

CIVIL LIBERTIES  
AFTER 9/11

THE ACLU  
DEFENDS  
FREEDOM

A HISTORICAL PERSPECTIVE ON PROTECTING LIBERTY IN TIMES OF CRISIS

This report was made possible by generous grants from The Ford Foundation, The Rockefeller Foundation, the Open Society Institute, and other private foundations.

RESPONDING WITH A VENGEANCE  
TO TERRORIST ATTACKS IN U.S. CITIES,  
AN ATTORNEY GENERAL UNLEASHES  
THE FULL FURY OF THE U.S. JUSTICE  
DEPARTMENT ON NEW IMMIGRANTS.  
HE SETS UP A VAST NEW SPY NETWORK  
TO INVESTIGATE SUSPICIOUS PEOPLE  
AND ACTIVITIES, ARRESTS 6,000 IN TWO  
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OF THEM . . .

It has the ring of familiarity, but it just goes to show that history, to some extent, repeats itself. This overwrought and ultimately shameful pursuit of immigrants actually took place more than 80 years ago, on the orders of an attorney general named A. Mitchell Palmer. Agents fanned out around the country in response to a spate of bombings, stoking fears not of Muslims but of Bolsheviks.

The Palmer Raids, as those infamous roundups came to be called, rained terror on immigrant communities throughout the U.S. Hundreds of Eastern Europeans were deported without due process — inviting comparison with the tactics being employed against terrorism today. Then, as now, Americans were asked to give up some freedoms for the sake of law and order — only to discover, to their horror, that such sacrifices aren't easy to undo.

**The Sept. 11, 2001, attacks changed us in many ways.**

Once secure in our military and economic superiority, we now realize that it cannot completely insulate us from the murderous intentions of individuals who have no regard for their own lives. Many of us travel less, leave more time for airport check-ins, and hold our children closer than before. We are less likely to balk at government invasions of our own privacy, more likely to fly an American flag.

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**But Attorney General John Ashcroft's responses to last year's atrocities also threaten us, as did Palmer's in an earlier generation, in three profoundly disturbing ways:**

- They focus suspicion on groups or individuals, based on religion or national origin alone;
- They demand virtually unchecked authority to snoop and spy on law-abiding Americans not suspected of any crime; and
- They shut down dissent and due process with strategies ranging from secret hearings and detentions to open disregard of the courts.

In the year since the Sept. 11 attacks, the ACLU has led the resistance against new policies and practices that strike at the heart of what this democracy is all about. The ACLU has fought measures that roll back fundamental protections and jeopardize basic freedoms — employing lawsuits, testimony in Congress, and direct appeals to citizens who may not realize that their way of life is endangered.

Most Americans do not recognize that the USA PATRIOT Act, conceived by Ashcroft and rammed through Congress under pressure from President Bush, gave the government expanded power to invade their privacy, imprison people without due process, and punish dissent. Ostensibly needed for the war on terrorism, it actually put in place domestic changes so sweeping that even religious conservatives, who had pushed hard for Ashcroft's appointment as

attorney general, decided he had gone too far. For example, it allows delayed notice of law-enforcement agency searches; under this “sneak and peek” provision, agents can enter a house, apartment or office with a search warrant when the occupant is away, make photographs and take physical property including communications equipment, and not inform the owner or occupant until later. Ashcroft also aggressively targeted immigrants, stepped up domestic spying, and proposed using volunteer snoops in his campaign against terrorism.

Unable to countenance such intrusions on innocent groups and individuals, conservatives — including Grover Norquist, president of Americans for Tax Reform, Ken Connor, who heads the Family Research Council, and Paul Weyrich, who heads the Free Congress Foundation — took their concerns public. “If there hadn't been this big government problem,” Norquist said, “Ashcroft would have been talked about as the Bush successor. Instead, the talk is ‘too bad we pushed for him.’ “

The secrecy surrounding the detentions of more than 1,200 people since Sept. 11 is particularly alarming. The ACLU sued for release of the detainees' identities, eliciting some information, but the government has adamantly refused to disclose their names or where they were incarcerated. Some were held for many weeks without charges, and none were charged with terrorism. Virtually all were Arab, South Asian or Muslim, and all but a few hundred are now believed to have been deported on immigration charges or allowed to leave voluntarily.

The administration sought to try suspected foreign terrorists before military tribunals instead of civilian judges and juries, appropriating to itself powers once reserved for the judiciary, in what one federal judge has called “the most profound shift in our legal institutions in my lifetime.”


The government is also pitting neighbor against neighbor. With its Operation TIPS (Terrorism Information and Prevention System), the government sought to conscript postal workers, delivery agents, and utility workers to spy and report on law-abiding Americans in and around their own homes. Though it later announced a less invasive plan, in response to storms of protest from the ACLU and others, it still plans to use ordinary untrained citizens as domestic spies. In Detroit, home to America’s largest Arab American community, Middle Eastern émigrés keep a low profile — some won’t even go to court to fight parking tickets — for fear they may be accused of something worse. Like Malek Zeidan, a native of Syria, who had lived in Paterson, N.J., for 14 years when Immigration and Naturalization Service agents came calling; Zeidan was on his job at Dunkin’ Donuts when they showed up to question him about a former roommate. He wound up spending 40 days in jail because of an expired visa.


The trouble with the government’s no-holds-barred strategy is that it entails an unnecessary trade-off between freedom and safety, as if by giving up the blessings of liberty we could save lives.

This is a false dichotomy, as false today as it was during earlier roundups of Bolsheviks and Japanese Americans — dark periods in our national history, for which later administrations have had to apologize.

Increased security is essential, but it is possible to be both safe and free. Government can thoroughly investigate, prevent and prosecute terrorism while preserving our most fundamental rights and liberties. To deprive Americans of fundamental rights and permanently change our way of life makes us less secure. In poll after poll, Americans have indicated that they are concerned that the government will do too little to increase security, and too much to restrict liberty.

If the national disgrace known as the Palmer Raids teaches us nothing else, it is that the democracy we are at war to protect will be diminished if the trampling of our constitutional rights goes unchecked.

  
Nadine Strossen, President, ACLU

  
Anthony D. Romero,  
Executive Director, ACLU

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## THE PALMER RAIDS: PRECURSOR OF THINGS TO COME

The period after World War I was a time of great political and economic turmoil worldwide. The old world order was collapsing and new social and revolutionary movements were under way. Millions of people were uprooted, disoriented and frightened. Here in the U.S., cities were bursting with new immigrants who were poorly housed and working under dangerous industrial conditions. Labor strikes led to violent demonstrations and in some cases riots. In 1919, bombs exploded in eight cities, one on the doorstep of Attorney General Palmer's Washington townhouse.



**JOURNEY'S END:**

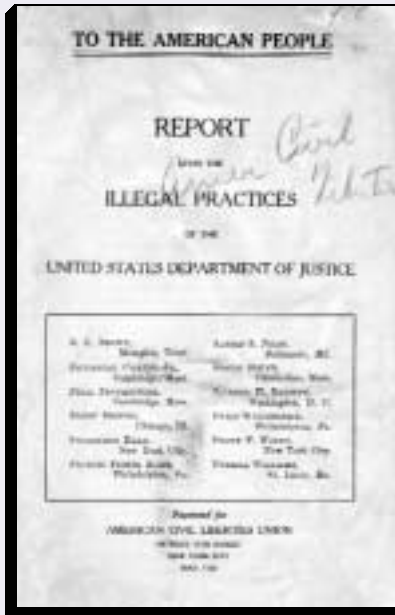
**After a long sea voyage, 1920s-era immigrants get their first glimpse of America.**

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Palmer responded swiftly, creating a new General Intelligence Division within the Justice Department to hunt down radicals, left-wing groups and aliens. He put a tough, 24-year-old lawyer named J. Edgar Hoover in charge. Over a two-month period in 1920, agents swooped down on suspected Bolsheviks in union halls, bowling alleys and private homes in 33 cities, arresting 6,000 people — most of them immigrants.

