

FINAL
Larry D. Thompson
Senior Fellow, The Brookings Institution

Keynote Address *
2003 Bench Bar Judicial Conference
Third Circuit

Philadelphia, Pennsylvania
November 10, 2003

Good Afternoon. It is truly an honor and a privilege to address this distinguished gathering. I am pleased to see old friends here and delighted to meet new ones.

I would like to acknowledge two very distinguished members of this conference who have truly made an impact on our profession and who are great public servants. Judge Michael Chertoff. Judge Chertoff, as assistant attorney general in charge of the Justice Department's Criminal Division, led the largest criminal investigation in U.S. history following the attacks on the World Trade Center Towers and the Pentagon. He made important contributions to our antiterrorism efforts and was a good and brilliant colleague. Judge Chertoff, thank you for your continued public service.

Judge Anthony Scirica. Judge Scirica has ably, wisely, and tirelessly undertaken one of the most important jobs in the profession. He has served as chair of the Standing Committee on Rules and has had to balance the competing interests of the private bar, the government, and even the Judiciary as new rules and modifications of old ones are considered for submission to the Judicial Conference. A very important job. Judge Scirica, thank you for your service.

I feel honored and blessed to have served the Department of Justice as deputy attorney general this past almost 2 ½ years. By the way, those years must have been dog years because it feels like I was at Justice for at least 6 years. And my experience with the Department was in many ways very satisfying. I served – and we all lived through – some truly historic times. In the

aftermath of September 11, the president charged the department with taking all necessary steps to prevent and disrupt terrorist activities in the homeland. In addition, the department was charged with taking the lead in trying to help restore our financial markets following the spate of corporate scandals that started with the Enron bankruptcy.

Because of the role I played in the government's antiterrorism efforts, people often ask me, "What do you worry about?" So this afternoon I would like to talk to you a bit about what bothers me as it relates to how we are dealing with terrorism.

As a leader in the Department of Justice, I came to realize that the country's success in fighting the threat of terrorism would increasingly depend on public confidence that the government could ensure the fair and impartial administration of justice for all Americans while carrying out its essential national security and public safety efforts.

Achieving this much-needed public confidence is being seriously undermined by the level of discussion and debate about the government's antiterrorism efforts: the discussion and debate is at the extremes. Some view the government's techniques and authorities as unnecessarily authoritarian – a threat to our civil liberties. Others view those who have concerns as uninformed and willing to unnecessarily sacrifice the country's safety – sort of unpatriotic or foolish. Much of the debate is shrill and ill-informed.

While the government needed new authorities to pursue its prevention and disruption mission in dealing with terrorism, I told the Ninth Circuit Judicial Conference this year that the government's authorities are not, and should not be, unbridled. There should be appropriate checks and balances to government power.

I often marvel that many who criticize the government's actions as overly aggressive seemingly ignore altogether that almost all of the government's actions are subject to judicial

review. So, as judges, you have faced the same difficult questions and issues as the department in dealing with the threat of terrorism. You review the legal sufficiency of the criminal charges brought by the department. You review the department's use of the important new authorities provided by the PATRIOT Act. For example, all of the electronic surveillance techniques and search requests authorized by the PATRIOT Act are subject to judicial review.

In fact, judicial review is an essential element of a democracy. Shortly after the attacks of 9-11, I met with retired Justice Barak of the Supreme Court of Israel. It was a very profound experience. Justice Barak left me with a copy of a 1999 decision of the Israeli Supreme court dealing with the interrogation practices of the General Security Service - also known as "Shin Bet" – in using so-called "moderate physical pressure" in the interrogation of terrorism suspects. The Court noted in deciding to prohibit this practice:

A democratic freedom-loving society does not accept that investigations use any means for the purpose of uncovering the truth – at times, the price of truth is so high that a democratic society is not prepared to pay it.¹

The Israeli Supreme Court's conclusion in the case applies equally to our country. I quote:

This is the destiny of democracy as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and [add to] its strength and allow it to overcome its difficulties.²

Wise and eloquent words. But because the level of discussion of our antiterrorism actions and authorities is so low, and because the authorities themselves, and the role the judiciary plays in the process, is generally misunderstood or misrepresented, I believe we as a country are heading for a major train-wreck when it comes to doing everything we can to protect ourselves against terrorism.

One of the very good things I believe the department has done in dealing with terrorism is increase the availability of searches and electronic surveillance under the Foreign Surveillance Act. Of course, all actual searches or surveillance undertaken is only done after approval by a federal judge. In proceeding this way, the department issued new directives that fostered cooperation among national security and law enforcement personnel. In other words, the department directed that intelligence and law enforcement officials share information with each other, talk to each other, or, as we have come to say in these matters, “connect the dots” in terrorism investigations.

Now, the department’s authority to undertake these important efforts is derived under Section 218 of the PATRIOT Act and that particular provision will “sunset,” or cease to be in effect, on December 31, 2005.³ In fact, sixteen provisions of the PATRIOT Act will sunset in 2005.⁴

I obviously strongly believe that this provision is very important to our success in dealing with terrorism. But, what I believe is not the point. The point is that we need to have a reasoned, dispassionate and informed debate about the legal tools and measures necessary in dealing with terrorism. This is the only way we can achieve the much needed public confidence. And, we certainly cannot afford to allow the provisions of the PATRIOT Act, like Section 218, sunset without the kind of high-level national discussion I am talking about. Too much is at stake. I have a modest proposal. This discussion or review of the government’s antiterrorism authorities and actions, I believe, should be done outside the partisan wrangling of Congress and outside the unhelpful influence of interest groups.

