The Patriot Act of 2002

Myths, Misperceptions and Malapropisms

"We should all have a healthy dose of skepticism towards our government. We should always be watchful. That is the American way. But, I am convinced overall that the PATRIOT Act will not lead to the nefarious roll back of civil rights and civil liberties that its critics claim."

- Joe D. Whitley

The Joseph Henry Lumpkin Society Educational Seminar Series provides the opportunity for Georgia Law alumni to discuss current issues and their importance to the legal community with the key players involved. Attendance is typically limited to 25 guests and is reserved for members of the law school's Joseph Henry Lumpkin Society (annual donors of $1,000 or more) and their guests.

The series' inaugural speaker, Joe D. Whitley (J.D.'75) became general counsel for the Department of Homeland Security in August 2003. (Before August 2003, he served as a consultant for DHS beginning his duties in March 2003.) In this position, he advises the department's secretary and ensures that all actions of the DHS meet legal requirements. As such, he oversees approximately 1,500 lawyers from 22 different agencies, including the Secret Service, the Coast Guard, Border and Transportation Security, Science and Technology, the Transportation Security Administration, Information Analysis and Infrastructure Protection, and Emergency Preparedness and Response. Previously, Whitley was a U.S. associate attorney general, U.S. attorney for the Middle District of Georgia and U.S. attorney for the Northern District of Georgia.

The following is a summary of Whitley's remarks from his Dec. 3, 2004, presentation. Due to space constraints, the question and answer session was unable to be printed in the magazine. However, the Q&A will be included with the online version of the Advocate *at* www.law.uga.edu/news/advocate.

This morning I will talk about the Uniting and Strengthening America by Protecting Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "USA-PATRIOT Act"), but I also would like to get your questions and engage in a bit of a dialogue because it is important that we at DHS get the perspective of citizens, people who are practicing law and who may have been impacted by the PATRIOT Act.

We live in historic times. I want to begin this morning by reflecting on our unique times, talk about the PATRIOT Act in general terms, and lastly get into some of the provisions that have been the most controversial and then address what I see as the myths associated with those provisions.

For many Americans, it can be hard to separate reality from perception when it comes to the PATRIOT Act. One of the obligations we have as lawyers and government officials in Washington, D.C., who are reasonably well informed about the "actual" provisions and purposes supporting the act, is to dispel myths and misperceptions and encourage honest dialogue.

Hopefully, during this next session of Congress, with the presidential election behind us, controversial provisions of the act will be closely scrutinized and fairly debated.

At times, I think the discourse we have had to date about the PATRIOT Act could not be considered a debate. Far too often, advocates for and against the act have themselves become lightning rods and a distraction from legitimate issues in the debate.

During my earlier service at the Department of Justice, I first encountered the brutality and inhumanity of terrorism. I had the opportunity to work on the Pan Am 103 case. As you remember, on Dec. 21, 1988, as the result of a terrorist act, Pan Am 103 crashed in Lockerbie, Scotland. A bomb exploded in the plane's fuselage killing all 259 passengers and crew on board. The terrorists were connected to and later given safe haven by Colonel Quadhafi.

Shortly after the downing, I remember going across the street to the Federal Bureau of Investigation from my office at Main Justice to meet with the then-director of the FBI William Sessions and with my boss, Attorney General Dick Thornburgh. As part of the meeting, we looked at the photographs of what happens to a plane when it falls out of the sky from 30,000 feet and, even more tragically and graphically, what can happen to human beings when they are in that plane.

It was a riveting meeting for me. It made an indelible impression upon me and convinced me that we need to be aggressive about terrorism, not just because terrorism has been with us and will always be with us, but because of the far-reaching human consequences of terrorism in the modern world. It was with us in Lockerbie and again, of course in 1993, when the Twin Towers in New York were attacked the first time, unsuccessfully.

With incidents like Pan Am 103 and the increasing prevalence of terrorism and attacks on the United States or U.S. military and diplomatic installations, Republicans and Democrats began to rethink the role of law enforcement and intelligence and their inter-relationship.

