John Ashcroft's First Year as Attorney General:

The Triumph of Right-Wing Ideology

Over Our Constitution and Laws

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Ralph G. Neas
President

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For additional information on John Ashcroft, see www.pfaw.org/issues/democracy for a series of in-depth reports on his actions over the past year and his previous public record.

Introduction

In January 2001, a remarkably broad coalition of civil rights and other public interest organizations opposed the confirmation of John Ashcroft as U.S. Attorney General. People For the American Way helped lead that effort, and produced more than 80 pages of reports analyzing John Ashcroft's long public record. Those reports documented a career notable for its commitment to right-wing ideology, its lack of demonstrated commitment to fairness and equal opportunity, and its insensitivity to the rights of women and minorities.

One year later, Ashcroft has done much to ensure his legacy as a right-wing ideologue who is willing to bend the Constitution and laws to his worldview, disregard the constitutional principle of checks and balances, and endanger Americans' basic rights and freedoms. This People For the American Way Foundation report reviews his actions both before and after the Sept. 11 terrorist attacks that have an impact on a range of civil rights and civil liberties.

Grassroots opposition to Ashcroft's confirmation and the "no" votes of 42 senators were based on Ashcroft's public record as U.S. Senator and as Missouri state attorney general and governor. His 25-year record demonstrated clearly that Ashcroft was the wrong person to lead the Department of Justice. Today his public record is one year longer and the evidence is even stronger. John Ashcroft's tenure as attorney general threatens to reverse the nation's progress toward the goal of equal justice under the law and usher in a new era of civil liberties restrictions and civil rights abuses.

The Sept. 11 terrorist attacks were a watershed for the nation in many ways, and for John Ashcroft as well. Ashcroft's response to those attacks has been marked by a troubling willingness to amend our laws and Constitution by executive fiat and by a consistent disrespect for the role of the Congress and the courts in reviewing executive branch actions. He proposed legislation to grant extraordinary new powers to federal agencies and attempted to stifle congressional consideration of its impact. He then initiated or supported executive branch

orders, without consulting Congress, that expanded executive branch powers even beyond those granted in the sweeping anti-terrorism legislation.

With the powers he was granted, and those he has asserted, Ashcroft has overseen, for example, the detention of more than 1,200 individuals, many for extended periods of time, while stubbornly resisting the release of significant information about detainees to the public or the Congress. Such actions have drawn criticism from across the political spectrum, and from former FBI officials with experience in fighting terrorists. A number of former officials, including William Webster, a Missouri Republican who led both the FBI and CIA under President Ronald Reagan, have suggested that Ashcroft's policies are not only endangering civil liberties but are also threatening effective law enforcement infiltration of terrorist organizations.[1]

Also damaging has been Ashcroft's intolerance of criticism and his willingness to engage in the politics of intimidation. He attempted to bully Congress into swift passage of the administration's proposals by publicly insinuating that members of Congress were making America susceptible to future attacks. After the anti-terrorism bill had become law, he stated in congressional testimony that people who raise concerns about the impact of his actions on civil liberties "aid terrorists" and "give ammunition to America's enemies." That kind of statement is meant to silence critics and is particularly disturbing coming from the man charged with upholding Americans' constitutional rights, including the right to dissent.

Ashcroft's responses to Sept. 11 have not been the only troubling aspects of his first year; indeed his actions throughout the year on a range of issues have also been disturbing. Well before September, Ashcroft's actions in office were having an impact on a broad range of issues, including selecting judicial nominees, freedom of speech, religious liberty, reproductive choice, equal opportunity, gun control, and more. In his first weeks and months as attorney general, for example, Ashcroft led Bush administration efforts to fill key Justice Department and White House legal jobs with right-wing activists affiliated with the Federalist Society. That team (see Appendix A) affects legal policies and decisions on a wide range of issues, including positions staked out by the federal government in critical cases coming before the federal appeals courts and the Supreme Court, such as upcoming cases on private school vouchers and affirmative action in higher education.

Ashcroft and the rest of the administration's right-wing dream team, which has been called the most conservative in modern history, are now playing a central role in efforts to seat enough right-wing judges to complete a decades-long campaign by the far right to achieve complete ideological dominance in the federal judiciary. If that campaign is successful, we will witness the federal judiciary turning back the clock on seven decades of legal and social justice progress, dramatically affecting the daily lives of all Americans, their children, and their grandchildren.

Civil Liberties in the Aftermath of Terror

In the wake of the terrorist attacks it was imperative to ensure that our laws and policies provided officials with the tools they need to protect national security and the safety of Americans. It was also essential that a serious inquiry be conducted to review the work of our

nation's intelligence forces and law enforcement agencies, with the goal of learning lessons and preventing future catastrophes, rather than casting blame. Such efforts could have been valuable in determining whether there was truly a need for sweeping changes in federal investigative or police powers, rather than basing changes on the assumptions of the attorney general. Congress undertook no such inquiry. John Ashcroft and the White House aggressively promoted an anti-terrorism bill and took a series of executive actions which threaten constitutional liberties and the constitutional system of checks and balances.

The Ashcroft Anti-Terrorism Bill

The legislative proposal that Attorney General John Ashcroft sent to Congress eight days after the Sept. 11 attacks was a draconian measure that proposed to vastly expand federal powers while endangering individual liberty.

Ashcroft, of course, is not the first federal official to respond to threats by restricting liberty. John Adams signed the notorious Alien and Sedition Acts to control and punish activity he considered harmful to American interests, including criticism of the federal government. In this century, people of Japanese ancestry were forced into internment camps, regardless of whether they were American-born citizens or immigrants. Memories of the Cold War excesses of Joseph McCarthy and of J.Edgar Hoover's FBI also serve as a reminder of how a government can abuse its powers to persecute its own citizens in the name of security. During the civil rights era, a largely unaccountable intelligence apparatus investigated Martin Luther King and other civil rights leaders and then illegally spied on anti-war protesters.[2]

Ashcroft's legislative proposal aimed to radically broaden the government's wiretapping, surveillance and search-and-seizure authority, as well as its power to detain non-citizen suspects indefinitely while radically shrinking or abolishing meaningful judicial review or oversight of executive branch actions, a key part of our constitutional system of checks and balances. And it went well beyond the stated goal of fighting terrorism by expanding government police powers and restricting liberties in cases unrelated to terrorism.

Although the legislation proposed by Ashcroft underwent some revision on its way to final passage, and those will be noted later, it is worth reviewing the elements of the proposal he sent to Congress.

<u>The Rights of Immigrants</u>

Ashcroft's proposed vast and troubling changes in immigration law. Several provisions in the bill threatened basic freedoms and civil liberties by expanding the power of the sttorney general and the Immigration and Naturalization Service (INS) to determine the fate of immigrants.

Ashcroft proposed granting the attorney general the power, on recommendation of the Commissioner of the INS, to "certify" any alien if there was a "reason to believe [they] may further or facilitate acts of terrorism … or any other activity that endangers the national security of the United States."[3] With this broad power of certification, the attorney general

would have the authority to indefinitely detain any non-citizen who fit this overly broad standard and the recommendation would not have been subject to any form of judicial review.[4]

In addition, the proposed legislation would not have required the INS to provide any reasons for the certification or detention, making it nearly impossible for individuals to challenge the legitimacy of their detention.[5] Once certified, those detained would have no opportunity to challenge their detention before an independent immigration judge; instead, an INS prosecutor would simply review their cases.[6] Given that the proposal permitted indefinite detentions, it was quite possible that individuals could have been held for extended periods of time without access to a lawyer and without being informed of the charges against them. Even if a person won a court ruling preventing deportation, under Ashcroft's proposal the INS could still detain that individual.[7]

The Anti-Terrorism Act of 1996 already gave the INS broad authority to act against non-citizens suspected of being involved in or supporting terrorist activity, and these powers have been abused in the past. In a 2000 Florida ruling on secret evidence, U.S. District Court Judge Joan A. Lenard ruled that "the Court finds that the Petitioner's procedural due process rights have been violated insofar as the introduction of and reliance on classified information deprived him of his right to a fundamentally fair hearing to determine his eligibility for release from custody." Ashcroft's legislation would have essentially exempted the government from having to present any evidence at all to detain non-citizens.[8]

In that same 2000 case, the Judge wrote that on the issue of association with a group labeled as "terrorist" by the government, the government must present "evidence that demonstrates more than mere, 'membership' or 'association,' but rather 'meaningful association' or a 'degree of participation' in activities posing a threat to national security." Under the Ashcroft proposal, in order to detain a non-citizen, the INS would have merely needed "reason to believe" that the person may engage in a crime of violence, or may support an organization that has done so in the past. Beyond that, non-citizens could be deported if they had provided material support for the lawful activities of terrorist organizations in the past, even if the organization was not designated as a "terrorist organization" at the time the support was provided. There were no limits on what could be considered "support" of a terrorist organization; sending medical aid to a hospital run by an organization later classified as terrorist could be a deportable offense.[9] In essence, this could have led to the deportation of individuals strictly on the grounds of their political beliefs.