We should consider establishing either a congressional or presidential bipartisan commission to review and report on the sunset of provisions of the PATRIOT Act. Such a commission should consist of respected constitutional scholars and legal practitioners. I know commissions

have, in the past, been misused. For example, they have been used to shield Congress or the Executive Branch from having to make difficult decisions. But, perhaps, in this instance, a review commission, with an appropriately distinguished membership, will allow us to take one small, but very important, step toward an informed and rational discussion of our antiterrorism efforts. If after a reasoned and informed debate, it becomes clear that public confidence in the government's antiterrorism efforts would be substantially eroded if one or more provisions of the PATRIOT Act were not sunsetted, then so be it. We as a country should move on and the government continue to do all that it can to ensure the public's safety.

Now back to the Israeli Supreme Court. That is a court that has had to deal with the difficult questions that are bound to arise in a society facing terror while at the same time, holding steadfast to the country's democratic values. Its example teaches that a strong, vibrant and independent judiciary is critical to a free society.

And I know that it is important that the Department of Justice, which has more interactions with the judiciary than any other group of lawyers, as well as the private bar, do everything it can to ensure that this judicial independence is honored and respected. We need to attract great and good lawyers to the judiciary and keep them there. The confirmation process has got to become more civil and dignified. A president's nominee should receive an up or down vote. We have also got to make certain that the Hatch-Leahy Judicial salary legislation becomes final. This measure I understand will restore the cost-of-living adjustments denied the judiciary the past several years and help reduce – in a small way – the gap between judicial salaries and private sector salaries and income.

Finally, I wade into the last topic with some trepidation. So, I'll be very brief. I've been practicing law for 30 years and love and trust our justice system. It pains me to see Congress and

the judiciary at acrimonious loggerheads over sentencing. Congress, by a large and by a wide bipartisan margin, and the Department of Justice during my tenure, believed that downward departure rates were excessive, especially in sex crime and child pornography cases. Many judges feel that the judiciary was ambushed by the restrictions on downward departures and other provisions of the Feeney Amendment and Protect Act.⁵ I never had a more difficult speech than the one I gave before the chief judges of the District Courts following enactment of the Feeney Amendment. I guess this debate is inevitable in light of the concerns raised over the 1984 Sentencing Guidelines. But like with our antiterrorism debate, the debate we should have on this issue must be nonpartisan, informed and dispassionate. I know the department and the judiciary are discussing these issues regularly. That's good. As a private lawyer, I know I'm going to engage in the discussion and try to address these issues from the standpoint of what is best for the overall administration of justice and not from the standpoint of a narrow vantage point of a particular interest.

Chief Judge Lawrence Zatkoff of the Eastern District of Michigan recently said something I really agree with. He quoted Judge Calabresi of The Second Circuit who said, "an independent judiciary... is a pain in the neck to any government that wants to get things done."⁶ Well, it is a pain – a wonderful pain that is desperately needed if our democratic society is to function under the rule of law that I know all of us cherish.

Thank you.

*NOTE: Mr. Thompson frequently speaks from notes and may depart from the speech as prepared. However, he stands behind the speech as presented in written format.

¹ The Judgments of the Supreme Court of Israel, sitting as the High Court of Justice. *Public Committee Against Torture v. State of Israel*, H CJ 5100/94 (July 15, 1999). Retrieved October 20, 2003 from <http://62.90.71.124/eng/verdict/framesetSrch.html>.

² Ibid.

³ Section 218 (50 USC 1804(a)(7)(B); 50 USC 1823(a)(7)(B)).

⁴ Section 201 (18 USC 2516(1)(q)), Section 202: 18 USC 2516(1)(c); Section 203(b) (18 USC 2517(6); 18 USC 2510(19)); Section 203(d) (50 USC 403-5d); Section 204 (18 USC 2511(2)(f)); Section 206 (50 USC 1805(c)(2)(B)); Section 207 (50 USC 1805(e)(1); 50 USC 1824(d)(1); 50 USC 1805(d)(2)); Section 209 (18 USC 2510(1), (14); 18 USC 2703(a),(b)); Section 210 (18 USC 2703(c)(2)); Section 212 (18 USC 2702; 18 USC 2703); Section 214 (50 USC 1842(a)(1), (c)(2), (d)(2)(A); 50 USC 1843(a), (b)(1)); Section 215 (50 USC 1861; 50 USC 1862); Section 217 (18 USC 2510(20), (21); 18 USC 2511(2)); Section 218 (50 USC 1804(a)(7)(B); 50 USC 1823(a)(7)(B)); Section 220 (18 USC 2703; 18 USC 2711(3)); Section 223 (18 USC 2520(a)(f),(g); 18 USC 2707(d),(g); 18 USC 2712); Section 225 (50 USC 1805(h)).

⁵ Public Law 108-21.

⁶ From comments by Chief Judge Lawrence P. Zatkoff after his State of the Court message to the Eastern District of Michigan Chapter on September 16, 2003.