The Palmer Raids trampled the Bill of Rights: making arrests without warrants, conducting unreasonable searches and seizures, wantonly destroying property, using physical brutality against suspects, and detaining suspects without charges for prolonged periods. Palmer's men also invoked the wartime Espionage and Sedition Acts of 1917 and 1918 to deport noncitizens without trials, shipping 249 to the Soviet Union.

The people who sent the bombs were never discovered — but by the following year, when a bomb exploded on Wall Street, killing 33 people, that attack was seen not as a conspiracy but as the work of one deranged man.



The raids also ushered in a new era of concern for individual rights and freedoms. One response to the wretched excess epitomized by the Palmer Raids was the advocacy of a new nonprofit watchdog and legal assistance organization. Founded in 1920 by a group of former anti-militarists and civil libertarians headed by Roger Baldwin, the wealthy son of a railroad executive, this fledgling organization was the American Civil Liberties Union. It published a blistering **Report upon the Illegal Practices of the United States Department of Justice** in which

prominent lawyers including Felix Frankfurter charged that the Palmer Raids “struck at the foundation of American free institutions, and brought the name of our country into disrepute.”

The ACLU vigorously championed individual liberties against the excesses of those in high places — always an uphill battle in times of crisis, but one that gained adherents with subsequent threats to American core values. These included the internment of more than 120,000 Japanese Americans after Pearl Harbor; the Red-baiting of the House Un-American Activities Committee; and investigations of lawful peace and civil-rights activists, including the Rev. Martin Luther King Jr.

Such government responses to real or perceived threats aren’t always seen as abuses in their own time — though they shame subsequent generations.



**DEPORTED:**  
**Anarchist Emma Goldman, who opposed the draft and stumped for birth control, rides a streetcar in 1917, two years before the first of the Palmer Raids. She was one of 249 residents rounded up and shipped back to the Soviet Union without a trial.**

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# HOW THE GOVERNMENT'S ANTI-TERRORISM TACTICS THREATEN OUR WAY OF LIFE

## THE TARGETING OF IMMIGRANTS

In the hours following the Sept. 11, 2001, attacks, bullets were fired at an Islamic center in Irving, Texas; windows were broken in a Muslim student center at Wayne State University in Detroit; and bricks were thrown through the windows of an Islamic bookstore in Alexandria, Va.

President Bush and key officials moved quickly to condemn these and other attacks against Arab Americans, Muslim Americans, Sikh Americans and Asian Americans. By early December, Attorney General Ashcroft said, the Justice Department had investigated more than 250 retaliatory attacks or threats.

But the administration undercut its stated support for immigrants by aggressively engaging in or tolerating actions against certain groups on the basis of racial profiles. Young Muslim, South Asian and Arab men were tracked, interrogated and rounded up on 200 college campuses and in dozens of cities — often for no other reason than their religious backgrounds, countries of origin or Muslim surnames. Many were jailed on minor immigration charges that had not been used to detain members of other groups. Passengers from Middle Eastern countries were removed from flights just because pilots or passengers said the presence of such passengers made them

“uncomfortable.” A Muslim woman was subjected to a humiliating body search after refusing to remove her headscarf at O’Hare Airport in Chicago. Two Somali shop owners in Seattle lost more than \$300,000 in assets after Treasury agents raided their businesses and seized their inventories in a misguided search for wire transfers to terrorists.

And the government continued to focus suspicion on immigrants: It announced plans to fingerprint visitors from specific countries, banned the employment of noncitizens as airline screeners, and urged ordinary citizens to spy on their neighbors — implying that noncitizens pose a threat to Americans that citizens do not.

If the government’s early expressions of support for immigrant communities were reassuring, its subsequent actions were not. How could the government be expected to protect vulnerable groups, when some of the worst offenses were perpetrated or condoned by the government itself?

### *The ACLU fights the scapegoating of immigrants*

The ACLU moved quickly to keep immigrants from becoming innocent targets of investigation, with public education materials, legislative advocacy, lawsuits and offers of assistance to those caught up in the Justice Department’s dragnet:

**The ACLU published a “Know Your Rights” pamphlet in seven languages, including Arabic, Farsi, Urdu, Punjabi and Hindi, on “what to do if you’re stopped by the police, the FBI, the INS or**



the Customs Service.” Sparked by reports that people under investigation had been detained and impeded in their ability to contact lawyers and family members, the pamphlet was widely disseminated after the Justice Department announced plans to interview thousands of men from Middle Eastern countries. It contains basic information for citizens and noncitizens alike, none of it meant to stop people from cooperating with proper investigations.

**The ACLU opposed government attempts to involve local police departments in its “dragnet” of 5,000 immigrants.** Police should not be involved in immigration, or be asked to use ethnic and racial origin as the basis for suspicion, according to the ACLU and a growing number of police chiefs, who recognized that erosion of police-community relations would reduce their ability to solve crimes. Several local police forces in California, Michigan, Oregon and Texas, as well as the California Police Chiefs Association refused to participate in such compromising missions, and other cities have statutes that bar them from doing so.

**The ACLU filed five civil-rights lawsuits against four airlines that had removed passengers from flights based on the prejudices of airline employees and passengers alone.** The ACLU joined lawyers for the American-Arab Anti-Discrimination Committee in lawsuits filed on June 4, 2002, accusing American, Continental, Northwest and United Airlines of blatant discrimination in ejecting five men for reasons unrelated to safety. All five were removed after passengers or flight crews said

they “felt uncomfortable” with them on board. Two of the five are of Arab descent, four are U.S. citizens and the fifth is a permanent legal resident. (The Department of Transportation had warned major airlines as early as Sept. 21, 2001, and again in October not to discriminate against passengers on the basis of race, color or national or ethnic origin — to little apparent effect. The DOT itself documented 84 complaints of discrimination against air carriers in the first three months of 2002.)

**The ACLU went to court to challenge a new federal law requiring airport screeners to be U.S. citizens.** The law is unconstitutional and discriminatory, according to the lawsuit by the ACLU, the Service Employees International Union and nine screeners from two California airports. “Taking qualified, experienced screeners off the job because of their citizenship status won’t make anyone safer,” Mark Rosenbaum, legal director of the ACLU of Southern California, said. And replacing them with people who have no on-the-job training or experience opens the door to unnecessary security risks at airports. Screeners themselves welcome higher security standards, improved background checks and more rigorous employment qualifications, but see no need to bar legal immigrants from working as airport screeners. The restriction is illogical, ACLU lawyers pointed out, because no such requirement exists for

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members of the U.S. military, airline pilots, baggage handlers, flight attendants, cargo loaders, mechanics, guards or airplane cleaners.

**The ACLU sued the U.S. Treasury Department on behalf of two Somali shop owners in Seattle, whose assets were seized in a raid.**

MOST AMERICANS DO NOT EVEN RECOGNIZE THAT THE USA-PATRIOT ACT, CONCEIVED BY ASHCROFT AND RAMMED THROUGH CONGRESS AFTER THE ATTACKS UNDER PRESSURE FROM PRESIDENT BUSH, GAVE THE GOVERNMENT EXPANDED POWER TO INVADE THEIR PRIVACY, IMPRISON THEM WITHOUT DUE PROCESS AND PUNISH DISSENT.

Abdinasir Ali Nur and Abdinasir Khalif Farah suffered more than \$300,000 in losses when agents investigating a completely separate money-transfer business stormed in and emptied their shops, taking even the toilet paper. Their shops occupied the same building as the business under scrutiny, but had no connection to it, according to Kathleen Taylor, who heads the ACLU of Washington state. The government did not have “any reason to believe they had engaged in wrongdoing,” she argued. On May 8,

2002, the U.S. Treasury reimbursed Nur in the amount of \$40,500 for checks it had seized in the raid. The ACLU continued to pursue on Nur’s behalf his claims for more than \$250,000 in lost merchandise, including specially prepared *halal* meats — central to the religious practices of the Somali immigrants — that were destroyed in the raid.

