Two Years After 9/11:
Ashcroft's Assault on the Constitution

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I. Introduction

As America marks the second anniversary of the terrorist attacks that brought vast changes in our idea of national security, it is important to remember those who lost their lives on that fateful day, and to remind ourselves of the dangers that face us now and in the years ahead. Our nation must have all the tools it needs to fight terrorism while protecting the promise of freedom for our citizens and visitors. To that end, it is absolutely crucial that America's campaign to protect our security be overseen by an attorney general who can both stand up to terrorism and stand up for the Constitution.

Instead, the worst fears of constitutional and civil rights advocates raised after John Ashcroft was named as attorney general in December 2000 have come true. The information brought forth during his contentious but ultimately successful confirmation process demonstrated a troubling record in the areas of civil rights, separation of church and state, hate crimes, judicial nominations and reproductive freedom, as well as an unswerving commitment to right-wing ideology. The first year of Ashcroft's term signaled to many that an America under his tenure could become a reflection of the sometimes intolerant, divided nation that in some ways had been put to rest – one where government failed to combat race and gender discrimination, and where it was permissible for law enforcement officials to ignore the due process rights guaranteed under the Constitution. His actions immediately following the September 11 attacks added fuel to that fire as the Justice Department seemed to act with little regard for civil liberties.

People For the American Way helped expose Ashcroft's far-right views during the confirmation process, producing more than 80 pages of reports analyzing his long public record in the Senate and as Missouri's governor and attorney general. Ashcroft was confirmed, but he received the fewest votes since an attorney general nominee was defeated in 1925. In February 2002, PFAW Foundation reported on Ashcroft's first year as attorney general, following an earlier report on his first six months in office. This report, released as the second anniversary of the attacks on September 11 approaches, is an update of Ashcroft's actions as attorney general since February 2002 that have had an impact on civil rights and civil liberties, particularly his anti-terrorism efforts, the implementation of the PATRIOT Act and the activities of the Justice Department's Civil Rights Division.

It is clear that, rather than disproving the predictions of civil liberties advocates by enforcing our country's laws in a balanced and careful manner, Ashcroft's Justice Department has become the embodiment of some of the most extreme elements of the right-wing agenda. Ashcroft has sought to undermine existing law on a broad range of issues, such as civil rights, affirmative action and immigration. Ashcroft's operation of the Justice Department demonstrates an unacceptable willingness to use his position to further his personal, political and other views. This is evidenced by his failure to aggressively enforce the prohibition of employment discrimination in the public sector by prosecuting a record low number of Title VII cases, the unprecedented filing of briefs by the Justice Department in support of religious organizations that seek to proselytize in public elementary schools, and his dogged pursuit of the federal death penalty against the recommendations of career federal prosecutors.

Of his activities, none has been more pernicious than Ashcroft's assault on the protections guaranteed by the Fourth, Fifth and Sixth Amendments under the banner of combating terrorism. During his watch as the country's highest law enforcement officer and the first face of Bush's "war on terrorism," Ashcroft has arrested and locked up hundreds of individuals, most of whom have been held for weeks or months without charges and, in some cases according to critics, whose only identifiable connection to any terrorist organization appears to lie in the color of their skin, their religious affiliation or the origin of their ancestors.

Until recently, Ashcroft and the Bush administration were able to distract the American public from his overly aggressive investigative and enforcement policies by fiercely maintaining a shroud of secrecy, and fostering a climate of fear. Americans were kept so preoccupied by the varying shades of domestic terror alerts and by our increasing international activities that the far-reaching effects of Ashcroft's actions had been largely overlooked. Now, however, communities across the 50 states have come to understand the reality behind the smoke and mirrors: that the impact of Ashcroft's actions on this country's most basic rights in the name of conducting a war on terrorism has been devastating. A broad spectrum of public servants, public interest organizations and citizens have increasingly voiced their complaints about the attorney general and the administration's tactics, demanding that in their efforts to protect this nation they do not undermine the most basic principles upon which it is founded.

Two years after the events of 9/11, when a group of religious fanatics sought to forever dispel American tranquility by carrying out the worst act of domestic terrorism in our country's history, this report regrettably reveals that it is the current and ongoing erosion of fundamental rights by the executive branch, led by Attorney General John Ashcroft, that poses one of the greatest threats to the civil rights and civil liberties that are central to the American way of life. This conclusion is discussed below with respect to the Ashcroft Justice Department's dangerous tactics in the war on terrorism, its disturbing civil rights record, its participation in the administration's judicial nomination strategies, and its attacks on the First Amendment, the role of career prosecutors, and judicial independence.

II. Ashcroft's Dangerous Tactics in the War On Terrorism

Since the September 11 attacks, Ashcroft has set in motion a program that goes far beyond the prevention of terrorism and the identification of terror suspects. From the heavy-handed use of controversial anti-terrorism legislation to the secret manipulation of immigration laws and other federal statutes, federal agencies led by the Department of Justice have impeded some of the most basic freedoms enjoyed in this country, including the right against improper deprivation of liberty, the right to counsel, the right to be free from unreasonable searches and seizures, the right to a speedy and public trial, the right to individual privacy, and the freedom of information.

A. <u>Ashcroft's Implementation of the PATRIOT Act and Other DOJ Powers</u>

There is no question that law enforcement officials are charged with an important task in protecting national security and the safety of Americans. But in seeking to safeguard this

country from future acts of terrorism, they must also be mindful of protecting our country's values and the rights afforded by the Constitution, which are central to the American way of life.

Ashcroft aggressively pushed for the unprecedented expansion of federal law enforcement power embodied in the USA PATRIOT Act.[1] Ultimately, a slightly modified (but still very broad) version of the controversial legislation was passed while civil liberties and civil rights organizations, including People For the American Way, cautioned that the Act's expansion of federal police powers left room for law enforcement officials to ignore the most basic principles of this country's system of criminal jurisprudence. Those words of caution went stunningly unheeded by the attorney general in implementing the PATRIOT Act.

The PATRIOT Act armed Ashcroft with broad new law enforcement authority, ostensibly in the name of stopping terrorism, that extends to almost every aspect of traditional law enforcement activity, from the greater latitude the government now has to conduct wiretapping and other surveillance procedures to its broadened search-and-seizure and detention authority. For example, under Section 215 of the Act, the government now has significant discretion to obtain personal records and other tangible things about anyone. The Act allows the FBI to obtain an order directing any organization or person, including libraries, hospitals and businesses, to hand over personal records and information about anyone by merely asserting that the items are "sought for" in an ongoing terrorism investigation.[2] The Act even includes a gag order prohibiting the disclosure to the public by librarians and others of any information about such seizures.[3] The government can also now freely monitor certain computer activity of any person through internet service providers, including Web browsing and e-mail messages, and can conduct nationwide searches of computer information, including billing and credit card data.[4]

Though the legislation was proposed for use in targeting foreign agents of terror, it allows the government to spy on citizens and non-citizens alike. The law also does not require a showing of probable cause in many cases, allowing some searches and seizures to be conducted on the basis of mere suspicion.[5] Anyone can thus be subjected to repeated invasions of individual privacy even when there is no clear evidence of criminal activity and even when neither direct nor indirect ties to a terrorist organization have been established.[6] Indeed, the Justice Department itself has stated that its expanded powers under the PATRIOT Act can and should be used in non-terrorism related matters and "everyday prosecutions," and is seeking to train and encourage its employees to do so.[7]

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[1] Pub.L.No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (hereinafter "PATRIOT Act").
[2] *See generally* 50 U.S.C. §1861; §1861(a)(1), (b)(2).
[3] 50 U.S.C. §1861 (d).
[4] 50 U.S.C. §1861 (a)(1).
[5] The statute, however, does not allow the FBI to obtain a Sec. 215 search order for personal records of a U.S. citizen based solely on the exercise of that person's First Amendment rights. For example, the government cannot conduct the search merely because that person has marched against the U.S. occupation in Iraq. The Act does authorize such orders against non-citizens based solely on their First Amendment activity. *See* 50 U.S.C. §1861(a)(2)(B).
[6] *See* 50 U.S.C. § 1861 (a)(2); "Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You," American Civil Liberties Union (July 2003) ("ACLU Report") at 2-5.
[7] The Department of Justice held a Continuing Legal Education course on March 21, 2002, titled "USA PATRIOT Act Update: Forfeiture Provisions," that gave instruction to prosecutors on how to extend use of the PATRIOT Act to regular criminal investigations. A description of the course said: "We all know that the USA PATRIOT Act provided weapons for the War on Terrorism. But do you know how it affects the war on crime as well? Learn about the Act's impact on forfeiture and money laundering . . . look at the Act and its application to everyday prosecutions." This document was obtained from an internal

In recognizing the potential for constitutional abuses that could result from the administration's war on terrorism, Congress specifically sought to limit intrusions by law enforcement on individual civil liberties by adding a provision in the PATRIOT Act that requires individuals to be released within seven days of their arrest if no formal charges have been filed.[8] The attorney general - by use of the immigration laws, the material witness statute and the "enemy combatant" designation - has made a mockery of that provision and the principles underlying it. Coupled with broad invocations of secrecy and demonstrated concerns about the Justice Department's actual use of the PATRIOT Act, it is clear that instead of carefully administering his expanded authority to prevent improper deprivations of civil rights and liberties, Ashcroft's actions have seriously jeopardized these basic protections.

1. Troubling Use of Immigration Laws

Integral to Ashcroft's efforts to cast a wide net in his anti-terrorism crusade is his manipulation of the immigration laws. As attorney general, he is charged with the "administration and enforcement" of "all . . . laws relating to the immigration and naturalization of aliens," including the deportation of aliens who are present in the United States unlawfully.[9] Under this authority, Ashcroft essentially called for a nationwide roundup of foreigners after September 11. The result has been the detention of more than 1,400 individuals, most of whom have no connection to terrorism and are guilty only of routine visa violations that carry no penalties aside from deportation.

a. Unilateral Changes in Long-Standing Immigration Procedures

Ashcroft has used his authority to completely revamp and reconstitute the process of immigration appeals and review and dramatically undermine the due process rights of aliens in removal proceedings. Since September 11, 2001, Ashcroft has made significant changes to the Board of Immigration Appeals (BIA), a review board that has national jurisdiction to hear appeals from certain decisions rendered by immigration judges and by district directors of the Department of Homeland Security and often serves as the last option for immigrants fighting deportation.[10] On September 26, 2002, Ashcroft published a final regulation restructuring the Board of Immigration Appeals under the guise of "streamlining," establishing a one-judge review process in many cases instead of the existing three-judge panel, and reducing the number of members on the Board itself from 21 to 11,[11] despite a record backlog of pending cases reaching in the tens of thousands.[12]

Under Ashcroft's new regulation, the BIA is also now required to apply the limited "clearly erroneous" standard in its review of immigration judges' fact-findings, meaning that the Board does not itself independently consider the facts of the case and may not disturb an

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schedule of continuing legal education programming available on the Justice Department's television network and is available from People For the American Way Foundation.