We needed new tools and a new way of thinking. The Cold War mentality would not work. This was a new kind of enemy: unconventional and asymmetric.

The additional tools that were needed to deal with these situations were considered by Congress in the sessions preceding 9/11, but because there was no consensus and unfortunately for some, no sense of urgency, no action was taken.

But with a watershed event like 9/11, Congress can suddenly focus and pass significant legislation that might otherwise stall. For instance, I can remember in 1986 when Maryland basketball player Len Bias died from a drug overdose. The public reaction to Bias' death led to Congress passing tough new anti-drug legislation in short order.

But sometimes when Congress reacts to a tragic event, it overreacts. Did that happen with the PATRIOT Act? That is something we need to consider and debate vigorously in the next several months so we can reach a collective decision about whether or not we should reauthorize key provisions of the PATRIOT Act. In my opinion, we should reauthorize most of the act, but I welcome the debate.

Joe D. Whitley (J.D.'75)

Photograph by Robert Newcomb.

On 9/11, 19 evil but determined people with a budget of $500,000 forever changed the United States, significantly harmed the economy of the United States and altered the mindset of Americans in a way that nobody could have ever imagined.

So, what happened in October 2001 was remarkable. Congress acted in a very bipartisan fashion to pass the PATRIOT Act. The Senate passed the PATRIOT Act by a vote of 98-1. It is truly rare, almost unprecedented, to see any legislation pass the Senate by that kind of margin. The House margin was quite large as well.

The PATRIOT Act was signed by the president on Oct. 26, 2001, and went into effect immediately. What happened, too, at the same time, was the retooling of law enforcement.

DHS is not the lead agency in Washington responsible for enforcing the main provisions of the PATRIOT Act, but rather it is the DOJ. However, at DHS, we have customs agents and immigration agents who have law enforcement authority, and we work very closely with the DOJ to investigate and prosecute various criminal cases. What happened at the DOJ and FBI, in particular, under the leadership of FBI Director Robert Mueller, who was confirmed within a week of 9/11, and former Atlantan Larry Thompson, who was the deputy attorney general, was a revolutionary change in the law enforcement world.

The FBI, which had recently been pursuing business executives and corporations because of the corporate scandals on Wall Street and in the greater business community, immediately shifted its focus to terrorism and its absolute highest priority – bar none – became terrorism. Attorney General John Ashcroft and Director Mueller, directly, or through their surrogates, reached out to virtually all of the 90-plus U.S. Attorney's offices and 50-plus FBI Special Agent in Charge (SAC) offices around the United States. The message was clear: prosecutors and agents now needed to redirect their law enforcement mission and resources toward a preemption mission. This was something dramatically new and not something we had come to expect from traditional law enforcement.

In law enforcement, we ordinarily wait until the crime is committed to conduct the investigation. In fact, we do that quite well. After the first bombing of the World Trade Center on Feb. 26, 1993, the FBI did an extraordinary job of investigating the bombing and making key arrests, within days, of individuals who conspired in the bombing, most notably, Ramzi Yousef, the Sunni extremist who planted the bomb. The 9/11 Commission suggests the successful prosecution of those involved in the first World Trade Center bombing may have led to a widespread underestimation of the threat.

The PATRIOT Act is a move toward preemption, in some ways, but certainly not in all respects like the futuristic crime fighting Tom Cruise movie "Minority Report." Current thinking is that we cannot wait until a heinous crime like 9/11 occurs again and then investigate the crime, make arrests and prosecute those accused. We must do our best to prevent acts of terrorism before they happen.

As I will discuss with you shortly, the act tries to give law enforcement the tools to prevent future 9/11s. The most significant of which is its provisions that "tear down the wall" between law enforcement and the intelligence community, so law enforcement and intelligence authorities can share information with each other about the terrorist threat.

Is the PATRIOT Act intrusive? Does it reach over into parts of our lives that it should not reach into? Here is where the real debate lies with the PATRIOT Act: because of 9/11, Congress gave the federal government more tools and law enforcement authority but, at the same time, did it give us those tools while eroding individual rights?

