

Not Moderate, Not Compassionate, Not Conservative

**John Ashcroft's Radical Revisionism
Of Basic Constitutional Values in America**



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Washington National Office
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A report by:

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This report has been prepared by the American Civil Liberties Union, a nationwide, nonpartisan organization of 275,000 members dedicated to preserving and defending the principles set forth in the Bill of Rights.

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“It’s said that we shouldn’t legislate morality. Well, I think all we should legislate is morality.”

—John Ashcroft

Introduction

For two decades now, America has been in the midst of a struggle over fundamental values. On one side are the values of liberty and equal rights, codified in our Constitution and civil rights statutes. On the other side has been the backlash against those values, reflected in the assertions of traditional privileges and the rising tide of authoritarianism.

Between 1954 and 1973, the values of liberty and equal rights enjoyed an exponential renaissance, as the Constitution's promises were extended by law to embrace many Americans who had long been left out. During the late 1970s, a movement arose in opposition to this progress and in the years since 1980 we have witnessed a relentless attack upon the gains of liberty and equal rights.

Throughout this period, advocates of constitutional values have had to fight a war on many fronts. Remedies for the persistent nightmare of racial discrimination have been resisted; freedom of expression has been attacked; women's rights to control their own bodies and choose their own destinies have been assaulted; and religious extremists who have found a foothold in the corridors of government have threatened the constitutional guarantees of religious liberty.

Sixteen years ago, near the beginning of this struggle, the American Civil Liberties Union criticized the Reagan Administration for what we then called "a radical and shameful assault on ... civil rights protection for millions of Americans." In a comprehensive report, the ACLU systematically criticized the Reagan Administration's civil rights record in the context of the nomination of Edwin Meese as Attorney General, and testified before the Senate Judiciary Committee on that nomination.

Then, as now, the ACLU's criticism was nonpartisan and limited to civil liberties issues. Then, as now, we did not take a position on the nomination of any particular individual, but instead used the nomination as an occasion to enter the debate over Administration policies that would deeply affect civil liberties. We expressed alarm about Meese's role in developing those policies, and we urged the United States Senate to enter the debate as well, and to take seriously its concurrent obligations to protect Constitutional rights.

Today, the nomination of John Ashcroft as Attorney General provides us with another opportunity to join that debate and to engage the Congress and the American public in vigorous discussion over fundamental values. At stake is nothing less than the future of fundamental rights in this country, rights for which many have struggled and more than a few have died.

As President of the United States, George W. Bush will appoint a broad array of individuals charged with enforcing our laws and protecting constitutional rights. The new President will also have many opportunities to propose changes in the law and to support or oppose constitutional amendments. Of all of his important appointments, the selection of an Attorney General and of nominees for the U.S. Supreme Court will inevitably have the greatest impact on our legal rights.

On December 22, 2000, President-elect Bush nominated Ashcroft for the position of Attorney General. As a non-partisan organization that has never endorsed or opposed nominees for cabinet positions, the American Civil Liberties Union does not now take a position on whether Senator Ashcroft should be confirmed by the Senate as Attorney General. What we hope to accomplish today by issuing this report is to analyze and disseminate his positions on important civil liberties issues that face the nation, and to urge Congress to evaluate them in light of the grave responsibility of the office of Attorney General.

The Attorney General holds vast powers in the American legal system. An Attorney General:

- ☐ Decides how vigorously to enforce existing civil rights laws.
- ☐ Advises the President about appointments to the federal judiciary.
- ☐ Helps shape the Supreme Court docket through requests that the Justices consider specific cases and through the filing of briefs on behalf of the federal government.
- ☐ Offers opinions to all federal departments and agencies about the scope of federal law.
- ☐ Develops and presents administration policy to Congress on legislation affecting the Justice Department and on civil and constitutional rights.
- ☐ Establishes guidelines that govern FBI and other federal law enforcement investigations.

We believe that the decision by the U.S. Senate to confirm or reject a nominee for the Attorney General provides a unique opportunity to engage in a discussion on important civil rights and civil liberties issues and on our federal government's willingness to protect and defend those rights. This report examines those aspects and only those aspects of John Ashcroft's record.

John Ashcroft's career is not a secret, and we do not have to guess at his positions. His public record on civil liberties and civil rights is ample, and in this report we have undertaken to set it forth accurately.

Ashcroft's legislative career has not been one of total hostility to civil liberties. He led efforts to protect the right to communicate privately by supporting the export of strong encryption; he opposed a national ID card and national health identifiers; and he voted repeatedly to protect free speech rights in the context of campaign finance reform (although not in the context of free speech on the Internet, or in the context of using an American flag to express dissent).