[8] 8 U.S.C. § 1226(a)(5).

[9] 8 U.S.C. § 1103(a)(1); § 1227(a) (2002).

[10] Department of Justice website, viewed September 2, 2003, "Board of Immigration Appeals," http://www.usdoj.gov/eoir/biainfo.htm; 8 C.F.R. § 1003.1(b).

[11] "Civil Liberties Issue Packet," American Immigration Lawyers Association, 6/12/03.

[12] "Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures," Department of Justice, 8/23/02.

immigration judge's fact-findings unless they were so clearly wrong that they must be overturned.[13] By contrast, previous rules gave immigrants the right to a complete *de novo* review by the BIA. Ashcroft's regulation reconstituting the BIA's review procedures has succeeded in sharply increasing the number of appeals rejected by that Board, from 59% previously to 86%.[14]

In February 2002, before Ashcroft's changes to the BIA were finalized, two former general counsels to the INS wrote an editorial criticizing Ashcroft's proposed changes, saying that "although [the changes] address some genuine problems, [they] pose a real threat to the integrity of the immigration process and the independence of the board." The two further stated that Ashcroft's proposals "go so far beyond [streamlining] that they suggest a deeper and more troubling agenda" and said that "if this new proposal is adopted, it could mean that thousands of immigrants will get no effective review of their cases, before either the Board of Immigration Appeals or a federal court."[15]

Despite growing opposition to his tactics, Ashcroft has resisted meaningful review of his actions within the INS while continuing to cultivate a climate of fear. In May 2003, when the Supreme Court declined to review a federal appeals court decision that upheld Ashcroft's order closing immigration hearings for "special interest" detainees, Ashcroft praised the high court's decision, saying, "This authority to close hearings is an important, constitutional tool in this time of war, when we face an unparalleled threat from covert and unknown foes spread across the globe."[16] Soon after, in July 2003, unconfirmed rumors began circulating about the attorney general's plans to set new regulations for the Executive Office for Immigration Review (EOIR), which is the administrative entity overseeing immigration judges and the Board of Immigration Appeals. The content of such future changes remains unknown, but careful scrutiny is crucial, particularly in light of the changes that have already undermined fairness and due process.

b. Classification and Treatment of Immigrant Detainees

Since the September 11 attacks, over 1400 foreign nationals have been arrested and detained for months on end.[17] This includes some 650 apprehended abroad and held at Guantanamo Bay, Cuba and more than 750 arrested in the U.S. who were arbitrarily classified and detained either at a maximum security federal prison or an INS detention facility.[18]

Perhaps the most damning criticism of Ashcroft's tactics with respect to immigrant detainees comes from inside the walls of the Justice Department itself, at the Office of the Inspector General. The April 2003 inspector general investigation was conducted pursuant to the key oversight provisions of the USA PATRIOT Act added by Congress against the will of the

[13] "Board of Immigration Appeals: Final Rule Fact Sheet," Department of Justice, 8/23/02.
[14] "The Importance of Independence and Accountability in our Immigration Courts," American Immigration Lawyers Association, 3/5/03.
[15] "Ashcroft's Immigration Threat," T. Alexander Aleinikoff and David A. Martin, *The Washington Post*, 2/26/02.
[16] "High Court Stays Out of Secrecy Fray," Edward Walsh, *The Washington Post*, 5/28/03.
[17] *See* "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," U.S. Department of Justice, Office of the Inspector General (July 17, 2003) at 12 (referring to 762 aliens detained via immigration laws post-9/11); and "U.S. Leaves Fate Of Guantanamo Detainees in Limbo," Matthew Hay Brown, *Chicago Tribune*, 7/20/03 (referring to the 650 held at Guantanamo Bay since 9/11 and their "indefinite detention").
[18] *Id. See also* "A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," Office of the Inspector General, April 2003 ("April IG Report"). The report was made public in June 2003.

attorney general. Glenn A. Fine, the Justice Department's Inspector General, found significant problems in the attorney general's detention process and treatment of hundreds of individuals, many of whom had no connection to terrorism.

In a stunning indictment, the report found that Ashcroft's classification process of designating alien detainees as "high interest," "of interest" or "of undetermined interest" – the primary factor used in determining whether a person was held in a high-security federal prison or an INS detention facility – was seriously flawed and randomly applied. The inspector general criticized the process, describing it as "indiscriminate and haphazard" and finding that many immigrants were wrongfully designated as "high interest," "of interest," or "of undetermined interest" when they "had no connection to terrorism."[19] The inspector general found that the flawed classification process "had enormous ramifications for September 11 detainees, who were denied bond and also were denied the opportunity to leave the country until the FBI completed its clearance investigation," and stated that "[f]or many detainees, this resulted in their continued detention in harsh conditions of confinement."[20] As the report admonished, "[t]his disconnect should have been discovered earlier and should have caused a review of the manner in which detainees were being categorized."[21]

The inspector general's internal review of the treatment of 9/11 detainees found that those confined at the Metropolitan Detention Center (MDC) in New York were treated the worst. Eighty-four men arbitrarily classified as people of "high interest" in the FBI investigation of September 11th were jailed at the MDC between September 14, 2001, and August 27, 2002, where the report found that there existed a "pattern of physical and verbal abuse."[22]

The MDC detainees "were held under 'the most restrictive conditions possible'" akin to inmates placed in "disciplinary segregation," including being placed in "'lockdown' for at least 23 hours per day," and imposition of a "communications blackout" wherein they were not allowed any phone calls, visitors or mail for several weeks. Furthermore, many were subject to "restrictive escort procedures" and placed in restraints anytime the detainees were moved outside their cells - including handcuffs, leg irons and heavy chains.[23] The inspector general found that "the evidence indicates a pattern of abuse . . . particularly during the first months after the attacks" and that ". . . MDC staff verbally abused them with such taunts as 'Bin Laden Junior' or with threats such as 'you will be here for the next 20-25 years like the Cuban people.'"[24] The inspector general's report even includes the testimony of one guard who admitted witnessing other guards slam inmates against walls and stated that "this was a common practice before the MDC began videotaping the detainees."[25]

A subset of those detained at the MDC, including some immigration violators, were designated as September 11 "high interest" cases and held in an administrative maximum special

[19] *Id.* at 70.
[20] *Id.* at 71.
[21] *Id.* at 70.
[22] *Id.* at 142, 157.
[23] *Id.* at 157, 160.
[24] *Id.* at 162.
[25] *Id.* at 145.

housing unit, known as the ADMAX-SHU.[26] There, they were subjected to a four-man hold restraint policy, transported in shackles, handcuffs and waist chains, and had their cells illuminated 24 hours a day.[27] The inspector general found that those confined in the SHU were held in conditions that "severely limited the detainees' ability to obtain, and communicate with, legal counsel," which hampered their ability to quickly or effectively pursue their cases in court.[28] The number of immigrants detained in such conditions is unknown.

Some of the inspector general's findings mirror allegations of abuse made in a civil lawsuit against the attorney general and other officials. In February 2002, a class-action lawsuit was filed by seven former detainees at the MDC who were arrested for alleged immigration violations.[29] The lawsuit alleges that the plaintiffs were wrongfully classified as "suspected terrorists," put in high-security cell blocks reserved for the prison's most dangerous inmates, denied access to phones and lawyers for weeks at a time, locked in tiny cells, put in handcuffs and shackles, and beaten at random.[30] The case is currently still in the pre-trial stages.

c. Prolonged Detention of Immigrants with No Connection to Terrorism

Of the more than 750 immigrant detainees reviewed by the inspector general, most have been found to have no connection to terrorism and are guilty only of routine visa violations that carry no penalties aside from deportation. Indeed, this was the conclusion of the inspector general in his review of Ashcroft's foreigner roundup.

The report released by the inspector general found that "for many months, detainees were being held, even beyond 90 days, despite their willingness to leave the country."[31] It further recognized that "[t]he overwhelming majority of aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing."[32]

The class-action lawsuit in New York by MDC detainees also addressed their subjection to prolonged confinement even though they were charged only with the non-criminal offense of illegally entering or remaining in the United States and even after they had agreed to leave the country. Both Yasser Ebrahim and Shakir Baloch, two of the plaintiffs in the lawsuit, were held for eight months without being charged with a crime and then were simply deported.[33] Another plaintiff, Asif-ur-Rehman Saffi, was arrested at LaGuardia Airport on September 30, 2001 after his tourist visa expired. Although a judge ordered that he be deported for the routine visa violation only two weeks after his arrest, he was detained at MDC for another five months.[34]

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[26] *Id.* at 118-124 (explaining that Special Housing Units (SHU) are typically used to segregate inmates who "have committed disciplinary infractions" or who "require administrative separation" from the general population; detailing harsher conditions of the ADMAX-SHU, which was created for the 9/11 detainees at the MDC).
[27] *Id.* at 125-6, 153-5.
[28] *Id.* at 130.
[29] "Government's Report Bolsters Abuse Claims By Arab Detainees," Tom Hays, *Associated Press*, 6/23/03 ("Hays").
[30] *See generally Turkmen v. Ashcroft*, Case No. 02-CV-2304 (JG) (S.D.N.Y. 2002) ("*Turkmen* Complaint").
[31] *Id.* at 108.
[32] *Id*. at 111.
[33] Hays; *Turkmen* Complaint.
[34] "Detainees Use Report To Back Civil Rights Suit," Tom Hays, *Associated Press*, 6/6/03.

