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## **“To Support and Defend the Constitution of the United States Against All Enemies, Foreign and Domestic”: Four Types of Attorneys General and Wartime Stress**

*Betty Houchin Winfield\**

War exacerbates the usual tensions between individual freedoms and national security. In such times, the United States frequently sacrifices its tradition of individual autonomy and deliberative debate for the security and unanimity of an autocratic, military-style government. Individual rights are often the first casualties of hastily enacted legal measures that expand executive power without regard to constitutional checks and balances.<sup>1</sup> While these expansions have generated criticism and calls for greater government accountability, it is often difficult to determine who within the executive should be held accountable. As the President's chief law enforcement officer, the Attorney General of the United States interprets and implements these legal measures. Yet, in the oath of office the Attorney General promises “to support and defend the Constitution of the United States against all enemies, foreign and domestic.”<sup>2</sup> Consequently, the Attorney General's actions have often been linked to the expansion of executive power at the expense of civil liberties.

John Ashcroft, the current Attorney General under President George W. Bush, exemplifies this relationship between government power and civil liberties. Among other things, Ashcroft's office was largely responsible for drafting, lobbying for, and implementing the USA PATRIOT Act, which expanded the federal government's law enforcement powers in the wake of the September 11th terrorist attacks.<sup>3</sup> A hastily enacted conglomeration of provisions, the Act has engendered much criticism for eviscerating civil liberties, especially the

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\* University of Missouri Curators' Professor. The author wishes to thank Jay Hyun-Joo Song, University of Missouri—Columbia Ph.D candidate in Journalism, for research assistance. An earlier version of this article was presented as a paper at the Journalism & Terrorism Conference, at the First Amendment Center, Arlington, VA, September 2002, and published in *Journalism & Terrorism: How the War on Terrorism Has Changed American Journalism* (2002) by the First Amendment Center.

1. For a discussion of war in democratic societies, see PHILLIP KNIGHTLEY, *THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND MYTH-MAKER FROM THE CRIMEA TO KOSOVO* (rev. ed. 2000).

2. 5 U.S.C. § 3331 (2000).

3. *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act].

freedoms of speech, association, and religion, and the right to privacy.<sup>4</sup> To further expand executive power, President Bush and Attorney General John Ashcroft proposed the Domestic Security Enhancement Act of 2003, which would add new law enforcement tools for seizing records, compelling testimony in terrorism cases without a court order, denying bail, allowing the death penalty with less-than-unanimous jury verdicts, and exempting new intelligence gathering powers from privacy statutes.<sup>5</sup>

While Ashcroft's actions have been much criticized, he is hardly the first Attorney General to face a national security crisis. In fact, since the country's founding, some seventy-eight Attorneys General have broadened the interpretation and enforcement of existing laws during domestic and foreign crises. In order to fully understand Ashcroft's role in history and the possible import of his actions, it is necessary to examine the actions of past Attorneys General during crisis periods. To that end, this essay posits four models of Attorneys General during wartime. These models both explain the various roles of Attorneys General during such periods and provide a useful context for examining Ashcroft's behavior.<sup>6</sup>

Part I of this essay reviews the current Attorney General's efforts to expand law enforcement powers following the terrorist attacks of September 11, 2001. In an effort to give context to the discussion regarding various models of Attorneys General, Part II sets forth a brief history of the Office of the Attorney General during the nineteenth century. Part III presents four models of behavior as characterized by previous Attorneys General. Specifically, this Part discusses the Attorney General as (1) the *coordinator*, (2) the *extreme aggressor*, (3) the *extreme aggressor-fall guy*, and (4) the *leveler*. These models explain past behavior and provide a context for comparison. This essay concludes by taking up that comparison and examining Attorney General Ashcroft's actions in light of these models.

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4. See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002); Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002).

5. See Draft of the Domestic Security Enhancement Act of 2003, available at [http://www.publicintegrity.org/docs/PatriotAct/story\\_01\\_020703\\_doc\\_1.pdf](http://www.publicintegrity.org/docs/PatriotAct/story_01_020703_doc_1.pdf) (last visited September 17, 2004); Philip Shenon, *Opponents Say Republicans Plan Sequel to Patriot Act*, N.Y. TIMES, Sept. 23, 2004, at A18.

6. On the usefulness of models, see DENIS MCQUAIL & SVEN WINDAHL, COMMUNICATION MODELS FOR THE STUDY OF MASS COMMUNICATION 2 (2d ed. 1993).