The proposal did not provide for any form of meaningful judicial review once a non-citizen was detained. It would not be until after the INS had issued a removal order that those detained would have been granted any type of judicial review, and even that was limited to a *habeas corpus* petition that could only be filed with the U.S. District Court for the District of Columbia.[10]

Reducing Search and Seizure Protections

Ashcroft also proposed to greatly expand the government's power of search and seizure at the expense of civil liberties.

The proposal sought to eliminate the requirement that surveillance under FISA (Foreign Intelligence Surveillance Act) be limited to surveillance directed at "agents of a foreign power," potentially allowing for increased surveillance of U.S. citizens and permanent resident aliens.[11] The original purpose of FISA was to allow for secret electronic surveillance, searches of residences, and seizure of bank and other records, for the purpose of gathering foreign intelligence. As such, it provided few of the constitutionally mandated protections required during criminal investigations.[12]

Ashcroft's legislation included provisions permitting the sharing of grand jury information, with no meaningful review, wiretap information and other "foreign intelligence information" acquired in a criminal case with different federal agencies. This could permit investigators to share with the White House, for example, information collected about foreign policy critics of the administration.[13] Such information sharing has been abused in the recent past, as when the CIA and FBI engaged in surveillance of, and shared information about, thousands of Americans, including civil rights leaders and opponents of American involvement in Vietnam.[14]

The amendments to FISA would also have deleted the requirement that FISA surveillance be used only when gathering foreign intelligence was "the" primary purpose of the surveillance,[15] and allowed intelligence gathering when surveillance is only "a" purpose of an investigation. The Ashcroft proposal would have effectively allowed the authorities to use FISA surveillance in criminal investigations, essentially circumventing many of Americans' Fourth Amendment protections. And if information gathered under FISA was then used to jail an individual, that individual would not be entitled to notification that the government had seized information or property, or that his/her conversations had been monitored. [16]

The way the government can go about gathering information and conducting surveillance would also have been greatly expanded, allowing for greater latitude in the use of significant government surveillance on the Internet. The law prior to Sept. 11 allowed the government to obtain certain types of telephone information without a search warrant. Specifically, "pen registers" are used to record the outgoing telephone numbers dialed by any monitored phone, and "trap and trace devices" to record the incoming calls made to any monitored phone. Under Ashcroft's proposal, however, the law would have been expanded to cover Internet communications such as e-mail, web surfing and all other forms of electronic communication.[17] Information generated by such technology is far more specific than mere telephone numbers, providing the addresses of web pages visited or the subject headings of e-mails and other information on the content of Internet communications. Ashcroft's proposal would have authorized the government to obtain such information without a search warrant.

The Justice Department also sought to expand its use of "roving wiretaps," essentially creating a zone of no privacy around any individual, allowing the government to tap any phone or electronic device the monitored individual may use.[18] Many civil libertarians saw the need to update the law to keep up with new cellular and other communications technology. They had concerns, however, about allowing overly broad warrants, believing the administration's proposals went too far by not including a reasonable balancing of individuals' privacy interests and establishing what amounts to a "no privacy zone" that follows a target of surveillance.

Under these circumstances, it will be more difficult to ensure that innocent people are not subject to wiretaps.

In addition, the Justice Department sought to expand the government's power of forfeiture in criminal cases not directly related to terrorism. Ashcroft proposed allowing the authorities to take any property of an accused person before even proving that the individual had committed any crime.[19] The legislation would also have allowed prosecutors to use information collected by foreign governments against U.S. citizens, even if the information was gathered in such a way that would have violated Fourth Amendment protections had it occurred in the United States.[20]

Other Reduced Privacy Protections

The Ashcroft proposal sought greater access to student records. It would have amended the Federal Education Rights and Privacy Act (FERPA) to permit access to educational records in the investigation of domestic or international terrorism, or national security.[21] According to *The Chronicle of Higher Education*, student and college advocates were worried that the language was so broad and vague that it would permit federal officials to access student records with little or no evidence that they had any connection to terrorism. The plan would have allowed any employee of the Department of Justice or the Department of Education to seek the confidential information.[22]

The Ashcroft proposal also called for expanding FBI access to business records, such as those from airlines, car rentals and hotels, by removing a judicial review process that had been put in place when the FBI's access to business records was expanded in 1998.[23] Another section would have allowed greater FBI access to banking, credit and other records of consumers or groups who are not agents of foreign powers.[24]

Rep. Barney Frank, D-Mass., noted the historically inappropriate use of such information during a September Congressional hearing: "[O]ne of the problems we've seen historically is the inappropriate release of information garnered by surveillance, and one of the worst instances in history was the savage campaign of defamation waged by J. Edward Hoover as head of the FBI against Dr. Martin Luther King, taking information he gained from surveillance, having found nothing criminal, nothing subversive, nothing incriminating."[25]

Overly Broad Provisions

Ashcroft proposed to expand the definition of "terrorist activity" to include the use, or the threat to use, any "explosive, firearm, or other weapon or dangerous device" with the intent to endanger persons or property.[26] Under this expanded definition, disturbances such as bar room brawls or rock throwing could be considered terrorist activities.

The proposal also did not distinguish between foreign or domestic organizations, so that anti-abortion or pro-environmental organizations that have ever, in the past, used or threatened to use a weapon against a person or property could be considered terrorist organizations. One critic said that the legislation "might make PETA a terrorist organization because one of its members hit the Secretary of Agriculture with a pie."[27]

Libertarian columnist Jacob Sullum noted that some provisions of the Ashcroft proposal "have little or nothing to do with terrorism. For instance, the bill allows the seizure of a defendant's assets before trial, even when the assets are not connected to the alleged offense. It also authorizes the government to seek warrants for 'sneak and peak' searches, conducted without notifying the target. Both sections apply to all criminal cases."[28]

Furthermore, the Ashcroft proposal contained a provision establishing "a DNA database for every person convicted of any felony or certain sex offenses," almost all of which are entirely unrelated to terrorism.[29]

Subverting the Legislative Process

In the same way that the substance of Ashcroft's bill demonstrated a clear disregard for judicial oversight, the way he attempted to ram the bill through Congress evidenced his disrespect and disregard for the role of the Congress.

First, he proposed mammoth and sweeping legislation with a demand that Congress pass the bill within three days.[30] He was in effect asking for Congress to give him free rein without giving any serious consideration to the impact of his proposed legislation or to the intelligence failures that may have allowed the Sept. 11 plans to go undetected.

When some members of Congress from both parties resisted that timetable and began to hold hearings, Ashcroft attempted to bully Congress into rubber stamping the administration's proposals by suggesting publicly that if members of Congress did not swiftly pass the bill they would be helping to make America susceptible to future attacks.

The political pressure generated by the attorney general contributed to Senate passage of the legislation after just four hours of debate, the bill having bypassed a separate committee vote.[31] In the House, Judiciary Committee members from both parties unanimously endorsed a compromise that was hammered out through extensive bipartisan negotiation and public hearings, but the bill was jettisoned on the House floor by GOP leaders under pressure from the administration and replaced with a bill more to the administration's liking.[32]

Changes Made to the Ashcroft Proposal by Congress

Regrettably, in part because of Ashcroft's intimidation tactics, most of the measures proposed by Ashcroft were enacted into law, though Congress did make some modifications to his original proposal.

The final legislation removed the provision that would have allowed the Justice Department to detain non-citizens for an indefinite time period without charging them with any crime and instead required that detainees be charged within seven days or released. Members of Congress also inserted language that attempts to limit the ability of the government to use "pen register" type surveillance authority to intercept the content of Internet communications and to limit potential abuse of FISA surveillance authority.

Congress also added a much-needed measure of judicial oversight to the section governing surveillance and to limit the increased access to student information to the attorney general or assistant attorney general rather than to any employee of the Justice Department. In addition, Congress eliminated the proposal to permit the use of evidence collected by foreign governments that would not be admissible in U.S. courts.

Perhaps most important were the "sunset" provisions that will cause some sections of the bill dealing with expanded wiretapping powers and limiting some areas of judicial oversight to expire in four years. Ashcroft strenuously opposed any sunset provisions.[33]

Although Congress made significant improvements in Ashcroft's original proposal, the lack of a truly deliberative process has resulted in a law that threatens constitutional liberties and requires heightened vigilance by Congress and the American public.