The inspector general was directly critical of the Justice Department on this point, saying that "[a]s the Department learned more about the 762 September 11 detainees, the fact that many of these detainees were guilty of immigration violations alone, and were not tied to terrorism, should have prompted the Department to re-evaluate its original decision to deny bond in all cases."[35] The report also went on to say that "attorneys in the Deputy Attorney General's office who were responsible for coordinating these immigration issues had enough information to realize that this was a significant legal issue that needed to be addressed."[36]

Although the Justice Department made vague pledges to address the prisoner treatment issues raised in the April IG report, the majority of the report's findings have been greeted with defiance by Ashcroft and the Justice Department. As DOJ spokesperson Barbara Comstock said, "We make no apologies for finding every legal way possible to protect the American public from further terrorist attacks."[37] An editorial in the *New York Times* noted that the Bush administration was "unwilling to accept criticism of the war on terrorism," and called its response to the April IG report "true to form."[38]

Indeed, this attitude is consistent with Ashcroft's apparent position that constitutional protections are only afforded to non-citizens on a very limited basis, if at all. For example, in the case of Jorge Esparza-Mendoza, prosecutors argued in a Utah federal court that the Fourth Amendment, which protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . .,"[39] did not apply to an alien who had been deported and had reentered the country illegally.[40] District Judge Paul J. Cassell, a conservative Bush appointee, agreed with the government and held that such an alien was not part of the "people" to whom the Fourth Amendment's protection against unreasonable searches and seizures applied.[41] Salt Lake City immigration attorney Hakeem Ishola called Cassell's decision "flat-out wrong," explaining that the courts have long held that "[a]s long as you have stepped foot in the U.S. you remain a person under the Constitution."[42] Esparza-Mendoza's defense attorney, Benjamin Hamilton, also explained that Cassell's ruling "undermines the Fourth Amendment protections of those who are in a suspect class, i.e. of a particular ethnicity."[43] Indeed, the decision holds far-reaching implications for certain immigrants who, under the rationale of Ashcroft's Justice Department and Judge Cassell, have no right to be free from unlawful searches and seizures or deprivations of liberty, much like the 9/11 detainees.

2. Abuse of Material Witness Statute

The current material witness statute was passed in 1984. Under the broadly worded statute, the government is allowed to detain an individual whose testimony is "material" to a

[35] April IG Report at 88.
[36] *Id.* at 108 (emphasis added).
[37] "Statement of Barbara Comstock, Director of Public Affairs, Regarding the IG's Report on 9/11 Detainees," DOJ Press Release, 6/2/03.
[38] "Abusive Detentions of Sept. 11," *New York Times*, 6/3/03.
[39] U.S. Const. Amend. IV (emphasis added).
[40] *See U.S. v. Esparza-Mendoza*, 265 F.Supp.2d 1254 (D. Utah 2003).
[41] *Id.* at 1273.
[42] "Illegal Denied Protection," Angie Welling, *Deseret Morning News*, 6/12/03.
[43] *Id*.

criminal proceeding and who is a flight risk, the rationale being that detention is permissible when "necessary to prevent a failure of justice." The statute is highly useful to law enforcement and highly susceptible to great abuse, as it does not require the government to first establish probable cause. Although an officer is required to file an affidavit as to the materiality of the individual's testimony, an assertion of mere suspicion is sufficient.[44]

Traditionally, the statute has been rarely invoked and used only when a witness to a *specific* crime proved uncooperative. After September 11, the statute became one of the main vehicles Ashcroft used to arrest and detain people believed to be connected to the attacks. In the period immediately following the attacks, its usage could have been appropriate to the extent that the government was acting in a legitimate law enforcement capacity by investigating an actual crime. Quickly, however, the government's use of the statute was transformed to fit neatly into the administration's tactics as a device to detain countless people for long periods whose connection to prospective terrorist activity is nebulous at best.

Because the government claims that these "material witnesses" have information that may be disclosed in grand jury proceedings, which are secret under federal law, it has refused to reveal the number of people who have been detained, who they are, or any information about their cases, including which court has jurisdiction and when and if these individuals will ever be released.[45] Often, the detainees are reportedly kept in solitary confinement with no access to phones or visitors.[46] Without having been charged with a crime, they have no right to a speedy trial or any trial at all. The court's opinion in one case describes the type of treatment a "material witness" can expect:

> "Having committed no crime – indeed, without any claim that there was probable cause to believe he had violated any law – [the witness] bore the full weight of the prison system designed to punish convicted criminals as well as incapacitate individuals arrested or indicted for criminal conduct. . . [He was] repeatedly strip-searched, shackled whenever he [was] moved, denied food that complies with his religious needs. . . prohibited from seeing or even calling his family over the course of 20 days and then [pressured into] testifying while handcuffed to a chair." *United States v. Awadallah*, 202 F.Supp.2d 55, (S.D.N.Y. 2002).[47]

University of Georgia law professor Ronald Carlson also criticized the government's use of the material witness statute, saying that "[t]he law has been metamorphosing into something it was not originally conceived for. The current use of the law is very troubling. If the pattern continues, it's only a matter of time before this spreads to detention in terms of general crimes instead of just terror."[48] Similarly, Harvard University law professor Phil Heymann said that under the government's interpretation of the material witness statute, "any one of us could easily be treated as a material witness - anybody who is suspected of anything. It could be the slightest

[44] "The Real 9/11 Liberties Problem," Josh Gerstein, *The New Republic*, 4/22/02.
[45] "Justice Milking Detention Authority: 'Material Witnesses' of Terrorism Languish Without Testifying," Steve Fainaru and Margot Williams, *The Washington Post*, 11/24/02.
[46] *See, e.g.*, "Oregon Man's Jailing Is Raising Protests," Timothy Egan, *New York Times*, 4/4/03.
[47] As noted by the court, "[m]any of [the witness's] allegations about his treatment during the weeks of incarceration are uncontested." 202 F.Supp.2d at 59.
[48] "Held Without Charge/Material Witness Law Puts Detainees in Legal Limbo," John Riley, *Newsday*, 9/18/02.

of suspicion."[49]

Although the Department of Justice claims that the detention of these material witnesses is related to grand jury proceedings, thus justifying the shroud of secrecy, a November 2002 *Washington Post* review of 44 material witness cases, shows that 20 people detained had never been brought before a grand jury.[50]

There has also been judicial criticism of the government's use of the material witness statute, most notably in the case of Osama Awadallah, a Jordanian who at the time of his arrest held a valid U.S. green card and had lived in California for almost three years. In that case, federal prosecutors filed perjury charges against Awadallah for his grand jury testimony that the government obtained while holding him under the material witness statute. In February 2002, U.S. District Judge Shira Scheindlin, of the Southern District of New York, held a four day hearing to determine whether the DOJ and a federal magistrate ignored the provisions of the "material witness" statute requiring the magistrate to consider whether taking a sworn statement from Awadallah would have been an adequate alternative to keeping him in jail. In her decision, Judge Scheindlin found that the government's affidavit to the magistrate was "misleading" and said that had it been accurate, "it is overwhelmingly likely that the court would have found that Awadallah's presence . . . could have been secured by subpoena."[51]

In May 2002, Judge Scheindlin dismissed the government's perjury case against Awadallah, ruling that the government's detention of him under the material witness statute was itself improper because the statute did not authorize such detention of material witnesses in connection with grand jury proceedings and could not constitutionally do so.[52] The prosecution promptly appealed to the Second Circuit and the appeal is pending. In July 2003, District Judge Mukasey, chief judge of the same court, ruled in another case that the material witness statute could apply to grand jury proceedings, explicitly criticizing Judge Scheindlin's opinion and reasoning in *Awadallah*.[53] Given the directly conflicting opinions, the Second Circuit's decision in the *Awadallah* appeal will have wide implications for the government's continued use of the statute in detaining individuals as a tactic in the war on terrorism.

3. Creation and Misuse of the Administration's "Enemy Combatant" Status

One of the most harmful weapons in Ashcroft's arsenal is the unilateral executive designation of people as "enemy combatants." Without explicit authority sanctioned by Congress or the Constitution, the administration has created a classification conferring upon itself unfettered power to detain without charge *any* person seized outside a zone of active combat, even U.S. citizens seized on U.S. soil. While Congress authorized a military response in Afghanistan after the terrorist attacks of Sept. 11, 2001, and the PATRIOT Act permitted the limited detention of aliens in the United States suspected of terrorist ties, neither made mention

[49] "Friends Call For Release Of 'Witness'/ Intel Engineer Held 2 Weeks in Solitary Without Charges," William McCall, *Associated Press*, 4/4/03.
[50] "Justice Milking Detention Authority 'Material Witnesses' of Terrorism Languish Without Testifying," Steve Fainaru and Margot Williams, *The Washington Post*, 11/24/02.
[51] *U.S. v. Awadallah*, 202 F.Supp.2d 82, 98 (S.D.N.Y. 2002).
[52] *U.S. v. Awadallah*, 202 F.Supp.2d 55 (S.D.N.Y. 2002).
[53] *See In re Application of the United States for a Material Witness Warrant*, 213 F.Supp.2d 287 (S.D.N.Y. 2002).

of arresting U.S. citizens on U.S. soil.[54] Ashcroft's brazen use and defense of this designation is further evidence of his disregard of this country's constitutional system of checks and balances, his practice of over-reaching beyond the legitimate powers of the executive branch, and the administration's unilateral form of justice.

So far, the United States is holding around 650 enemy combatants from 42 nations,[55] three of whom reportedly are children aged 13-15.[56] Most were arrested overseas and are being held at Guantanamo Bay, Cuba or other military bases, almost all without prisoner-of-war status or criminal charges. At least two named enemy combatants — Jose Padilla and Yasser Hamdi — are U.S. citizens, one of whom was arrested nowhere near a battlefield, but in Chicago, Illinois. They have all been unilaterally designated and denied the proper treatment the U.S. Constitution and international law requires.

Notwithstanding its unlawfulness and inherent unfairness, the "enemy combatant" card is unparalleled in its usefulness to Ashcroft as an instrument of intimidation to seek to gain information from prisoners or browbeat them into a quick plea. This is so because the consequences of enemy combatant status are so dire and the stakes so high.

First and foremost, enemy combatants are confined on a U.S. military base. Those held in Cuba have no opportunity for judicial review since federal courts have ruled that the base, on land the United States leases from Cuba, lies beyond the reach of U.S. law.[57]

Second, they are generally held incommunicado, with no access to phone calls, mail or visitors and severely limited access, if any, to counsel.

Third, they are held indefinitely, with no legal ability even to challenge the alleged rationale for their confinement.