**The ACLU joined other groups filing federal and state lawsuits asserting that the Freedom of Information Act requires the government to divulge the names of those arrested in its terrorism investigation, and to say where they are being held.**

While the ACLU recognized that some aspects of the investigation should remain confidential, it was troubled by reports that some detainees had not been accorded the constitutional protections guaranteed to all people in America by the Bill of Rights, including access to lawyers and families. After trying and failing repeatedly to obtain information that would have reassured the American public, the ACLU joined with a coalition of civil-liberties, human rights and electronic privacy organizations to file a Freedom of Information Act request on Oct. 29, 2001, followed by a federal lawsuit on Dec. 5, 2001. Anthony D. Romero, executive director of the ACLU, pointed out: “The more questions arose about the government’s treatment of these individuals, the tighter the veil of secrecy was drawn. This has to offend us as Americans.”

A second suit was brought by the ACLU of New Jersey, which invoked New Jersey law and sought the names of Immigration and Naturalization Service detainees held in Hudson and Passaic County, N.J., jails. In both cases, the Justice Department fought the ACLU every step of the way—essentially arguing that blind trust in the government was all that was needed.

**Making the defense of immigrants whose rights had been violated a top priority, the ACLU tried to locate those who had contacted foreign consulates or embassies after being placed in secret detention.**

Fearful that the historical record of civil liberties abuses would be lost with the deportation and departure of secret detainees, Romero sent letters and copies of the ACLU “Know Your Rights” brochure to the

consulates of 10 countries, offering legal assistance to innocent people caught up in the dragnet. American rights and liberties “extend to all individuals in our country,” Romero declared. Foreign officials were hesitant at first, and surprised that an American organization was offering to challenge its own government. But they did eventually provide names of detainees and even immigration file numbers that the ACLU suspects the consulates had obtained from the U.S. government — information the government had withheld from the ACLU.

“I had heard of this civil-liberties group in many TV shows and talk shows,” said Mohammad Hafeez, the consul general of Pakistan in New York. “But they become more relevant when you confront the situation when your nationals are under detention.”

**The ACLU hired a documentary filmmaker to interview families and attorneys of detainees and, in some cases, detainees themselves.** With information from the consulates, the filmmaker was able to chronicle the difficulties of victims like Mohammed Gondal, a 45-year-old Pakistani who spent 125 days in jail. Gondal, who was not charged with any crime related to terrorism, said, “I’m not afraid from investigate. I’m worried about my health . . . Before, very nice country, very peaceful. I like it. Now, I think I not ever come back.”

The ACLU used portions of its interviews with Gondal and other detainees to bring their plight home to the American people. Public service announcements were

broadcast without charge in more than 60 markets through the generosity of stations that contributed more than \$500,000 in airtime — giving listeners access to people the government had shut away. In their own voices, detainees spoke, sometimes haltingly, about being held for months; about not being allowed to phone an attorney or family members for up to three weeks; and in some cases, about their enduring love for America.

Another Pakistani, Iqbal Tihar, had been seeking legal permission to stay in the U.S. since 1992 — and still wanted to make his home here, even after two and a half months in jail. “My daughter is U.S. citizen, I want to stay here, is good life,” he said. “You can eat good, you can make good money. Three months I bought a car. In my country, I work whole life, cannot buy a car . . . Here I can do everything.”

**The ACLU drafted model pleadings for immigrants who remained in jail after their immigration charges were resolved.** Most of the 1,200 people rounded up after Sept. 11 were taken into custody on visa or other minor immigration violations, and not charged with terrorism-related crimes. Under the law, they should have been freed or deported after resolution of the immigration charges — but an undetermined number were not, even if they agreed to be deported and the country of origin agreed to take them back. The FBI continued to hold

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them, without any legitimate reason to do so. Because the ACLU didn't know who they were, if they had lawyers or where they were being held, its Immigrants' Rights Project was greatly hampered in its ability to offer direct assistance. So ACLU lawyers

drafted a model petition of *habeas corpus* that could be used by families and friends to get detainees out. Such petitions ask a court to direct the government to "show cause" (provide the reason) for the person's detention.

In the first such cases brought by the ACLU and others, the government continued to defy the courts, usually deporting the detainee instead of providing the requested information. "It's not the ideal outcome in every case," Lee Gelernt, an ACLU lawyer, said, "but sometimes it's the best an individual can hope for — freeing him from the limbo of indefinite

imprisonment, and enabling him to get on with his life."

Such interventions might not have been so sorely needed if the government had given more than lip service to the fundamental rights of all people residing in the U.S., including immigrants. Non-citizenship is not a reliable proxy for suspicion. At least one al Qaeda member convicted in the terror attacks on U.S. embassies in Africa was an American; and three other U.S. citizens — John Walker Lindh, Abdullah Al Mujahir (also known as José Padilla) and the Louisiana-born Yasser Esam Hamdi — are now in custody on charges of collaborating with al Qaeda.

An individual's citizenship status reveals nothing about his involvement with terrorism. And profiling is a flawed law-enforcement tactic, squandering limited resources on factors that do not predict wrongdoing. It also engenders hostility in the very immigrant communities from which law-enforcement agencies are trying to recruit agents, translators and informants.

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## THE RED HUNTS AND THE WORLD WAR II INTERNMENTS

Immigrants make tempting scapegoats in times of crisis. Bomb blasts, labor strikes, crimes, war and social unrest have at many points in our history caused neighbors to look askance at the newcomers in their midst. Set apart by their accents, mannerisms or physical appearance, immigrants are usually easy to spot and to suspect, particularly if they live in immigrant communities.



**EVACUATION: Japanese Americans at Manzanar Relocation Center, 1943.**

**The ACLU pointed out the “injustice and hardship” of relocating people whose relatives were “loyally serving by the thousands in our armed forces,” but in the panic following Pearl Harbor, the administration was unmoved.**

It may be that America, created by immigrants who displaced the indigenous population, is uniquely sensitive to the possibility of displacement. But as a backward glance at our recent history reminds us, the scapegoating of immigrants is nothing new.

Suspicion has greeted every wave

of immigrants since the late eighteenth century, from the Irish who fled their homeland during the potato famine to the Southern Europeans, Eastern Europeans and Chinese refugees who followed. Cries for the registration, detention and deportation of aliens have followed nearly every war in the last century. Mandatory finger-

printing, loyalty oaths and denials of due process have been put forward with numbing frequency as responses to the distrust that has periodically gripped the country.

Since its inception, the ACLU has worked — not always successfully — to persuade lawmakers of the shortsightedness of anti-immigrant policies. The Palmer Raids, culminating in the deportation without trials of 249 Eastern Europeans, were a case in point. Though more than 6,000 were arrested without evidence, the roundups failed to accomplish their stated purpose. Not only did they fail to identify bombers or make America more secure; they sowed such deep suspicion of enemies in our midst that fanatics in Congress were still pursuing and blacklisting alleged communists 30 years later.

ACLU founder Roger Baldwin, opposing a variety of anti-alien measures sparked by fears of communists, wrote in 1935 about the dangers to all minority groups created by bills targeting even one: “Zionists, Catholics, trade-unionists, even businessmen with foreign headquarters visiting in the United States, could all be subjected to summary banishment.” Restoration of a secret service would “turn loose on the country a horde of sleuths, spying upon unions and

radical parties and provoking the very acts they are hired presumably to prevent.”

Red-baiters such as Harold H. Velde, a Republican congressman from Illinois who sat on the House Un-American Activities Committee, used hyperbole as boldly 50 years ago as Bush and

sponsors’ reasons, one by one. “Registration would enable all aliens in the country to be hounded by government agents, while our comparatively few alien ‘enemies’ would easily be able to evade such a mass registration system,” the ACLU argued. There was no need “to ape the totalitarian” restraints of other countries. (The only lesson

to the Dec. 7, 1941 bombing of Pearl Harbor.