There are really five major categories of changes in the PATRIOT Act:

- First, money laundering enforcement was made more aggressive in the provisions of the PATRIOT Act.
- Second, it also dealt with new forfeiture provisions to give government the ability to forfeit the proceeds of terrorist activity. If you are a terrorist, by virtue of your status and association, your property can be subject to forfeiture. This provision has not yet been tested in the courts.
- Third, the Foreign Intelligence Surveillance Act (FISA) was modified in significant respects.
- Fourth, there were some procedural adjustments.
- Finally, there were a number of new crimes created in the PATRIOT Act.

All in all, these are significant changes in some people's eyes but, yet again, 9/11 was a watershed event and, as a consequence, Congress reacted with legislation.

In my view, there is one central myth about the PATRIOT Act, and that is the act somehow expands terrorism to include domestic terrorism, which could subject legitimate political organizations – people who have different points of view from the government – to surveillance, wiretapping, harassment and criminal sanctions for political advocacy.

We should all have a healthy dose of skepticism towards our government. We should always be watchful. That is the American way. But, I am convinced overall that the PATRIOT Act will not lead to the nefarious roll back of civil rights and civil liberties that its critics claim. I am convinced it accomplishes a noble result – the prevention of future acts of terrorism and the protection of American lives.

Given our limited time, there are five provisions I want to briefly touch on this morning:

- Section 215, better access to records under FISA. The myth associated with this provision is the library habits of regular Americans will sometimes become the target of government surveillance. From all accounts, this has not been the case. To date, I am unaware of any instance in which it has been used to pry into people's reading selections.
- Another provision, Section 213 permits the so-called "sneak-and-peek" search warrants. Section 213 is otherwise called the "Delayed Notice of Execution of Search Warrants." The myth was this provision would mark a sea change in the way search warrants were executed in the United States. It is not a radical change at all.
- Section 201 granted the authority to intercept wire, oral and electronic communications related to terrorism. A myth associated with Section 201 was the government already had this authority under FISA to conduct this sort of surveillance. Not true. This is one of the most important changes in the act and expands our ability to prevent terrorist acts.
- Section 203 is the authority to share criminal investigative

information. The so-called "metaphorical" wall that existed between the intelligence community and the law enforcement community is another part of the PATRIOT Act that was addressed partially in this provision. The hope is law enforcement and the intelligence community will now be able to share information about potential terrorists that, in the past, they were prevented from doing.

- Lastly, Section 206 provides roving surveillance authority. In other words, the provision addresses the fact that criminals who engage in terrorist activity do not use just one phone in one location. They move about to other locations throughout the United States. So, the surveillance authority, under FISA at least, was extended and expanded so you could pursue those individuals wherever they were in the United States. The myth with this provision was again that there was enough legal authority to do this already, that there might somehow be the granting of this surveillance authority without probable cause by courts. Now, Section 206 makes clear that law enforcement has this authority, so that they will be less encumbered and more flexible in keeping tabs on potential terrorists. This is "real time" law enforcement.

Again, I do not know of any real glaring problems with the PATRIOT Act, but I welcome your thoughts and concerns. In the next 12 months, before some of its provisions sunset and we consider renewal, I hope we can talk about and debate the PATRIOT Act in a way that is as dispassionate and fact-based as possible. But, there is plenty of passion – even in my own family!

I was talking earlier with Dean Rebecca White about being in my kitchen one morning and having a discussion with my daughter about the PATRIOT Act. As a father, I have found that I have had most of my productive conversations with my daughter – and some not so productive – in the kitchen.

That morning, my daughter Lauren said, "Dad, what about this PATRIOT Act? How can you be for it?" I said, "What do you mean?" She said, "It's just wrong." I said, "Tell me, Lauren, why it's wrong." She said, "It's just wrong. Everybody says it's wrong, and John Ashcroft is for it, so it has to be wrong."

So, in any event, that was my daughter's logic at the time. She is a very intelligent young woman, but there is a lot of misinformation out there. I hope to address some of the PATRIOT Act in a way that sheds light on its provisions.

