

THE FEDERALIST SOCIETY
2003 NATIONAL LAWYERS CONVENTION

ADDRESS BY
THE HONORABLE JOHN ASHCROFT
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LEONARD LEO: It is early, but I promise that our first speaker and the debate that follows will awaken the senses.

About three months ago, the Constitution Project and the Federalist Society came together to discuss how we might collaborate on a debate series that would touch upon some of the legal issues that currently are making the headlines. Today's panel on civil liberties and the War on Terror is the first in this collaborative series we've launched. We are most grateful to Virginia Sloan and others at the Constitution Project with whom we have been working for their partnership on this new venture and the panel that will follow.

What a great way to start our morning and to mark this new series of Federalist Society/ Constitution Project panels, we have with us the Attorney General of the United States, the Honorable John Ashcroft. Last year at the Federalist Society's 20th Anniversary Gala, we were privileged to have General Ashcroft with us. We were most grateful for his kind words about the Society and very well entertained by his wonderful wit and sense of humor that evening. Thinking back on that night, though, what struck me most about his remarks was the deep sense of humility that drives his life, and more specifically his service as the nation's chief law enforcement officer. The General's respect for the rule of law, for example, was unflinching.

Federalists, as you know, are a pretty tough crowd, but General Ashcroft made his obligations, even in unpopular cases, very clear. He said, "As Justice Department employees, some of your colleagues have the federal government as a client. If that client has interests, its lawyers must defend those interests, even if, from time to time, the lawyers might take an opposite side in a Federalist Society debate. Even if they are not, perhaps, the view of the law that a consensus in this group might think appropriate." And he added, "First and foremost, we must follow the Constitution."

I was also very impressed by the appreciation that General Ashcroft demonstrated for the value of fair debate in finding the right answers. At last year's dinner, the General observed, "Just a sharp dissent in a judicial opinion can force the majority to refine and ultimately improve its reasoning. A sharp debate on public policy questions can improve our resolution of these challenges. From those debates, America will learn. A learning America will be a free America, stronger and safer."

This willingness to keep an open mind about issues and a strong belief that one's personal preferences are subordinated to the law and the search for truth are the real hallmarks of General Ashcroft's humility as a public servant, and such humility is an indispensable characteristic for leaders of a limited constitutional government.

General Ashcroft, it is a great privilege once again to have a man of such integrity visit us here at the Federalist Society. We are most appreciative for your continued interest in our work and efforts, and far more importantly for your dedication to, and affection for, the republic.

Ladies and gentlemen, the Attorney General of the United States.

HON. ASHCROFT: Thank you very much. You can skip the rest of the workout. It's Saturday morning. I'd like to know when the Federalist Society began keeping farmer's hours, getting up to give a speech at 8:00 a.m. on Saturday; I commend you.

Let me just pause for a moment to say how much I appreciate the Federalist Society. Freedom is based on an awareness that the Creator endowed us with the capacity to make choices, and consequential choices. I say consequential choices because there seems to be rampant in the culture the myth that somehow freedom is the ability to choose without consequence. A choice without consequences does not define freedom; it defines meaninglessness. Real freedom shapes events. It shapes the future in which we live. And the fundamental blessing of freedom is that our choices do have consequences, and because they do, it is essential that we know the truth and that we make good choices based on strong analysis and accuracy. That's why, in the crucible of debate, those who love the truth and pursue it promote freedom more therapeutically than any other group in the culture. I'm grateful for your desire to know, your industry in seeking, and your persistence in pursuing the Truth.

Now, there are times when I'm sure you look around yourselves in this culture, and I certainly observe it, when you think that the Federalist Society must be some sort of target-rich environment because there may be those who maybe aren't as concerned about discovering what's at the barebones of the argument, what are the fundamental constructs that relate to a discussion. But I want to thank and commend everyone who pursues the Truth aggressively, who is willing for the light, the bright light, of inquiry to shine upon the issues that we face so that we make those consequential decisions in a way that the consequences are a real asset, not only to us as individuals but to those who follow us. So, I commend you and I thank the Federalist Society, and I am grateful to you.

When your friends at the American Constitution Society for Law and Public Policy held their inaugural event, they let Janet Reno speak at a far more civilized hour than 8:00 in the morning. I mean, how do you expect me to speak this morning and still be fresh for John Ashcroft's Dance Party this evening? I do appreciate this great opportunity.

The Federalist Society, its membership, have been the resolute defenders of the nation's founding ideas. These are values. They don't have value because our founders embraced them; our founders embraced them because they had universal value; ideals of liberty, the rule of law. It is in this capacity that the Federalist Society is so necessary today. For the past two years, you've been a part of the debate about how best to preserve and protect our liberty in the face of a very real terrorist threat. America has an honored tradition of debate and dissent under the First Amendment, and it's an essential piece of our constitutional and cultural fabric.

