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Joe D. Whitley
U.S. Dept. of Homeland Security

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The PATRIOT Act of 2002: Myths, Misperceptions and Malapropisms Q&A

This is the question and answer session that followed the Joseph Henry Lumpkin Society Educational Seminar Series address by Department of Homeland Security General Counsel Joe D. Whitley (J.D.'75) on Dec. 3, 2004.

Question: I would like to hear more about your view on what you are doing, how you protect us. Is it possible? What are we really, as you see it, dealing with?

Joe Whitley: We have protected you, and by that, I mean all Americans. Nonetheless, I think it is a question of not if, but when another terrorist attack is going to happen. I think it is inevitable that there will be others. We have a difficult balancing job to do, which is keeping our society safe while keeping it free and open.

By way of example, there was a lot of criticism during the last campaign about how the United States was treating container shipments coming into the United States. What we are doing to protect in this area is layering our defense. We can check a varying percent of all containers coming into the U.S. depending on the risk level of each container. To do this, we are pushing our borders out. We have agreements with our foreign trade partners and with those farther out the supply chain in other countries to ensure that they will be checking containers and will be working with us. By doing this, we can detect a high percent in one layer and an even higher percent in another layer. This ultimately provides us with greater protection than just having one layer.

At DHS, we worry about cargo shipments coming into the United States, but if we shut down shipments to check every cargo container, we would debilitate our economy. Osama bin Laden, from his cave, or wherever he was when he issued his first comments after 9/11, said that what he and his team were trying to do was destroy the American economy, in so many words. While he didn't destroy our economy, he did do billions and billions of dollars worth of damage. In our strategy to protect cargo shipments, then, we should not help him achieve one of his goals.

People movement is another issue. We have 95,000 miles of coastline. We have long borders with Mexico and Canada that are protected, but they are not hermetically sealed. So, a lot comes across those borders – a radiological weapon, not per se a nuclear bomb, but a dirty bomb – those types of materials could move across the border. There are a number of things that can happen and the nightmare scenarios we deal with everyday are remarkable. As a result, we try to do tabletop exercises as often as we can and every two years we engage in full scale exercises referred to as TOPOFF exercises, which stands for Top Officials, that can help us enhance our critical incident management capability. In one of our full scale exercises in Chicago and Seattle, we involved the state, tribal and local governments as well as foreign leadership. The exercises were mock radiological and biological-chemical scenarios.

At DHS, we have successfully sustained our interests in making sure America is protected at the department level. But we are only 180,000 people, and our mission is to keep the rest of the 300 million Americans interested and focused on issues of security.

We cannot leverage the resources we have at DHS effectively without involving state, tribal and local governments around the country. To this end, Secretary Ridge has been working with all 50 governors and with mayors around the country to make sure that they take the threat seriously in their communities. Again, one of the worst things we could do is to make anti-terrorism a federal problem instead of a national problem. So, we are working aggressively to push money out where we can to help state, local and tribal governments. We are trying to harden our infrastructure around the country, all the way from the dam at Lake Lanier to the water systems in Atlanta, to electrical grids in Los Angeles, and to any number of types of infrastructure that make America: America.

Whenever I go out and give a speech and somebody learns I am with DHS, they may say for example, "You know, have you thought about the bridges on I-95?" Think about a bridge on I-95. Think about any number of smaller targets. But the intelligence and their public pronouncements suggest that the terrorists want to do things that are big. They do not like "little" targets, but you can imagine how destroying even "little" targets could harm people's confidence.

Our intelligence suggests – and this is public – that obviously we must protect other modes of transportation beside air transportation. Post-9/11, we put a tremendous amount of money into protecting air traffic. Now we are putting more money into protecting rail transportation in the northeastern corridor in particular.

Question: The media does not explain very well where the jurisdiction of Homeland (DHS) ends and Justice (DOJ) begins and how they interact. Since there are representatives for both here I would like to understand them better.