Aside from these issues, however, the vast majority of Ashcroft's policy positions indicate that he fundamentally disagrees with core tenets of the Bill of Rights and Constitution as they are currently understood and applied. As the title of this report indicates, Ashcroft's policy positions are not moderate in tone or substance, are not compassionate toward those who need the defense of government and his legislative proposals are not conservative modifications of the status quo. They certainly do not conserve the values reflected in the Constitution. Instead, Ashcroft's policies represent radical notions about changing the Bill of Rights and the Constitution to conform to his vision of liberty and justice for some.

President-elect Bush, quoting Thomas Jefferson, recently vowed "to stand for principle, to be reasonable in manner and above all, to do great good for the cause of freedom and harmony." He pledged to be "a uniter, not a divider." The question we must ask the President-elect is

whether this nomination is also an endorsement of Ashcroft's polarizing and divisive record and policy positions on civil rights and liberties. If so, then Mr. Bush has strayed far from his commitment to be a "compassionate conservative," or indeed to be conservative at all. Certainly, conserving the Constitution and the Bill of Rights seems to have been absent from among Ashcroft's concerns during his service as an elected official, both in Missouri and in the U.S. Senate.

After an examination of Sen. Ashcroft's statements and his votes on major federal legislation, we conclude that he supports a radical evisceration of rights as we now know them.

Following are some of the more troubling aspects of the Ashcroft record:

Harbored a Fundamental Disdain for the Constitution

Ashcroft supports major erosion of the constitutional framework of our democracy. Sixteen times he has sponsored or supported amendments to the Constitution, including amendments that would, for the first time in American history (except for Prohibition) dilute rights already protected by the Constitution.

Sought to Eliminate the Wall Separating Church and State

Ashcroft is the architect of legislation that provides direct funding to religious organizations to carry out a variety of federal programs. Despite his assertions to the contrary, Ashcroft seems to believe that his view of the word of God should trump civil rights and civil liberties laws.

Advocated Limiting the Free Speech Rights of Those with Whom He Disagrees

Ashcroft believes that the federal government should have the authority to punish protestors who burn their own flag, and that the government should criminalize free speech on the Internet if it is offensive or sexually explicit, even though not legally obscene.

Repeatedly Tried to Eliminate Reproductive Freedom

Ashcroft has shown hostility to the rights of women to control their reproductive choices. He opposes several common forms of birth control and abortion – even in the case of rape and incest and where a pregnancy threatens a woman's health.

Opposed Remedies for Civil Rights Violations

Ashcroft opposed civil rights remedies including school desegregation orders and affirmative action laws and failed to endorse racial profiling legislation.

Established a Mixed Privacy Record

Ashcroft supported three major privacy laws, even in the face of strong administration opposition. But his record also demonstrates a disturbing lack of concern for some privacy rights that are most at risk today.

Evinced Animosity Toward the Federal Judiciary

Ashcroft has shown contempt for the authority of the federal judiciary, especially in instances where he disagrees with the outcome of federal court cases. He voted to severely restrict habeas corpus rights and to remove the authority of federal courts to hear immigration and school desegregation cases and to fashion remedies for abusive prison conditions.

Supported Draconian, Overly Punitive Sanctions for Young and Adult Offenders

Ashcroft sponsored legislation to increase the prosecution of children as adults at the same time he sought to eliminate federal safeguards protecting juveniles housed in adult jails. He has resisted efforts to prevent the innocent from being executed and has supported a major expansion of mandatory sentences for drug crimes.

The remainder of this report provides greater detail on the troubling civil liberties record of John Ashcroft. We urge the U.S. Senate, in exercising its "advise and consent" authority, to carefully review the following record as it considers Senator Ashcroft's nomination as Attorney General.

Ashcroft Harbored a Fundamental Disdain for the Constitution

Amending the United States Constitution is always a serious undertaking. It should be reserved for those rare instances when there is a compelling need to establish rights that cannot be secured by other means. In fact, with the exception of Prohibition – which was later repealed – the Constitution has never been amended in a manner that would limit an individual right.

The Bill of Rights consists of the first 10 amendments to the Constitution, and taken together with the Civil War Amendments and the amendment granting women the right to vote, forms the basis of freedom and liberty in the United States. But despite the proud history of the Constitution – and the care with which it was crafted – in only one six-year Senate term, Ashcroft supported 16 efforts to amend our founding charter, several of which took direct aim at the Bill of Rights. In fact, none of the amendments he supported would have expanded individual rights; many of them instead represented blatant attacks on our most cherished rights.

Ashcroft voted to amend the Constitution to make it a crime to express frustration with the government or protest a governmental policy by "desecrating" your own flag. This proposed amendment, which has for years narrowly failed to win approval in the Senate, would undermine the very principles for which the flag stands and do irreparable harm to our right to free speech. Despite two Supreme Court decisions to that effect, Ashcroft failed utterly to grasp the magnitude of that kind of limitation on free speech.

