otherwise: "**Can it!** Here comes the **FTC.**" And what does Hormel have to say about all this malicious and/or humorous use of its valuable "SPAM" **trademark** (and, of course, all that "free publicity")? Hormel complacently observes, "SPAM doesn't live in glass houses. It comes in cans." Or in the memorable words to the Press of John Barrymore, perhaps "hamming" it up a bit: "Just spell my name right, boys."

DON'T LET THE BEDBUGS BITE! ***"Goodnight, sleep tight, don't let the bedbugs bite!"*** An old bedtime saying or a serious warning when staying at the Motel 6 (now Red Roof Inn) in Downtown Chicagoland owned and operated by Accor Economy Lodging? So serious that **Seventh Circuit Court of Appeals Judge Richard A. Posner** ("one of the founding fathers of the law and economics school of thought and the most widely cited living legal scholar" - University of Texas School of Law, Oct. 2, 2001), allegedly led the ***unanimous "overruling"*** of the ***State Farm Mutual Automobile Ins. Co. v. Campbell*** (123 S. Ct. 1513, 1524 (2003)), "maximum single digit ratio" **punitive damages** cap (in **State Farm** the ration had been 145:1), and approved the award of a 37.2:1 ratio of punitive ($372,000) to compensatory ($10,000) damages (***Matthias v. Accor Economy Lodging***, Nos. 03-1010, 03-1078 (7th Cir 2003)). In **State Farm** the **High Court** stressed the need of "vigorous judicial scrutiny of **punitive damages awards**" because: "Although these awards serve the same purposes as criminal penalties, defendants subjected to **punitive damages** in civil cases have not been accorded the ***protections applicable in a criminal proceeding***" (emphasis added), speculating a "cap" of perhaps 2:1 or 4:1 or at a most single digit ratio. But, Posner reasoned (in part), "defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of **punitive damages** in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." But is this **"buggy"** reasoning, or well **"bedded"** in law and fact?

"DOWN AND DIRTY JUSTICE." Gary Lowenthal, Esq., Law Professor and criminal trial lawyer, who has taught at the University of Virginia, the University of California-Berkeley and Arizona State University, after spending his sabbatical year as a criminal prosecutor, published ***"Down and Dirty Justice: A Chilling Journey Into the Dark World of Crime and the Criminal Courts."*** In this exposé he concludes that: ? "Little justice exists today in **America's criminal justice system**." ? "***Judges*** have been left impotent by **mandatory sentencing laws**." ? "***Prosecutors*** wield too much power, ***defense attorneys*** jump at plea bargains, and **constitutional rights** often are ignored." ? "***Poor and middle-class defendants*** are urged to take plea bargains by ***prosecutors***, no matter how bad the deals or whether or not they are innocent, rather than take their chances in court represented by ***public defenders***." ? ***"Incompetence reigns on all sides."*** Hopefully, this indictment of **"America's criminal justice system"** is isolated to the Maricopa County Attorney's Office in Arizona, where Professor Lowenthal spent his sabbatical year prosecuting a heavy felony docket, and not indicative of **Federal** and State prosecutorial offices throughout the **U S of A**.

BE WARY, BE WARNED, BAIT AND SWITCHERS WANT YOU! "You are attracted to a store by an advertisement for a bargain-priced product. [The **bait!**] Once at the store, you discover that the product is sold out or otherwise not available. You may then be **'switched'** to a higher priced item by a salesperson, or while you are in the store, you may find yourself induced to make other purchases. In either case, the retailer captures your shopping dollars by luring you to the store with an advertised bargain that was never intended to be made available in reasonable quantities." Consumers "are particularly vulnerable to the pressure to **switch** to alternative products when the one they expected to buy is not available." So warns the Canadian Competition Bureau, advising the consumer and the business community that: "**Bait and switch advertising** is anti-competitive. By advertising products at bargain prices that are not available in reasonable quantities, retailers can unfairly lure consumers to their stores … Under the **Competition Act**, companies are prohibited from advertising products at bargain prices that they do not have available in reasonable quantities. Retailers who contravene the law may be ordered by the Competition Tribunal to stop the conduct, publish a corrective notice, and/or pay a significant administrative monetary penalty." In Canada "Consumers or competitors who notice **bait and switch advertising** are encouraged to report it to the Competition Bureau by calling 1-800-348-5358." In the **United States** such activities are also illegal and should be reported to the **Federal Trade Commission** and the State Consumer Protection Enforcement Agencies. So now and always be wary, be warned, '**Bait and Switchers Want You**!"

FOLLOW UP

ENRON EXAMINER TAKE HEED! Last month in ***Federally Speaking***, No 35, we cautioned ***'In-House Counsel Take Heed!"*** This was based on the Final Report of Neal Batson, Esq., Court-Appointed Examiner in the Enron **Chapter 11 Bankruptcy** (***In re: Enron Corp., et al.,*** U.S Bankruptcy Court, Southern District Of New York, Case No. 01-16034 (AJG)), where he concluded that Enron's In-House Counsel's failures to "inform" themselves, to "take **remedial actions,"** and "to exercise the **competence and diligence** normally exercised by reasonably prudent attorneys," among other things, provided "sufficient evidence from which a fact-finder could determine" that they "committed **statutory/regulatory malpractice** (Texas Rule 1.12), 'committed **malpractice based on negligence**,' and/or **breached their** '**fiduciary duties**'." Now, perhaps Attorney Batson, himself, has failed to exhibit the "prudence" that is "exercised by reasonably prudent attorneys." Whatever the reasons and whatever the outcome, Examiner Batson's charges to the **Chapter 11** Enron Estate since mid-2002 of in excess of $100 million, and his "appearingly" early Motion to be discharged as Examiner, while at the same time asking to be permitted to destroy the voluminous documents gathered during this investigation, and to be given a blanket grant of protection and immunity from liability and subpoenas relating to Enron, places a cloud of imprudence, and the possible appearance of impropriety and doubt, over his otherwise apparently laudable endeavor. Undoubtedly, heeding prudence is a two way street.

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