Fourth, non-citizen enemy combatants may be subject to trial not in a criminal court but in a U.S. military tribunal.[58] The Bush administration reinitiated the use of tribunals – dormant since WWII – by executive order in November 2001 to try non-citizen defendants apprehended in the fight against terrorism on war-crimes charges.[59] The administration defends such tribunals as "full and fair" trials and likens them to normal criminal trials, but the cards are so stacked in favor of the prosecution in a tribunal that the comparison is not even close.[60] The tribunals, comprised of three to seven military officers, can convict on any non-capital crime by majority vote and can impose death sentences by unanimous vote.[61] They lack many of the protections afforded defendants in U.S. courts, both martial and civilian. For example, the tribunals can consider evidence that wouldn't be admitted in a regular court, such as a defendant's statements

[54] Indeed, in 1971 Congress passed 18 U.S.C. § 4001, to prevent the detention of U.S. citizens without a statutory basis.
[55] "U.S. Leaves Fate Of Guantanamo Detainees In Limbo," Matthew Hay Brown, *Chicago Tribune*, 7/20/03.
[56] *See* "3 Children Held In Guantnamo Bay Prison May Be Released, Officials Say," Tania Branigan, *The Washington Post*, 8/23/03; "After Sundown, the 'Enemy Combatants' Began to Sing," Charles Savage, *Miami Herald*, 8/24/03.
[57] "Detainees From the Afghan War Remain in a Legal Limbo in Cuba," Neil Lewis, *New York Times Abstracts*, 4/24/03. The Supreme Court has recently been asked to review this question.
[58] "Leading the News: Guilty Pleas Expected at Tribunals," Jess Bravin, *Wall Street Journal*, 8/11/03 ("Bravin").
[59] "Bush Selects Six for Tribunals," Frank Davies, *Knight Ridder*, 7/4/03.
[60] Bravin.
[61] *Id.*; "Terror Tribunals Miss Justice For All," *Seattle Post Intelligencer*, 7/8/03.

obtained under interrogation without a lawyer present, and they have wide authority to close proceedings and withhold information designated as "classified" for national-security reasons.[62] The rights of appeal are limited since defendants cannot appeal to a civilian court and the tribunal itself ultimately answers to the Secretary of Defense and the President.[63]

Also, the procedures involved in defending a case before a tribunal are so onerous that it has negatively affected the ability to obtain attorneys for the accused. The board of directors of the National Association of Criminal Defense Lawyers (NACDL) recently voted at its annual conference not to endorse its members' participation in military tribunals, concerned that the restrictions placed on civilian attorneys in military tribunals are so severe that the ethical duties imposed on all lawyers to diligently represent their clients cannot in be carried out. "We took the position that it is unethical for a lawyer to represent a client under current conditions for military tribunals, and if a lawyer chose to do so, he or she must contest all of those unethical conditions," said Barry Scheck, the incoming president of the NACDL.[64] For example, since enemy combatants are held on a Navy base, civilian attorneys must request and obtain a security clearance before talking with their client, and even then, their on-site conversations between a defendant and the attorney are monitored for "intelligence purposes."[65] The prosecution can also withhold evidence that could assist the defense attorney if the prosecution believes it would hurt American interests, even if the evidence is relevant to the defendant's assertion of innocence.[66]

In fact, the mere threat of invocation of "enemy combatant" status has entirely changed the legal landscape and given a dangerous new weapon to prosecutors. In Lackawanna, New York, six Yemeni Americans were arrested by FBI agents and charged with providing "material support" to the al Qaeda terrorist network. The government had information that the men had traveled to Afghanistan in Spring 2001, where some completed a training camp for beginning jihadists, but had no evidence that any of the defendants had actually spoken of or planned an attack. However, reports indicate that the prospect of enemy combatant status was so frightening that the six men quickly pled guilty to terror charges and accepted prison terms of six and a half to nine years. As the Lackawanna defense lawyers explained, the real threat of tossing the defendants into a secret military prison without trial, via the "enemy combatant" status, where they could languish indefinitely without access to courts or lawyers, was enough to inspire the six to plead. As one lawyer put it, "We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us . . . So we just ran up the white flag and folded." Although U.S. Attorney Michael Battle claimed that his officer never explicitly threatened to invoke enemy combatant status, he implicitly acknowledged that the enemy combatant device played a role in the guilty pleas, saying, "I don't mean to sound cavalier, but the war on terror has tilted the whole [legal] landscape. We are trying to use the full arsenal of our powers."[67]

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[62] *Id.*
[63] "Bush Decides 6 Detainees Can Be Tried by Military," Richard A. Serrano, *Los Angeles Times*, 7/4/03.
[64] "Defense Lawyers Group Meeting in Denver Won't Endorse Participation in Military Tribunals," Anne Gearan, *Associated Press*, 8/2/03.
[65] "Military Tribunals: Misrule Of Law," Nat Hentoff, *Newspaper Enterprise Association*, 7/17/03.
[66] "Unjust, Unwise and UnAmerican," Robyn E. Blumner, *St. Petersburg Times*, 8/3/03.
[67] "No Choice but Guilty; Lackawanna Case Highlights Legal Tilt," Michael Powell, *The Washington Post*, 7/29/03.

So far, two U.S. citizens have experienced first-hand the full weight of enemy combatant status. Yasser Esam Hamdi was arrested in Afghanistan with Taliban troops, carrying a rifle. Labeled an unlawful enemy combatant, he is being held incommunicado in a Norfolk, Virginia Navy brig. Since his capture, Hamdi has not been charged and has not seen a lawyer or his family. In January 2003, the 4th Circuit Court of Appeals in Richmond ruled that as an enemy combatant, he has no right to a lawyer or other constitutional protections and dismissed his petition for *habeas corpus* relief.[68]

The second American enemy combatant, Jose Padilla, represents a more complicated case for Ashcroft. Padilla – a U.S. citizen arrested on U.S. soil - was seized unarmed by the FBI at Chicago's O'Hare airport on May 8, 2002. The government initially detained Padilla under the material witness statute because of his purported knowledge of an alleged Al Qaeda plan to detonate a "dirty bomb" in the United States. He was flown to the East Coast, where he was held in federal custody for over a month while he waited for his appearance before a grand jury. His defense lawyer was prepared to represent him in the material witness detention process, the administration decided to name Padilla an enemy combatant instead, immediately depriving him of the rights guaranteed by the Constitution. In June 2002, while Ashcroft appeared in a press conference from Moscow publicizing the capture of Padilla and calling him a "known terrorist," federal agents secretly transferred Padilla to a Navy brig in South Carolina without access to phones, letters, visitors or his attorney.[69]

Unlike John Walker Lindh, the American Taliban fighter in Afghanistan who had access to counsel, and Zacarias Moussauoi, the non-citizen purported 20th hijacker of the 9/11 attacks, who is having a criminal trial, Padilla has been denied both. Padilla's attorney, Donna Newman, has not seen or spoken to her client for over 14 months though she continues to fight for his freedom and the government has yet to issue any formal charges against him.

In December 2002, U.S. District Judge Michael Mukasey held in a split decision that while the government acted lawfully in detaining Padilla, he did have the right to meet with an attorney to assist him in challenging his designation as enemy combatant and his detention.[70] In an extremely troubling move, the government appealed the judge's decision, dissatisfied with the court's decision that mostly found in its favor, arguing incredibly that even a U.S. citizen arrested on U.S. soil should not be given the opportunity to present facts in connection with his petition for *habeas corpus* relief and should not be given access to a lawyer.

The case, presently before the 2nd Circuit Court of Appeals, represents the boldest assertion by Ashcroft and the Bush administration yet, that they can order the military to detain an American citizen arrested on U.S. soil indefinitely and without charges, a trial or access to a lawyer. To date, nine friend-of-the-court briefs have been filed by law professors, former federal judges, libertarians, civil rights groups and lawyers' associations on behalf of Padilla. Groups on the left and the right, often opposed to each other, have joined in opposition to Ashcroft's position. For example, one brief was filed by the Lawyers Committee on Human Rights and

[68] *Hamdi v. Rumsfeld,* 316 F.3d. 450 (4th Cir. 2003).
[69] "Civil Liberties Aside in 'Dirty Bomb' Case," Paula Span, *The Washington Post*, 8/3/03.
[70] *Padilla v. Bush, 233* F.Supp.2d 564 (S.D.N.Y. 2002).

People For the American Way Foundation, as well as the Cato Institute and Rutherford Institute.[71]

The array of briefs filed in Padilla's case is reflective of the growing public opposition to the administration's heavy-handedness in its war on terrorism and use of enemy combatant status. As one brief, filed by retired federal appellate judges and former government officials, put it: "The precedent the executive asks this court to set represents one of the gravest threats to the rule of law, and to the liberty our Constitution enshrines, that the nation has ever faced."[72]

4. Secrecy and Further Concerns About Use of the PATRIOT Act

With respect to his manipulation of the immigration laws, material witness statute and the enemy combatant status, as well as his use of the PATRIOT Act, Ashcroft has fiercely maintained his right to keep his actions secret. A week after the attacks, at Ashcroft's direction, the chief immigration judge ordered all proceedings in deportation hearings to be closed to the press and public, including family members and friends, in cases where the government claimed a "special interest." But questions arose almost immediately as to Ashcroft's need for such secrecy, prompting court challenges as to the constitutionality of the order.

In August 2002, the U.S. Court of Appeals for the Sixth Circuit struck down the chief immigration judge's order as a violation of the First Amendment. The appellate court held that the government could close individual cases, but that it could not unilaterally impose secrecy across the board.[73] In October 2002, after media outlets filed suit to obtain access to INS deportation proceedings involving persons whom the attorney general designated as "special interest" cases, another federal appellate court held differently, finding that closure of the hearings was not a violation of the First Amendment.[74] Although the Justice Department itself would ordinarily seek review of such conflicting decisions in the Supreme Court, Ashcroft avoided Supreme Court review by simply not seeking it in the Sixth Circuit case and suggesting in the other case that procedures were under review and might not be repeated, although making no specific changes on the record.

Ashcroft has also withheld information as to his use of the material witness statute, arguing that because the testimony of individuals detained under the statute is relevant to grand jury proceedings, which are secret under federal law, he is not required to release any information relating to those named as material witnesses. Similarly, in the case of enemy combatants, as they are held on a military base, away from counsel and family, there is literally no information available to the public on their treatment or the government's case against them. Certainly, none has been forthcoming from the attorney general. In naming Jose Padilla as an enemy combatant - though he was initially arrested under the material witness statute - the administration has called him "a threat to the nation" and, citing national security concerns, insists that he be held in incommunicado.[75]

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[71] Brief of *Amici Curiae* for Jose Padilla, *Jose Padilla v. Donald Rumsfeld*, (2nd Cir. 2003) (No. 03-2235(L), 03-2438).
[72] "Court Filings Rip Bush on Padilla Case," Tom Brune, *Tribune Newspapers*, 8/6/03.
[73] *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
[74] *North Jersey Media Group*, 308 F.3d 198 (3rd Cir. 2002), *cert. denied*, 123 S.Ct. 2215 (Mem.), 155 L.Ed.2d 1106, 71 USLW 3579, 71 USLW 3731, 71 USLW 3734 (2003).
[75] "Battle Brews Over Detainees' Rights," Tom Brune, *Newsday*, 8/6/03.