Ashcroft also sponsored an amendment to the Constitution to ban nearly all abortions, including those involving rape, incest and serious injury to the woman. This amendment was an attempt to overrule Supreme Court decisions that have firmly established the critically important right of a woman to control her reproductive choices. Senator Ashcroft's disdain for the right to choose is one of the hallmarks of his Senate career and is discussed more fully on page 9.

Ashcroft voted for a constitutional amendment that would have diminished the rights and protections afforded to those accused of a crime in a misguided bid to afford additional rights to crime victims. The so-called Victims' Rights amendment, which Ashcroft voted for in September 1999 in the Senate Judiciary Committee, would have resulted in the conviction of more innocent people by eroding the presumption of innocence and the right to a fair trial. He even voted against a proposed modification to the amendment that would have ensured that nothing in the victims' rights amendment could be used to limit the constitutional rights of the accused.

Ashcroft Sought to Eliminate the Wall Separating Church and State

Ashcroft's Senate career was marked by repeated and sustained attacks on the separation of church and state that was established in the First Amendment. Ashcroft frequently led his colleagues in attacks on the Establishment Clause of the First Amendment. For example, Ashcroft:

- ☐ Favored school vouchers, which would force taxpayers to support religious beliefs and practices with which they disagree, finance discrimination in education and weaken the public schools.
- ☐ Sponsored a Senate resolution in support of the posting of the Ten Commandments in an Alabama court, despite a court ruling that such a posting would violate the separation of church and state.
- ☐ Led proponents of so-called "Charitable Choice" legislation, which provides for direct funding of religious institutions to provide social services in a proselytizing manner.

We do not take issue with Sen. Ashcroft's personal religious beliefs. Rather, we are alarmed that Sen. Ashcroft is willing to impose his religious beliefs on others through a variety of federal policies. He has consistently stated his support for government laws authorizing prayer in public school and he argues for laws that would help our nation return to "traditional values." On the Senate floor he opined, "Just as in the larger culture prayer can play a unique role in dealing with violence, drugs and the other challenges in the schools ... Prayer is the answer. Prayer is not the problem."

Over the objections of District of Columbia leaders, Ashcroft attempted to impose a pilot school voucher program in the District public schools. This would mean that schools that are religiously controlled would for the first time receive federal funds, yet would not be required to comply with federal civil rights laws. Ashcroft also voted to have the government endorse the posting of the Ten Commandments, notwithstanding Alabama state court orders that such displays violated the establishment clause of the First Amendment.

Ashcroft's ceaseless support for Charitable Choice is perhaps the most damaging of his positions in this area. Under current law, religious institutions must form non-sectarian affiliates to provide federally funded social services. But Senator Ashcroft pushed repeatedly – and at times successfully – to allow churches, mosques and synagogues to provide direct federally funded social services. His legislation transforms the helping hand of the government into a chokehold of potential discrimination and government regulation of churches and other houses of worship.

Charitable Choice legislation could undermine the very civil rights laws that the Attorney General must enforce. In fact, the Charitable Choice legislation that Senator Ashcroft championed sought to exempt from civil rights laws – specifically Title VII, which prohibits employment discrimination – the religious organizations it would fund. For example, under Charitable Choice proposals, organizations receiving taxpayer funding would be permitted to discriminate on the basis of pregnancy status, gender and sexual orientation as long as doing so was part of the religion's "teachings and tenets."

In describing his Charitable Choice proposals on the Senate floor in 1999, Ashcroft said that a "religious organization may consider religious beliefs and practices in their employment decisions" and called regulations requiring that social services be provided in a non-sectarian environment "discrimination."

It is a theme he has returned to often. In December 1999, Ashcroft told the magazine Charisma that, "It's said that we shouldn't legislate morality. Well, I think all we should legislate is morality."

Ashcroft Advocated Limiting Free Speech Rights

With the exception of his opposition to unconstitutional restrictions on political advocacy in the context of campaign finance reform, Ashcroft has voted repeatedly to restrict the right of free speech and has often served as a leader of efforts to restrict speech. Most notably, he has been an outspoken proponent of a constitutional amendment to make it a crime to "desecrate" your own flag to protest governmental policies and actions. (See page 5.)

Ashcroft has also led efforts to censor the Internet. He enthusiastically supported the so-called "Communications Decency Act," which would have effectively reduced the level of discourse on the Internet to that appropriate for consumption by a child. In a resounding and unanimous victory for free speech, the Supreme Court in *ACLU v. Reno* held that the CDA was an unconstitutional restriction of First Amendment-protected speech.

