

THE FEDERALIST SOCIETY

Presents the

2003 NATIONAL LAWYERS CONVENTION

ADDRESS BY

THE HONORABLE JOHN ASHCROFT

U.S. Attorney General

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FEDERALIST SOCIETY**ADDRESS BY THE HONORABLE JOHN ASHCROFT**

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3 SPEAKER: I promise that our first
4 speaker and the debate that follows will awaken the
5 senses.

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

17 What a great way to start our morning and
18 to mark this new series of Federalist Society/
19 Constitution Project panels, we have with us the
20 Attorney General of the United States, the
21 Honorable John Ashcroft. Last year at the
22 Federalist Society's 20th Anniversary Gala, we were

1 privileged to have General Ashcroft with us. We
2 were most grateful for his kind words about the
3 Society and very well entertained by his wonderful
4 wit and sense of humor that evening. Thinking back
5 on that night, though, what struck me most about
6 his remarks was the deep sense of humility that
7 drives his life, and more specifically his service
8 as the nation's chief law enforcement officer. The
9 General's respect for the rule of law, for example,
10 was unflinching.

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

1 Constitution."

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

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

21 General Ashcroft, it is a great privilege
22 once again to have a man of such integrity visit us

1 here at the Federalist Society. We are most
2 appreciative for your continued interest in our
3 work and efforts, and far more importantly for your
4 dedication to, and affection for, the republic.

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

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

13 Let me just pause for a moment to say how
14 much I appreciate the Federalist Society. Freedom
15 is based on an awareness that the Creator endowed
16 us with the capacity to make choices, and
17 consequential choices. I say consequential choices
18 because there seems to be rampant in the culture
19 the myth that somehow freedom is the ability to
20 choose without consequence. A choice without
21 consequences does not define freedom; it defines
22 meaninglessness. Real freedom shapes events. It

1 shapes the future in which we live. And the
2 fundamental blessing of freedom is that our choices
3 do have consequences, and because they do, it is
4 essential that we know the truth and that we make
5 good choices based on strong analysis and accuracy.
6 That's why, in the crucible of debate, those who
7 love the truth and pursue it promote freedom more
8 therapeutically than any other group in the
9 culture. I'm grateful for your desire to know,
10 your industry in seeking, and your persistence in
11 pursuing the truth.

12 Now, there are times when I'm sure you
13 look around yourselves in this culture, and I
14 certainly observe it, when you think that the
15 Federalist Society must be some sort of target-rich
16 environment because there may be those who maybe
17 aren't as concerned about discovering what's at the
18 barebones of the argument, what are the fundamental
19 constructs that relate to a discussion. But I want
20 to thank and commend everyone who pursues the truth
21 aggressively, who is willing for the light, the
22 bright light, of inquiry to shine upon the issues

1 that we face so that we make those consequential
2 decisions in a way that the consequences are a real
3 asset, not only to us as individuals but to those
4 who follow us. So, I commend you and I thank the
5 Federalist Society, and I am grateful to you.

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

14 The Federalist Society, its membership,
15 have been the resolute defenders of the nation's
16 founding ideas. These are values. They don't have
17 value because our founders embraced them; our
18 founders embraced them because they had universal
19 value, ideals of liberty, the rule of law. It is in
20 this capacity that the Federalist Society is so
21 necessary today. For the past two years, you've
22 been a part of the debate about how best to

1 preserve and protect our liberty in the face of a
2 very real terrorist threat. America has an honored
3 tradition of debate and dissent under the First
4 Amendment, and it's an essential piece of our
5 constitutional and cultural fabric.

6 As a former politician, I've heard a few
7 dissents in my time, and even expressed a few of my
8 own. The founders believed that debate should
9 enlighten, not just enliven. It should reveal the
10 truth; it should not obscure it. The future of
11 freedom does, then, demand that our discourse be
12 based on solid facts and the sincere desire and
13 pursuit of that which is valid and true. As we
14 consider the direction and the destiny of our
15 nation, our friends and those of us who embrace
16 freedom must practice this pursuit, this
17 willingness to demand from ourselves and others a
18 debate informed by fact and directed toward the
19 truth. Take away all the bells and whistles, the
20 rhetorical flourishes, and occasional vitriol, and
21 the current debate is about the rule of law and the
22 role of law.