Three days after Pearl Harbor, Attorney General Francis Biddle told the country, “It is essential at such a time as this that we keep our heads, keep our tempers — above all, that we keep clearly in mind what we are defending” and guard freedom “most zealously at home.” But as *In Defense of Liberties*, Samuel Walker’s 1990 history of the ACLU, recounts, the government then imposed a curfew on Japanese, German and Italian aliens; arrested several hundred Japanese nationals in a matter of days; and went on to perpetrate one of the worst civil liberties violations in American history.

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Ashcroft do now. Loyalty oaths, Velde said in a 1952 radio broadcast, were needed to combat a “new and evil force more treacherous than has ever been known in the history of the world — the force of the communist dictatorship.”

In 1939, the 76th Congress considered a variety of bills that would have required the registration and fingerprinting of aliens annually, or even every six months, with penalties of up to \$10,000 and five years in prison for failure to comply. But the ACLU responded with a broadsheet refuting the

John Ashcroft seems to have drawn from this earlier administration’s defeat, however, was to avoid going through Congress; when he ordered the fingerprinting and photographing of visitors from certain countries earlier this year, it was on his own initiative. He didn’t consult with or even advise Congress in advance).

The Palmer Raids, the Red hunts and the Ashcroft power grab notwithstanding, there has not been a more harrowing abuse of power since the end of slavery than the government’s response

Lt. Gen. John L. DeWitt, military commander of the Pacific Coast area, set up a military zone running from the Canadian to the Mexican borders, covering portions of eight states, from which 120,000 Japanese American citizens as well as aliens would be evacuated to internment camps.

To justify such harsh measures, General DeWitt cited the threat of Japanese-American espionage and the danger of an attack on the West Coast. However, according to the Justice Department’s own files — opened four decades

later through the Freedom of Information Act — the military report on which DeWitt relied was riddled with “lies” and “intentional falsehoods.”

On Feb. 19, 1942, President Roosevelt issued Executive Order 9066 authorizing the internment. Soon afterward, the ACLU denounced it — sending letters of protest to the president and the secretary of war. Baldwin instructed the ACLU’s California offices “to confer with representatives of Japanese-American organizations [and] to resort to the courts if necessary where ‘injustices appear to be done.’ ” Many hoped that wouldn’t be necessary.

Appealing for “sanity on the West Coast,” the ACLU protested that the presidential order was “far too sweeping to meet any proved need.” The plan did not even provide hearings for those to be evacuated. If extreme measures were necessary, the organization urged President Roosevelt to invoke martial law “applying equally to all citizens instead.”

Arthur Garfield Hays, general counsel for the ACLU, cited the “injustice and hardship to American citizens of Japanese ancestry who are loyally serving by the thousands in our armed

forces but whose citizen relatives are not permitted to occupy their homes.”

But, in the panic sweeping the country, the administration was unmoved. And, after much internal controversy, the ACLU National Board adopted a resolution on June 22, 1942, outlining four grounds for legal challenges to the internments: the absence of clear military necessity, racial discrimination, the lack of individual hearings, and detention.

In the pressure of wartime, people tended to rally around the president, and even the ACLU board was divided on internment. But the ACLU’s West Coast affiliates and staff in northern and southern California had already committed themselves to representing individuals who stood in defiance of the evacuation and internment. The ACLU of Northern California directly represented Fred Korematsu, a 23-year-old draftsman who defied the evacuation order; and the ACLU of Washington state came to the defense of Gordon Hirabayashi, a Quaker college student who refused to

register for the evacuation.

The cases went all the way to the



**REGISTRATION:  
Internees fill out registration forms at the Santa Anita reception center, 1942.**

U.S. Supreme Court. On June 21, 1943, in a decision written by Associate Justice Harlan Fiske Stone, the Court upheld the conviction of Korematsu. “We cannot close our eyes to the fact that in a time

of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry,” it said. In a larger question on the limits of war power, the High Court voted 6 to 3 on Dec. 18, 1944, to accept the government’s argument that mass evacuation was necessary because “it was impossible to bring about an immediate segregation of the loyal and disloyal.”

Forty years later, Korematsu’s conviction was overturned by a federal judge in San Francisco on a petition filed by the sons and daughters of Japanese-American internees. But it took 45 years for the government to acknowledge its wrongful actions and authorize \$20,000 in reparations to each surviving victim.

## DOMESTIC SPYING

With the passage of the USA PATRIOT Act a little more than a month after the attacks, Attorney General Ashcroft demanded and got from Congress new, sweeping powers to obtain sensitive private information about people, eavesdrop on conversations, monitor computer use, and detain suspects without probable cause. As it turned out, those powers were largely not used or needed in the roundup of suspected terrorists in the months that followed.

But in a series of actions closely monitored and publicly condemned by the ACLU's Washington legislative office, Ashcroft went even further, loosening guidelines that limited FBI spying on religious and political organizations:

- He unleashed the bureau to spy on domestic groups and individuals who are lawfully engaged in First Amendment activities, such as Operation Rescue or Greenpeace;
- He authorized FBI agents to conduct preliminary investigations for up to a year without headquarters' approval or reasonable indication of a crime;
- He claimed authority to search for leads to terrorist activities in public databases or the Internet; and to purchase commercial data-mining services from companies that collect, organize, and analyze marketing and demographic information; and
- He allowed field agents to infiltrate mosques, synagogues or other houses of worship, as well as online chat rooms and message boards, without any evidence a crime might be committed.

The administration also considered, and has not ruled out, such controversial and unproved strategies as biometric devices for high-tech surveillance and tracking of people; encoded postage stamps that could be traced back to the purchaser; and a national identity card — a measure vigorously opposed by such disparate groups as the Eagle Forum and the ACLU because of the potential for identity theft and abuse.

And in what some charge was an attempt to cover up its failures, the administration demanded even more. It proposed creating a vast, new \$37.5 billion bureaucracy, to be called the Department of Homeland Security, with jurisdiction over 180,000 employees drawn from 22 federal agencies. Long on secrecy and short on accountability, the proposed cabinet-level department was to be exempt from laws designed to keep government open and to protect whistleblowers.

From Ashcroft's defiance of the courts to his rewriting of the FBI guidelines without notice to Congress, he has assumed for his department almost limitless authority to spy and detain without interference from other branches of government. Such invasive and unilateral assumptions of power go far beyond the limits of what is needed to investigate suspected terrorists and thwart Congress's ability to make government accountable.

### *The ACLU exposes 'Big Brother' spy tactics*

The ACLU strenuously opposed government spying on people who were not suspected of crimes — with a massive public education



and advocacy campaign aimed at elected officials, policymakers and judges as well as the press and public.

**The ACLU issued three major reports:**

*Upsetting Checks and Balances:*

*Congressional Hostility Toward the Courts in Times of Crisis* (October 2001), which

chronicles the history of assaults on civil liberties through such court-stripping laws

as were enacted after the Oklahoma City bombing; *The Dangers of Domestic Spying*

by *Federal Law Enforcement* (January 2002), a case study on FBI surveillance

of the Rev. Martin Luther King Jr.; and *Insatiable Appetite: The Government's*

*Demand for New and Unnecessary Powers After September 11* (April 2002), a detailed

analysis of the Justice Department's new powers and their likely impact.

**The ACLU organized mass meetings and partnered with other groups and individuals to channel public support for civil liberties in the wake of the attacks.**

To commemorate the Martin Luther King Jr. holiday, the ACLU in January 2002 brought more than 1,000 civil-rights, civil-liberties, Arab, Muslim, African-American and Asian activists to a “town hall meeting” at the Washington Convention Center to recall King's legacy and signal the dangers of domestic spying and racial profiling. The ACLU also spearheaded the issuance of a statement by more than 150 organizations, 300 law professors and 40 computer scientists opposing unnecessary infringements on freedom.