He also supported a successful move in Congress last year to force the use of Internet blocking software on public libraries and schools. This legislation, which the ACLU is expected to challenge in the next several weeks, would impose on both children and adults software that is notoriously clumsy and ineffective and which inevitably restricts access to valuable, protected speech on the Internet. Blocking software is the electronic equivalent of removing thousands of titles from library bookshelves, including classics and books that virtually no one would find offensive.

Ashcroft's efforts to censor the Internet extend beyond sexually explicit material. He also supported legislation to ban dissemination of information on the production of controlled substances and supported efforts to restrict the dissemination of information with violent content. "Without the cooperation of television networks, however, Congress has no choice but to give the FCC (Federal Communications Commission) the authority to impose itself upon the entertainment industry," he said on the Senate floor. His statements appear to suggest that governmental control of speech is an acceptable means of shaping our culture.

"We are in the strange intersection between freedom of expression and the damage that can be done when freedom is abused," he said during a Senate Commerce Committee hearing. "If we don't have a way of understanding how we can shape this culture more therapeutically and beneficially, then we might end up with greater incidents of influence prevailing from these very brutal, inhuman and inhumane influences in our culture."

As his actions suggest, Ashcroft seems to have a very dim view of free speech in general. During debate over the National Endowment for the Arts, Ashcroft questioned whether the federal government should even be in the business of funding the arts. "It is bad public policy to subsidize free expression," he said on the Senate floor in 1998. "We have seen that government funding has frequently meant pornography, obscenity, attacks on religious faith, Mapplethorpe – I don't have to go further."

That said, Ashcroft has been a staunch proponent of speech during political campaigns by opposing Congressional efforts to stifle political speech under the rubric of campaign finance reform. Under some versions of the McCain-Feingold campaign finance legislation, outside groups would be effectively prohibited from spending money to criticize candidates' policies

and activities fewer than 60 days before an election – when that criticism is most likely to be heard by the public. Indeed many of the advertisements that sought to highlight candidates' records on the issues that appeared in the last election, including the NAACP ad on the President-elect's position on hate crimes legislation, would have been illegal if McCain-Feingold had become law.

Ashcroft Repeatedly Tried to Eliminate Reproductive Freedom

Ashcroft is more than an opponent of a woman's right to choose. He has made elimination of the right to abortion the centerpiece of his public career. And as Attorney General, he would hold the power to either vigorously enforce laws protecting reproductive freedom or to allow those laws to wither and fade away. The Attorney General, for example, shapes the federal law enforcement response to violence at abortion clinics. And with the Supreme Court so closed divided on reproductive rights issues, the Attorney General's recommendations with respect to Supreme Court nominees can be of immense importance.

Ashcroft's record on reproductive freedom is deeply troubling. As a U.S. Senator, he sponsored a "Human Life" amendment to the U.S. Constitution, which would make a fetus a "person" under the Fifth and Fourteenth Amendments from the moment of fertilization forward. The law would thus subject doctors performing abortions and pregnant women who have abortions to criminal prosecution for murder. This amendment would outlaw abortions even in cases of rape, incest, and when the pregnancy threatens a woman's health. It would also subject women to prosecution for any conduct during pregnancy that could harm their fetus in utero.

Not only would Ashcroft deprive women of the right to choose to terminate a pregnancy, he would deny them the right to take some of the most common forms of contraception to prevent pregnancy in the first place. Ashcroft opposes, for example, a woman's right to use birth control pills or IUDs, deeming them to be "abortifacients." Even within the anti-choice movement, Ashcroft's views place him at the far fringe.

Ashcroft has been a leader in legislative efforts to ban abortions in almost all circumstances. In the Senate, he sponsored legislation criminalizing safe and common abortion procedures used from the early stages of pregnancy, which failed even to include an exception for procedures necessary to preserve a woman's health. While he characterized the bill as banning only a single procedure (so-called "partial-birth abortion"), the U.S. Supreme Court, reviewing a Nebraska law that is nearly identical to the bill Ashcroft championed, found it banned several common abortion methods. The Court declared the law unconstitutional for its broad ban on safe procedures and its failure to safeguard women's health. Ashcroft also voted against a resolution that would have affirmed *Roe v. Wade*, a decision that he has declared was built "on the quicksand of judicial imagination."

Earlier in his career, as Governor of Missouri, Ashcroft supported a bill that would have outlawed abortions in 18 specific situations. He also signed the law that was challenged in *Webster vs. Reproductive Health Services*, which, among other things, declared that life begins at conception and prohibited all but lifesaving abortions at public hospitals, even those necessary to prevent permanent harm to a woman's health. As Attorney General of the State of Missouri, he personally defended the state's restrictive abortion law before the United States Supreme Court in *Planned Parenthood v. Ashcroft*.