## I. THE CURRENT ATTORNEY GENERAL

Following the September 11th terrorist attacks, Attorney General Ashcroft was instrumental in obtaining and greatly expanding law enforcement powers. Within weeks of the attacks, attorneys in Ashcroft's office were largely responsible for drafting original provisions of the USA PATRIOT Act,<sup>7</sup> and Ashcroft himself lobbied Congress for its swift enactment.<sup>8</sup> The Act dramatically increases the government's surveillance, search-and-seizure, and wiretapping authority.<sup>9</sup> In particular, the USA PATRIOT Act amended the Foreign Intelligence Surveillance Act ("FISA"), which authorizes wiretaps in certain foreign intelligence investigations under lesser standards than those required in criminal investigations or intelligence investigations of purely domestic threats.<sup>10</sup> Section 218 of the USA PATRIOT Act erodes the distinction between domestic criminal and intelligence investigations by allowing the FBI to obtain wiretaps under the lower FISA standards if it certifies that the collection of foreign intelligence is a "significant purpose" of the investigation, rather than the "primary" purpose as required under the old standards.<sup>11</sup> Section 215 of the Act also expands the government's authority to obtain library, bookstore, medical, and educational records regarding persons who are not involved in terrorist activities.<sup>12</sup>

Ashcroft proposed other measures expanding the government's surveillance capacities, including the Terrorist Information and Prevention System ("TIPS"), which recruited individuals and neighborhood watch groups to work

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7. See Bob Woodward & Dan Balz, *Combating Terrorism: "It Starts Today"*, WASH. POST, Feb. 1, 2002, at A01, available at 2002 WL 10945021 (discussing presidential directive that Ashcroft design a legislative package to seek new powers).

8. See *Hearing on Terrorism Investigation and Prosecution Before the United States Senate Judiciary Committee*, 107th Cong. (2001) (testimony of Attorney General John Ashcroft), available at 2001 WL 1132689.

9. For a discussion of the changes brought about by the USA PATRIOT Act, see AMERICAN CIVIL LIBERTIES UNION, UNPATRIOTIC ACTS: THE FBI'S POWER TO RIFLE THROUGH YOUR RECORDS AND PERSONAL BELONGINGS WITHOUT TELLING YOU 2-9 (July 2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=13245>; LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES (Sept. 2003), available at [http://www.humanrightsfirst.org/us\\_loss/assessing/assessingnewnormal.htm](http://www.humanrightsfirst.org/us_loss/assessing/assessingnewnormal.htm) [hereinafter ASSESSING THE NEW NORMAL].

10. 50 U.S.C. §§ 1801-11 (Supp. 2001). For a discussion of the Fourth Amendment standards pertaining to domestic criminal or intelligence investigations, see *United States v. United States District Court*, 407 U.S. 297 (1972); *Katz v. United States*, 389 U.S. 347 (1967).

11. USA PATRIOT Act of 2001, Pub. L. No. 107-56, sec. 218, 115 Stat. 272 (codified as amended at 50 U.S.C. § 1804(a)(7)(B) (Supp. 2001)).

12. *Id.* sec. 215, § 501 (codified as amended at 50 U.S.C. § 1861 (Supp. 2001)).

with the government to identify terrorists.<sup>13</sup> The TIPS program was to recruit and train one million volunteers from the postal and utility systems in ten cities to report suspicious activities.<sup>14</sup> According to one report, such suspicions were allegedly to have been made public as a result of being forwarded to the FOX-owned "America's Most Wanted."<sup>15</sup> Additional attempts to expand power included proposed Internet data mining systems,<sup>16</sup> airline passenger profiling systems,<sup>17</sup> and a roll-back of restrictions on the FBI's ability to infiltrate and spy on domestic groups and individual Americans in churches, on the internet, in bookstores, and in libraries.<sup>18</sup>

In addition to enhanced surveillance capabilities, Ashcroft also exercised broad authority to confine and question suspected terrorists. Almost immediately after the attacks, the Justice Department detained nearly 1,200 Muslim men without revealing their identities or allowing them to have contact with families or attorneys.<sup>19</sup> Although such men were detained based upon suspicions of terrorism, few if any were ever identified with terrorist activities and most were held primarily because of their ethnicity.<sup>20</sup> Under Ashcroft, the Department of Justice required fingerprinting or registration of young men from countries such as Iran, Iraq, Syria, Sudan, and Libya who visited the United States on business, student, or tourist visas.<sup>21</sup> Ashcroft also enacted regulations

13. See USA Freedom Corps Overview (Jan. 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/freedom-corps-policy-book-03.html>.