As reported in our last report on Attorney General Ashcroft, in late 2001, People For the American Way Foundation, along with the ACLU, the Center for National Security Studies and other civil liberties organizations, challenged the attorney general's policy of refusing to release specific information on post-9/11 detainees, including those detained as material witnesses, such as specific numbers of detainees in each category, names, whether they had attorneys and the attorneys' names and the court orders purportedly justifying secret treatment of material witnesses.[76] Ashcroft opposed the lawsuit, claiming that releasing the detainees' names would alert terrorist groups to certain leads in federal investigations. In August 2002, U.S. District Judge Gladys Kessler ordered the government to release much of the requested information, but the administration appealed the decision to the D.C. Circuit Court of Appeals. On June 17, 2003, by a 2-1 majority, a panel of the court ruled in Ashcroft's favor, further shielding the attorney general from public accountability. Further proceedings are expected this fall.

Ashcroft's use of the powers granted him by the PATRIOT Act has also been shrouded in secrecy. In June 2002, the House Judiciary Committee sent Ashcroft a letter asking him to respond to a series of questions regarding the Department of Justice's implementation of the PATRIOT Act.[77] Ashcroft's Justice Department was anything but forthcoming. Rather than complying with the request, Assistant Attorney General Daniel J. Bryant simply told the committee in a letter that some classified information would be provided to the House Intelligence Committee instead.[78] By August, the committee was so frustrated with the attorney general's lack of responsiveness and refusal to turn over certain details about anti-terror tactics contained in the PATRIOT Act that the House Judiciary Committee's Chairman Representative F. James Sensenbrenner Jr., R-Wis., reportedly threatened to issue a subpoena for Ashcroft if answers to the committee's questions were not provided by Labor Day.[79] The Justice Department's heavily redacted response to Congress was released by the House Judiciary Committee to the public in October 2002.[80]

Ashcroft has similarly resisted accounting for his activities before the Senate. According to two Republican leaders and the Democratic chairman of the Senate Judiciary Committee, Ashcroft's Justice Department also refused to turn over a legal opinion issued by the court that oversees secret intelligence warrants, even though the document was unclassified.[81]

The DOJ's response to Congress' inquiries was particularly troubling in light of the semi-annual reports released by the Department's own Inspector General concerning complaints about PATRIOT Act-related civil rights and civil liberties violations. From June 2002 to June 2003, the Inspector General's office reported that it received more than 1800 such complaints.[82] Although most were outside its jurisdiction, more than 400 were within the inspector general's

[76] "John Ashcroft's First Year as Attorney General," People For the American Way (Feb. 2002).
[77] Letter to Attorney General Ashcroft, F. James Sensenbrenner and John Conyers, Jr., Truthout.com, 6/13/02.
[78] "Lawmakers Say That Ashcroft Is Withholding Documents," Dan Eggen, *The Washington Post*, 8/21/02.
[79] "Ashcroft Assailed on Policy Review; Lawmakers Say Oversight Is Blocked," Dan Eggen, *The Washington Post*, 8/21/02 ("Eggen").
[80] "Anti-terror Law Worries Librarians," Dana Hull, *San Jose Mercury News*, 10/18/02.
[81] Eggen.
[82] "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," U.S. Dept. of Justice, Office of the Inspector General (July 17, 2003)("July IG Report) at 6; "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," U.S. Dept. of Justice, Office of the Inspector General (January 22, 2003) ("January IG Report") at 6.

purview, and more than 10% of these, some 67 complaints, were found to state a "credible PATRIOT Act complaint." For example, an Arab-American complained that FBI agents illegally searched his apartment, vandalized it, stole items, and called him a terrorist.[83] A detained Egyptian citizen reported that he was forced to undergo multiple, invasive body searches, was denied the right to practice his religion, and was forced to eat food prohibited by his religion. An official reportedly ordered a Muslim detainee to remove his shirt so the officer could use it to shine his shoes. These and other complaints are being investigated by OIG and other officials.[84]

In February 2003, a bipartisan report issued by senior members of the Senate Judiciary Committee expressed deep frustration with the Justice Department's refusal to submit to congressional oversight:

> "We are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Specter to ask the Attorney General directly, "how do we communicate with you and are you really too busy to respond?"[85]

In addition, in August 2002, the ACLU and a coalition of civil rights organizations filed suit in federal court to force the attorney general under the Freedom of Information Act to disclose information relating to the number of times the FBI exercised its new surveillance powers provided by Sec. 215 of the PATRIOT Act. Although the attorney general released some information responsive to the FOIA request in October 2002, some of the documents were so redacted that it was impossible to determine the number of times the FBI sought a Sec. 215 order. A federal district judge ultimately held against the plaintiffs, finding that FOIA did not *require* the attorney general to make any further disclosures, but in doing so, he did state that there was a "compelling argument that the disclosure of this information will help promote democratic values and government accountability."[86] Unfortunately, Ashcroft believed differently and continued to withhold the information even though the FOIA request did not seek the names of people under investigation listed in the orders.

In July 2003, the ACLU filed a lawsuit in federal court in Detroit to block investigations conducted under Section 215 of the PATRIOT Act, arguing that the law violates protections against unreasonable searches and the right of free speech and religion. As discussed above, Section 215 greatly expanded the government's ability to go after any tangible thing from any entity, including libraries, requiring only that the government agent certify that the item is being sought for an authorized intelligence investigation, even one that is not terrorism related. In the ACLU case, among the plaintiffs is the Islamic Center in Portland, which has been targeted in a local terrorism investigation.[87]

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[83] July IG Report at 7-8.
[84] *Id.*; *see also* January IG Report.
[85] ACLU Report at 11.
[86] *ACLU v. U.S. Dept. of Justice*, 265 F.Supp.2d 20, at 31 (D.D.C. 2003).
[87] *Muslim Community Association of Ann Arbor v. Ashcroft*, No. 03-72913 (E.D. Mich. 2003).

B. Ashcroft's Efforts to Further Expand DOJ Power and the Response

For months after its passage, John Ashcroft and the Justice Department resisted congressional efforts to assess the effectiveness of the PATRIOT Act in combating terrorism or the law's impact on civil liberties.[88] Then, despite assurances to Senate Judiciary Committee members to the contrary,[89] a draft of a new anti-terrorism bill was leaked in February of this year.[90] The new bill, entitled the Domestic Security Enhancement Act of 2003, was leaked along with Justice Department routing information indicating that it had been sent to Vice President Dick Cheney and House Speaker Dennis Hastert.[91] Justice Department officials denied that the bill had circulated to these leaders.[92] The new bill sought sweeping powers to once again increase domestic surveillance and arrest authority while simultaneously decreasing judicial and legislative oversight of law enforcement activities and further shutting off public access to information.[93]

The Domestic Security Enhancement Act was quickly dubbed PATRIOT Act II. The bill was an audacious power grab that would have vastly expanded the capabilities of the attorney general and federal law enforcement agencies. The legislation would have added a federal death penalty for terrorist offenses,[94] authorized the creation of a DNA database of individuals not convicted of crimes,[95] and allowed the executive branch to strip an American of his or her citizenship and essentially render that person stateless and without rights.[96] The bill also would have been a broadside attack on hundreds of consent decrees that protect citizens from ongoing local and federal law enforcement attacks on civil rights and privacy.

Strong public outcry forced PATRIOT II out of public view. Civil liberties activists have remained vigilant, and some aspects of that bill have resurfaced. Earlier this year, Senator Orrin Hatch, R-Utah, offered and then quickly withdrew legislation to lift the "sunset" clauses on parts of the PATRIOT Act that would have curbed new investigative powers after four years.[97] The elimination of the "sunset" was also part of PATRIOT II.[98]

More of the new powers from PATRIOT II are included in the proposed Vital Interdiction of Criminal Terrorist Organizations Act of 2003, known as the VICTORY Act.[99] Drafts of this legislation indicating that it will be introduced by Senator Hatch were circulated throughout the summer of 2003.[100] Like PATRIOT II, the VICTORY Act would also

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[88] "Sensenbrenner Wants Answers on Act," Steve Schultze, *Milwaukee Journal Sentinel*, 8/19/02.
[89] "Comments of Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee, On the Justice Department's Secrecy in Drafting a Sequel to the USA PATRIOT Act," 2/10/03.
[90] *See* Transcript of "Now, With Bill Moyers," 2/7/03.
[91] "Justice Department Drafts Sweeping Expansion of Anti-Terrorism Act," Charles Lewis and Adam Mayle, Center for Public Integrity, 2/7/03.
[92] *Id.*
[93] *See* Transcript of "Now, With Bill Moyers," Interview with Chuck Lewis, Center for Public Integrity, 2/7/03.
[94] "Domestic Security Enhancement Act of 2003: Section by Section Analysis," at Sec. 411, Department of Justice, 1/9/03.
[95] *Id* at Sec. 301-306.
[96] *Id* at Sec. 501.
[97] "GOP Wants To Keep Anti-Terror Powers; Broad Spying Tools Would Become Permanent," *New York Times*, reprinted in *San Francisco Chronicle*, 4/9/03.
[98] "Domestic Security Enhancement Act of 2003: Section by Section Analysis," at Sec. 110, Department of Justice, 1/9/03.
[99] "Target: Narco-Terror," Dean Schabner, ABCNews.com, 8/20/03.
[100] *Id.*

dramatically expand the authority of law enforcement and intelligence gathering agencies.[101] The legislation would also scale back public accountability and judicial oversight of law enforcement and domestic intelligence gathering.[102]

One part of the bill would give the attorney general broader authority to issue "administrative subpoenas" in the course of a terrorism investigation. These subpoenas would not be subject to judicial review, and would grant nearly unlimited access to the personal financial records of anyone.[103] The bill would also increase the power of law enforcement to use roving wiretaps, which essentially create a no-privacy zone into which anyone can fall. Worse yet, the law would make it more difficult for people to fight illegal wiretaps that threaten their privacy.[104]

The VICTORY Act would also give law enforcement the power to compel communications companies, Internet service providers, and financial institutions to hide government inquiries, wiretaps, and Internet traffic intercepts from customers. All told, these and other powers asserted since the September 11, 2001 terrorist attacks would allow the government to effectively create a secret internal intelligence force which can gather information on innocent people and guarantee that they never find out they are the subject of an investigation. Such secret investigations could lead to an indefinite detention as an 'enemy combatant,' deportation, or worse. Assessing the VICTORY Act as Attorney General Ashcroft toured the country to promote the administration's anti-terrorism efforts, the Casper (Wy.) *Star-Tribune* concluded: "The ironically named Victory Act would not be a victory for freedom loving people. It's really a wish list for those who want more federal police power."[105]