Finally, Ashcroft has voted for legislation dubbed the "teen endangerment act," which would have made it a crime for a family member other than a parent – including a grandmother, aunt or older sister – to help a teenager travel to another state for an abortion. Instead of helping

young women deal with the difficult circumstances of an unintended pregnancy, this bill would deny already vulnerable minors the assistance of trusted adults, endanger their health and violate their constitutional rights.

Senator Ashcroft has made no secret of the absolute priority he places on rolling back basic reproductive freedoms. In 1998 he told *Human Events Magazine*, "If I had the opportunity to pass but a single law, I would fully recognize the constitutional right to life of every unborn child, and ban every abortion except for those medically necessary to save the life of the mother."

Ashcroft's attacks on choice have been relentless and he has pledged throughout his 30-year career in public service to do everything in his power to end reproductive choice. "Over 30 million lives have perished since *Roe v. Wade* became the law of the land," he said on the Senate floor in 1995. "I am pained to my core by this tragedy and stand ready to reverse it."

Ashcroft Opposed Remedies for Civil Rights Violations

The Attorney General is the nation's chief civil rights law enforcement officer. But Ashcroft's voting record and public statements raise serious doubts about his commitment to equal justice under the law.

An Attorney General must pursue full and fair civil rights remedies and defend the government's civil rights practices. However, Ashcroft's position on affirmative action is inconsistent with a commitment to seeking appropriate remedies for civil rights violations for racial minorities and women. In fact, his position on affirmative action breaks with a commitment to fairness exercised under both Republican and Democratic administrations.

Despite widespread evidence of continuing discrimination against racial minorities and women, for example, Ashcroft sponsored legislation that would prohibit the use of affirmative action in federal employment, contracting, and other federal programs and activities. In addition, as a U.S. Senator, Ashcroft voted to eliminate programs – which he termed "official discrimination" – to help businesses owned by women and minorities to compete for federally funded transportation projects. Indeed, the Justice Department defends the very programs that Ashcroft sought to eliminate – including the federal contractor nondiscrimination requirements and program-specific minority and women-owned business provisions.

Ashcroft also opposed remedies to school desegregation. According to the *St. Louis Post Dispatch*, as Missouri Attorney General Ashcroft was in "stubborn opposition to school desegregation in St. Louis and Kansas City." Other Missouri newspapers say that he "fought endlessly against the voluntary school desegregation plan in St. Louis."

The New York Times cited the comments of Gary Orfield, an expert on school desegregation who teaches at Harvard University. "Mr. Ashcroft was an unrelenting opponent of doing anything in St. Louis," Orfield told the paper. "He had no positive vision and constantly stirred up racial divisions over this question."

Orfield, who the *Times* said is known for his pragmatic approach to school desegregation, also said that in the more than 30 federal court cases involving desegregation efforts in which he had been involved, Ashcroft was the most resistant individual he had yet encountered. "He was simply opposed to having the federal courts do anything about racial justice or the state having any accountability even though the state of Missouri had many years of segregation and schools were incredibly unequal," Orfield told the *Times*.

The *Times* also says that Ashcroft was so persistent in challenging the voluntary desegregation plan that he was criticized by Judge William Hungate, who was supervising the case, for being obstructionist. The *Times* said that the St. Louis plan that Ashcroft opposed was voluntary and was based on the idea that some white suburban students might choose to go to a magnet school in St. Louis while a limited number of urban black students could enroll in suburban schools.

Based on his gubernatorial record, it is also reasonable to question Ashcroft's commitment to equal voting rights. In an incident cited by the *Times*, Ashcroft twice vetoed legislation that would have allowed officials from the League of Women Voters to register voters in St. Louis, a heavily black and Democratic city. The *Times* said that the bills, passed in 1988 and

1989, would have permitted the city to use the same registration procedures already in place in the surrounding St. Louis County, which was largely Republican and white. In his veto message, Ashcroft cited potential voter fraud.

On another question of equal justice – that of the rights of lesbians and gay men – the Attorney General must ensure that all persons receive equal protection of the law. However, Ashcroft's vote against the Employment Non-Discrimination Act, and his anti-gay public statements, do not square with an Attorney General's obligation to ensure that the law treats all persons equally. In fact, he told the *San Francisco Chronicle* that sexual orientation "is clearly a choice – a choice that can be made and unmade."

Before voting against ENDA, which would protect gay men and lesbians from being fired from their jobs because of their sexual orientation, Ashcroft characterized the legislation as giving "special rights." He also publicly condemned gay men and lesbians when he told the National Liberty Journal Online in August 1998 that, "Well, you know, I believe that the Bible calls [homosexuality] a sin, and that's what defines sin for me."