14. Eric Lichtblau, *Terrorism Tip Network Scaled Back Surveillance: Workers With Access to Homes Won't Use New Hotline, Justice Department Says*, L.A. TIMES, Aug. 10, 2002, at A1, available at 2002 WL 2495625. As a result of public outcry, Congress banned implementation of Operation TIPS. See 6 U.S.C. § 460 (Supp. 2002).

15. Dave Lindorff, *When Neighbors Attack!*, available at [http://www.salon.com/news/feature/2002/08/06/tips/index\\_np.html](http://www.salon.com/news/feature/2002/08/06/tips/index_np.html)

16. Alexander Cockburn, *Total Information, Total Confusion*, THE NATION, Dec. 16, 2002, at 9, available at 2002 WL 2211090.

17. ASSESSING THE NEW NORMAL, *supra* note 9, at 24-26.

18. See U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (May 30, 2002), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf>. For a discussion of the changes brought about by the new guidelines, see ELEC. PRIVACY INFO. CTR., THE ATTORNEY GENERAL'S GUIDELINES, available at <http://www.epic.org/privacy/fbi/> (last visited Aug. 16, 2004).

19. AMERICAN CIVIL LIBERTIES UNION, INSATIABLE APPETITE: THE GOVERNMENT'S DEMAND FOR NEW AND UNNECESSARY POWERS AFTER SEPTEMBER 11, at 5 (2002), available at <http://www.aclu.org/Files/OpenFile.cfm?id=10403> (last visited Sept. 17, 2004).

20. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577-78 (2002).

21. See Susan Sachs, *Government Ready to Fingerprint and Keep Track of Some Foreign Visitors*, N. Y. TIMES, Sep. 9, 2002, at A16.

allowing government officials to eavesdrop on attorney-client conversations if the Attorney General “certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism.”<sup>22</sup>

Since the September 11th terrorist attacks, Attorney General Ashcroft and other members of the Bush administration have cloaked government proceedings and information in secrecy. In October 2001, the Attorney General directed federal agencies to interpret requests for government information under the Freedom of Information Act (“FOIA”) in light of wartime national security policies.<sup>23</sup> Specifically, he directed officials to interpret expansively those exceptions to the government’s obligation to produce information under FOIA and to be mindful of “institutional, commercial, and personal privacy interests” when considering FOIA requests.<sup>24</sup> Ashcroft’s response is in marked contrast to the previous openness adopted by “Attorney General Janet Reno, who advised officials to release records unless disclosure would result in foreseeable harm.”<sup>25</sup>

Moreover, Ashcroft and the Bush administration proposed a new exemption from FOIA’s requirements. Specifically, the Homeland Security Act of 2002 allows the Department of Homeland Security to withhold from disclosure under FOIA “critical infrastructure information . . . that is voluntarily submitted” to it by private entities “regarding the security of critical infrastructure and protected systems.”<sup>26</sup> The law further imposes criminal sanctions on government officials who disclose such information, provides companies with immunity from civil liability based on such information, and preempts state access laws.<sup>27</sup> In essence, the Act gives businesses that designate corporate information as “critical infrastructure information” a free pass on public disclosure, placing any requested information beyond the scrutiny of the public, Congress, the courts, and the media.

Attorney General Ashcroft has either ignored criticism of his actions or labeled those who decried them as aiding terrorists, being unpatriotic, and “liv-

22. National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001).

23. FIOA Memorandum from Attorney General John Ashcroft, to Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* <http://www.usdoj.gov/oip/foiapist/2001foiapist19.htm>.

24. *Id.*

25. Martin E. Halstuck, *In Review: The Threat to Freedom of Information*, COLUM. JOURNALISM REV., Jan./Feb. 2002, at 8. *See also* FOIA Implementation Memorandum from Attorney General Janet Reno, to Heads of Departments and Agencies (Oct. 4, 1993), *available at* <http://www.fas.org/sgp/clinton/reno.html>.