Fortunately, both Congress and the public have reacted with concern and outright opposition to many of Ashcroft's tactics and plans. When the attorney general testified before the House Judiciary Committee in June 2003, he was faced with open opposition and criticism. Some Democratic members of the panel, outraged by his record of detaining hundreds of foreigners, many for lengthy periods of time, under the guise of immigration violations, and emboldened by the circulation of the internal inspector general report earlier that week validating allegations of the Department's mistreatment of detainees, expressed their extreme displeasure. As Representative Maxine Waters, D-Calif., said in the June 5, 2003 committee hearing:

> With 9/11, we are concerned about the way that you have used your power, the way that you have detained immigrants . . . Isn't it a fact that after you rounded up these individuals, you found that they had no involvement with terrorist activity, but found a problem with the immigration status that provided you a simple legal basis to [detain] them?[106]

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[101] "Bill Covers Narco-Terrorism," Keith Perine, *CQ Weekly*, 8/9/03, at 2309.
[102] "Target: Narco-Terror," Dean Schabner, ABCNews.com, 8/20/03.
[103] *Id.*
[104] *Id.*
[105] "Victory Act No Triumph for Freedom Lovers," Charles Levendosky, *Casper Star-Tribune*, 8/26/03.
[106] "Ashcroft Seeks Broader Powers; House Urged to Toughen War on Terrorism," Rebecca Carr, *The Atlanta Journal – Constitution*, 6/6/03.

Several measures are now under consideration aimed at curtailing the Bush administration's assertions of unchecked intrusive power. They include bills to protect personal information and enhance judicial review of proposed searches by federal agents. One bill, sponsored by Senator Lisa Murkowski, R-Alaska, and Senator Ron Wyden, D-Ore., titled the "Protecting the Rights of Individuals Act," seeks to restrict the definition of domestic terrorism and require a higher standard of proof before federal agencies could search data such as library, bookstore, and medical records.[107] Legislation introduced by Senator Russell Feingold, D-Wis., titled Library, Bookseller, and Personal Record Privacy Act, seeks to place limits on the authority the PATRIOT Act granted to the FBI to obtain essentially unfettered access to library, bookseller, and other business records pursuant to the Foreign Intelligence Surveillance Act (FISA).[108]

These developments in Congress follow a significant legislative victory for proponents of civil liberties. On July 22, 2003, Attorney General John Ashcroft suffered an enormous setback when the House of Representatives, in a stunning 309-118 vote, voted on an amendment sponsored by Representative C.L. "Butch" Otter, R – Idaho, and decided to strike down funding for Ashcroft's "sneak and peek" warrants, a key search-and-seizure section of the USA PATRIOT Act. The action by the House marked the first time either chamber of Congress has voted to revoke any part of the PATRIOT Act and reflects the growing public concern about diminishing individual liberties under Ashcroft's implementation of the Act.

In anticipation of the vote, the Justice Department sent House Speaker Dennis Hastert, R-Ill., an eight-page letter criticizing the amendment and invoking the scare tactics so often heard from Ashcroft's Justice Department by calling the legislation a "terrorist tip-off amendment."[109] But the letter did little to sway even Ashcroft's right-wing supporters in the House; a whopping 113 of the votes in favor of the ban were by Republicans.[110]

In addition, there has been an overwhelming grassroots uprising in the last 18 months against Ashcroft's and the administration's tactics in its war on terrorism. A multitude of local and state ordinances have been passed condemning the attorney general's use of his expanded law enforcement authority under the PATRIOT Act - and in some cases refusing to help to enforce it - and the threat that some of the Act's provisions pose to fundamental civil rights and civil liberties. So far, 157 cities, towns, and counties have passed such resolutions, along with state legislatures in Alaska, Hawaii and Vermont.[111]

The attorney general's team has responded to the public's concerns with denial, defensiveness and untruths. In April 2003, a DOJ spokesperson denied the PATRIOT Act's potential infringement on civil liberties, stating only that both the PATRIOT Act and the Homeland Security Act follow the Constitution.[112] In May 2003, another DOJ spokesperson

[107] Protecting the Rights of Individuals Act, S. 1552.
[108] Library, Bookseller, and Personal Record Privacy Act, S. 1507.
[109] "Fierce Fight Over Secrecy, Scope of Law," Amy Goldstein, *The Washington Post*, 9/8/03.
[110] "No Sneak And Peek; The House Rejects Funds For Patriot Provision," Nat Hentoff, *Washington Times*, 8/4/03.
[111] Bill of Rights Defense Committee website, 9/3/03.
[112] "City's Ordinance Outlaws Adherence to Patriot Act," Evelyn Nieves, *The Washington Post*, 4/22/03.

defended the PATRIOT Act by discrediting local governments, claiming that "[a] lot of these city councils basically don't understand what the PATRIOT Act does."[113]

Viet Dinh, former Assistant Attorney General for the Office of Legal Policy and one of the drafters of the DOJ's original version of the PATRIOT Act,[114] attempted to minimize the significance of such resolutions, saying "[i]f one actually reads these resolutions and these enactments, there's nothing disagreeable about them" and that they are "merely statements of principle of saying that the Constitution . . . is sacred and that the states and locals will not do anything in abridgment of the Constitution."[115] This claim is simply false. Many of the resolutions are not mere recitations of the Constitution, but are directly critical of the PATRIOT Act and the attorney general's implementation of it. The Alaska State Senate, for example, sent Ashcroft a particularly powerful message when it unanimously approved a resolution that stated:

> WHEREAS certain provisions of the [USA PATRIOT Act] allow the federal government more liberally to . . . engage in surveillance activities that may violate or offend the rights and liberties guaranteed by our state and federal constitutions . . . BE IT. . . RESOLVED that it is the policy of the State of Alaska to oppose any portion of the USA PATRIOT Act that would violate the rights and liberties guaranteed equally under the state and federal constitutions; and . . . that the Alaska State Legislature implores the United States Congress to correct provisions in the USA PATRIOT Act and other measures that infringe on civil liberties, and opposes any pending and future federal legislation to the extent that it infringes on Americans' civil rights and liberties.[116] (emphasis added).

Similarly, contrary to Dinh's assertion, Hawaii's resolution also directly addresses the PATRIOT Act, stating that "the recent adoption of the USA PATRIOT Act and several executive orders may unconstitutionally authorize the federal government to infringe upon fundamental liberties in violation of due process."[117]

Most recently, perhaps in response to such opposition, Ashcroft has embarked on a nationwide tour in defense of the PATRIOT Act. In late August 2003, Ashcroft began a multi-city publicity stint during a time of heightened opposition to his implementation of the Act, with legislation pending in Congress to roll back certain provisions of the law and Senator Hatch poised to introduce Ashcroft's VICTORY Act.[118] Ashcroft's tour has drawn criticism from members of both parties in Congress. David Carle, spokesman for Senator Patrick Leahy, D-Vt., the ranking Democrat on the Senate Judiciary Committee, said, "[w]hat is needed is less self-promotion and lobbying and more accountability . . . There is bipartisan concern in both the Senate and the House about how oversight questions from the committees that oversee the Justice Department sometimes have gone unanswered for a year or longer."[119]

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[113] "Anti-Terror Patriot Act Prompts Grass-Roots Uprising," Kevin Diaz, *Star Tribune*, 5/23/03.
[114] "National Security: The Ashcroft Doctrine," Siobhan Gorman, *National Journal*, 12/21/02.
[115] Transcript of News Hour with Jim Lehrer, 8/19/03.
[116] Bill of Rights Defense Committee website, 8/22/03.
[117] *Id.*
[118] "US Attorney General Defends Anti-Terrorism Law," James Vicini, *Newsdesk*, 8/19/03.
[119] "Patriot Act Needs Help, Reno Says, Ex-Attorney General Says Rights in Trouble," Chuck McCutcheon, *Newhouse News Service*, 8/30/03.

Representative Otter, R-Idaho, who authored the amendment limiting "sneak and peek" searches,[120] summed up the concerns of many regarding Ashcroft's nationwide tour and actions in the name of anti-terrorism: "Instead of hitting the campaign trail, the attorney general should be listening to the concerns that many Americans have about some portions of the act."[121]

III. Ashcroft's Abysmal Civil Rights Record

The past eighteen months of Ashcroft's tenure have further solidified the concerns of the civil rights community that the attorney general not only lacks sensitivity to civil rights principles, but that he also lacks a commitment to enforcement of them. Despite the Justice Department's unexpected and uncalled for activism in nontraditional areas that coincide with Ashcroft's personal and political views, or perhaps because of it, Ashcroft has simply failed to carry out his prescribed duties as chief enforcer of the nation's civil rights laws. Under Ashcroft's watch, since February 2002, the federal government has weakened enforcement of those laws, opposed affirmative action in higher education, stopped pursuing high-stakes employment discrimination cases, and failed to investigate violations of the Voting Rights Act in connection with the 2000 presidential election.

One of the most controversial actions by the Ashcroft Justice Department since February 2002 was its filing of Supreme Court *amicus* briefs in the University of Michigan cases concerning affirmative action in higher education admissions. Even though Democratic and most Republican Justice Departments have supported affirmative action in the past, and even though the Clinton Justice Department had supported affirmative action in the Michigan case, the administration's 2003 briefs opposed affirmative action and the university's position. The Bush administration claimed that both the Michigan law school and undergraduate plans were unconstitutional, and that diversity in higher education could be promoted only through racially neutral means. Civil rights groups criticized that Justice Department position, and the administration's two highest-ranking minority officials – Secretary of State Colin Powell and National Security Advisor Condoleeza Rice – "subsequently distanced themselves from the Bush administration brief."[122]

Ultra-conservatives in the Ashcroft Justice Department reportedly urged the administration to take an even more anti-affirmative action approach and argue to the high court that it should rule, contrary to the 1978 decision in the *Bakke* case, that promoting diversity is not a compelling government interest at all.[123] In its decision in the Michigan case, the Supreme Court rejected both these positions, reaffirmed *Bakke,* upheld the law school plan while striking down the undergraduate plan, and ruled that carefully tailored affirmative action in higher education is constitutional.[124]

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[120] "Ashcroft Campaigns to Save Patriot Act," Paul Foy, *Associated Press,* 8/25/03.
[121] "Ashcroft, Patriot Act Trouble Both Liberals and Conservatives," Dan Eggen and Jim Vandehei, *The Washington Post Service*, 8/29/03.
[122] "The Bush Administration Takes Aim: Civil Rights Under Attack," Leadership Conference on Civil Rights Education Fund (April 2003) ("LCCREF Report") at 27-8.
[123] "Spinning Race," Howard Fineman and Tamara Lipper, *Newsweek,* 1/27/03; *see Regents of the University of California v. Bakke*, 428 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).
[124] *Grutter v. Bollinger,* ___ U.S. ___, 123 S.Ct. 2325, 71 USLW 4498 (2003).