Finally, an Attorney General is obligated to craft meaningful remedies to civil rights violations, giving force to the constitutional guarantee of equal protection of the laws. However, Ashcroft failed in one of the few opportunities that he had to lead the Senate toward a stronger response to racial discrimination.

Specifically, Ashcroft did not follow through on his promise to support legislation to address the problem of racial profiling on the nation's highways. At a March 2000 hearing of the Constitution Subcommittee, which he chaired, Ashcroft said that the allegations of discriminatory traffic stops disturbed him and promised that he would throw his complete support behind legislation if its sponsors would agree to some of his suggested changes.

Speaking before a packed hearing room and before several victims of racial profiling, Ashcroft said: "So long as whole groups of our citizens believe that there is a two-tiered system of treatment by government officials arbitrarily divided by race, they will have no confidence in that system. They will understandably conclude that if government is improperly motivated by race in some circumstances, it might be improperly motivated by race in all circumstances. This is particularly true if that perception is held of law enforcement, the very government agents entrusted with protecting citizens from injustice."

Even though the bill's sponsors quickly began discussions with Ashcroft and were prepared to accommodate his suggestions, the Senator never became a cosponsor of the legislation. His failure to lend his support to the bill was critical to its demise.

Ashcroft Established a Mixed Privacy Record

Protection of personal privacy consistently rises to the top among the rights that Americans believe are most at risk in the new century. And the Attorney General wields enormous power to protect or infringe upon our privacy. Not only does the Attorney General propose electronic surveillance legislation that can enhance or diminish privacy, but he can also enforce those laws in a manner that damages all individual privacy.

Ashcroft's record on protecting this right is, at best, mixed.

In the face of strong opposition from the Department of Justice, Ashcroft led the fight in Congress to permit the use and export of strong encryption software. Encryption products allow people to encode documents and electronic messages such as e-mail so that they can communicate privately. Ashcroft also opposed an amendment to a 1996 anti-terrorism law that would have allowed the government to eavesdrop on telephone conversations for 24 hours without a prior court order. The requirement of a court order discourages illegal wiretaps of innocent persons.

In another pro-privacy vote, Ashcroft supported an amendment to a 1996 immigration law that would have stripped from the law national ID provisions that required states to issue identification documents that conform to a federal standard, and that mandated the creation of pilot projects for a nationwide electronic identification system. Ashcroft also supported a bill to block the development of unique health identifiers.

On the other hand, Ashcroft ultimately voted in favor of a "roving" wiretap amendment that empowers law enforcement to more easily obtain court orders authorizing them to tap phones that a suspect *might* use. An altered form of this amendment became law in other legislation, and will likely result in the interception of hundreds of thousands of innocent conversations each year. He also sponsored a bill to expand the government's authority to conduct "secret searches" without notifying the target of the search or whether any information was obtained during the search.

He did not support the comprehensive medical privacy legislation endorsed by privacy advocates from across the political spectrum and he opposed strong genetic privacy protections.

Finally it appears that Ashcroft is completely willing to sacrifice personal privacy when it comes to the so-called war on drugs. He supports random drug testing of federal job training applicants and pre-release drug testing of prisoners. "If you vote against drug testing, you vote in favor of saying continue the current policy of ignoring drug use," he said on the Senate floor in 1995.

Ashcroft Evincing Animosity Toward the Federal Judiciary

Ashcroft's career has been marked by frequent denunciations of court decisions upholding constitutional rights with which he disagrees. Those decisions frequently involve upholding reproductive rights, ensuring that poor children in a school district are given access to the resources they need to learn and stopping governmental efforts to establish or favor religion in the United States.

"A robed elite have taken the wall of separation designed to protect the church and they have made it a wall of religious oppression," Ashcroft told a 1998 gathering of the Christian Coalition. "They may try to take prayer from our schools, but they can never steal God from our hearts. I believe that we must continue across this land to fight for our God-given constitutional right to acknowledge and affirm our Creator."

It is when taken in context with the role the courts play in protecting our liberties that Ashcroft's position is most troubling. The judiciary is vested with the power to overturn unconstitutional laws and to reign in unconstitutional actions by the Executive Branch. And while Congress is vested with much power to determine the jurisdiction of the federal courts, the Attorney General can play an important role in recommending legislation to expand or restrict court jurisdiction to hear civil rights and civil liberties claims.

Ashcroft signaled his disdain for the judiciary in a speech delivered to the Heritage Foundation in 1997:

"But here in America today, can it still be said that 'the people govern'? Can it still be said that citizens control that which matters most? Or have people's lives and fortunes been relinquished to renegade judges, a robed, contemptuous intellectual elite fulfilling Patrick Henry's prophecy, that of turning the courts into, quote, 'nurser[ies] of vice and the bane of liberty?'"