**The ACLU's Washington office rigorously monitored and strenuously opposed the loosening of restrictions on domestic**

**snooping and spying.** This office kept a close watch on activities of the attorney general, whose power grab recalls the worst abuses of the J. Edgar Hoover era — and concluded that the administration had simply not made a case for such extraordinary expansions of power. “When the government fails, the Bush administration's response is to give itself new powers rather than seriously investigate why the failures occurred,” said Laura W. Murphy, director of the ACLU's Washington legislative office.

Public concerns about unwarranted and unchecked spying, and evidence of the ACLU's ability to reach out and galvanize large segments of the American public, are reflected in statistics kept by the organization: Tracking the largest growth spurt in its 82-year history, the ACLU reported that almost 75,000 individuals became “card-carrying members” for the first time in 2001— many of them after Sept. 11. In just the first four months following the attacks, Murphy's staff of 30 issued 54 press releases, responded to more than 4,200 inquiries from reporters, and generated more than 150,000 letters to Congress and the administration from supporters nationwide.

**ACLU leaders took their concerns about executive branch excesses to Congress.**

ACLU leaders testified before congressional committees seven times, joining with other rights groups, to lobby for the inclusion of safeguards in the USA PATRIOT Act. As ACLU President Nadine Strossen warned

THE ADMINISTRATION PROPOSED CREATING A VAST, NEW \$37.5 BILLION BUREAUCRACY, TO BE CALLED THE DEPARTMENT OF HOMELAND SECURITY, WITH JURISDICTION OVER 180,000 EMPLOYEES DRAWN FROM 22 FEDERAL AGENCIES.

a Jan. 24, 2001, congressional “Forum on National Security and the Constitution”: “We know from history what happens when the FBI is given too long a leash — it targets individuals and groups based on their advocacy and association rather than based on legitimate law-enforcement concerns.”



**FBI WHISTLE-BLOWER:**  
Colleen Rowley blasts  
FBI officials for failing to act on  
information from field agents.

The ACLU also issued 18 fact sheets, wrote dozens of letters to Congress and the Bush administration, and made hundreds of TV and radio appearances calling on Congress to defend the fundamental rights and freedoms that distinguish us from repressive societies in other parts of the world.

**The ACLU persuaded Congress to build some safeguards into the USA PATRIOT Act.** The bill as

proposed would have given the Attorney General power to label a non-citizen a “terrorist” and detain him or her indefinitely without any meaningful judicial review. The bill as passed by Congress permits the Justice Department to detain such persons without charges for seven days. The ACLU helped to quash provisions that would have exempted Department of Justice attorneys from ethics rules that bind other lawyers. It also influenced Congress to limit the sharing of information obtained through wiretapping, and to bar foreign governments from conducting wiretapping in the United States.

**The ACLU persuaded Congress to build safeguards into other anti-terrorism legislation.**

- In a border security bill, ACLU lobbyists persuaded Congress to drop a requirement that identification documents issued to certain U.S. citizens have biometric identifiers. And to minimize the risk of deportation for immigrants reporting crimes to their local police, the ACLU lobbied Congress to restrict the sharing of federal immigration information with state and local law-enforcement officers.
- In a trade bill, the ACLU persuaded Congress to preserve the privacy of outbound international U.S. mail that weighs less than a pound.
- In an information-sharing bill, the ACLU influenced Congress to narrow the types of sensitive personal information that could be shared by the federal government, and the purposes for which it could be shared.

**The ACLU alerted the nation to the dangers of citizens spying on each other under the proposed Terrorism Information and Prevention System (TIPS).** That proposal “languished in relative obscurity,” according to The New York Times, until the ACLU warned in July that it would “turn local cable or gas or electrical technicians into government-sanctioned peeping Toms.” The prospect of “citizens spying on one another” led to a firestorm of criticism from conservatives, such as the House majority leader, Richard K. Armey of Texas, and Rep. Bob Barr of Georgia, as well as from liberals like Sens. Edward M. Kennedy of Massachusetts and Rep. Nancy Pelosi of California.

“We don’t want to see a ‘1984’ Orwellian-

type situation here where neighbors are reporting on neighbors,” said Sen. Orrin Hatch of Utah, the Judiciary Committee’s senior Republican. The Washington Post also editorialized against the proposal: “Police cannot routinely enter people’s houses without either permission or a warrant. They [the Justice Department] should not be using utility workers to conduct surveillance they could not lawfully conduct themselves.” Ashcroft retorted that the administration “never proposed cable installers,” but by Aug. 9, 2002, had scaled back the operation to exclude mail carriers, utility workers and others with access to private homes. However, Ashcroft still planned to enlist transportation, trucking, shipping, maritime, and mass transit workers in the effort,

**The ACLU warned that the post-Sept. 11 excesses of the Bush administration could undermine democratization in other countries.** As the organization wrote to the Inter-American Commission on Human Rights on June 6, 2002, some other nations “have already begun to treat” the Bush administration’s new anti-terrorism measures “as precedent, model and justification for their own repressive actions.”

Some invasions of privacy, such as the Internet monitoring of people who aren’t suspected of a crime, may seem justified in these troubled times, even benign. Some law-abiding people shrug off these and other Big Brother tactics, such as neighbors reporting on neighbors, on the grounds that they have “nothing to hide.” But how can groups and individuals engage in full and open debate on issues if they need to be concerned that the FBI is listening in or attending their meetings? How can U.S. diplomats and poli-

cymakers encourage the efforts of moderates and progressives in other countries if they have so little faith in the free exercise of expression, religion and assembly at home?

“Political spying is likely to exacerbate violence rather than stop it,” Nadine Strossen reminded the congressional forum in January, recalling the views of a great Associate Justice of the Supreme Court. “Justice Louis Brandeis recognized long ago that the First Amendment acts as a safety valve. If those marginalized in our society are free to express their views and engage in political activity, they are less likely to resort to violence. Political spying plays into the hands of anti-government extremist groups, driving them underground and encouraging the fanatics among them to respond with violence.”

Most important, as FBI whistleblower Colleen Rowley insisted in a sensational memo to Director Robert Mueller after the attacks, it wasn’t a failure of intelligence-gathering, paraphernalia or authority that kept agencies from “connecting the dots” before Sept. 11, but rather the failure of FBI Headquarters personnel to act on information they received from field agents. Recounting the difficulties faced by agents in Minneapolis, Rowley pointed out that they did have probable cause of criminal activity to search Zacarias Moussaoui’s personal effects. She argued powerfully that it is not more curtailments on individual rights and freedoms that are needed, but officials with the integrity and competence to make effective use of information they already possess.

BUT HOW CAN GROUPS AND INDIVIDUALS ENGAGE IN FULL AND OPEN DEBATE ON ISSUES IF THEY NEED TO BE CONCERNED THAT THE FBI IS LISTENING IN?

## THE LONG REACH OF J. EDGAR HOOVER

For more than half its history the United States got along without a general-purpose investigative agency. Many people do not realize that the Federal Bureau of Investigation did not come into being (as an investigative force within the Justice Department) until 1908. Or that it was established not by an act of Congress but by executive order of a long-forgotten attorney general. Its history provides a vivid example of how bureaucracies are created and how, once entrenched, they can become rife with abuse.



**J. EDGAR HOOVER, right, who used the FBI to harass and discredit civil-rights and anti-war activists, confers with Sen. William Jenner and Atty. Gen. Herbert Brownell Jr. before a 1953 Senate hearing.**

From its inception, the Bureau of Investigation (as it was called until 1935, when it acquired its present name) abused its investigative authority. With America's entry into World War I, it rounded up thousands of young men as

suspected draft dodgers — only to conclude that most were not draft dodgers after all. J. Edgar Hoover, who rose to prominence during the notorious Palmer Raids and was later selected to clean up the disgraced agency, worked to build

its reputation with the highly publicized capture of a handful of gangsters — but is most remembered for his politically inspired spying.