Section 215 - Access to Records Under FISA

Now, let's turn to the facts and law as I see them. Section 215 permits access to business records and other information, including information from libraries, and gives federal law enforcement, the FBI in particular, in FISA cases, the opportunity to obtain records from a number of places. An assistant special agent in charge of the FBI, and no lower, can go to the FISA court and seek a court order for information about records in any U.S. location.

Now, prior to the PATRIOT Act, you could do that in regular federal law enforcement cases through grand jury subpoenas. The remarkable thing about grand juries, as those of us who practice in this area know, is they are relatively unfettered by the courts. There has not historically been a lot of judicial oversight of grand juries, nor of what assistant U.S. attorneys do in those grand juries.

But, the interesting thing about Section 215 is that, although it permits you to gather that information concerning foreign intelligence matters, you have to go through the extra step of obtaining a court order. Again, you have to go through the "extra" step of obtaining a court order.

Clearly, Section 215 is the provision of the PATRIOT Act you hear about the most. Nonetheless, protections are built in under the act that require the attorney general every six months to go to Congress and report to a number of committees about how he has used this provision. This is far and away a much, much higher bar than existed with the pre-PATRIOT Act method of obtaining the materials with grand jury subpoenas.

In any event, it is the granting of this new authority in the setting dealing with library records that causes concerns. I do not think the reading habits of the average American are the focus of law enforcement, but this is something that is on the minds of the ACLU (American Civil Liberties Union) and other groups that are concerned about what the government is doing in obtaining these records.

The aerobic aspect of ensuring the proper usage of Section 215 is the oxygen that is infused from the three branches of our government. For example, if the Department of Justice overreaches, Congress has the ability to deal with the attorney general and, the courts have oversight. Also, in the first instance, Section 215 requires an order to be granted by the FISA court.

Section 213 - "Sneek-and-Peek" Search Warrants

The second provision I'll talk about today is Section 213, which provides for the delayed notification of search warrants. Again, this is authorized by the PATRIOT Act only in the FISA setting.

Historically, it is not a remarkable law enforcement technique in organized crime cases and in drug cases, that is, regular criminal cases. Indeed, the delayed notification of search warrants is something that has been going on for a number of years in mainstream criminal cases. While there is a requirement that there be timely disclosure under Federal Rule of Criminal Procedure 41 and under the Fourth Amendment, that disclosure is associated with the obtaining of tangible items and materials from the area that is searched.

Under the PATRIOT Act, the same authority that already existed in regular criminal search warrant cases is granted to the intelligence community. Before this technique can be employed, the PATRIOT Act lists a number of preconditions or factors that have to be present to prevent immediate notification of a search warrant being executed. They are as follows: the death or physical harm to an individual, flight from prosecution, potential evidence tampering, witness intimidation and jeopardy to the investigation. At least one or more of these factors has to be present. Again, this is all subject to a court order and court oversight.

Delayed notification under Section 213 is characterized as "sneak-and-peek" by some, but it is a somewhat standard procedure for organized crime investigations.

We could not have debilitated organized crime the way we did had we not been able to gain access to locations after hours and place listening devices in those locations to determine exactly what was going on with the mob, for example. The same thing could be said of terrorist activity. We have to gain special access to learn what terrorists are doing, and delayed notification gives us that opportunity.

Section 201 - Authority to Intercept Communications

The next section I'll speak about is Section 201 which gives investigators the authority to intercept wire and oral and electronic communications related to "terrorism" by adding it to the Title III wiretap provisions in the federal law as another of the possible predicate acts needed to obtain a wiretap. The adding of terrorism crimes as a predicate act seemed a logical thing to do.

The provision also adds the use of chemical weapons offenses, money laundering offenses associated with terrorism and the use of weapons of mass destruction as predicate acts. The potential killing of Americans abroad and terrorist financing, therefore, all provide law enforcement with the ability to obtain information via wire, oral or electronic communication surveillance.