Executive Branch Orders and Other Assertions of Power

Almost immediately after pushing through the anti-terrorism legislation, the Justice Department under Ashcroft began to undertake many actions that erode fundamental civil liberties and violate the fundamental principle of checks and balances. They amount to unilateral assertions of power, in effect efforts to amend the Constitution and laws by executive fiat.

Faced with the attorney general's continuing lack of consultation with his former collegues, Senate Judiciary Chairman Patrick Leahy, D-Vt., sent Ashcroft three letters in a two-week period expressing concern about Justice Department secrecy in the continuing terrorism investigation. Leahy also wrote that he was "deeply troubled" by Ashcroft's decision to allow government intercepts of conversations between people in federal custody and their lawyers without a court order. "Since we provided you with new statutory authorities in the USA Patriot Act, I have felt a growing concern that the trust and cooperation Congress provided is proving to be a one-way street."[34]

Right to Legal Counsel

In October, Attorney General Ashcroft approved an "emergency order" that permits Department of Justice officials to monitor the conversations that lawyers have with clients who are in federal custody, including people who have been detained but not charged with any crime. The rule unilaterally grants the attorney general the absolute power to strip any person in federal custody, including U.S. citizens, of the right to communicate confidentially with an attorney, a violation of rights protected by the First, Fourth, Fifth and Sixth Amendments. It is a profound violation of fundamental legal and constitutional principles at the very core of our system of justice.

According to the Department of Justice order, published in the *Federal Register* on Oct. 31, the secret monitoring of conversations will be initiated without a court order or finding of probable cause, and whenever the attorney general believes "that reasonable suspicion exists" that detainees may "use communications with attorneys or their agents to facilitate acts of violence or terrorism."[35]

In a letter to Ashcroft in November, Chairman Leahy wrote that there are "few safeguards to liberty that are more fundamental than the Sixth Amendment," which guarantees a right to legal assistance in the criminal process. "When the detainee's legal adversary – the government that seeks to deprive him of his liberty – listens in on his communications with his attorney, that fundamental right, and the adversary process that depends upon it, are profoundly compromised."[36]

The extreme nature of Ashcroft's order becomes clear when compared with requirements the government must meet before abridging other constitutional protections. Before searching an individual's home or tapping a person's phone, law enforcement officials generally must demonstrate probable cause to a judge or magistrate. Under Ashcroft's order, there is no judicial oversight of the decision to eavesdrop on conversations between individuals and their attorneys.

On Dec. 28, People For the American Way Foundation filed comments asking for the withdrawal of the new regulation and the adoption of a less harmful alternative that includes meaningful judicial review. Similar comments were filed by the American Bar Association and many other organizations.

Creation of Secret Tribunals with Broad Jurisdiction

Ashcroft's Justice Department participated in preparing, and has publicly supported, a presidential military order authorizing secret military tribunals with extremely broad jurisdiction, no effective oversight, and the power to try, convict and execute suspects without appeal to any court. The order covers not only individuals captured on the battlefield but also an estimated18 million non-citizen residents of America. Tribunals would not be required to adhere to the standards of our own system of military justice or our civilian courts.

The order was issued without consultation with Congress, a recurring theme of the Ashcroft Justice Department. It created powers far more sweeping than administration officials initially acknowledged publicly and has caused alarm from across the political spectrum, including conservative commentator William Safire.

Defense Secretary William Rumsfeld has said publicly that the intense scrutiny given to the military order will help shape the regulations being written to implement the tribunals. There have been reports that the administration does intend to take some of the criticism into account in the implementing regulations, but such rules have not yet been released. And they would do nothing to change the order's overbroad assertion of power.

Secrecy, Lengthy Detentions and Closed Hearings

The secrecy of confidential information is always a sensitive issue, especially in wartime situations. The Justice Department under Ashcroft, however, is establishing a wall of secrecy around the Department's actions that even Congress isn't allowed to peer over.

After rounding up and detaining over 1,200 individuals in the terrorist investigation, the Justice Department announced in early November that it would stop issuing tallies of how many individuals were being detained while officials conducted the terrorism investigation.[37] Faced with mounting criticism, Ashcroft released a limited update on the detentions in late November, but firmly refused to identify most of the remaining detainees.[38]

Ashcroft has changed Justice Department policy on agencies releasing information under the Freedom of Information Act (FOIA), the law that allows reporters and others to get unclassified government records that are not routinely made public. In an Oct. 12 memo, Ashcroft directed agency heads to be cautious when releasing such records and pledged that decisions to legitimately turn down FOIA requests would have the full backing of the Justice Department.[39]

People For the American Way Foundation and 15 other civil liberties and civil rights organizations filed a FOIA request with the Justice Department on Oct. 29 seeking information about detainees. In late November, the Department released fragmentary information, which fell far short of what had been requested, and failed to respond to the FOIA request. On Dec. 5, 2001, PFAWF and the 15 groups, including the ACLU, Amnesty International, several Arab-American anti-discrimination and immigration rights groups, filed a lawsuit against the Justice Department seeking release of the information requested. While that lawsuit is still pending, partial release of information prompted by the lawsuit has already documented a number of lengthy detentions that had previously been kept secret.

In January 2002, Rep. John Conyers, D-Mich., the ACLU, and some Detroit news organizations filed suit challenging the Justice Department's decision to close what are normally open public immigration hearings.[40] The specific case involved Rabih Haddad, a Muslim cleric in Ann Arbor, Michigan.[41] Rep. Conyers and journalists were denied access to his Dec. 19 deportation hearing, as was his family. The judge in the case confirmed that her decision to close all proceedings was prompted by a Sept. 21 memo from Chief Immigration Judge David Creppy, which states, in part, "[T]he Attorney General has implemented additional security procedures for certain cases in the Immigration Court. Those procedures require us to hold the hearings individually, to close the hearings to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court ..."[42]

Dragnet Operations

The Justice Department is questioning or seeking to question up to 5,000 Middle Eastern men living legally in the U.S., a tactic called problematic by former FBI officials in several newspaper reports. Oliver "Buck" Revell, former FBI executive assistant director and architect of the bureau's anti-terrorism strategy in the 1980s, said this strategy "is not effective" and "really guts the values of our society, which you cannot allow the terrorists to do."[43] William Webster, a conservative Republican from Missouri and former FBI and CIA Director under Ronald Reagan, also raised serious concerns about the Justice Department's current tactics. News reports indicate that a number of current senior FBI and Justice Department officials disagree strongly with some of Ashcroft's initiatives.[44] Some have suggested that Ashcroft is leading a return to the discredited tactics of the J. Edgar Hoover era.

Increased Surveillance of Religious and Political Organizations

In the wake of the Sept. 11 terrorist attacks, Ashcroft has proposed further infringements upon the freedoms of religious and political groups in the name of national security. In a December interview with ABC News, Ashcroft indicated that the Justice Department might loosen restrictions on monitoring religious groups: "If a religion is hijacked and used as a cover for killing thousands of Americans, we're interested in that."[45] Currently, regulations require that the Justice Department show probable cause of criminal activity before conducting surveillance of political and religious organizations. Ashcroft's proposal would relax the probable cause requirement, affecting domestic groups as well as those based in other countries.[46] Restrictions on the monitoring of such groups were put into place during the Vietnam era after revelations about the abuses of the Hoover-era programs, including the use of surveillance by the FBI and CIA to disrupt the activities of legitimate civil rights and antiwar organizations. In 1975, a Senate committee concluded that such monitoring was "a sophisticated and vigilante program aimed squarely at preventing the exercise of First Amendment rights of speech and association."[47]

Other Terrorism-Related Impacts on Civil Rights and Civil Liberties

Freedom of Speech

Ashcroft's assertion in congressional testimony in December 2001 that those who question the impact of his department's actions on civil liberties are aiding terrorists and giving ammunition to the nation's enemies reflects an extremely troubling willingness to try to intimidate his critics into silence. The *Washington Post*, in an editorial entitled "The Ashcroft Smear," said "Mr. Ashcroft may not like the criticism. But his job is to defend dissent, not to use the moral authority of his office to discourage people from participating in one of the most fundamental obligations of citizenship."[48]

After Sept. 11, moreover, Ashcroft has made it a policy that all tips on domestic terrorism be investigated. While not every tip leads to a face-to-face visit with an FBI agent, an increasing number of cases suggest that expressing strong opinions about the war or political leaders can bring questioning federal agents to one's door.