Joe Whitley: Let me start first and, Paul Murphy ((J.D.'88) former interim U.S. Attorney and Associate Deputy Attorney General), will you fill in the blanks please? DHS and DOJ are siblings, part of the same family. Part of DHS comes from Treasury, part of DHS comes from Transportation, and part of DHS comes from DOJ. For example, TSA was at Transportation; it is now at DHS. Our Customs component came from Treasury. Our Immigration piece came from DOJ. Each has enforcement capacities. Coast Guard came to us as well, so did Secret Service. They are all part of DHS. Secret Service has law enforcement jurisdiction to protect individuals like the President and others, and investigate counterfeiting and financial fraud matters. U.S. Customs and Border Protection (CBP) protects us at the borders and other ports of entry from the importation of illegal goods, contraband, things that might harm us. CBP is dealing with tariffs and duties and the criminal enforcement of those laws.

So, we do have an enforcement aspect. For example, when people try to smuggle illegal aliens across the border, it is criminal and DHS has enforcement responsibility over this transportation of illegal aliens into the United States. Immigration & Customs Enforcement (ICE) is also part of an inter-agency effort referred to as Joint Terrorism Tracking Task Forces around the United States, which the FBI directs as the lead agency.

There was some debate between DOJ and DHS earlier on about our jurisdiction in money laundering activity as applied to terrorism. The jurisdiction to investigate terrorist criminal activity is vested in the FBI and United States Attorneys around the country, and DOJ handles all Federal court litigation for DHS.

DHS litigates cases in immigration court dealing with deportation matters and things of that nature, but does not litigate cases in district court. DHS attorneys might work with an Assistant U.S. Attorney as a Special Assistant U.S. Attorney, so might sometimes argue cases in the District Courts, Courts of Appeal and Supreme Court, but does so together with other attorneys from DOJ.

Paul, I spelled out the way I see it from my perspective. What do you think?

Paul Murphy: The only thing I would say is that in terms of where DHS's venue rests versus DOJ's, I do not know that you can really divide it up. I think it is a collaborative effort – DHS works hand in hand with DOJ with respect to counter-terrorism initiatives. As Joe said, there are all these joint terrorism task forces across the country that DOJ entities belong to and DHS entities belong to. They really do work very closely together in the various districts on terrorism issues. Again, to parse out what DOJ does from a litigating standpoint, because it is true that we do all the litigation at DOJ, but apart from that, in terms of what is going on in the field, it really is a collaborative effort. If there is a squabble between the two departments, we arm wrestle over that.

Joe Whitley: We have a lot of meetings. Let me emphasize that something remarkable has happened post-9/11 throughout the Executive Branch of government. It continues in our world in DHS, but it does not necessarily continue in Congress or in the rest of the public. This collaboration is a recognition that we can't afford to not work things out. There is much more of a cooperative attitude in Washington than I have ever seen before. It has been said that Washington is one of those places where if you want a friend, you should bring a dog. That is sometimes true. God bless our country's capital, but, partisanship and conflict has been a reality about Washington historically. Now, though, I feel like something new and collaborative is afoot with our war against terrorism.

Question: You mentioned that Attorney General Ashcroft reports to Congress on various committees in regards to Section 215 activity. How does he select what he is going to report and how does Congress check to see whether he is reporting the truth?

Joe Whitley: There is an officer called the Inspector General in almost every department who is looking over everybody's shoulder. They do a good job, and in addition, Congress through the GAO (Government Accountability Office) is there to verify whether or not things are being reported appropriately. The Attorney General is supposed to report on the number of times that provision has been used to Congress, to the Permanent Subcommittee on Intelligence on the Senate side, to the comparable committee on the House side, and to the Judiciary Committees in both chambers. So, there is a lot of reporting and crosschecking.

And then there is The Washington Post and The New York Times. Freedom of the press is a useful way to track government conduct. Washington is a "steel sieve with plenty of leaks." It is not so much a steel trap. So, if someone steps over the line and does something inappropriate, it is almost immediately known somehow in the pressroom of The Washington Post.

There are just a lot of checks and balances, I think, to protect us against someone trying to play fast and loose with Congress on the reporting obligations.

It is remarkable how quickly something is known throughout Washington if you try to do something that is outside the bounds of what you are supposed to be doing.

DHS also has its own Office of the Inspector General, which serves as an independent and objective inspection, audit and investigative body.

I do not have it with me this morning, but there is a little book I carry around with me which is the entire statute, the Homeland Security Act. It seems like I have about 50 copies of it. I do not think I have one in my car here in Atlanta, but I do all over the place in Washington, so I am constantly referring to it. As lawyers at DHS, we have to be guided by the provisions of the Homeland Security Act and other laws.