The ACLU, of course, fully supports the right of all persons to vigorously denounce court decisions with which they disagree. In Ashcroft's case, however, his harsh denunciations have been accompanied by efforts to close the doors of the federal courthouse to unpopular or weak groups such as immigrants and prisoners.

Ashcroft voted in favor of anti-terrorism and immigration legislation that, among many other things, limit the right of non-citizens to secure judicial review of actions by the Immigration and Naturalization Service that could result in their removal from the United States.

He sponsored legislation that would put severe limitations on the right of habeas corpus, which is designed to ensure that people who are incarcerated have an opportunity to prove to a judge that continued incarceration is unconstitutional or illegal. This attack on the right of habeas corpus was incorporated into the Effective Death Penalty and Antiterrorism Act of 1996 and became law. He also supported legislation making even worse the 1996 Prison Litigation Reform Act, a bill that strips the federal courts of much of their power to correct egregious prison conditions. Ashcroft's legislation would have also stripped federal courts of their

authority to hear even constitutional challenges to state laws adopted by referendum, such as California's Proposition 209, which banned race and gender considerations in public hiring, contracting and college admissions and stripped state and local governments of their authority to remedy race and gender discrimination.

In a March 1997 speech before the Conservative Political Action Conference Annual Meeting, Ashcroft delivered a harsh criticism of an independent judiciary, which he termed "judicial tyranny":

"These cases are but a page of snapshots in an album of the liberties lost. Over the last half century, the federal courts have usurped from school boards the power to determine what a child can learn; removed from the people the ability to establish equality under the law; and challenged God's ability to mark when life begins and ends."

Ashcroft Supported Strong Sanctions for Young and Adult Offenders

Even in a society that has increasingly become "tough on crime," Ashcroft's criminal justice policies rank among the harshest and, in the view of many criminologists, least likely to succeed in limiting violent crime.

An Attorney General must ensure that criminal laws are enforced fairly, particularly against children. But Ashcroft has sponsored or sponsored 10 bills that would have had the effect of scarring for life children who committed youthful errors. His policies would have given federal prosecutors unfettered power to prosecute juveniles as adults without review by judges. He supported a bill to encourage states to fingerprint and photograph juveniles and to send those fingerprints and photographs to the FBI where they would have been treated the same as the records of adult offenders.

Most notably, Ashcroft has sought to prosecute children as young as 14 as adults and to house them in prisons with adults. "Punishing dangerous juveniles as adults is an effective tool in fighting violent juvenile crime," he said on the Senate floor in 1997.

He also supported opening juvenile records, which have traditionally been closed to protect the privacy of children and to enable them to rehabilitate themselves without the stigma associated with delinquent behavior. He voted against a measure that would have required states to take steps to reduce the disproportionate number of children of color who come into contact with the juvenile justice system and sponsored legislation that would limit access to prison health care services for both youthful offenders and adult prisoners.

"Our laws continue to view juveniles through the benevolent prism of basically good kids going astray," Ashcroft said on the Senate floor. "The law should really view the juvenile predators of today as the criminals that they are. The argument is that we are protecting juveniles from the stigma of a record, but in reality we are coddling hardened criminals."

An Attorney General must ensure that the punishment sought fits the crime. But as a Senator, Ashcroft supported mandatory sentences despite overwhelming evidence that they lead to unfair results and fill prisons with non-violent offenders who need treatment, not confinement. On the question of drug policy, Ashcroft has voted to adopt a harsh measure that would, among other provisions, increase mandatory sentences for cocaine offenses rather than providing cost-effective drug treatment. He was the original sponsor of two bills to increase mandatory minimum sentencing for methamphetamine trafficking. He also supported legislation to suspend federal educational loans to anyone who is convicted of even misdemeanor drug offenses.

The Attorney General must enforce Supreme Court precedents designed to protect individual rights. Yet as Senator, Ashcroft attacked the Supreme Court's *Miranda* decision, the ruling that encouraged law enforcement officials to read a person his or her rights when they are arrested. Ashcroft even submitted a brief to the Supreme Court arguing that *Miranda* warnings are not constitutionally required.

Finally, the Attorney General decides whether to pursue the death penalty in federal cases. Yet, despite overwhelming evidence that innocent people sit on death rows across the country and that racial and geographic disparities permeate the use of the death penalty, Ashcroft supports expanded use of the death penalty and has consistently rejected efforts to insure that potentially innocent people are not executed.

In a letter to a constituent that has been posted on the Internet, Ashcroft wrote that "frivolous, lengthy death penalty appeals should be ended" and said that he supported in the 104th Congress limits on the amount of time that a court may spend in consideration of a habeas corpus petition.