As a former politician, I've heard a few dissents in my time, and even expressed a few of my own. The founders believed that debate should enlighten, not just enliven. It should reveal the Truth; it should not obscure it. The future of freedom does, then,

demand that our discourse be based on solid facts and the sincere desire and pursuit of that which is valid and true. As we consider the direction and the destiny of our nation, our friends and those of us who embrace freedom must practice this pursuit, this willingness to demand from ourselves and others a debate informed by fact and directed toward the Truth. Take away all the bells and whistles, the rhetorical flourishes, and occasional vitriol, and the current debate is about the rule of law and the role of law.

The notion that the law can enhance, not diminish, freedom is an important one, and it is an old one. John Locke said, "The end of law is not to abolish or restrain, but to preserve and enlarge freedom." George Washington called this "ordered liberty".

There are some voices in this discussion of how best to preserve freedom that reject the idea that law can enhance freedom. They think that passage and enforcement of any law is necessarily an infringement of liberty. Ordered liberty is the reason we are most open, and that we are not only the most open but the most secure society in the world. Ordered liberty is a guiding principle. It is not a stumbling block to security.

When the first societies passed and enforced the first laws against murder, against theft and rape, the men and women of those societies unquestionably were more free as a result of the law, not less free as a result of the law. A test of a law, then, is this: Does it honor or degrade or devalue liberty? Does it enhance or diminish freedom?

The founders provided the mechanism to protect our liberties and preserve the safety and security of the republic. It's more than a mechanism; it's a framework—the Constitution of the United States. It is a document that safeguards security, but not at the expense of freedom. It celebrates freedom, but not at the expense of security. It protects us and our way of life.

Since September 11, 2001, the Department of Justice has fought for, and Congress has created, and the judiciary has upheld, legal tools, tools that honor the Constitution, tools that make America safer while enhancing American freedom. It is a compliment to all who worked on the PATRIOT Act to say that it is not constitutionally innovative. These are not new ideas. The Act used and uses court-tested safeguards and time-honored ideas to aid the War against Terrorism, at the same time protecting the rights and the lives of citizens.

Madison noted in 1792 that the greatest threat to our liberty was centralized power. "Such focused power," he wrote, "is liable to abuse." That's why he included a distribution of power into separate departments as a first principle of free government. The PATRIOT Act honors Madison's first principles, giving each branch of government a role in ensuring both the lives and the liberties of American citizens are protected. The PATRIOT Act grants the executive branch critical tools in the War on Terrorism. It provides the legislative branch with extensive oversight. It honors the judicial branch with court supervision over the Act's most important powers.

First, the executive branch. At the Department of Justice, we are dedicated to detecting, disrupting, and dismantling the networks of terror before they can strike our nation again. In the past two years, no major terrorist attack has been perpetrated on our soil. Now, let me just say, consider the bloodshed of terrorism elsewhere in the world in that time. Women and children slaughtered in Jerusalem; innocent young lives snuffed out in Indonesia; Saudi citizens savaged in Riyadh; church-goers in Pakistan murdered by the hands of hate. I would pause for a moment just to say that terrorism has not abated in the last two years; it has intensified.

I would also note that we are not a nation that terrorism has sought to forsake. We are a primary target. We are still referred to as the great Satan. We are the target of preference. We must keep that in mind.

We are using the tough tools provided in the U.S. PATRIOT Act to defend American lives and liberty from those who have shed blood and decimated lives in other parts of the world. The PATRIOT Act does three basic things. It closes, first, gaping holes in the law enforcement community's ability to collect vital intelligence information on terrorist enterprises. It allows law enforcement to use proven tactics, long used in the fight against organized crime and drug dealers. Second, the PATRIOT Act updates our anti-terrorism laws to meet the challenges of new technology and new threats. And third, with these critical new investigative tools created by the PATRIOT Act, law enforcement can share information and cooperate better with other law enforcement agencies. From prosecutors to intelligence agents, the Act allows law enforcement to connect the dots and uncover terrorist plots before they are launched.

Here's an example of how we use the Act. Some of you are familiar with the case of Iman Ferris, a naturalized United States citizen who worked as a truck driver out of Columbus, Ohio. Using information sharing allowed under the PATRIOT Act, law enforcement pieced together Ferris' activities; how Ferris met senior al Qaeda operatives in a training camp in Afghanistan; how he was asked to procure equipment that might cause train derailments and sever suspension systems of bridges; how he traveled to New York to scout a potential terrorist target. Now, Ferris pleaded guilty on May 1, 2003, and on October 28, he was sentenced under the PATRIOT Act's tough sentences. He'll serve 20 years in prison for providing material support to al Qaeda and the conspiracy for the terrorist organization, providing them with information about possible U.S. targets for attack.