In early November, a small private art museum in Houston, Texas was visited by FBI agents investigating reports of "anti-American activity."[49] FBI spokesman Robert Dogium said the visit was a routine follow-up call "from someone who said there was some material or artwork that was of a threatening nature to the President."[50] FBI agents questioned the gallery owner but concluded that the exhibit, simply art about U.S. government covert operations, was "not dangerous." In October, Barry Reingold, a retired phone company worker, was visited by FBI agents in San Francisco after engaging in a political discussion at his local gym. One woman earned a similar visit from FBI agents based on a political poster hanging on her living room wall. Although the FBI has not apparently taken further action against any of these individuals, the possibility that the expression of a political opinion may be sufficient to trigger an interrogation calls for heightened vigilance against actions that could be used to intimidate individuals or suppress such expression.[51]

Racial Profiling

During his confirmation hearings, some Ashcroft supporters pointed to his stated opposition to racial profiling to offset criticism of racial insensitivity that stemmed from his long record as a U.S. senator and as governor and attorney general of the state of Missouri. In February 2001, the American Civil Liberties Union applauded Ashcroft's statements calling on Congress to pass racial profiling legislation. They noted, however, that Ashcroft had failed to support similar legislation while he was in the Senate.

In July, the Justice Department's newly confirmed civil rights chief, Ralph Boyd, told *The Boston Globe* that the department would take an aggressive stand on racial profiling, suing local police departments that don't halt the practice.[52] And in August, Ashcroft reportedly told law enforcement officials that racial profiling was a "profound moral wrong." Justice Department officials said the department would begin its own study of the problem even though legislation had not been passed. But when Assistant Attorney General Boyd finally announced in September that the Justice Department would begin a study of racial profiling at local police departments, he effectively gave departments the choice to opt out, saying participation in the study will be voluntary. Said Boyd, ""We are not here to micromanage police departments all over the country."[53]

Civil rights advocates have been working to raise awareness of racial profiling for years, but the Sept. 11 terrorist attacks have brought a new focus to the issue. Many civil rights groups have expressed grave concern that the search for justice is coming with an increased tolerance for judging individuals based on their actual or perceived ethnicity, adding another dimension to the calls for the Justice Department to investigate racial profiling. The breadth of the issue is illustrated by an incident on Dec. 25, 2001, when an Arab American Secret Service agent was denied access to an American Airlines flight.[54]

Ashcroft's broad policy of detention and questioning of young Arab and Arab American men drew harsh criticism and a recent immigration policy change has brought charges of racial profiling on the Justice Department itself. In January 2002, the *Washington Post* reported that the Justice Department had decided to give the highest priority to deporting young men from the Middle East, targeting those nationals before other foreign nationals in cracking down on those who have ignored deportation orders.[55] Wade Henderson, executive director of the Leadership Conference on Civil Rights, criticized the move, saying that, "nothing prevents INS from following leads to apprehend suspects, even if those leads include descriptions based on race or national origin. But a dragnet approach to law enforcement -- rounding up men based on national origin rather than suspicious behavior or credible evidence -- is highly questionable."[56]

Equality for Gay Americans

While numerous news stories noted that some of the victims and heroes of Sept. 11 were gay, some Religious Right groups urged private relief agencies to withhold assistance to surviving partners of gay people who died. The Traditional Values Coalition's Lou Sheldon said "[Relief organizations] should be first giving priority to those widows who were at home

with their babies, and those widowers who lost their wives. It should be given on the basis and priority of one man and one woman in a marital relationship." He accused grieving gay survivors of pursuing a political agenda, adding "This is just another example of how the gay agenda is seeking to overturn the one man-one woman relationship from center stage in America, taking advantage of this tragedy."[57]

Last fall, Congress passed, and the president signed into law, legislation creating the publicly funded "September 11th Victim Compensation Fund of 2001" to provide compensation to those who were physically injured in the terrorist attacks and to the surviving "relatives" of those who were killed. The statute creating the Fund did not define the word "relatives." It also charged the attorney general, acting through a Special Master, with the responsibility for administering the Fund, and for adopting regulations to discharge that responsibility.

Before issuing those regulations, the Department of Justice solicited public comment on them. The Department received comments from numerous organizations and individuals, including People For the American Way Foundation, urging that the regulations make clear that the surviving same-sex partners and non-biological children of gay men and lesbians killed in the terrorist attacks would be able to receive compensation from the Fund. The attorney general was specifically urged to recognize families-in-fact in implementing the Fund, and specifically urged not to rely on legal definitions that treat some families-in-fact as though their members are legal strangers.

Nevertheless, the regulations issued by Attorney General Ashcroft on December 20, 2001 do precisely that: they look to state laws to determine who will be considered a decedent's surviving "beneficiaries" for purposes of the Fund. As Ashcroft well knows, by looking to such state laws, in many instances the surviving same-sex partners and non-biological children of the gay men and lesbians killed by the terrorists will be deemed ineligible to receive compensation under the Fund. Although the regulations permit the Special Master to override the planned distribution of an award from the Fund, notwithstanding any provision of state law, "in order to appropriately compensate the victim's spouse, children, or other relatives," the regulations, like the statute, do not define "relatives." For many surviving family members of the gay and lesbian victims of Sept. 11, Ashcroft's regulations fail to provide for the receipt of compensation from the Fund, and compensation may well depend on the good graces of the Special Master, hardly a fair, consistent or humane response to this national tragedy or the loss that all victims of Sept. 11 have suffered.

Other Civil Liberties Issues

In addition to undermining civil liberties in the name of fighting terrorism, Ashcroft's Justice Department has also taken a series of actions in his first year that undermine civil liberties across a broad range of issues.

Religious Liberty and Separation of Church and State

The Ashcroft Justice Department reflects the hostility of the Religious Right for the constitutional separation of church and state, one of the First Amendment's pillars of religious

liberty, and for the application of the principle of government neutrality toward religion in federal policy. Serious threats in this area have surfaced in several policy areas during Ashcroft's first year.

Government Funded Religion

In 2001, the Bush administration strongly supported H.R. 7, a bill that critics charge would divert billions of taxpayer dollars in social service spending to pervasively religious organizations and endorse government-funded discrimination. Before passage of that legislation, House Judiciary Committee Chairman James Sensenbrenner, R-Wis., had expressed concerns over the constitutionality of the proposed measure. Attorney General Ashcroft, himself the author of the limited "charitable choice" provision in the 1996 welfare reform bill as well as even more extensive legislation pushing that concept, contacted the legislator to try to convince him to support the Bush plan. Ashcroft was followed by Solicitor General Ted Olson, who serves as the Justice Department's top lawyer before the Supreme Court. Olson met with Sensenbrenner for two hours to convince him to change his mind. As attorney general, Ashcroft will also play a crucial role in anticipated administration regulatory proposals to authorize more government social service funds to go to pervasively religious groups. For example, under the Clinton administration, the Justice Department indicated that while "charitable choice" funding could go to religiously affiliated groups like Lutheran Social Services or Catholic Charities, it could not go to pervasively religious groups that discriminate in hiring based on religion. The Ashcroft Justice Department has already signaled it will not follow that interpretation.

Religious School Vouchers

In July, in a case with potentially far-reaching implications for religious liberty and church-state separation, Solicitor General Olson took the unusual step of asking the Supreme Court to take up the Ohio school voucher case. Lower courts have ruled that the program's publicly funded vouchers predominantly benefit religious schools and violate the establishment clause of the First Amendment. Olson's brief asked the justices to uphold Cleveland's voucher program, and was seen by Court observers as a way for the administration to send a signal to the Court about the importance of the issue to the administration. Olson sought and received permission to participate in arguing the case in front of the Court on February 20, 2002. Religious Right organizations and their political allies hope that the Supreme Court will use the voucher case to radically alter its interpretation of the First Amendment and open the door to a wide range of government funding for religious institutions.

Religion in the Workplace

At the Justice Department, Ashcroft has raised concerns by leading daily sessions of prayer and Bible Study. Federal government guidelines on religious exercise and religious expression in the workplace urge supervisors to exercise particular care so that employees not perceive any coercion, whether intended or not, to participate in such gatherings. As the

highest-ranking supervisor at the Justice Department, Ashcroft's conduct is questionable under those guidelines.