At his instigation, the bureau set up a series of secret police operations within the Justice Department that investigated people because of their ethnic or racial backgrounds or political views, used its intelligence apparatus to disrupt and discredit anti-war and civil-rights activists, and harassed people like the Rev. Martin Luther King Jr., who posed no threat of violence or illegal activity. It not only spied on law-abiding Americans, it also used burglary, blacklisting and **agents-provocateurs** to entrap them. The bureau even mailed letters with compromising information to people's spouses in attempts to destroy their marriages. Covert activity became such an obsession of Hoover's that he reportedly kept voluminous files not only on alleged subversives but also on political opponents, celebrities and colleagues — because of their political views or their lifestyles.

The worst of those abuses came to light in a series of high-profile congressional hearings convened by Frank Church in 1976. Spy operations included COINTELPRO, created to harass and spy on

peaceful social protest groups; STOP INDEX, which tracked and monitored the activities of anti-war activists; CONUS, which collected more than 100,000 files on political activists during the Cold War; and "Operation Chaos," which spied on peace activists during the 1960s. The FBI also spied on and harassed members of CISPES, the Committee in Solidarity with the People of El Salvador, an organization that opposed then-President Reagan's Latin American policy. (And subsequent hearings and press reports exposed continuing lapses such as "Filegate," in which the Clinton White House improperly received confidential documents about the first Bush White House.)

From the late 1950s, the FBI used one flimsy pretext after another

to investigate and harass the Rev. Martin Luther King Jr. — contending that his nonviolent civil rights movement might **become** violent, that communists had infiltrated it, and that Dr. King was a "traitor" by

dint of his opposition to the Vietnam War.

According to a January 2002 ACLU analysis (***The Dangers of Domestic Spying by Federal Law Enforcement***) there was no basis for any of these charges; Dr. King's only "crimes" were to speak out against segregation, the war and the persistence of poverty. But the effort continued even after Dr. King's death, with an FBI memo to members of a House committee who the bureau believed would block the designation of a national holiday in his honor "if they realize King was a scoundrel."



**BLACKLISTED:**

**Hollywood writer Dalton Trumbo wrote an Academy Award-winning screenplay under a pseudonym, after being blacklisted as a suspected communist.**

intelligence role altogether. It also proposed: drastic curtailment of the government's power to classify information as secret, a ban on retaliation against whistleblowers, a ban on lying by intelligence



**A HERO AND A TARGET:**

**The Rev. Martin Luther King Jr., with his wife Coretta and two of their children, was an FBI target even after his death.**

officers about prohibited activities, and remedies for those whose rights had been violated. Under intense pressure from lawmakers, the public and groups such as the ACLU, the FBI finally agreed in 1976 to rein itself in.

The bureau refused to get out of the spy business altogether, but it did voluntarily limit its spying to situations in which criminal conduct was suspected — until 2002, when Ashcroft rewrote the guidelines.

## UNDERMINING DUE PROCESS, STAMPING OUT DISSENT

Ahmed Alenany was driving a cab in Brooklyn when he was caught in the post-Sept. 11 dragnet. He was arrested Sept. 21, 2001 by a police officer who questioned him about stopping in a no-parking zone, and who found that his visa had expired.

THE FIFTH AMENDMENT MAKES

NO DISTINCTION AMONG

INDIVIDUALS, STATING CLEARLY

THAT “NO PERSON SHALL . . .

BE DEPRIVED OF LIFE, LIBERTY

OR PROPERTY WITHOUT DUE

PROCESS OF THE LAW.”

THE U.S. SUPREME COURT

AFFIRMED THIS PRINCIPLE

AS RECENTLY AS JUNE 2001.

YET HUNDREDS ARE STILL

INCARCERATED WITHOUT

ACCESS TO LAWYERS...

Alenany told an immigration judge that he did not need a lawyer and just wanted to get home to his wife and two children in Cairo. When the judge suggested that deportation would be the fastest route, he agreed, and received his deportation order on Oct. 16. But authorities refused to comply with that order after learning that the 50-year-old Egyptian might have made anti-American comments; that he had taped a picture of the World Trade Center to the glove box of his cab; and that while driving a cab in Saudi Arabia in 1990, he might have dropped a fare off at a house belonging to Osama bin

Laden. At last report, he was still in legal limbo — neither charged with a crime, nor free to go.

As a child, “I felt love for America,” he told The New York Times five months after his arrest. “Now, I’m in very bad shape . . . . Sometimes I feel it’s hopeless, that I will stay in this jail all my life.”

Alenany’s case is not unusual. Many of the immigrants detained in the post-Sept. 11 crackdowns were denied due process — despite constitutional guarantees that apply to citizens and noncitizens alike. The Fifth Amendment makes no distinction among individuals, stating clearly that “No person shall . . . be deprived of life, liberty or property without due process of the law.” The U.S. Supreme Court affirmed this principle as recently as June 2001. Yet hundreds are still incarcerated without access to lawyers, and the government has drawn a cloak of secrecy around them in violation of international law and the U.S. Immigration and Naturalization Service’s own rules.

In a blistering report based on information from attorneys, family members and visits to two New Jersey jails, Amnesty International concluded six months after the attacks that some detainees had been held for as many as 119 days without being told why. Some had been denied access to attorneys for up to three months. Some were shackled, and held in solitary confinement for prolonged periods. A man who had lived in the U.S. for 11 years was deported to Pakistan in January without notice to his family.

The Legal Aid Society, which was permitted to interview 30 detainees in the federal Metropolitan Detention Center in Brooklyn during a brief period of access last fall, found even harsher conditions there. It reported that one detainee was taken from the facility in an orange prison jumpsuit and put on a plane to Nepal in the middle of the night without his identity card, bank card or clothing.

With some brief exceptions, the government barred or severely restricted visits to such facilities after 9/11. It also tried to choke off due process and dissent by, among other things, closing immigration hearings to the public and press and discouraging lawful protests.

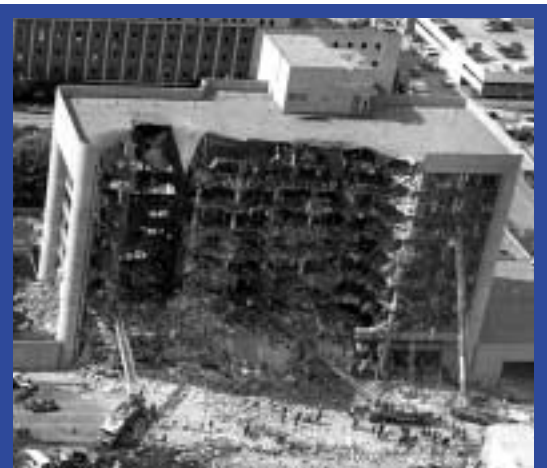
One reason it has been able to do so is the gradual erosion of judicial oversight. The role of the courts in terrorism cases has declined since the 1995 Oklahoma City bombing, in which 168 people were killed. The Bush administration continued this trend, in treating courts as an encumbrance in its war on terrorism. Attorney General Ashcroft seized for himself the power to monitor confidential attorney-client conversations *without* judicial oversight. The USA PATRIOT Act allows agents to seize business records, search a home or get information about a person's web surfing activity with minimal judicial review. It also allows the FBI to monitor telephone or email communications without demonstrating probable cause.

The government seeks to avoid judges and juries entirely in the cases of two U.S. citizens taken into custody since Sept. 11 by declaring them to be "enemy combatants." Yasser Esam Hamdi, a Saudi national who was captured in Afghanistan, is a U.S. citizen by virtue of having been born in Louisiana. The denial of due process to an American is a development that many lawyers and constitutional scholars find chilling. The case of Abdullah Al Mujahir (also known José Padilla), an American arrested in Chicago on suspicion of seeking information about building a radioactive bomb, has aroused even greater concerns.

"This is the model we all fear or should fear," a public defender, Frank Dunham, observed: "The executive branch can arrest an American citizen here and then declare him an enemy combatant and put him outside the reach of the courts. They can keep him indefinitely without charging him or giving him access to a lawyer or presenting any evidence."