The Ferris case illustrates what the PATRIOT Act does. One thing the PATRIOT Act does not do is to allow the investigation of individuals "solely on the basis of activities protected by the First Amendment to the Constitution of the United States." We know that it does not do that. And even if the law did not prohibit it, the Justice Department has neither the time nor the inclination to delve into the reading habits or other First Amendment activities of our citizens.

Despite all the hoopla to the contrary, for example, the PATRIOT Act, which allows for court-approved requests for business records, including library records, has never been used to obtain records from the library. Not once. Senator Diane Feinstein said, "I have never had a single abuse of the PATRIOT Act reported to me." I'll go on to quote her more extensively. "My staff," she said, "emailed the ACLU and asked them for instances of actual abuses. They emailed back and said they have none."

The PATRIOT Act has enabled us to make quiet, steady progress in the War on Terror. Since September 11, we've dismantled terrorist cells in Detroit and Seattle, Portland, Northern Virginia, and Buffalo, New York. We've disrupted weapons procurement plots in Miami, in San Diego, in Newark, and in Houston. We've shut down terrorist affiliate charities in Chicago and Dallas and Syracuse. We've brought criminal charges against 280-some individuals and secured convictions for over 155 of them as those cases continue to make progress. Terrorists who are incarcerated, deported, or otherwise neutralized threaten fewer American lives, and for two years, our citizens have been safe. There have been no major terrorist attacks on our soil. American freedom has

been enhanced; it has not been diminished. Our Constitution has been honored, not degraded.

Second, the role Congress plays. In six weeks of debate in September and October of 2001, both the House of Representatives and the Senate examined studiously and debated vigorously the merits of the PATRIOT Act. Let me just indicate, there was an intense focus on this particular enactment, the intensity of which was probably unparalleled, at least in my period of observation of the activities of the United States Congress. And in the end, both houses overwhelmingly supported its passage, with a 98-1 vote in the Senate and a 5-1 margin in the House.

Congress built into the PATRIOT Act strict and structured oversight of the executive branch. Twice annually—every six months—the Justice Department provides Congress with reports of its activities under the PATRIOT Act, comprehensive reports. Since September 24, 2001, Justice department officials, myself included, have gone before the Congress, testified on the PATRIOT Act and other homeland security issues more than 115 times. We've responded to hundreds of written and oral questions and provided reams of written responses to the Congress about the act. To date, no congressional committee has found any evidence that law enforcement has abused the powers provided by the PATRIOT Act in a way that would offend the Constitution or in any other way.

Legislative oversight of the Executive Branch is critical to ordered liberty. I spent some time in the legislature. I understand how important it is for the representatives of the people to understand the way the laws which they enact are being implemented. That oversight ensures that the laws are administered in ways that respect the rights and liberties of the citizens.

There has not been a major terrorist attack within our borders in this time. Time and again, Congress has found the PATRIOT Act to be effective against terrorist threats and respectful and protective of citizens' liberties. The Constitution has been honored; it has not been degraded.

Finally, the PATRIOT Act and its relation to the Judicial Branch of government. The PATRIOT Act provides for close judicial supervision of the Executive Branch's use of PATRIOT Act authorities. The act allows the government to utilize many long-standing, well-accepted law enforcement tools in the fight against terror. These tools include delayed notification, judicially supervised, of searches. They also include things that we've had for quite sometime, like so-called roving wiretaps.

Just for a moment, let me pause. Roving wiretaps were authorized by the Congress in 1986 in the fight against organized crime and drugs. Sometime, we in the law enforcement community appropriate to authorities names which are frankly more threatening than the authority is itself. The use by some of the name "sneak a peek", when you're talking about a judicially supervised, court-authorized delay in the notification for a search warrant, suggests that you can go peeking around somehow independently without cause or without reason. The name has eroded our capacity to do what ought to be done and can be done respectfully of the Constitution.

Similarly, the roving wiretap has confused Americans. They think, well, if you're just roving around tapping phones, that's wrong. And they would be right in thinking that's wrong, if they were not wrong in thinking that's right. That will not be on the final exam. If it is, it will be in the form of a trick question.

The point is this. A roving wiretap is carefully supervised, and it is designed merely to allow an individual to be surveiled individually once the courts have determined that surveillance is appropriate, so that, if an individual uses his home phone and then his car phone and then his office phone and then another cell phone, or perhaps even uses a throw-away instrument of communication, we have the ability to follow the communication pursuant to the judicial supervision and court authority. That's been available since 1986 in the war on drugs. And I have within myself a deep conviction that it is within not only the opportunities expressed in the Constitution, but in the duties of the Constitution that we use the full range of tools appropriate against organized crime and drug dealers. We use those tools to safeguard the security and liberty of the American people against terrorists.