Perhaps even more troubling has been Ashcroft's performance, or lack thereof, concerning employment discrimination. Though Justice serves as the primary enforcer in the public sector of Title VII of the Civil Rights Act, which prohibits discrimination in employment based on race, sex, religion, or national origin, the department has been largely missing in action on Ashcroft's watch.

In the two a half years since Ashcroft's confirmation on February 1, 2001, the department has filed only eight Title VII cases, about three a year.[125] In comparison, over the past 20 years, during the Reagan, Bush I and Clinton administrations, the Justice Department averaged between 12 and 14 Title VII cases per year.[126]

In response to questions by a Senate oversight committee in May 2002, outgoing Civil Rights Division head Ralph Boyd denied allegations that he has been lax in enforcement of Title VII, claiming that his department had several employment discrimination cases in the pipeline.[127] His statement was belied by the fact that according to the division's website, in the year following Boyd's appearance before the oversight committee, it filed only five cases. So far, in the first eight months of 2003, the division has initiated only one employment case, a far cry from the dozen plus average during former Democratic and Republican administrations.

Under Ashcroft, the Civil Rights Division has also switched positions in ongoing civil rights litigation and settlements in a way that has harmed discrimination victims, as discussed in PFAWF's February 2002 report. Since that report, Ashcroft's Civil Rights Division has done the same in several employment cases. During the first Bush administration, the Justice Department filed suit against the New York City Board of Education for discrimination against women and minority school custodians, when its investigation revealed that 92% of the staff custodians were white and 98.5% were males. The suit was ultimately settled in the year 2000, but in April 2002, the Ashcroft Justice Department abandoned its support of the women and minority victims, announcing that it would not defend the settlement decree against the continued court challenges by white male custodians.[128]

The Ashcroft Justice Department also switched sides in an important case involving discrimination in the Buffalo, New York Police Department, supporting in 2002 the use of job tests with an adverse impact on minorities that the Justice Department opposed as recently as June 2001. In a letter to the Justice Department career lawyer who had taken the contradictory positions, an attorney from the New York firm of Cravath, Swaine & Moore, which represented African American police officers in the case, acknowledged that the switch was probably imposed by the "front office" – that is, political appointees at Justice. Nevertheless, he concluded, the "dramatic departure" from Justice's previous position in the case was "breathtaking."[129]

The Ashcroft Justice Department again switched sides in a police misconduct case involving the Pittsburgh Police Department. In 1997, the DOJ first intervened in a lawsuit

[125] Department of Justice Civil Rights Division website, 8/26/03; Roll Call List, Senate website, 2/1/01.
[126] "No More Enforcers," Doug Huron, *Legal Times*, 5/19/03.
[127] *Id.*
[128] LCCREF Report at 29.
[129] *Id.* at 29-30.

brought by the NAACP, the ACLU, and other organizations and aided their efforts to bring systemic reforms to the Pittsburgh Police Department. Five years later in September 2002, however, the Civil Rights Division joined with city officials in asking the court to lift the consent decree, despite an internal report that found that problems still existed in the police department, particularly with regard to its process of investigating police misconduct. The court ultimately granted the Justice Department's motion in part, over the objection of the plaintiffs.[130]

Concerns have also been raised about the Ashcroft Justice Department and voting rights. In January 2001, the claims of thousands of disenfranchised Florida voters prompted the NAACP, People For the American Way Foundation, and other civil rights organizations to file the case of *NAACP v. Smith*, a federal voting rights lawsuit, which sought relief for the statewide purge and voter registration problems that disproportionately harmed African American voters in Florida during the 2000 presidential election.[131] Extensive pretrial discovery took place, and a settlement was reached in late summer of 2002, requiring extensive monitoring and other effort. In spring 2002, the Civil Rights Division of the Justice Department abruptly closed the vast majority of its investigations into the 2000 Florida election misconduct allegations.

Ashcroft's Justice Department has also supported the State of Florida's continued disenfranchisement of thousands of African Americans through a state law that denies individuals who have been convicted of a felony the right to vote. The Brennan Center for Justice of New York University brought suit challenging the State of Florida's law under Section 2 of the Voting Rights Act, contending not only that the law has the effect of denying the right to thousands of African Americans, but also that the law was originally enacted with discriminatory intent. Although fourteen former Justice Department officials, including Deputy Attorney General Eric Holder and former Solicitor General Seth Waxman, filed a brief in support of the plaintiffs in that case, Ashcroft's Justice Department filed an *amicus* brief in support of Florida's law.[132]

The future of the Civil Rights Division as the lead enforcer of the country's civil rights laws remains troubled. Though former Civil Rights Division chief Ralph Boyd is gone, it is uncertain whether any improvement will occur under Ashcroft's pick as successor. As principal deputy of the division from January 2001 until December 2002, Alex Acosta "is closely linked to many of the division's controversial positions."[133] Acosta has offered little explanation for the Justice Department or the Civil Rights Division's poor record of enforcing the civil rights laws. Instead, he has obliquely side-stepped the issue and concerns about the division's actions by repeatedly pledging a policy of strong enforcement. For example, during his confirmation hearing before the Senate Judiciary committee on July 23, 2003, after Sen. Ted Kennedy, D-Mass., complained that the Justice Department's Civil Rights Division had become "politicized" and ineffective, Acosta simply said, "[e]mployment discrimination cases will be pursued vigorously, using all the resources at our disposal."[134] Close monitoring of the Civil Rights Division's performance will continue to be essential.

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[130] *Id.* at 32-33.
[131] *See NAACP, et al. v. Smith, et al.*, Case No. 01-0120-CIV (S.D. Fla.).
[132] *Id.* at 32.
[133] "Debate Begins Over DOJ Civil Rights Pick," Vanessa Blum, *Legal Times*, 8/4/03.
[134] "Senate Panel Oks Pryor's Nomination," Jan Crawford Greenberg, *Chicago Tribune*, 7/24/03.

IV. The Ashcroft Justice Department and Federal Judicial Nominations

As significant as Attorney General Ashcroft's direct actions have been in harming civil rights and liberties, the Ashcroft Justice Department may have an even more far-reaching and long-lasting impact on our Constitution and laws by helping to pack the federal courts with judges ready to limit and overturn crucial court precedents protecting those rights. Both White House and Justice Department officials have confirmed that under Ashcroft, the Justice Department plays a central role in the Bush administration's judicial nominations strategies. Ashcroft's director of the Department's Office of Legal Policy (formerly the Office of Policy Development), a position filled until recently by Viet Dinh, serves as a principal member of the administration's Judicial Selection Committee. The committee screens and recommends candidates for nomination to the president, with DOJ and the White House Counsel's office conducting joint interviews and joint assessments of nominees for all levels of the federal judiciary.[135] Early in his tenure, Ashcroft restored to Dinh's office the Office of Legal Policy name that it had during the Reagan administration, a move that "perhaps signaled that this President Bush's judicial selection behavior would be more like that of President Reagan, known for his aggressive pursuit of a conservative agenda through judicial appointments."[136]

In fact, this prediction has proven, if anything, an understatement. The concerted effort by the administration to submit right-wing judicial nominees and move the federal courts further to the right is well documented.[137] The White House DOJ screening and interview process is crucial to that effort. For example, it was reported earlier this year that Pennsylvania Republican Senators Santorum and Specter recommended several female candidates to fill an open seat on the U.S. Court of Appeals for the Third Circuit created by the death of Judge Carol Mansmann. The candidates were reportedly interviewed at the White House, but rejected as "not sufficiently conservative or pro-life."[138]

Even though Bush administration-appointed judges have been on the bench for a relatively short period of time, the consequences are already beginning to be felt. The recent decision that Fourth Amendment protections should not apply to non-citizens, contrary to established precedent as discussed above, was rendered by one of the administration's most controversial district court appointees, Paul Cassell.[139] Just this summer, Bush D.C. Circuit appointee John Roberts wrote a dissent arguing that the court should reconsider its own precedents and rule that a regulation implementing the Endangered Species Act is unconstitutional.[140] As University of Chicago professor Cass Sunstein has explained, the "nation

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[135] *See* "W. Bush Remaking the Judiciary: Like Father Like Son?" Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, Sara Schiavoni, *Judicature* (May-June, 2003) at 284-6. In an interview, Dinh appeared to suggest that Ashcroft is sometimes personally involved in the process, reporting that the DOJ participants in Judicial Selection Committee meetings include "both this office [OLP] and the Attorney General when appropriate." *Id.* at 285.

[136] *Id.* at 284.

[137] *See, e.g.*, *The Approaching Armageddon on Judicial Nominations*, People For the American Way Foundation,1/6/03; for additional reports on this subject, go to www.pfaw.org. "The Right-Wing Assault," Cass Sunstein, *The American Prospect* (Spring 2003)("Right-Wing Assault"); "More Conservatives for the Courts," *New York Times*, 7/29/03 (referring to Bush administration's "effort to remake the federal courts in its own ideological image").

[138] "Fisher to Become Federal Judge," G. Joseph, *Philadelphia Daily News*, 4/11/03.

[139] *See U.S. v. Esparza-Mendoza*, 265 F.Supp.2d 1254 (D. Utah 2003).

[140] *See Rancho Viejo, LLC v. Norton*, No. 01-5373 (D.C. Cir. July 22, 2003)(Opinion of Roberts, J., dissenting from denial of hearing *en banc*).

is in the midst of a period of right-wing judicial activism," and "much worse may be on the way."[141] The Ashcroft Justice Department continues to play an important role in this area.

V. Ashcroft's Attacks on the First Amendment and DOJ Career Prosecutors and Threats to Judicial Independence

A. Separation of Church and State

As one of the early architects of legislation to allow federal funding for religious social service programs, Ashcroft is a natural point man with respect to the Bush administration and the Religious Right political movement. His actions in the past year and a half make clear that the attorney general will not hesitate to blur the constitutional separation of church and state, one of the First Amendment's pillars of religious liberty. Ashcroft, like Bush, has openly used his position to undermine this important principle.