Freedom of the Press

Vanessa Leggett, a part-time college lecturer and freelance writer, was jailed in July for refusing to turn over to the FBI notes and research she collected while writing a book about a Texas crime. The Justice Department has reasoned that only "legitimate" journalists or reporters can be protected by the First Amendment protections of the U.S. Constitution regarding a free press.[58] Although the lower court's actions against the writer have been upheld, there has been significant criticism of the Ashcroft Justice Department's role in the case. Critics include Robert Lystad, legal counsel for the Society of Professional Journalists. "The Justice Department appears to be harking back to the Watergate era when harassment and intimidation of journalists by high-ranking government officials was condoned," he said. "Even with fundamental constitutional liberties at stake, the Justice Department apparently will not even heed its own regulations."[59]

After five months in prison—considerably longer than any other reporter has been held in a case of this nature—Leggett was released because the term of the grand jury that requested her research had expired. However, the Justice Department may again call for her to be detained. A statement by the U.S. attorney's office noted that it intends to continue to take steps to "require Leggett's cooperation."[60]

In addition, in May, while serving as acting deputy attorney general, Robert S. Mueller III authorized U.S. Attorney Mary Jo White to obtain a record of the outgoing and incoming home telephone calls of an Associated Press reporter covering the investigation of Sen. Robert G. Torricelli, D-N.J. Mueller is now the director of the FBI.[61] An outraged Louis D. Boccardi, president of Associated Press, said the Justice Department's actions "fly in the face of long-standing policy that recognizes what a serious step it is to go after a reporter's phone records. We hope that this secret assault on the press is not an indication of the Bush administration's attitude toward a press free of government interference."[62]

Other Civil Rights Issues

One of the primary concerns raised by opponents of Ashcroft's confirmation was his lack of demonstrated commitment to aggressively enforcing the nation's civil rights laws. During Ashcroft's first year as attorney general, those concerns have been vindicated. In particular, there has been a marked lack of action on voting rights, despite the intense need for Justice Department action after the 2000 elections.

Voting Rights

Widespread concern over voting irregularities across the nation following last year's election recounts in Florida prompted Ashcroft to add additional attorneys in the Voting Rights Section of the Civil Rights Division. Ashcroft also announced he would create a new voting rights initiative to include a new senior counsel position within the department's civil rights division.

But Justice Department attorneys have not become involved in any of the lawsuits alleging voter disfranchisement in Florida or elsewhere other than to review changes to Florida's law as they are required to do. They have instead focused primarily on investigating charges made by Republicans of voter fraud in St. Louis, where Ashcroft sent in monitors to oversee a special election in March. (In 2000, Ashcroft was defeated in his bid for reelection to represent Missouri in the Senate.)

In June, the U.S. Commission on Civil Rights released its report on irregularities in the Florida vote and recommended that the Justice Department investigate possible violations of the Voting Rights Act of 1965 and requested a meeting with the attorney general. To date, that meeting has not occurred, though a Justice Department spokesperson has said the Department is investigating 12 claims of voting irregularities in Florida.

In August, the Justice Department temporarily blocked three sections of the new elections law passed by Florida's Republican-controlled legislature and signed by Gov. Jeb Bush, asking for proof that the changes would not create more obstacles for minority voters. JoNel Newman, the attorney in a private lawsuit against the Florida law, was heartened by the action, saying, "We are certain that with more information, [Justice] officials will reach the same conclusion that we have – that some of these electoral reforms push minority voters back into the past rather than moving us all into the future."[63]

However, in December, the Justice Department approved all but one section of the law. Joseph D. Rich, head of the voting rights section, withheld approval of the most controversial component, the creation of a statewide voter registration database to purge convicted felons from voter rolls. Florida's existing database was the center of many voter complaints during the 2000 election, many of whom were mistakenly told that they could not vote because their names were on a list of felons.[64]

Affirmative Action and Anti-Discrimination Enforcement

The Ashcroft Justice Department has abandoned a key affirmative action position taken by the Clinton administration, declining to file a brief in the landmark University of Michigan affirmative being decided by the 6th U.S. Circuit Court of Appeals. In a December 2001 editorial, the *Detroit Free Press* called the Justice Department's inaction a "disappointing silence," saying that while "neutrality is preferable to opposition, it remains troubling that Justice has chosen not to take a principled stand in favor of integration in higher education."[65]

Earlier in 2001, the Justice Department dismayed some of its right-wing supporters by filing a brief with the Supreme Court in the case of *Adarand v. Mineta,* supporting the federal rule that allows the Department of Transportation to operate affirmative action programs. Reportedly, Transportation Secretary Norman Mineta, who has long been committed to effective affirmative action measures, argued strenuously on behalf of the program challenged in *Adarand*. Administration officials sought to mute right-wing criticism by emphasizing the limited reach of this decision. Indeed, the first argument in the administration's brief was that the Supreme Court should not decide the case at all, and the Court in fact decided to do just that. *The Wall Street Journal* reported that several Justice Department officials said no

sweeping pronouncements could be made about the administration's position on affirmative action based on the *Adarand* brief. "This is the argument for this program," one official said. "It is a narrow focus."[66]

Observers say the Justice Department was avoiding a legal fight against affirmative action until a "better" case comes to court and that the Solicitor General was legally bound to defend the Department of Transportation. In fact, it would have been an extraordinary step for the federal government to switch sides in a case currently before the Supreme Court. Most agree that the true test of the Justice Department's affirmative action position will come when one of the challenges to race-based university admissions programs, such as the University of Michigan case mentioned above, comes before the court; two others are also working their way through appeals. In 1996, now-Solicitor General Ted Olson argued the landmark Hopwood decision for the anti-affirmative action Center for Individual Rights, which banned affirmative action programs in university admissions throughout the 5th Circuit.

Another major test for the Department in this area has centered on the Federal Communication Commission's (FCC) equal opportunity rule. As *The Washington Post* put it, the rule represented "the most inoffensive corner of affirmative action," requiring only that broadcasters engage in outreach and other efforts to "try to get minorities and women into their applicant pools."[67] The rule was struck down by a divided D.C. Circuit Court of Appeals in June 2001. The presidents of the NAACP, National Urban League, National Council of La Raza, and LULAC wrote to Ashcroft and FCC chair Michael Powell urging them to request Supreme Court review of the appellate court decision invalidating the FCC rule. As the presidents of the nation's four largest African-American and Hispanic organizations explained, the result would be "enormously harmful to minority and female job applicants" at radio and television stations and would undermine the bipartisan policy of "ensuring equal opportunity in the broadcast industry."

In December 2001, the Justice Department took a position on the issue, asking the Supreme Court not to hear the case even while conceding that the decision invalidating the rule was flawed. People For the American Way Foundation joined with other civil rights groups in arguing that the negative impact of the decision was far broader and asking the Supreme Court to take the case. In January 2002, the Court declined to hear the case.

Also last year, the Ashcroft Justice Department dropped support of a key civil rights suit regarding job discrimination. In 1997, the Clinton Justice Department intervened on the side of the plaintiffs in *Lanning v. SEPTA*, arguing that the Pennsylvania transportation agency discriminated against female applicants by requiring a running test that was even stricter than the one required by the FBI and Secret Service. After the Ashcroft Justice Department dropped its support for the plaintiffs, an attorney with the Public Interest Law Center of Philadelphia, which is representing the plaintiffs, criticized the move as "contrary to the promise Attorney General John Ashcroft made not to retreat in the area of civil rights."[68]

Other Issues

Reproductive Freedom

Opponents of Ashcroft's confirmation as attorney general were deeply concerned about his extreme anti-choice record as a public official. As attorney general, he has responsibility for enforcing the Freedom of Access to Clinic Entrances Act (FACE), reviewing pending Congressional legislation dealing with women's health, and coordinating the Task Force on Violence Against Health Care Providers. Ashcroft had once said he would dismantle the Task Force, but backed down from that promise during his confirmation hearings. The Task Force continues, but many have raised concerns about its effectiveness. Vicki Saporta of the National Abortion Federation says "It's now much harder to talk to career DOJ people; they have to get clearance just to speak with us."[69]

Ashcroft initially decided not to provide protection during an announced summer 2001 campaign by protesters affiliated with Operation Save America (formerly Operation Rescue) targeting the Wichita, Kansas clinic operated by Dr. George Tiller, a physician who was shot in front of his clinic in 1993. However, as three abortion rights groups called a news conference to denounce Ashcroft's decision, the Justice Department reversed its decision and announced it would send U.S. Deputy Marshals to help protect Tiller.

Following the Sept. 11 terrorist attacks, there was a rash of false anthrax threats made against various groups, with hundreds of women's health clinics receiving threat letters in the mail. On Oct. 16, Ashcroft issued the following statement regarding anthrax hoaxes: "The Department of Justice will prosecute and punish with the full force of our laws, those who issue false anthrax threats or any other form of terrorist threat."[70] However, at least initially, the attorney general seemed reluctant to vigorously pursue those who committed anthrax threats against family planning clinics.

Pro-choice groups criticized Ashcroft's silence in the months following two mass mailings of anthrax threat letters to abortion clinics. As the National Abortion Federation's Saporta put it, "This is the largest single orchestrated anthrax threat against any type of organization. And it seems to us that [Ashcroft] sometimes goes out of his way not to mention the fact." Pro-choice advocates also accused Ashcroft of denying requests for a meeting to discuss security concerns at women's health clinics.[71] On Oct. 26, Senator Barbara Boxer, D-Calif., sent the attorney general a letter urging him to "act with … resolve" in addressing anthrax threats against family planning groups.[72]

In December, the FBI did arrest self-proclaimed anti-abortion "warrior" Clayton Lee Waagner, who Ashcroft called the prime suspect behind anthrax hoaxes against 280 women's health clinics. Waagner, an escaped prisoner who has been convicted of firearms and auto theft and accused of bank robbery, was on the FBI's 10 most-wanted fugitive list.