In using these tactics to fight terrorism, the PATRIOT Act includes an additional protection for individual liberty. A federal judge supervises the use of each of the tactics. Here we speak about very important issues. Were we to seek an order to request business records, that order would need the approval of a federal judge. Now, grand jury subpoenas issued for similar requests by police in standard criminal investigations are issued without that kind of judicial oversight, so that under the PATRIOT Act there is this additional supervisory oversight by the federal judiciary throughout the PATRIOT Act. Tools provided to fight terrorism require that the same predication be established before a federal judge as would similar tools provided to fight other crime.

In addition, the PATRIOT Act includes yet another layer of judicial scrutiny by providing a civil remedy in the event of abuse. Section 223 of the PATRIOT Act allows citizens to seek monetary damages for willful violations of the PATRIOT Act. This civil remedy serves a further deterrent against infringement upon individual liberties. Now, given our overly litigious society, you are probably wondering how many such civil cases have been filed to date. It is a figure as astronomical as the library searches: zero. There is a simple reason for this. The PATRIOT Act has not been used to infringe upon individual liberties.

Now, many of you have heard the hue and cry of critics of the PATRIOT Act who allege that liberty has been eroded. But more telling is what you have not heard. You have not heard of one single case in which a judge has found an abuse of the PATRIOT Act because, again, there have been no abuses. It is also important to consider what we have not seen: no major terrorist attacks on our soil over the past two years. The PATRIOT Act's record demonstrates that we are protecting the American people while honoring the Constitution and preserving the liberties we hold dear.

While we're discussing the judiciary, let me make one additional point. To be at its best, the judiciary requires a full bench. Now, this is not like football or basketball where the bench consists of reserves who might not see action. We're talking about a different kind of bench. The judicial bench, to operate best for the people, must be at full strength. Let me say this. President Bush has performed his duties admirably—admirably—in selecting and nominating highly qualified jurists to serve.

Since I have the privilege of signing the commissions for judges, you know, I read them occasionally. The language in a judge's commission reads, "George W. Bush, President of the United States of America, to all who shall see this, presents greeting. Know ye that reposing special confidence and trust in the wisdom, uprightness and learning, I have nominated. . . ." and you can fill in the blanks with Bill Pryor, Janice

Rogers Brown, Priscilla Owen or Carolyn Kuhl. Well, this language may seem anachronistic, but the ideals of the men and women of the bench that they must uphold are not anachronistic. They are ideals of wisdom and uprightness and learning. I must say that the President's nominees personify those noble ideals. His nominees are proven defenders of the rule of law, and they should be treated fairly. The rule of law itself is a concept which indicates that there should be equity between the way individuals should be treated without regard to their personhood.

In the effort to populate the bench, which enforces the rule of law in the country, it is important that this government observe the similar and important identical principles, as a matter of fact, supporting the rule of law. That is, equity in treatment. They deserve to be treated with the dignity that befits the position to which they are being appointed and in which they would seek to serve our country to defend freedom and our citizens.

You may think that some of the President's best nominees are being treated unfairly. I can understand that. In that case, you may want to exercise your right to dissent. The future of freedom and the rule of law depend on citizens informed by fact and directed toward truth. To be sure, the law depends on the integrity of those who make it, of those who enforce it, and those who apply it. It also depends on the moral courage of citizens, and of lawyers like you, to insist on being heard, whether in town hall meetings, in county council meetings, or in the United States Senate.

There is nothing nobler than fighting to preserve our God-given rights, and our proven tactics against the terrorist threat are doing just that. For more than two years, with God's help, we have protected the lives of our citizens here at home again and again. The courts have determined that our citizens' rights have been respected, and the Constitution respected as well.

Twenty-six months ago, terrorists attacked our nation thinking our liberties were a weakness of this country. They were wrong. The American people have fulfilled the destiny shaped by our forefathers and founders, and they have revealed that liberty is the strength of America. It is the source of power within our freedom.

Time and again, the spirit of our nation has been renewed and our greatness as a people has been strengthened by our dedication to the cause of liberty, to the rule of law, and to the primacy and dignity of each individual. I know we'll keep alive these noble aspirations that are at the base of the hearts of all of our fellow citizens and for which our young men and women at this moment are fighting and making the supreme sacrifice.

What we are defending is what generations before us fought for and what they defended: a nation that is a standard, a beacon, an aspiration to all who desire a land that promises to uphold the best hopes of all mankind, a land of justice. We defend a land of liberty. I am grateful for your defense, for your dedication to these values and ideas. May God bless you, and God bless America.

LEONARD LEO: General, we have a long-standing tradition at the Federalist Society of giving a great little book to public officials, one that I'm sure you're familiar with—*The Federalist Papers*. As I'm sure you wear your copies out quite often, here's another one that you can turn to in the future. Thank you for joining us today.