In December 2002, the president signed an executive order stating that the government should not distinguish between religious and other secular providers in dispensing government grants.[142] In January, the attorney general kicked off a publicity tour endorsing Bush's plan to fund religion-based social services and stepped into the debate in a manner criticized as wholly unsuitable for the nation's top law enforcement official.[143]

In Ashcroft's support of the plan, he made no mention of how the administration would deal with religious institutions that discriminate in employment or the dispensation of services based on religion, or concerns that such federally funded religious programs could demand clients to sign a declaration conforming with the organization's particular religious beliefs. Tellingly, the only response Ashcroft had to such concerns was: "Any citizen who's offended can leave the service."[144]

Spring 2003 saw an unusual move by the Civil Rights Division of the Justice Department when it filed *amicus* briefs in two cases in support of a Christian evangelical organization that wants public schools to distribute its invitations to after school religious sessions. In two separate appeals, one before the Fourth Circuit against Montgomery County Public Schools in Maryland and one before the Third Circuit against Stafford Township School District in New Jersey,[145] the DOJ filed briefs in support of the Child Evangelism Fellowship (CEF). CEF sued two school districts after the schools had decided it was improper to send kids home with flyers publicizing CEF religious gatherings. The flyer at issue in the Montgomery County case said, ". . . boys and girls . . . hear Bible stories, play games, sing songs, and memorize Scripture."[146] In a particularly unusual move, the Department asked for and received permission to appear in the

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[141] Right-Wing Assault at A4. *See also Courting Disaster*, People For the American Way Foundation (2003).
[142] Exec. Order No. 13279, 2002 WL 31785004 (Pres.) (2002).
[143] "Ashcroft Backs U.S. Funds For Faith-Based Groups,'" Curt Anderson, *Associated Press*, 1/14/03.
[144] "Ashcroft Pitches Faith: In Denver, AG Lauds Aid For Religious Groups," Susan Greene, *Denver Post*, 1/14/03.
[145] Brief of DOJ as Amicus Curiae for CEF, *Child Evangelism Fellowship of Maryland, et al. v. Montgomery County Public Schools, et al.*, (4th Cir. June 2003) (No. 03-1534); Brief of DOJ as Amicus Curiae for CEF, *Child Evangelism Fellowship of New Jersey, et al. v. Montgomery County Public Schools, et al.*, (3rd Cir. May 2003) (No. 03-1101).
[146] "White House Steps In On Church-School Case, Evangelists Want To Distribute Fliers," Patrick Badgley, *The Washington Times*, 6/29/03; "An Outrageous Brief," *Arizona Daily Star*, 7/2/03.

Court of Appeals and argue on the side of CEF in the Maryland case.[147] The CEF cases represent the first time that the Justice Department has ever injected itself into a dispute supportive of a religious organization's claim that public schools are required to distribute religious fliers, and signal the attorney general's intent to use the power of his office to undermine religious liberty safeguards.

B. Free Speech

Ashcroft has recently asked the Supreme Court to reverse a court decision that prohibits the federal government from investigating and punishing physicians for making recommendations to patients about the medical use of marijuana.

In the case of *Conant v. Walters*, a group of patients and California physicians sued in 1997 to enjoin enforcement of a federal government policy that threatened to punish physicians who communicated with their patients about the medical use of marijuana. That year, U.S. District Court Judge Fern Smith entered a preliminary injunction in the case, prohibiting the federal government from investigating and revoking the licenses to prescribe drugs of physicians who recommended the medical use of marijuana to patients or engaged in non-criminal activity related to such recommendations. No appeal was filed by the Clinton Justice Department to the temporary injunction, which did not apply to doctors who actually prescribe, dispense or aid and abet in the distribution of marijuana in violation of federal law, and it remained in place for two years. In September 2000, another district court judge dissolved the temporary injunction and made it permanent, noting that "the government agreed that revocation of a license was not authorized where a doctor merely discussed the pros and cons of marijuana use."[148]

On appeal, the Ninth Circuit upheld the permanent injunction, finding that the government policy of threatening revocation of a doctor's license to prescribe drugs based solely on that doctor's recommendation of the medical use of marijuana violated First Amendment rights. In doing so, the court relied on the district judge's opinion as to the chilling effect of the government's policy:

> As the government concedes. . . many patients depend upon discussions with their physicians as their primary source of sound medical information. Without open communication with their physicians, patients would fall silent and appear uninformed. The ability of patients to participate meaningfully in the public discourse would be compromised.[149]

Noted conservative Ninth Circuit Judge Alex Kozinski joined in the opinion, criticizing the Justice Department's position that by "speaking candidly to their patients about the potential benefits of medical marijuana," doctors should "risk losing their licenses to write prescriptions."[150]

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[147] *See CEF of Maryland, Inc. v. Montgomery County Public Schools*, No. 03-1534 (4TH Cir., Order of Aug. 27, 2003).
[148] *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002).
[149] *Id.* at 635.
[150] *Id.* at 639 (Kozinski, J. concurring).

Nevertheless, and despite the fact that the injunction does not hinder legitimate criminal investigations of physicians who dispense or prescribe marijuana, the Ashcroft Justice Department petitioned the Supreme Court in August 2003 to overturn the 9th Circuit Court of Appeals decision. The Supreme Court has not announced whether or not it will hear the case.

C. Restrictions on Career Prosecutors Concerning the Death Penalty & Sentencing Issues

One of the more troubling practices of the attorney general has been his significant restrictions on the authority of career federal prosecutors. Through his actions in the areas of the death penalty and sentencing, Ashcroft has demonstrated an unprecedented willingness to substitute his judgment for that of U.S. Attorneys offices across the country.

After his first year as attorney general, People For the American Way Foundation reported Ashcroft's aggressive support of capital punishment when, contradicting a 2000 Justice Department report finding that racial disparities existed in the imposition of the death penalty, he said, "[t]here is no evidence of racial bias in the administration of the federal death penalty."

Since then, Ashcroft has engaged in a crusade to promote capital punishment, despite a national trend that is increasingly skeptical of some aspects of the death penalty. That skepticism has surfaced not only among the American public, but also in the courts and state governments. In June 2002, the Supreme Court barred the execution of the mentally retarded and invalidated procedures in at least five states that allowed judges, rather than juries, to decide death sentences.[151] In both Maryland and Illinois, state governors have issued moratoriums on executions pending investigations as to the existence of racial disparities in death penalty sentences. In an unprecedented development, outgoing Illinois Governor George Ryan emptied death row before his departure, commuting 167 death sentences.[152]

In years past, the decision whether to seek the federal death penalty has rested in the hands of local U.S. Attorneys who have the most information available to make a fair decision on whether such a recommendation is appropriate. Under the Ashcroft regime, the story is entirely different. Federal defendants and career prosecutors across the country have discovered that the decision rests solely in Washington at the desk of the attorney general. Since his confirmation, Ashcroft has vetoed recommendations by federal prosecutors not to seek the death penalty on at least 31 occasions.[153]

Similarly, Ashcroft has limited the authority and second-guessed the judgment of career federal prosecutors with his most recent move in the area of sentencing. Under federal law, federal judges follow sentencing guidelines set by the U.S. Sentencing Commission in deciding criminal sentences, with explicit authorization to impose lesser sentences ("downwardly departing" from the guidelines) in individual cases. When federal prosecutors believe that such downward departures in particular cases are improper, they have objected, reported to DOJ in Washington, and appealed. On July 28, however, Ashcroft issued a directive that prosecutors

[151] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).
[152] "Ryan Quietly Pardoned Many Illinois Inmates," Nicole Ziegler Dizon, *Associated Press*, 2/3/03.
[153] "Federal Death Penalty Use Grows," Alan Judd, *The Atlanta Journal*, 6/9/03.

must report virtually all downward departures to Ashcroft's office in Washington, which will now have the "final say" on whether to appeal and produce "greater scrutiny" by Ashcroft of "day-to-day operations" of federal prosecutors.[154] As one commentator noted, the effect is to "give Ashcroft more control" and to reduce the authority of "prosecutors in the field, the people who know more about the defendant and the circumstances of the case than does anyone in Washington."[155]

In many eyes, this move was also seen as part of a continuing effort by the attorney general to intimidate the federal bench and threaten judicial independence. Ashcroft's first effort to limit the sentencing discretion of federal judges occurred in spring 2002, when the Justice Department lobbied aggressively for the passage of legislation seeking to limit the ability of trial judges to issue sentences that departed downwardly from the sentencing guidelines. The legislation passed, though it caused many federal judges, including staunchly conservative Chief Justice William Rehnquist, to object, arguing that the limitation could lead to intimidation of individual judges and unjust results.[156]

Ashcroft's July 28 directive was widely criticized as having the same effects. Senator Edward Kennedy, D-Mass., accused Ashcroft of an "ongoing attack on judicial independence" by establishing a "black list" of judges who diverge from the guidelines.[157] An editorial in the Wausau, Wisconsin *Daily Herald* was even more critical, contending that Ashcroft was engaged in a "witch hunt," seeking to compile a "list of 'liberal' judges that they can go after, discredit, and replace with their conservative kinfolk."[158] The co-chair of the Sentencing Commission's Practitioners Advisory Group stated that "[t]he Justice Department has embarked on a mission to eviscerate the autonomy of the Sentencing Commission in general and of sentencing judges."[159]

VI. Conclusion

The second anniversary of the tragic attacks on our nation on September 11 is a time to recall with pride the heroism of so many, to remember sadly the fates of innocent victims, and to remind ourselves of the security dangers that America faces in the 21st century. It is also a time to rededicate our country to the values that we stand for and that distinguish us as a nation, and to reject improper assaults on those values in the name of security. Unfortunately, rather than leading us in that rededication, Ashcroft has led us in the opposite direction. In his actions in the name of the war on terrorism and his troubling civil rights and civil liberties records over the last 18 months, Attorney General Ashcroft has undermined key American precepts and values.

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[154] "Ashcroft Justice: Intimidate The Judges," Helen Thomas, *Houston Chronicle*, 8/19/03 ("Thomas"); "Attorney General Directs U.S. Attorneys to Keep Tabs on Downward Departures," 72 U.S. Law Week, 8/19/03, at 2085, 6. Ashcroft's directive also suggested that federal prosecutors are "too often going along with downward departures" and exhorted them to oppose them more frequently. *Id.*

[155] *Ibid*.

[156] "Panel Caught in Tussle Over Judges' Power," Jonathan Groner, *Legal Times*, 8/18/03, ("Groner") at 1.

[157] Thomas.

[158] "Ashcroft Wants All Judges To Think Like He Does," P. Wasson, *Wausau Daily Herald*, 8/20/03.

[159] Groner at 8.