Capital Punishment

In June, Ashcroft told Congress that "There is no evidence of racial bias in the administration of the federal death penalty." His statements contradicted a September 2000 Justice Department report, which found that minorities were considered for the federal death penalty more often than whites, accounting for 74 percent of such cases since 1995.[73]

Last summer, the Justice Department killed a pilot program providing federal money to pay for DNA testing of inmates. The plan, originally proposed during Janet Reno's tenure as attorney general and finalized under Ashcroft, was put on hold in August.[74] In December, the National Institute of Justice, the department's research arm, announced it had used the $750,000 grant money on DNA testing of the terrorism victims and additional research on identifying casualties. Seattle lawyer Irwin Schwartz, president of the National Association of Criminal Defense Lawyers, criticized the decision saying, "Almost 100 people will have been released from prison soon who DNA evidence showed were innocent, and it's been an uphill battle because of the lack of funds to do testing."[75]

Gun Control

A lifetime member of the National Rifle Association, Ashcroft has overturned the longstanding position of the Justice Department – one that has been repeatedly upheld by the courts – in order to embrace an interpretation of the Second Amendment so broad that it threatens gun control and law enforcement efforts. Ashcroft announced his decision in a May letter to the NRA. The letter has already been used to challenge a conviction in a criminal case involving illegal handgun possession by a Texas man who was under a restraining order.[76]

In addition, top Justice Department officials halted efforts by the FBI to access gun purchase records that could have been used to determine whether any of the people detained after Sept. 11 had recently purchased firearms. This decision was made even after Al Qaeda training manuals were found in Afghanistan terrorist bunkers that explicitly directed followers to purchase firearms while in the United States and after the FBI, in an initial check of 186 detainees, found at least two examples of detainees who had been approved to buy guns.[77] In addition, the ATF found that 34 guns seized in crimes had been bought at some point by people on the detainee list.[78] The Justice Department interpreted the law as permitting the information gathered by background checks to be used only for denying gun purchases and for no other purpose.

Ashcroft had earlier dismayed many law enforcement officials by announcing in June that he would require the FBI to "protect the privacy" of gun dealers and buyers by erasing records of firearms transactions within 24 hours of purchase. Current law allows the records of background checks to be retained for 90 days and be used "for the purposes of investigating, prosecuting, and/or enforcing violations of criminal or civil law that may come to light during N.I.C.S. [National Instant Criminal Background Check System] operations."[79] In 1998, as a senator, Ashcroft voted for an amendment that would require destruction of such records immediately after background checks were completed, but that effort was defeated.[80]

In mid-December, Senators Kennedy and Schumer pressured Ashcroft to preserve the gun purchase records to aid in the investigation of potential terrorists and suspend the change in the policy, but the Justice Department refused.[81] The International Assocation of Chiefs of Police, the nation's largest group of law enforcement executives, called this decision "absurd and unconscionable" and stated that "the decision has no rational basis in public safety…If someone is under investigation for a terrorist act, all the records we have in this country should be checked, including whether they bought firearms."[82]

Hypocrisy on "States' Rights"

Ashcroft has been a powerful advocate of "states' rights" throughout his career. But as attorney general he has intervened twice to take direct action to thwart the will of the voters on issues that were important to his right-wing constituencies of support.

In November 2001, Ashcroft issued an order that authorized federal agents to revoke the licenses of any doctor who prescribed lethal drugs for terminally ill patients, a direct challenge to a law passed by Oregon voters in 1994. The Death with Dignity Act made it legal for physicians to prescribe lethal drugs to any person with less than six months to live and who was mentally competent to make the decision to end their own life.[83] Ashcroft has long been opposed to assisted suicide and, as a senator, led an effort to outlaw federal funding of the practice. While serving in the Senate, he made his opposition well known, calling the practice "perverse" and "morally contemptible."[84] He voted in the Senate Judiciary Committee for a bill that would have made it illegal to prescribe federally-controlled drugs for assisted suicide.[85]

Despite the controversy surrounding the law, three years later a ballot measure to repeal it was rejected by the voters of Oregon, demonstrating that 60% of the state's citizens supported the law.[86] The final outcome of the Oregon's controversy remains in doubt. Shortly after Ashcroft issued his edict, the state sued to block it. U.S. District Judge Robert Jones issued a temporary restraining order on Ashcroft's ban and gave the state and the Justice Department five months to prepare arguments in the case.[87]

Also in November 2001, federal authorities raided and closed a Los Angeles medical marijuana clinic. The clinic, which provided marijuana to ease the suffering of cancer and AIDS patients, operated under the terms of a ballot initiative passed by California voters in 1996. The Justice Department asked a federal appeals court to allow the federal government to revoke prescription drug licenses of California doctors who prescribe marijuana for their patients.[88]

Judicial Nominations

As this report has documented, Attorney General John Ashcroft is having an enormous impact on Americans' rights and freedoms in a broad range of areas. But his most far-reaching, long-lasting, and potentially devastating impact on our Constitution and laws could be through helping to pack the federal judiciary with judges eager to overturn decades of Supreme Court precedents .

Through the Justice Department's role in recommending, interviewing and reviewing potential judicial nominees, the attorney general plays an important role in determining what sort of judges will preside over the federal judiciary. Furthermore, members of the ultra conservative Federalist Society, now ensconced in the Justice Department and White House legal counsel's office, oversee much of the screening and selection processes for federal judges. The Federalist Society provides much of the legal and intellectual firepower for right-wing efforts to transform and fundamentally remake the American legal system.

The very real possibility that the far right's ideological hostility to civil rights, environmental protections and government regulations could come to dominate the federal judiciary is a major threat to Americans' rights and freedoms. In 2000, People For the American Way Foundation published *Courting Disaster,* which analyzed the concurring and dissenting opinions of the court's most right-wing justices, Antonin Scalia and Clarence Thomas, to determine the consequences of additional right-wing appointments to the Court. The report concluded that a Scalia-Thomas majority – just one or two votes away – could overturn more than 100 Supreme Court precedents. Many right-wing legal activists are candid that they are out to overturn the New Deal and much of the bipartisan legal and policy accomplishments of the past 65 years.

Given how much is at stake, achieving ideological dominance of the federal judiciary is the Right Wing's primary goal. As attorney general, Ashcroft is playing a key role in pursuit of that goal, just as he did as a senator.

At the center of the Right Wing's judicial strategy are the federal appeals courts. The vast majority of federal cases never make it to the Supreme Court, but are decided by lower federal courts. In 2000, for example, the federal appellate courts decided more than 27,000 cases, many of which were important rulings on privacy, the environment, and human and civil rights. This is in sharp contrast to the Supreme Court, which handed down only 87 opinions last term.[89] In effect, many appeals court rulings stand as the final word governing the law for millions of Americans in their regions.

As a senator, Ashcroft played a central role in the right-wing campaign to slow the approval of President Clinton's appeals court nominees to a crawl. Given Ashcroft's central role in this blockade, his efforts as attorney general to force quick action on Bush nominees – and his comments that "justice delayed is justice denied" – appear remarkably hypocritical.[90] It is equally remarkable that he made some of those comments at an appearance before the American Bar Association, which the administration ousted from the pre-nomination screening role of judge's competence and character, a role the ABA had played for presidents of both parties for the past 50 years. Requiring the ABA to conduct its reviews after nominees are made public builds additional delays into the confirmation process.

The ideological blockade thrown around the appeals courts by Ashcroft and others, with vigorous support from right-wing activist groups, was stunningly successful. Between 1995 and 2000, 35 percent of Clinton's appeals court nominees were not even allowed to come up for a vote; 45 percent went unconfirmed in the Congress in which they were nominated. Right-wing groups hope the White House will take advantage of the vacancies their Senate allies perpetuated by filling them with right-wing ideologues. Republican-nominated judges currently hold a majority on seven of the 13 circuit courts of appeal. If all President Bush's current nominees are approved, such judges will make up a majority on 11 circuit courts. And by the end of 2004, Republican-appointed judges could make up a majority on every one of the 13 circuit courts of appeals.

As we have said, that is an unprecedented situation that calls for an unprecedented solution. President Bush must consult with Congress in a bipartisan fashion and nominate more moderate mainstream judges that can win bipartisan support. Unfortunately, the evidence

is that Ashcroft, other members of the administration, and right-wing senators are choosing to mount aggressive and deceptive public relations campaigns to try to push the Senate into approving Bush nominees without giving careful consideration to their records.