Conclusion

Taken as a whole, John Ashcroft's policy positions and his actions to implement those positions reflect a fundamental opposition to longstanding interpretations of core constitutional principles. Whether it is the doctrine of separation of church and state or equal justice under the law, or the privacy rights of women to make their own choices about when or if to bear children, Ashcroft's legislative record makes his views explicit: these principles must be compromised or even obliterated.

It is one thing to have strongly held personal views, but it is quite another to play a leadership role in drastically changing the Bill of Rights and federal statutes to dilute or eliminate fundamental rights. Integrity in pursuit of such goals is no virtue. John Ashcroft's record is an unquestionable sign that he is willing to change the law – *even the Constitution* – to impose his particular religious and moral views on all Americans.

On policy issues ranging from his insistence that prayer and the posting of the Ten Commandments should be government-endorsed, his harsh and unforgiving attitude toward child offenders or his belief that the reproductive choices of women should be subsumed to the “God-given rights” of the fetus, Ashcroft's zealous positions are far out of the mainstream of modern political thought. In implementation, these policies would represent a radical revision of core constitutional protections.

In Ashcroft's public statements there is little acknowledgement that there are many law-abiding Americans who do not want the government to foist a particular set of religious beliefs on them just because they are in need of federal assistance.

In evaluating his nomination, Senators should consider whether his policy positions take into account that there are many religiously devout and non-religious parents who do not want the government to insist that their children pray in school. They should consider whether or not he is aware that there are judges and social workers who believe that children should be rehabilitated even if they have a serious encounter with the law. The Senate should ask Senator Ashcroft whether or not he knows that there are women in desperate circumstances who have to make hard choices to terminate a pregnancy or who merely think that the IUD or RU-486 is their best birth control alternative. These are the people who have to wonder whether or not their privately held, constitutionally protected beliefs will be respected by the policies of the incoming Justice Department.

Given the attitudes Ashcroft has expressed about the decisions of the federal judiciary, it is clear that he holds contempt for the independence of our courts. The Constitution provides for a judiciary that is a co-equal branch of the federal government whose responsibility it is to interpret the Bill of Rights and Constitution. Rather than simply making his disagreements with the courts known, he has sponsored legislation to strip them of their jurisdiction even to hear certain kinds of cases. Seeking to undermine substantive rights by denying them a hearing, he has fought the courts' authority to review cases on issues such as abortion, immigration, prison conditions and school desegregation. Those most in need of getting a hearing on violations of their constitutional rights have often been the subject of Ashcroft's attempts to close the courthouse doors in their faces.

Senator Ashcroft's repeated votes to expand mandatory sentences and his ardent support of the death penalty indicate a lack of concern about racial bias in the criminal justice system. His willingness to vote for legislation to cut off death row appeals all but insures that the innocent will continue to be executed at the hands of the state. Notwithstanding the fact that he chaired hearings that showed ample evidence that in far too many jurisdictions police used skin color as the primary reason to stop alleged traffic violators, he failed to use his power to address this problem.

After reviewing his record, we have found scant evidence that Senator Ashcroft has supported proactive remedies to address the problem of racial bias. During his career he has decried school desegregation orders, opposed affirmative action and withheld support for legislation encouraging collection of data to prove whether or not race is a factor in the enforcement of the law. There is ample evidence of racial discrimination in employment and housing, and that voting rights of racial minorities are repeatedly violated. Nevertheless, what evidence is there that Ashcroft has taken advantage of his service in the Senate to right these wrongs? Based on his Senate record, are we to expect that Ashcroft will take seriously his obligation to vigorously enforce those civil rights with which he has disagreed?

The American Civil Liberties Union expresses grave concerns about Ashcroft's record in the Senate. We want to know whether this activist Senate record would extend to the Attorney General's office. Would long-standing constitutional doctrines be challenged, would the Department of Justice under Ashcroft's leadership work to eviscerate remedies for constitutional violations and would it insist that the judicial branch be forced to play a diminished role in interpreting constitutional rights? Would the Attorney General instead take on the judiciary's task of interpreting the Constitution rather than enforcing the rights that the American people now enjoy?

As ACLU founder Roger Baldwin famously said, "no fight for liberty ever stays won." And we should not forget that most of what we now recognize as constitutional rights were established in practice only within the past 40 years.

The struggle for our hard won rights and liberties has come at a great cost: dreams denied, lives lost and promises betrayed. In considering President-elect George W. Bush's nomination of John Ashcroft to be Attorney General, members of the United States Senate must ask themselves if Ashcroft's policies will build on our nation's struggle for liberty or reverse our hard-won gains.