Question: This one fellow, does he report the frequency of the activity or does he report the substance of the activity?

Joe Whitley: I think it is the frequency, not the actual substance of it. I think there may be ... there have been occasions when he may go up informally and tell people what the actual substance has been. There is a good bit of disclosure to people on the intelligence committee, a substantial amount of disclosure – a surprising amount, in fact, with a lot of bipartisan collaboration on some of this. There is usually a lot of “peace and love” during the first year of an administration that may trend otherwise as we head toward 2008. There is unanimity of drive and direction and thought about terrorism in Congress. It is just that we all have, maybe, different ways of getting there. I do not think there is any question that Congress supports the efforts we have undertaken at DHS. It is just a question of style and approach. I think that is what you will see in the years ahead.

If Kerry had been elected, it would have been interesting to see what he would have done with DHS. I have reached out to some of my Democrat friends who had measuring tape ready to figure out how they could move furniture into my office and some of the other offices at DHS and other places. I plan to spend time with them trying to get them to download information with me about what they were going to do and what some of their thinking was on how DHS has been doing. Also, our Secretary (Ridge) has been great in all respects. He has said this time and again that we do not do politics at DHS, and certainly that is nearly an impossible thing to say since we are in Washington, but I think Secretary Tom Ridge meant what he said.

Question: Do you have any special powers to follow the money, so to speak, to investigate bank accounts and where money is coming from? Where it goes? The first deposition I want to take as chief financial officer is to follow the money to try to find where the treasure is buried. To what extent and who is responsible for coordinating it with foreign governments?

Joe Whitley: It is split between Treasury, DHS, and DOJ, tracking the money. The \$500,000 that the terrorists used to do what they did on 9/11, that money is money that subsequently has been tracked and traced by the FBI along with Treasury. The PATRIOT Act has provisions in it dealing with reporting obligations of people in the financial community. As you may know, sometimes law enforcement is about the “falling bird” theory of prosecution, something just kind of lands in your hand. So, you have got to have predication from good investigative work or good luck before you open up an investigation and look at something.

There are suspicious activity reports (SAR) that financial institutions are supposed to file if there are cash transactions of more than \$10,000 money coming in and out of the banks. There is always illegitimate and legitimate cash moving in and out of the country via people. For example, some money launderers bring in bulk cash, things of that nature.

All of our money laundering enforcement has its roots in the investigations of drug trafficking and the money associated with drug trafficking, where the focus is going to the source of the money that funds the drug traffickers’ activity. The Treasury Department, our Department, and Justice would be looking at the financial transactions with cash on a daily basis via computer programs. Again, if we have somebody who is cooperative with us, helping us to identify where the money is - and the forfeiture provisions permit forfeiture of the funds from that activity – and, if you are identified as a terrorist, there is a forfeiture provision in the PATRIOT Act. It is unique as I mentioned earlier, as it permits forfeiture by association – your property is forfeitable if you are deemed to be a terrorist. This has not yet been tested in the courts, but, again, I agree with you that the best way to go at terrorist activity is through the money.

Question: Earlier you made a comment that one of your concerns is that security would remain a national problem, not just a federal problem. How is it that your agency anticipates implementing programming so that the common folk still have the sensitivity to perceive security as a national issue?

Joe Whitley: There is an educational program called the “Be Ready Program” that is on our website, www.dhs.gov. There is a similar business program, and there are a number of programs that we have to assist families. For example, everyone should

have a family plan for emergencies.

Let's say there is a hurricane that comes through part of Georgia or any kind of other catastrophic event, those are events that would be responded to by FEMA (the Federal Emergency Management Agency), which is part of the Department of Homeland Security. When the shuttle disaster happened, FEMA responded. So, our involvement at DHS in these natural disasters is a reminder to the public of the role of DHS in terrorist-caused disasters.

But, for simple and basic things, be sure you have your children's cell numbers and they have your cell number, that you have a plan for where you are supposed to go in the case of a disaster and who you are supposed to call, and that you have potable water in your home and some supply of food that can get you through a short period of time. These are among the types of things that we are providing as advice and information to Americans.