"If a noncitizen like Zacarias Moussaoui can be tried in a regular court of law, surely a United States citizen arrested on American soil can be afforded the same access to justice," said Romero, executive director of the ACLU. As was demonstrated in the prosecutions of the 1993 World Trade Center bombers and Oklahoma City bomber Timothy McVeigh, he said, "our courts are capable of meting out justice even in the most horrific of circumstances."

In the case of Yasser Hamdi, the government's view of access to the courts did not sit well with U.S. District Judge Robert G. Doumar, who is presiding over a request by Hamdi's father to allow a federal public defender to visit his son. Addressing the government in an open courtroom on Aug. 13, 2002, Judge Doumar said "I tried valiantly to find a case of any kind, in any court, where a lawyer couldn't meet" with a client. "This case sets



**TERROR STRIKES HOME:**  
168 men, women and children died in the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City—until 2001, the worst terrorist attack on U.S. soil.

the most interesting precedent in relation to that which has ever existed in Anglo-American jurisprudence since the days of the Star Chamber,” a reference to the secret court used by English monarchs from the 1400s to the 1600s.

The Justice Department has also sought



**Anthony Romero**  
Executive Director, ACLU

to stifle dissent through the surveillance and harassment of citizens not even suspected of terrorist activities. Like Barry Reingold, a 60-year-old retired phone company worker, who was visited by agents because of

comments he made at a Bay Area gym. During an argument, Reingold had said, “Bush has nothing to be proud of. He is a servant of the big oil companies and his only interest in the Middle East is oil.” The FBI agents informed him that he had a right to freedom of speech but that “we still need to do a report.”

Even more troubling, the attorney general has gone so far as to accuse civil-rights and civil-liberties activists of disloyalty to their country. In a staggering display of hubris on Dec. 6, 2001, Ashcroft categorically rejected questions about his trampling of individual freedoms and constitutionally guaranteed rights. “To those who pit Americans against immigrants, citizens against noncitizens,

those who scare peace-loving people with phantoms of lost liberty,” he said in a speech before the Senate Judiciary Committee, “my message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to America’s friends.”

The ACLU did not take this direct assault lying down. It mounted a national advertising campaign to underscore the importance of informed debate in a free society, and brought a number of legal challenges on behalf of those whose rights had been violated or whose voices stilled.

But the government continued to assail its critics. Targets have included a Houston art gallery docent, Donna Huanca, who was investigated by the FBI for alleged “anti-American activity” in connection with a planned art exhibit on covert government activities; and A. J. Brown, a student at Durham Technical Community College in North Carolina, who was grilled by agents about “un-American materials” in her apartment, including a poster of George W. Bush (who as governor of Texas staunchly supported the death penalty) holding a noose.

Kate Rafael, a California peace activist, was so shocked to be visited by FBI agents seeking information about Muslim men that she told them: “If it’s your job to hunt Islamic fundamentalist terrorists, then it’s your job to know that they don’t hang out with Jewish lesbians in San Francisco.”



## *The ACLU defends due process and dissent*

**When Attorney General Ashcroft questioned the patriotism of the administration's critics and political rivals, the ACLU responded with a national media campaign urging Americans to defend their Constitution.** "Don't let the Constitution be rewritten by terrorism," the organization warned in one ad. "The acts of terrorism that struck our country on September 11 were intended not only to destroy but also to intimidate, forcing us, as a nation, to take actions that are not in our best interest. If we allow these attacks to alter our basic freedoms, the enemy will have won."

Another four-page ad encouraged Americans to take part in the broader public debate about balancing civil liberties and national security: "Americans everywhere are struggling to reconcile their strong commitment to personal freedom with the changes wrought by the tragedies of September 11," it said, encouraging individuals to stay informed, to take action by contacting their elected representatives, and to join the ACLU.

**The ACLU sued the government under the Freedom of Information Act, to disclose the names and whereabouts of detainees incarcerated since Sept. 11.** The administration has been ordered repeatedly to release their names but has refused to do so, filing appeal after appeal, as described elsewhere in this report. Warren Christopher, who was President Clinton's secretary of state, finds this administration's penchant

for secrecy especially troubling. He told The New York Times recently that the administration's refusal to identify the people it had detained reminded him of the "disappeareds" in Argentina. "I'll never forget going to Argentina and seeing the mothers marching in the streets asking for the names of those being held by the government," he said. "We must be very careful in this country about taking people into custody without revealing their names."

**The ACLU brought suits in federal courts to force the opening of secret deportation hearings, from which the government had barred the press, the public and even members of Congress.**

The administration has been ordered in two separate 9/11 cases to end its policy of closed deportation hearings. District Court Judge Nancy Edmunds ruled in a Detroit case, from which the administration had barred two newspapers, a member of Congress and hundreds of others, that "openness is necessary to the public to maintain confidence in the value and soundness of the government's actions, as secrecy only breeds suspicion." In striking down closed hearings in a case brought in New Jersey, a federal judge ruled that his opinion applied to hearings nationwide.

"IF A NONCITIZEN LIKE ZACARIAS MOUSSAOUI CAN BE TRIED IN A REGULAR COURT OF LAW, SURELY A UNITED STATES CITIZEN ARRESTED ON AMERICAN SOIL CAN BE AFFORDED THE SAME ACCESS TO JUSTICE," SAID ROMERO, EXECUTIVE DIRECTOR OF THE ACLU. AS WAS DEMONSTRATED IN THE PROSECUTIONS OF THE 1993 WORLD TRADE CENTER BOMBERS AND OKLAHOMA CITY BOMBER TIMOTHY MCVEIGH, HE SAID, "OUR COURTS ARE CAPABLE OF METING OUT JUSTICE EVEN IN THE MOST HORRIFIC OF CIRCUMSTANCES."



**“YOUR TACTICS  
AID TERRORISTS”:**

**In a stinging speech, Attorney  
General John Ashcroft questions  
the patriotism of his critics.**

IN A STAGGERING DISPLAY OF  
HUBRIS ON DEC. 6, 2001,  
ASHCROFT CATEGORICALLY  
REJECTED QUESTIONS  
ABOUT HIS TRAMPLING OF  
INDIVIDUAL FREEDOMS AND  
CONSTITUTIONALLY GUARAN-  
TEED RIGHTS. “TO THOSE WHO  
PIT AMERICANS AGAINST  
IMMIGRANTS, CITIZENS  
AGAINST NONCITIZENS, THOSE  
WHO SCARE PEACE-LOVING  
PEOPLE WITH PHANTOMS OF  
LOST LIBERTY, MY MESSAGE  
IS THIS: YOUR TACTICS ONLY  
AID TERRORISTS...

The administration has fought these court orders as well, going so far as to get a stay from the U.S. Supreme Court, while awaiting the final outcome of its appeals.

**The ACLU fought the establishment of military tribunals** for suspected terrorists, charging that the administration has not shown that the constitutional jury system would not allow for the prosecution of accused terrorists. Tribunals would give one man, the president of the United States, undue discretion over the lives of defendants, it said, in violation of American and international standards of justice. Military tribunals could use secret evidence and would effectively suspend the writ of *habeas corpus*, a centuries-old legal procedure protecting citizens from being held illegally by the government. No president has the right to do that without the approval of Congress.

A “Military Commission Order” issued on March 21, 2002, in response to concerns raised by the ACLU and others, does provide for the presumption of innocence and a military defense lawyer in

military tribunals, and requires a unanimous verdict for any death sentences. But serious problems remain. There is no provision for impartiality and independence; ultimate control over the proceeding is left to the president, the secretary of defense or their designee; and there is no provision for review by any civilian court.

**The ACLU brought legal challenges on behalf of groups that were barred from holding public protests.** These have included School of the Americas (SOA) Watch, which opposes the training of foreign soldiers in schools operated by the U.S. military in Colombia and at Fort Benning, Ga.; and the Coalition for Peace and Justice, which wanted to hold a peace rally in Pleasantville, N.J.