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

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

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

1 diminish freedom?

2 The founders provided the mechanism to
3 protect our liberties and preserve the safety and
4 security of the republic. It's more than a
5 mechanism; it's a framework -- the Constitution of
6 the United States. It is a document that
7 safeguards security, but not at the expense of
8 freedom. It celebrates freedom, but not at the
9 expense of security. It protects us and our way of
10 life.

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

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

16 At the Department of Justice, we are
17 dedicated to detecting, disrupting, and dismantling
18 the networks of terror before they can strike our
19 nation again. In the past two years, no major
20 terrorist attack has been perpetrated on our soil.
21 Now, let me just say consider the bloodshed of
22 terrorism elsewhere in the world in that time.

1 Women and children slaughtered in Jerusalem;
2 innocent young lives snuffed out in Indonesia;
3 Saudi citizens savaged in Riyadh; church-goers in
4 Pakistan murdered by the hands of hate. I would
5 pause for a moment just to say that terrorism has
6 not abated in the last two years; it has
7 intensified.

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

13 We are using the tough tools provided in
14 the U.S. PATRIOT Act to defend American lives and
15 liberty from those who have shed blood and
16 decimated lives in other parts of the world. The
17 PATRIOT Act does three basic things. It closes,
18 first, gaping holes in the law enforcement
19 community's ability to collect vital intelligence
20 information on terrorist enterprises. It allows
21 law enforcement to use proven tactics, long used in
22 the fight against organized crime and drug dealers.

1 Second, the PATRIOT Act updates our anti-terrorism
2 laws to meet the challenges of new technology and
3 new threats. And third, with these critical new
4 investigative tools created by the PATRIOT Act, law
5 enforcement can share information and cooperate
6 better with other law enforcement agencies. From
7 prosecutors to intelligence agents, the Act allows
8 law enforcement to connect the dots and uncover
9 terrorist plots before they are launched.

10 Here's an example of how we use the act.
11 Some of you are familiar with the case of Iman
12 Ferris, a naturalized United States citizen who
13 worked as a truck driver out of Columbus, Ohio.
14 Using information sharing allowed under the PATRIOT
15 Act, law enforcement pieced together Ferris'
16 activities -- how Ferris met senior al Qaeda
17 operatives in a training camp in Afghanistan; how
18 he was asked to procure equipment that might cause
19 train derailments and sever suspension systems of
20 bridges; how he traveled to New York to scout a
21 potential terrorist target. Now, Ferris pleaded
22 guilty on May 1, 2003, and on October 28, he was

1 sentenced under the PATRIOT Act's tough sentences.
2 He'll serve 20 years in prison for providing
3 material support to al Qaeda and the conspiracy for
4 the terrorist organization, providing them with
5 information about possible U.S. targets for attack.

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

16 Despite all the hoopla to the contrary,
17 for example, the PATRIOT Act, which allows for
18 court-approved requests for business records,
19 including library records, has never been used to
20 obtain records from the library, not once. Senator
21 Diane Feinstein said, "I have never had a single
22 abuse of the PATRIOT Act reported to me." I'll go

1 on to quote her more extensively. "My staff," she
2 said, "emailed the ACLU and asked them for
3 instances of actual abuses. They emailed back and
4 said they have none."

5 The PATRIOT Act has enabled us to make
6 quiet, steady progress in the War on Terror. Since
7 September 11, we've dismantled terrorist cells in
8 Detroit and Seattle, Portland, Northern Virginia,
9 and Buffalo, New York. We've disrupted weapons
10 procurement plots in Miami, in San Diego, in
11 Newark, and in Houston. We've shut down terrorist
12 affiliate charities in Chicago and Dallas and
13 Syracuse. We've brought criminal charges against
14 280-some individuals and secured convictions for
15 over 155 of them as those cases continue to make
16 progress. Terrorists who are incarcerated,
17 deported, or otherwise neutralized threaten fewer
18 American lives, and for two years, our citizens
19 have been safe. There have been no major terrorist
20 attacks on our soil. American freedom has been
21 enhanced; it has not been diminished. Our
22 Constitution has been honored, not degraded.