We are also creating Homeland Security Institutes around the country at various institutions of higher learning. As an aside, I know that at the University of Georgia, there are some educational programs dealing with Homeland Security in the School of Public and International Affairs, though they are not per se sponsored by DHS. Anyway, the educational system is one way of getting the public involved.

Another focus is the business community. For example, if you are on an upper floor of a building or a number of floors up in a building in downtown Atlanta, you need to have an exit plan. People need to know how to get out of that building in case of an emergency. We are also working with first responders – policemen, firemen, others around the country - so we have uniform techniques and methods, connectable hoses and things of that nature, and communication systems, so we can respond better to an event should one happen.

But how to get this information to the average American is a real challenge without it becoming like what I went through years ago as a child in Columbus, Georgia: I remember being driven by school bus 30 miles outside of town to avoid the Russian missile that some thought was going to hit somewhere near Ft. Benning.

There is certainly more that we should be doing at DHS, but the response to terrorism needs to be across several layers of government. The State of Georgia has a Homeland Security Director that is putting out information. I do not know if there is something in Athens dealing with this, but any city needs to think about terrorism with different degrees of concern. If I were in the middle of Montana on 1,000 acres or 50 or 60 miles from a major metropolitan area, I probably would not be thinking about Homeland Security as much as I would be if I were on Broadway in New York, so it just depends.

Question: This is more technical than legal, but I was traveling the other day and saw a mother with two kids going through the airport who ended up getting searched. It is quite inconvenient. It is quite a waste of time. It is invasive and basically stupid. I have been searched three times by officers. Are we anywhere close to having an iris check or a fingerprint check just for good old American citizens?

Joe Whitley: You bring up another controversial issue, the use of biometric information and the concept of a standard ID card. We are using biometrics now. We are getting two index fingers and a photo of people coming in and out of the United States from other countries now, so we know who is in the United States and when they leave. It is a program called US-VISIT.

We also are looking at standardizing the information that goes into government identification cards at the federal level, which would be biometrics again. We are looking at Transportation Worker Identification Credentials (TWIC) at airports so the people at work around the country in airports, whether they are selling food at Chick-fil-A or putting tires on a plane, have standard credentials. A driver's license has proven to not always be the most reliable form of identification. It is easily duplicated in some circumstances. Since we rely heavily on it for documentation and verification purposes, I hope we move toward setting more stringent standards for the type of information that is implemented into driver's licenses in all 50 states.

We are moving toward a program called Secure Flight, which will move us away from the algorithm we are currently using under the program called CAPPS I. There was supposed to be CAPPS II, but the ACLU and others were pretty effective in working against it, and it did not happen. Secure Flight will obtain basic core information about you - your name, address and other things like that - which will then be "pinged" against all the terrorist watch list information we have. So, hopefully, there will not be more episodes where 90-year-old grandmothers are being searched happening around the country. The implementation of Secure Flight is one way to avoid that problem.

There is another program called Registered Traveler, which is a program you can engage in with your carrier that will be going into effect. We have run pilots in cities around the country; I do not think it was tried in Atlanta.

The problem of unnecessary checks hits everyone. For example, in Houston, I met with a federal judge when I was there to give a speech. The judge and his wife had been stopped on several occasions for additional checks. Before I gave my speech in Houston, I made sure I went by to see him and spent about an hour with him talking about Secure Flight and Registered Traveler. He was encouraged.

Under Registered Traveler, if you are willing to share information about yourself, you will be accelerated through the checking process at the airport. There will be a separate line for people who are willing to do that. Traveling is a privilege – it is not a right – on airplanes. As Americans, we should be comfortable that the persons sitting next to us are, in fact, who they say they are. This program will help us get there and, hopefully, we will, in conjunction with the privacy community, the civil rights community, and others, find a way to mitigate any concerns.

So your patience, your continued patience around the table with what we are doing is appreciated. A lot of things get through our screening. Our Inspector General has pointed that out. GAO has pointed that out. But today airport screening is much better than it ever was before, and I think we are doing a much more effective job. You can imagine how hard it is to achieve perfection in all respects with the 1.6 million people everyday who get on an airplane, together with approximately 3 million pieces of baggage. At Thanksgiving, about 4.6 million people fly a day. So really, it is impossible to do everything in a way that keeps everybody happy and totally safe. It is a challenge. I hope we are meeting it for the American people.