



Editorial Memorandum: **John Ashcroft's Relentless Assault on Civil Liberties** **November 14, 2001**

After the September 11 terrorist attacks, Americans have been forced to examine and reconsider the balance between security and liberty. In a free society, there is no fixed point on which that balance rests; public policy requires a careful weighing of risks and a clear understanding of principles that should guide decisions about tradeoffs that are made in times of crisis, with a focus on preventing those tradeoffs from causing long-term damage to our democratic principles and institutions.

At this crucial moment in our history, we need an attorney general who will be a passionate and tenacious prosecutor. But we also need a prosecutor who will be a passionate and tenacious defender of our Constitution and the Bill of Rights. Unfortunately, U.S. Attorney General John Ashcroft has not been that person. He has failed to pursue a responsible and balanced approach to achieving security and preserving liberty. Instead he has promoted legislation and instituted policies at the Department of Justice (DOJ) that could threaten civil liberties and undermine civil rights for years to come. These recent actions continue a dangerous trend that was already evident in his first six months on the job.

As Americans grapple with the difficulties of living ordinary lives in extraordinary times, it is vitally important that our leaders carry out their obligations responsibly, with particular care that the Constitution and the fundamental freedoms it protects are not sacrificed. Of course it was appropriate – indeed, imperative – for public officials to reevaluate and update intelligence and law enforcement policies. There continues to be extraordinarily broad and bipartisan support for President Bush and for administration efforts to bring to justice those who planned and helped carry out the attacks, and for giving the government effective tools for preventing future attacks. Both President Bush and Attorney General Ashcroft deserve credit, moreover, for affirming American pluralism and condemning violence against people perceived to be Muslims or Arab Americans. Yet actions taken by Attorney General Ashcroft have moved many Americans to recall the words of Benjamin Franklin: “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”

Most Recent Actions

Among the most recent troubling actions taken by Attorney General John Ashcroft:

- Ashcroft has approved an “emergency order” that permits DOJ officials to eavesdrop on the conversations that lawyers have with clients who are in federal custody, including people who have been detained but not charged with any crime. This order

is a profound violation of fundamental legal and constitutional principles at the very core of our system of justice. According to the DOJ order, published in the *Federal Register* on Oct. 31, the secret monitoring of conversations will be initiated without a court order or finding of probable cause, and whenever the attorney general believes “that reasonable suspicion exists” that detainees may “use communications with attorneys or their agents to facilitate acts of terrorism.”

American Bar Association President Robert E. Hirshon said the nation’s largest lawyers group “is deeply troubled” by the rule. “We certainly understand the necessity to take all steps necessary, consistent with our Constitution, to prevent terrorist acts,” Hirshon said. “But these new rules run squarely afoul of the Fourth and Sixth amendments to the U.S. Constitution.”

In a letter to Attorney General Ashcroft last week, Senate Judiciary Committee Chairman Patrick Leahy wrote that there are “few safeguards to liberty that are more fundamental than the Sixth Amendment,” which guarantees a right to legal assistance in the criminal process. “When the detainee’s legal adversary – the government that seeks to deprive him of his liberty – listens in on his communications with his attorney, that fundamental right and the adversary process that depends upon it are profoundly compromised.”

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

- DOJ officials announced Nov. 8 that they will no longer provide a running tally of the total number of people being detained across the country in conjunction with federal anti-terrorist investigations. Instead, officials said they would release revised numbers that omit the largest group of detainees, which includes people being held on some grounds not directly related to September 11. Two weeks ago, DOJ officials announced that they had detained 1,182 people since Sept. 11. DOJ has denied a freedom-of-information request for more information on the detainees and has apparently rejected similar requests from members of Congress, making effective accountability and oversight impossible.
- On Nov. 8 Ashcroft announced that he would oversee a “wartime reorganization” of DOJ that will move additional lawyers and staff to anti-terrorism activities, reducing the number of attorneys who working on other DOJ responsibilities. Strong concerns have been raised that this “wartime reorganization” will be used to reduce the number of attorneys and other resources devoted to the enforcement of the nation’s civil rights laws, one of the issues raised repeatedly during Ashcroft’s confirmation hearings. For example, Ashcroft’s reorganization could reduce the number of attorneys devoted to the voting rights section. The widespread public outcry over

voting irregularities last November in Florida and other states had led Ashcroft to add more attorneys in the voting rights section of the civil rights division; will that important effort now be abandoned? Ashcroft's reorganization could seriously hamper the federal government's responsibility to enforce laws upholding civil rights, voting rights, and environmental quality.

- Ashcroft is backing a recent executive order by President Bush to create a system of military tribunals that would have the power to try, judge, and execute suspected terrorists who are not American citizens without any of the principles, standards, and safeguards of the American legal system. A range of commentators, including conservatives like William Safire, have raised alarms about this order.

Anti-Terrorism Legislation

These disturbing actions came after Ashcroft had proposed and aggressively promoted draconian anti-terrorism legislation, which was significantly worse than what Congress ultimately adopted. The Ashcroft proposal aimed to radically broaden the government's wiretapping, surveillance and search-and-seizure authority, as well as its power to detain non-citizen suspects indefinitely without any meaningful judicial oversight.