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

13 Congress built into the PATRIOT Act
14 strict and structured oversight of the executive
15 branch. Twice annually -- every six months -- the
16 Justice Department provides Congress with reports
17 of its activities under the PATRIOT Act,
18 comprehensive reports. Since September 24, 2001,
19 Justice department officials, myself included, have
20 gone before the Congress, testified on the PATRIOT
21 Act and other homeland security issues more than
22 115 times. We've responded to hundreds of written

1 and oral questions and provided reams of written
2 responses to the Congress about the act. To date,
3 no congressional committee has found any evidence
4 that law enforcement has abused the powers provided
5 by the PATRIOT Act in a way that would offend the
6 Constitution or in any other way.

7 Legislative oversight of the executive
8 branch is critical to ordered liberty. I spent
9 some time in the legislature. I understand how
10 important it is for the representatives of the
11 people to understand the way the laws which they
12 enact are being implemented. That oversight
13 ensures that the laws are administered in ways that
14 respect the rights and liberties of the citizens.

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

22 Finally, the PATRIOT Act and its relation

1 to the judicial branch of government -- the PATRIOT
2 Act provides for close judicial supervision of the
3 executive branch's use of PATRIOT Act authorities.

4 The act allows the government to utilize many long-
5 standing, well-accepted law enforcement tools in
6 the fight against terror. These tools include
7 delayed notification, judicially supervised, of
8 searches. They also include things that we've had
9 for quite sometime, like so-called roving wiretaps.

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

1 of the Constitution.

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

9 The point is this. A roving wiretap is
10 carefully supervised, and it is designed merely to
11 allow an individual to be surveilled individually
12 once the courts have determined that surveillance
13 is appropriate, so that, if an individual uses his
14 home phone and then his car phone and then his
15 office phone and then another cell phone, or
16 perhaps even uses a throw-away instrument of
17 communication, we have the ability to follow the
18 communication pursuant to the judicial supervision
19 and court authority. That's been available since
20 1986 in the war on drugs. And I have within myself
21 a deep conviction that it is within not only the
22 opportunities expressed in the Constitution, but in

1 the duties of the Constitution that we use the full
2 range of tools appropriate against organized crime
3 and drug dealers. We use those tools to safeguard
4 the security and liberty of the American people
5 against terrorists.

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

22 In addition, the PATRIOT Act includes yet

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

13 Now many of you have heard the hue and
14 cry of critics of the PATRIOT Act who allege that
15 liberty has been eroded. But more telling is what
16 you have not heard. You have not heard of one
17 single case in which a judge has found an abuse of
18 the PATRIOT Act because, again, there have been no
19 abuses. It is also important to consider what we
20 have not seen: no major terrorist attacks on our
21 soil over the past two years. The PATRIOT Act's
22 record demonstrates that we are protecting the

1 American people while honoring the Constitution and
2 preserving the liberties we hold dear.

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

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

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

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

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

14 There is nothing more noble than fighting
15 to preserve our God-given rights, and our proven
16 tactics against the terrorist threat are doing just
17 that. For more than two years, with God's help, we
18 have protected the lives of our citizens here at
19 home again and again. Congress has determined that
20 the courts have determined that our citizens'
21 rights have been respected, and the Constitution
22 respected as well.

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

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

17 What we are defending is what generations
18 before us fought for and what they defended: a
19 nation that is a standard, a beacon, an aspiration
20 to all who desire a land that promises to uphold
21 the best hopes of all mankind, a land of justice.
22 We defend a land of liberty. I am grateful for

1 your defense, for your dedication to these values
2 and ideas. May God bless you, and God bless
3 America.

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

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