For additional information about the right-wing campaign to achieve ideological dominance of the federal judiciary, see http://www.pfaw.org/issues/democracy/judiciary.shtml.

Conclusion

John Ashcroft's first year as attorney general has mirrored the rest of his decades in public life. He has aggressively promoted his right-wing ideology at the expense of the Constitution. He has undermined the constitutional framework of checks and balances, scorning judicial review and congressional oversight of the executive branch. He has used the power of his office to undermine constitutional rights and freedoms and to bully opponents into acquiescence or silence. And he is supporting efforts to achieve right-wing dominance of the entire federal judiciary, the critical first step in the far right's efforts to turn back seven decades of legal and social justice progress.

There is no doubt that the terrorist attacks of Sept. 11 and the subsequent anthrax attacks through the mail have made the attorney general's job even more difficult and demanding. But they have also made the job even more important. At this critical point in the nation's history, we need an attorney general who is deeply committed to the Constitution and to the values of our free society.

In January 2001, it was clear that John Ashcroft was the wrong person for the job. In January 2002, the threats posed by Ashcroft as attorney general are even clearer. Extensive and intensive action to monitor Attorney General Ashcroft's activities, and to challenge them when necessary, is crucial to protecting our civil rights and civil liberties.

Appendix A

The Right Wing Dream Team at the Department of Justice: Some of the Players

Many high-level political positions within the Justice Department, addition to John Ashcroft himself, have been filled with ideological warriors from the far right, including many members of the Federalist Society, a legal group with a mission to "transform" American law by rolling back decades of Supreme Court precedents. Some of the members of the team:

Solicitor General -- Theodore Olson

Olson, the lawyer who argued on Bush's behalf before the Supreme Court last fall, was, until April, a member of the Federalist Society's Board of Visitors and one of the nation's premier legal advocates for a variety of right-wing causes. Olson represented Reagan during the Iran-Contra hearings and is a close friend and associate of Ken Starr. During Olson's confirmation hearings, questions rose about his role in the *American Spectator*'s anti-Clinton activities and in Olson's truthfulness in answering questions.

Deputy Attorney General -- Larry Thompson

Thompson, also a member of the Federalist Society, served as an adviser and witness for Supreme Court Justice Clarence Thomas during his Senate confirmation hearings. For nine years, Thompson was on the board of the Southeastern Legal Foundation, one of a network of legal organizations pushing a far-right agenda in the courts.

Assistant Attorney General for Legal Policy -- Viet Dinh

Dinh, a professor at Georgetown Law Center, is the point man for judicial selection in the Justice Department and a key architect of the administration's legal policies. Dinh, who worked on the Whitewater investigation, is also a member of the Federalist Society who has been described by a colleague as a "conservative hotshot." During the aftermath of the presidential election in Florida, Dinh was a visible commentator defending the actions of Republican party officials.

Assistant Attorney General for Environment and Natural Resources -- Thomas L. Sansonetti

Sansonetti is a Federalist Society member who has been a lobbyist for coal mining operations and other industries seeking access to public lands. He served in the Interior Department under Secretary Don Hodel (former president of the Christian Coalition) and as Legislative Director for then Congressman Craig Thomas, R-Wyo., now a U.S. Senator. He is still listed as a member of the Defenders of Property Rights Lawyers Network.

Principal Deputy Solicitor General -- Paul Clement

Clement is a Federalist Society member and former chief counsel for the Senate Subcommittee on the Constitution, Federalism and Property Rights chaired by then-Senator Ashcroft.

Deputy Assistant Attorney General for Civil Rights -- J. Michael Wiggins

Wiggins was formerly an associate at Kilpatrick Stockton, L.L.P. in Atlanta. He was also Vice Chairman of the Federalist Society Intellectual Property group and served on the Executive Board of the Atlanta Lawyers Chapter.

Counsel to the Assistant Attorney General in the Civil Division -- William H. Jordan

Jordan is the former president of the Atlanta chapter of the Federalist Society and was the Publications Vice Chairman for the Criminal Law and Procedure Practice Group for the national Federalist Society.

Counsel to Assistant Attorney General in the Criminal Division -- David E. Nahmias

Nahmias is a former Assistant U.S. Attorney and was a member of the Federalist Society's Atlanta chapter.

Deputy Assistant Attorney General in the Criminal Division -- John G. Malcolm

John G. Malcolm is a former Assistant United States Attorney and also served with the Office of Independent Counsel as Associate Independent Counsel in Washington, D.C. Malcolm was formerly the Chairman-Elect of the Federalist Society's Criminal Law Practice Group.

Administrator, Office of Juvenile Justice and Delinquency Prevention -- J. Robert Flores

Flores was the vice president and senior counsel for the National Law Center for Children and Families, a lobbying group that strongly supported Child Online Protection Act (COPA), an Internet censorship bill that has since been overturned in federal court and is now before the Supreme Court. Flores worked in the Justice Department under the first Bush administration and the Clinton administration, from 1989 to 1997, serving in the Justice Department's Child Exploitation and Obscenity Section of the Criminal Division. In 1997, Flores joined former Attorney General Edwin Meese and eleven right-wing "pro-family" groups to protest what they claim was a drop in obscenity prosecutions under President Clinton.

Staff Attorney, DOJ Voting Rights Section -- Hans A. von Spakovsky

Von Spakovsky, former vice-chairman of the Fulton County (GA) Registration and Election Board, told a Georgia newspaper that the departure of nine Republican lawyers from the Atlanta area had reduced the ranks of Atlanta's Federalist Society.

For additional information about the Federalist Society and the Bush administration, see www.pfaw.org/issues/democracy/federalist.

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[1] "Ex-FBI Officials Criticize Tactics on Terrorism," Jim McGee, *Washington Post*, 11/28/01.
[2] "Freedom's Value," Clint Bolick, Guest Comment, *National Review Online*, 9/18/01, http://www.nationalreview.com/comment/comment-bolick091801.shtml; "The Ghost of COINTELPRO," Earl Ofari Hutchinson, *Alternet.org*, 12/14/01, http://www.alternet.org/story.html?StoryID=12084
[3] "1st Draft of DOJ Surveillance & Antiterrorism Bill: The Mobilization Against Terrorism Act 2001 (MATA), 9/19/01," Electronic Frontier Foundation, www.eff.org/Privacy/Surveillance/20010919_mata_bill_draft.html
[4] Ibid.
[5] "Letter to Attorney General John Ashcroft," Human Rights Watch, 9/28/01, www.hrw.org/press/2001/09/ashcroft0928-ltr.htm
[6] "Analysis of Immigration Provisions of Mobilization Against Terrorism Act," National Lawyers Guild Post 911 Project, www.nlg.org/post911/immigration/talking_points.htm
[7] "Testimony of Professor David Cole on Civil Liberties and Proposed Anti-Terrorism Legislation Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee," 10/3/01, http://www.cdt.org/security/011003cole.pdf
[8] "U.S. District Court in Florida Finds Use of Secret Evidence Unconstitutional," statement from Tampa Bay Coalition for Justice and Peace, American Muslim Alliance Web site, http://www.amaweb.org/strategicnews/secret_evidence-31may00.htm
[9] "Testimony of Professor David Cole on Civil Liberties and Proposed Anti-Terrorism Legislation Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee," 10/3/01, http://www.cdt.org/security/011003cole.pdf
[10] "Federal Anti-Terrorism Efforts to Impact Immigration Policy, Procedures," Fragomen, Del Rey, Bernsen & Loewy P.C., 9/27/01, www.fragomen.com/index2.html
[11] "EFF Analysis of The Anti-Terrorism Act of 2001 (ATA): How the Bill Would Change FISA Surveillance," Lee Tien, Senior Staff Attorney, Electronic Frontier Foundation, http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20010927_eff_ata_analysis.html
[12] "Federal Law Enforcement and Intelligence Provision in proposed Anti-Terrorism Bill," Kate Martin, Center for National Security Studies, 10/1/01.
[13] "Anti-Terrorism Act Expands Government Surveillance Authorities, Weakens Privacy Protection with No Clear Benefit to Security," Center for Democracy & Technology, preliminary analysis of Anti-Terrorism Act of 2001, 9/21/01.
[14] "Domestic Surveillance:The History of Operation CHAOS," Verne Lyon, Covert Action Information Bulletin, Summer 1990; "EFF Analysis Of The Provisions Of The USA PATRIOT Act: That Relate To Online Activities," Electronic Frontier Foundation, 10/31/01.
[15] Ibid.
[16] Ibid.
[17] Ibid.