The Georgia ACLU sued the City of Columbus, Ga. when officials tried to bar SOA Watch from holding its protest march, an annual tradition, at the entrance to Fort Benning last October. The city cited increased need for security after Sept. 11. But federal Magistrate G. Mallon Faircloth ordered the city to allow the protest to go forward in accordance with President Bush’s charge for Americans to get back to their lives. As Faircloth saw it, his job was “to protect the American way of life,” which in Columbus included the annual SOA Watch march.

The ACLU of New Jersey threatened to sue the City of Pleasantville for trying to bar a post-Sept. 11 rally by the Coalition of Peace and Justice under an overly restrictive local

ordinance. The city had erected one obstacle after another: It threatened to arrest the demonstrators, told them to apply for a permit, and then refused to accept it — directing them to apply by mail, and purchase insurance, subject to penalties of up to \$1,000 and 90 days in jail for failure to comply. The city backed down after the ACLU entered the case, offering to forgo prosecution of the group and revise its onerous ordinance. By August 2002, ACLU of New Jersey had the proposed new ordinance under review.

As described elsewhere in this report, the ACLU also wrote to foreign embassies with offers of legal assistance for detainees caught in the FBI dragnet; prepared model writs of *habeas corpus* for those being held without charges; and hired a documentary filmmaker to interview detainees, lawyers and families.

“Law enforcement has been given virtually unfettered access” to investigate individuals “with little or no judicial review,” the ACLU’s Laura W. Murphy said. “The courts are powerless to stop the seven-day detention of wholly law abiding noncitizens

and can pose little challenge to their indefinite detention.”

“In treating the judiciary as an inconvenient obstacle to executive action rather than an essential instrument of accountability,” said Ronald Weich, author of the ACLU report, *Upsetting Checks and Balances: Congressional Hostility to Courts*

*in Times of Crisis*, “the recently passed USA PATRIOT Act builds on the dubious precedent Congress set five years ago when it enacted a trilogy of laws that, in various ways, deprive federal courts of their traditional authority to enforce the Constitution of the United States.”

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TO UNDERScore THE IMPOR-  
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THOSE WHOSE RIGHTS HAD  
BEEN VIOLATED OR WHOSE  
VOICES STILLED.

## CHECKS AND BALANCES: THE LONG VIEW

Long before Sept. 11, an ACLU report on threats to the U.S. system of checks and balances was in the works. The Alien and Sedition Acts of 1798, criminal restrictions on speech during World War I, the internment of Japanese Americans after Pearl Harbor, and the Cold War spying and blacklists all represented seizures of power in times of crisis that later generations would regret. And anti-terrorism laws passed by Congress in 1996 and 2001, after the Oklahoma City bombing, further weakened the judiciary's ability to curb excesses.



**RIGHT TO DISSENT:** The ACLU defended antiwar activists like pediatrician Benjamin Spock, who was indicted after urging Americans to “resist illegitimate authority” in the Vietnam War era.

Congress moved precipitously after Oklahoma City to block access to the courts for immigrants facing deportation, prisoners and inmates on death row.

That legislation, though enacted to provide “swift punishment of terrorists,” could be used to limit the rights of less narrowly defined groups as well, the ACLU warned.

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Indeed, its provisions have already added to the chaos and sloppiness of a capital punishment system so fraught with error that at least 100 innocent men and women have been sentenced to death since 1972. It has shattered lives and families of undocumented immigrants by speeding deportations and blocking asylum for those fleeing persecution, and thwarted attempts to improve prison conditions with especially dire consequences for women, children and the mentally ill.

No one could have guessed how quickly and easily those excesses would be eclipsed by even more blatant denials of due process. But by the time the ACLU released its long-planned report on checks and balances, in October 2001, the attacks on Washington and New York had thrown the administration and Congress into a panic. The USA PATRIOT Act was signed into law, further impairing the courts' traditional roles. Under many of its provisions, judges exercise no review whatsoever, reflecting the current administration's distrust of the judiciary as an independent safeguard against abuse of its authority.

The independence of the federal courts has been under siege almost since their creation. At various times in America's history,



**THE "RED" HUNTS:**

**In 1934, with fear of "Reds" rising to a feverish pitch around the country, suspected communists had as much to fear from police as from mob violence. Pictured is an alleged Communist Party headquarters in Berkeley, Calif. after a police raid.**

partisans have tried to limit the courts' ability to intervene in labor disputes, have opposed court rulings invalidating loyalty oaths, and have tried to strip courts of their jurisdiction over draft issues. Court-shackling efforts mushroomed in the 1970s and '80s, as members of Congress sought to overturn busing, school prayer and abortion decisions. In the 1990s, Congress tried to legislate the constitutionality of posting the Ten Commandments on government property, rather than leaving that to the courts.

But few administrations have been as openly contemptuous of the courts as that of George W. Bush which, by its outright defiance and circumvention of judges and

juries, has treated them as an encumbrance.

Crises tend to encourage violations of due process. But as Supreme Court Justice Robert Jackson said in 1943: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by courts."

**But few administrations have been as openly contemptuous of the courts as that of George W. Bush which, by its outright defiance and circumvention of judges and juries, has treated them as an encumbrance.**

## CONCLUSION

It is important to understand that the people who planned, financed and executed the Sept. 11 atrocities despise our values as much as they despise our wealth and power. They understand, perhaps even more keenly than some Americans, that our wealth and power derive from the democratic values expressed in our Declaration of Independence and Constitution. If we are intimidated to the point of restricting our freedoms and undermining our democracy, the terrorists will have won a resounding victory indeed.

Long-term vigilance is essential, because the war on terrorism, unlike conventional past wars, will not come to a visible, decisive end any time soon. Any civil-liberties restrictions imposed may be with us for a very long time. So long, in fact, that they may change the very notion of freedom in America and the character of our democratic system in ways that very few, if any, Americans desire. Long-term consequences must be taken into account so that America will be both *safe and free*.

The war on terror is also a war of ideas. If we are really serious about preventing further attacks, it is not enough to become better spies. We need to encourage public debate in this country and abroad on our enemies' ideas and our own. And we need to have confidence in our core values.

**Democracy has many great attributes, but it is not a quiet business.** Our democracy is built on principles of free speech and due process of law. These great principles encourage each and every one of us to speak up in the firm conviction that by so doing, we strengthen our nation. When

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Americans question whether the new anti-terrorism laws are upsetting the system of checks and balances that are fundamental to our democracy, they are fulfilling a civic responsibility. And when others decry the detention of hundreds of immigrants for reasons that have nothing to do with the Sept. 11 terrorist attacks, they are performing a necessary task.

As we mark the anniversary of Sept. 11, we have a choice about the content and character of our democracy. We can either follow our fears or be led by our values.

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It is the nation's largest public-interest law firm, with a staff of more than 500 people, and affiliated offices covering the 50 states, Puerto Rico and the District of Columbia. It handles thousands of cases annually in collaboration with more than 2,000 volunteer lawyers nationwide, and appears before the U.S. Supreme Court more than any other organization except for the U.S. Department of Justice.

Since the ACLU's founding in 1920, most of its clients have been ordinary people who have experienced an injustice and have decided to fight back, but the organization is perhaps best known for high-profile, precedent-setting cases that have strengthened American freedoms.

These have ranged from the 1925 Scopes case, in which Clarence Darrow defended a biology teacher who had violated a Tennessee ban on the teaching of evolution, to challenges of Japanese-American internments during World War II and, more recently, of Internet censorship laws that threatened freedom of speech. Nonpartisan and nonprofit, the ACLU is headquartered in New York, with a legislative office in Washington. It is supported by annual dues and contributions from its nearly 300,000 members, plus grants from private foundations and individuals, and receives no government funding.

If you believe your civil liberties have been violated, check phone listings for your nearest ACLU affiliate or visit the ACLU's Web site at [www.aclu.org](http://www.aclu.org).

# ACLU

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