Equally troubling was that Ashcroft accompanied this proposal for dramatic expansion of police powers with a demand that Congress pass the bill within three days, in effect insisting on a rubber stamp with no serious examination of the potential consequences of the legislation.

A coalition of remarkable ideological diversity raised questions about Ashcroft's claims and his intrusive proposals. When members of Congress from both parties insisted on hearings and modifications, Ashcroft tried to bully them into passing the administration's bill by implying that the "rather slow pace" of congressional action might leave the country "susceptible" to additional terrorist acts. In the House Judiciary Committee, a concerted bipartisan effort led to an unheard of 36-0 vote in favor of a measure that, while not perfect, strengthened protections for civil liberties. Under pressure from the administration, however, House GOP leaders jettisoned that hard-fought compromise and railroaded through the House a bill more to the administration's liking. The Senate reacted similarly to administration pressure.

The final legislation passed by Congress and signed by President Bush did include some significant improvements over Ashcroft's original bill – on detention, electronic surveillance of Internet communications, and a partial four-year "sunset" clause – but the law still contains provisions that could lead to abuse. The anti-terrorism law grants unprecedented power to the attorney general and the DOJ, including few checks and balances and only limited judicial oversight. If history is any guide, the grant of sweeping new powers will lead to abuses.

Trouble Apparent Before September 11

The anti-terrorism proposals that Ashcroft championed, combined with the most recent decisions he has announced or supported, vindicate many of the fears expressed by civil rights and civil liberties organizations when John Ashcroft was first nominated for the position of U.S. Attorney General. In fact, many of those fears had been vindicated even before September 11.

In early September, People For the American Way Foundation released “John Ashcroft’s First Six Months at the Justice Department: The Right-Wing Dream Team Takes Over.” That report documented “troubling actions or lack of action on a range of issues, including civil rights, civil liberties, gun control, the federal judiciary, church-state separation, and legal and constitutional interpretation.” In addition, the report predicted that “what is already a poor record is nearly certain to get worse,” because many right-wing Justice Department appointees were just settling into their jobs. *See “John Ashcroft’s First Six Months at the Justice Department: The Right-Wing Dream Team Takes Over,” at www.pfaw.org/issues/democracy/ash_update.shtml.*

The report took special note of the predominant role being played by right-wing legal activists in both the Justice Department and White House in the selection of nominees to the federal judiciary. Recent dishonest and disgraceful efforts to use the war on terrorism as a rationale for demanding swift approval of Bush administration judicial nominees have demonstrated the high priority placed on packing the judiciary with right-wing ideologues. The consequences of a federal judiciary dominated by the far right legal philosophy of Supreme Court Justices Antonin Scalia and Clarence Thomas would be devastating for civil rights, civil liberties, reproductive choice, religious liberty, environmental protection, and a range of other issues.

For more information on the situation facing the federal judiciary, see PFAWF’s October 17 report, “President Bush, the Senate, and the Federal Judiciary: Unprecedented Situation Calls for Unprecedented Solution,” www.pfaw.org/issues/democracy/judicial_10-17.pdf. For a rebuttal of efforts to use the war on terrorism to push quick action on judicial nominees, see PFAWF’s November 8 press release, “Senate GOP Exploits War on Terrorism to Promote Right-Wing Judges” at www.pfaw.org/news/press//2001-11-08.340.phtml

No Surprises

President-elect George W. Bush’s announcement in December 2000 that John Ashcroft was his choice to be Attorney General provoked an immediate response from organizations representing Americans concerned about constitutional rights, civil liberties and a wide range of other issues.

In January, People For the American Way published a series of reports examining Ashcroft’s long public record as a U.S. Senator and his record as state Attorney General and then Governor in Missouri. Those reports showed clearly that John Ashcroft had not demonstrated a sufficient commitment to equal justice under the law to be entrusted with upholding the Constitution and our nation’s civil rights laws and did not meet the high

standards of fairness and integrity required of the Attorney General. *See “The Case Against the Confirmation of John Ashcroft,” published by People For the American Way in two parts. For Part I, which covers Ashcroft’s record in the Senate, see www.pfaw.org/news/press/ashcroft_extreme.pdf. For a review of his record as Missouri Attorney General and Governor, see Part II at www.opposeashcroft.com/ashcroft_missouri.pdf.*

It was John Ashcroft’s well-documented public record, and his misrepresentations of that record during his confirmation hearing, that led many public interest advocates and 42 senators to conclude that he should not be entrusted with overseeing the enforcement of laws and the protection of constitutional guarantees affecting civil rights, civil liberties, religious liberty, reproductive rights, environmental protection, and more.

Vigilance

People For the American Way Foundation will work closely with our allies to monitor the implementation of the new anti-terrorism and other Justice Department policies and take appropriate legal and other action. We call on Members of Congress to exercise their oversight responsibility and hold emergency hearings to evaluate the actions taken by John Ashcroft’s Justice Department, scrutinize the impact of those actions on Americans’ rights and freedoms, and take action to protect constitutional principles that are at risk.

#