This Section 201 provision will be sunsetted on Dec. 31, 2005, as will many of these provisions. It will be incumbent upon Congress to consider whether to renew some of these provisions.

Section 203 - Authority to Share Investigative Information

The fourth section I'll speak about today, Section 203, which provides the authority to share criminal investigative information between the intelligence community on the one hand and the law enforcement community on the other, is something that needed to happen.

As an aside, there was a retired FBI agent by the name of John O'Neill who provided security for the towers in New York, who died in the attacks on 9/11. He was a terrorist investigator and an FBI agent, who understood and appreciated the fact the "wall" was an impediment to the sharing of information between those people who did intelligence investigations and those who did regular law enforcement investigations. Section 203 facilitates the sharing of that information.

Also as an aside, Rule 6 of the Federal Rules of Criminal Procedure is the provision that deals with grand juries and grand jury secrecy. We just had an event in Los Angeles that is remarkable, where a transcript from a grand jury was leaked in the steroid investigations of professional athletes. Maybe those of you around this table have seen this happen in your career, but I have never seen a grand jury transcript leak out the way this one did.

In any event, Section 203 modified grand jury secrecy rules so grand jury information in a criminal investigation can be shared with people in the foreign counter-intelligence community. Likewise, wiretap information obtained in criminal investigations can be shared with the foreign intelligence community under this particular provision and vice versa. Again, this provision sunsets in December 2005.

Section 206 - Roving Surveillance

Finally, under the fifth provision to be discussed today, Section 206, roving surveillance is permitted under FISA. This is absolutely necessary in my opinion.

We are in a war that will last not years but decades. There are generations of individuals, many young men, in other parts of the world who hate America, who hate this country, who hate our system of laws and who are dedicated to coming here to engage in what might seem to be a normal life in our country until, at some point in time, they are summoned to engage in activity that will cause a substantial loss of life again in our country.

As a consequence, Section 206 provides an effective resource in the war against terror in a very mobile country. It gives us the ability to use roving surveillance so we do not lose track of someone because we do not have timely and proper authority in a jurisdiction to obtain a wiretap order.

Roving surveillance of individuals in drug cases and racketeer-

The New York City skyline prior to 9/11.

ing cases has not been uncommon, but this same tool did not exist in terrorism investigations until the PATRIOT Act was passed in October 2001.

I am going to stop right here because there are a number of other provisions I could discuss that deal with the war against terrorism. But suffice it to say, my boss Secretary Tom Ridge and Attorney General John Ashcroft, despite what might be public perception, both care very greatly about individual rights.

I should note that at DHS, we have an officer for civil rights and civil liberties and an officer for privacy who deal with the critical issues of protecting individual privacy rights and civil rights and civil liberties. This is unprecedented.

Both offices are involved in the department's work on a daily basis to ensure that: (i) we protect civil rights and civil liberties while supporting homeland security and (ii) we achieve the DHS mission with the lowest possible impact on individual privacy.

Of course, we can have one misstep, one overreaching situation in the federal government, and that is one too many out of a thousand.

I think both Attorney General John Ashcroft and Secretary Ridge are very mindful of the need to make sure we use the new enforcement tools in the PATRIOT Act in a very judicious way, in a way that makes sure we focus on individuals who deserve scrutiny rather than inadvertently focusing on regular Americans, or we will lose these new statutory tools.

I do not denigrate the work of the ACLU or any other group that looks at these issues. I think we should welcome debate and the opportunity to discuss these issues fully going forward.

Nonetheless, we will never convince all Americans of anything all of the time. But there is one thing I think all Americans need to be unified in - one central theme, all of the time – and that is the fact that we are in a long term war against an enemy who wants to kill us and destroy our way of life.

This enemy is not a state, not a nation so much as it used to be, but it is individuals – sometimes organized individuals, sometimes just loosely organized individuals – who nonetheless are focused on ending America as we know it.