[18] "ACLU Says Congress Should Treat Administration Proposal Carefully: Says Many Provisions Go Far Beyond Anti-Terrorism Needs," Center for Democracy & Technology, 9/20/01, http://www.cdt.org/security/010920aclu.shtml
[19] Ibid.
[20] "Analysis of Provisions of the Proposed Anti-Terrorism Act of 2001: Affecting the Privacy of Communications and Personal Information," Electronic Privacy Information Center, 9/24/01, http://www.epic.org/privacy/terrorism/ata_analysis.html
[21] Ibid.
[22] "Changes in Antiterrorism Bills Protect Student Records, College Lobbyists Say," Sara Hebel, *The Chronicle of Higher Education*, 10/26/01.
[23] Testimony of Jerry Berman before the Senate Select Committee on Intelligence, 9/24/01, http://www.cdt.org/testimony/010924berman.shtml
[24] Ibid.
[25] House Judiciary Committee transcript, 9/24/01.
[26] "Testimony of Professor David Cole on Civil Liberties and Proposed Anti-Terrorism Legislation Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee," 10/3/01, http://www.cdt.org/security/011003cole.pdf
[27] "Letter to Congress Urges Changes In Anti-Terrorism Bill to Protect Civil Liberties," Free Congress Foundation, 10/2/01, http://www.freecongress.org/press/releases/011004.htm
[28] "Not So Fast," Jacob Sullum, ReasonOnline, 10/2/01, http://reason.com/sullum/100201.shtml
[29] "The End of Liberty," Damien Cave and Katharine Mieszkowski, *Salon.com*, 9/22/01, http://www.salon.com/tech/feature/2001/09/22/end_of_liberty/index.html
[30] "Lawmakers: Quick movement on new laws won't happen," *Associated Press*, 9/21/01.
[31] "Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities," Elizabeth A. Palmer, *CQ Weekly*, 10/27/01.
[32] Ibid.
[33] "Much of Anti-Terrorism Bill May Be Temporary," *Reuters*, 10/5/01.
[34] "They Can't See Eye-to-Eye: Leahy, Ashcroft embattled over civil rights vs. security," Tom Brune, *Newsday*, 11/13/01.
[35] "National Security; Prevention of Acts of Violence and Terrorism," Federal Register, 10/31/01.
[36] "Leahy 'Deeply Troubled' About Monitoring of Conversations Between Detainees, Their Attorneys," *U.S. Newswire*, 11/09/01.
[37] "U.S. to Stop Issuing Detention Tallies," Amy Goldstein and Dan Eggen, *Washington Post*, 11/9/01.
[38] "About 600 Still Detained in Connection With Attacks, Ashcroft Says," Dan Eggen, *Washington Post*, 11/28/01.
[39] "Ashcroft Urges Caution With FOIA Requests," *Associated Press*, 10/17/01.
[40] "ACLU Files First Post-Sept. 11 Challenge To Closed Immigration Hearings on Behalf of MI Congressman and Journalists," ACLU press release, 1/29/02, http://www.aclu.org/news/2002/n012902a.html
[41] "Lawsuit Filed Over Immigration Hearings' Closing," Hanna Rosin, *Washington Post*, 1/30/02.
[42] "Why We're Suing Ashcroft," Jeremy Voas, *Alternet.org*, 1/30/02, http://www.alternet.org/mobile/story_mobile.html?StoryID=12314
[43] "Ex-FBI Officials Criticize Tactics on Terrorism," Jim McGee, *Washington Post*, 11/28/01.
[44] Ibid.
[45] "Justice Department Considers Stepping Up Monitoring of Religious, Political Groups," Jess Bravin, *Wall Street Journal*, 12/03/01.
[46] Ibid.
[47] "Homeland Defense – of the Constitution," Nat Hentoff, *Insight*, 12/17/01.
[48] "John Ashcroft Misses the Point," *New York Times*, 12/7/01; "The Ashcroft Smear," *Washington Post*, 12/7/01.
[49] "Political dissent can bring federal agents to door," Kris Axtman, *Christian Science Monitor*, 1/8/02.
[50] "The New McCarthyism," Matthew Rothschild, *The Progressive*, January 2002.
[51] Ibid.
[52] "Us Vows Suits On Racial Profiling New Rights Chief Details A Strategy," Wayne Washington, *Boston Globe*, 7/26/01.
[53] "Justice Dept. to Study Racial Profiling Soon," *Associated Press*, 9/10/01.
[54] "Abusive Behavior, Or Racial Profiling?" Edward Walsh, *Washington Post*, 1/4/02.

[55] "U.S. Seeks Thousands Of Fugitive Deportees; Middle Eastern Men Are Focus of Search," Dan Eggen and Cheryl W. Thompson, *Washington Post*, 1/8/02.
[56] Ibid.
[57] "Surviviors of Terrorist Victims Granted Domestic Partnership Benefits," Matt Pyeatt, *CNSNews.com*, 10/4/01.
[58] "Jailing of Writer Sparks 1st Amendment Debate," Dan Eagen and Paul Duggan, *Washington Post*, 8/01/01.
[59] "SPJ Gives $12,500 To Fight Texas Case Threatening Freedom Of The Press," Society of Professional Journalists, press release, 8/10/01.
[60] "Writer Freed After Five Months in Jail, but New Subpoena Likely," Paul Duggan, *Washington Post*, January 5, 2002
[61] "Grassley Seeks Files On Media Subpoena," Dan Eggen, *Washington Post*, 9/5/01.
[62] "Justice Department Snags Reporter's Phone Records," Pete Yost, *Associated Press*, 8/27/01.
[63] "Florida election reform on hold," Alisa Ulferts, *St. Petersburg Times*, 8/21/01.
[64] "All but one part of new election law okayed," Lucy Morgan, *St. Petersburg Times*, 12/9/01.
[65] "Affirmative Action; From the Justice Department., a Disappointing Silence on the U-M Cases," *Detroit Free Press*, 12/6/01.
[66] "Bush Delays Offensive Against Affirmative Action," Gary Fields, *Wall Street Journal*, 8/13/01.
[67] "Wrongheaded on Race," *Washington Post*, 7/2/01.
[68] "Women lose key ally in bias suit vs. SEPTA," Joseph A. Slobodzian, *Philadelphia Inquirer*, 10/3/01.
[69] "Ashcroft Justice," Diana R. Gordon, *The Nation*, 7/23/01.
[70] Letter to Attorney General Ashcroft, Barbara Boxer, *Truthout.com*, 10/26/01, http://www.truthout.com/10.27B.Boxer.Ashcroft.htm
[71] "Are anthrax letters OK for abortion-rights groups?" Anthony York, *Salon.com*, 11/10/01, http://www.salon.com/news/feature/2001/11/10/ashcroft
[72] Letter to Attorney General Ashcroft, Barbara Boxer, *Truthout.com*, 10/26/01, http://www.truthout.com/10.27B.Boxer.Ashcroft.htm
[73] "Ashcroft: No Death Penalty Race Bias," Jim Stewart, *CBSNews.com*, 6/6/01, http://www.cbsnews.com/now/story/0,1597,295273-412,00.shtml
[74] "Program for DNA testing of inmates is scrapped," Richard Willing, *USA Today*, 12/25/01.
[75] "Funds to Test DNA Of Convicts Diverted to ID Sept. 11 Victims," *Washington Post*, 12/27/01.
[76] "Guns & Strange Bedfellows," Beverly Lumpkin, *ABCNews.com*, 10/19/01, http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice98.html
[77] "Ashcroft's gun-coddling hypocrisy," Thomas Oliphant, *Boston Globe*, 12/11/01.
[78] "Justice Dept. Bars Use of Gun Checks in Terror Inquiry," Fox Butterfield, *New York Times*, 12/6/01.
[79] Ibid.
[80] Ibid.
[81] "Senators Seek Gun Records," Jesse J. Holland, *Associated Press*, 12/13/01.
[82] "Justice Dept. Bars Use of Gun Checks in Terror Inquiry," Fox Butterfield, *New York Times*, 12/6/01.
[83] "Federal Agents Are Directed to Stop Physicians Who Assist Suicide," Sam Howe Verhovek, *New York Times*, 11/7/01.
[84] "Ashcroft Order Not His first Stand Against Assisted Suicide," Tom Detzel, *Portland Oregonian*, 11/11/01.
[85] ibid.
[86] ibid.
[87] "Ashcroft Ban on Suicide Blocked," *Associated Press*, *Washington Times*, 11/21/01.
[88] "States' rights under fire; Attorney general's actions show shift in White House policy," Bob Egelko, *San Francisco Chronicle*, 11/11/2001, http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/11/11/MN85331.DTL.
[89] "2000 Term Opinions of the Court," U.S. Supreme Court website, http://www.supremecourtus.gov/opinions/00slipopinion.html
[90] "Ashcroft Pushes Senate on Judicial Nominees," Dan Eggen, *Washington Post*, 8/8/01.