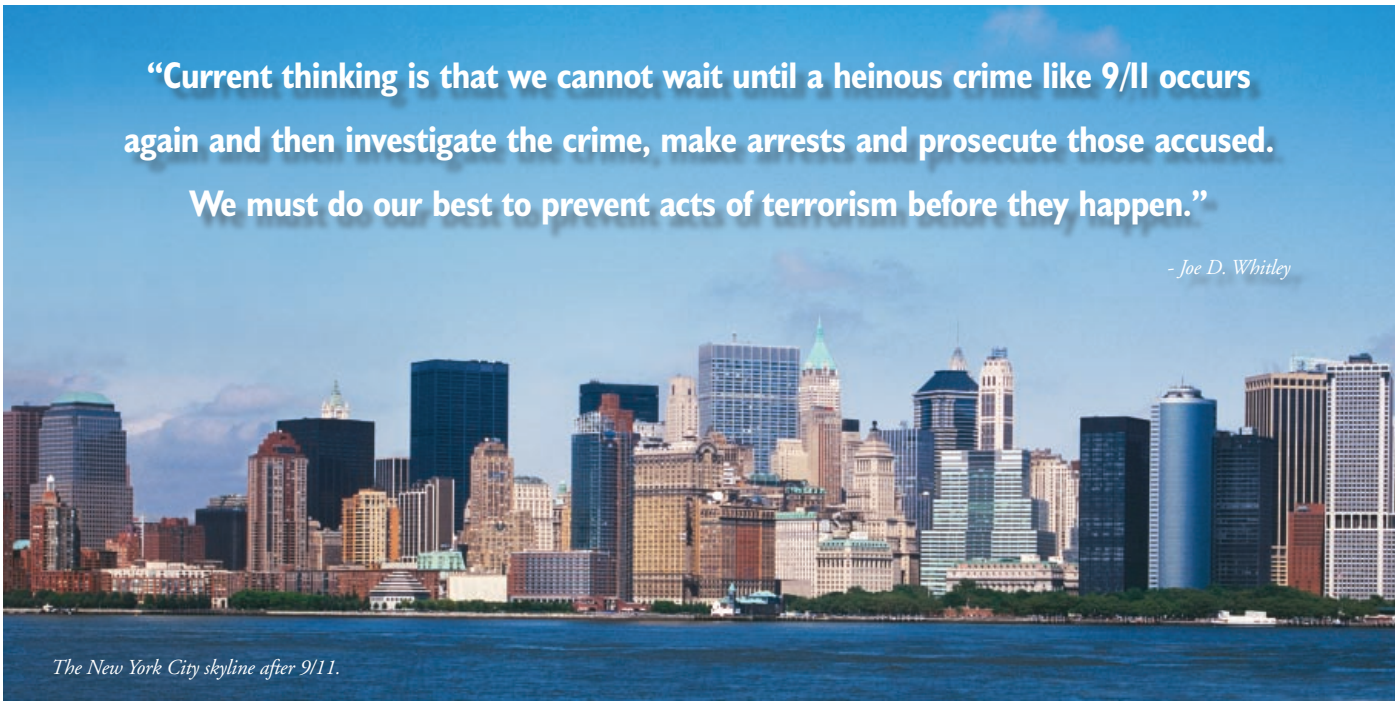
Because of them, the mission we have is different. We will focus less on some of the more traditional white-collar criminal activity from the U.S. Attorney's offices around the country. Indeed, the statistics in U.S. Attorney's offices may drop because they will not be working on the type of cases they used to work on.

The victories now will be silent, many unknown, because the new approach in the war against terrorism must be a more preemptive approach against terrorist activity.

This is serious business, and we do need to keep a good sense of the public perception of our efforts.

It is important we get out and talk to groups like this, decision makers in the community, and even go to the communities around the country that have passed anti-PATRIOT Act provisions, and discuss with them why they are opposed to the PATRIOT Act.

In conclusion, what we have not yet had at this point is a fully informed, fair debate about the PATRIOT Act. And I think, hopefully, in the first year of Bush's second administration, when nobody is thinking too much about who is going to be president in 2008, there will be an opportunity to discuss these issues in a more open and aerobic way. ■



The New York City skyline after 9/11.