26. Homeland Security Act of 2002 § 214(a)(1), 6 U.S.C. § 133(a)(1) (Supp. 2004).

27. *See id.* § 214(f), 6 U.S.C. § 133(f) (criminal penalties); *id.* § 214(a)(1)(C), 6 U.S.C. § 133(a)(1)(C) (civil “use” immunity); *id.* § 214(a)(1)(E), 6 U.S.C. § 133(a)(1)(E) (preemption of state access laws).

ing in a dream world.”<sup>28</sup> The Bush administration has further attempted to discount news coverage from European countries, images on Al Jazeera television, books about Osama bin Laden,<sup>29</sup> and even the U.S. media’s focus on prison abuse, American war dead, and other negative reactions to the Administration’s conduct of the war in Iraq, implying that such coverage aids terrorists or is terrorist propaganda. Ashcroft’s actions have created widespread fear, chilled expression, and led to the firing of suspects after government leaks, such as Louisiana State University researcher Steven Hatfill in September 2002.

While Ashcroft’s conduct is often criticized, he does not necessarily stand alone in history. Other Attorneys General have faced similar national security crises. In order to understand and evaluate Ashcroft’s actions, we must examine them in light of the actions of previous Attorneys General during wartime crises.

## II. THE ATTORNEY GENERAL AS PART OF THE EXECUTIVE BRANCH—A BRIEF REVIEW

The Attorney General serves as the country’s chief law enforcement officer, the head of the Department of Justice, and the de facto legal counsel to the President and the executive. In the oath of office, the Attorney General solemnly swears or affirms to “support and defend the Constitution of the United States against all enemies, foreign and domestic.”<sup>30</sup> In upholding the laws, Attorneys General are to be “mindful of the purpose and intent of Congress . . . [and] interpret and adhere to the rules promulgated in decisions of the Supreme Court.”<sup>31</sup> They are not to “deviate further than the law requires from the politics of the Presidential Administration of which they are a part.”<sup>32</sup>

While these descriptions provide a framework for understanding the Attorney General’s duties, they fail to address the important connection between the Attorney General and the President. Prior to becoming a major administrative official, the Attorney General was adviser and legal counsel to the President.<sup>33</sup> Although he has also become the nation’s chief law enforcement officer,

28. Neil A. Lewis, *A Nation Challenged: The Senate Hearing: Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, N.Y. TIMES, Dec. 7, 2001, at A26. See also Wendy Kaminer, *Ashcroft’s Lies*, AM. PROSPECT, July 15, 2002, at 9; Katharine Q. Seelye, *War on Terror Makes for Odd Twists in Justice System*, N.Y. TIMES, June 23, 2002, at A16.

29. David D. Kirkpatrick, *Publishers Joust Over Merit of Terrorist Leader’s Words*, N.Y. TIMES, Nov. 5, 2001, at C8.

30. 5 U.S.C. § 3331 (2000).

31. See U.S. DEP’T OF JUSTICE, 200TH ANNIVERSARY OF THE OFFICE OF THE ATTORNEY GENERAL 3-4 (1989) [hereinafter 200TH ANNIVERSARY].

32. *Id.*

33. See NANCY V. BAKER, *CONFLICTING LOYALTIES, LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789-1990*, at 1 (1992).

serving as a “bridge between the executive and the judicial branches,”<sup>34</sup> this dual role as enforcement officer and adviser to the President often puts the Attorney General at the center of a conflict between the policy-making and the political functions of the office.

This was not always the case. The Attorney General originally had far less power and prominence within the executive branch. The office was created by the Judiciary Act of 1789, which provided for the appointment of a “person, learned in the law, to act as Attorney General for the United States.”<sup>35</sup> In fact, the Attorney General was not recognized as a member of the cabinet, and served Congress as well as the President; however, Congress requested so much legal advice that the early Attorneys General spent most of their time working for the legislative branch. Moreover, the office was only a part-time post for the first sixty-four years of our nation’s history.<sup>36</sup>

Congress was initially reluctant to fund a full time legal office exclusively within the executive branch for fear that such a federal office might be used to deprive citizens of their newly won rights.<sup>37</sup> Despite constant pleas for resources, Edmund Randolph, the first Attorney General, had to rent his own office space and pay for his own heat, stamps, and stationery out of his \$1,500 annual salary.<sup>38</sup> In fact, until 1819, the Attorney General did not even have a secretary to help prepare opinions on the constitutionality of bills and procedures proposed in Congress.<sup>39</sup> Struggling to meet their workload, the early Attorneys General had little or no impact on executive power during the War of 1812 (1812-15), the Mexican-American War (1846-48), or the Civil War (1861-65).

The starkest example of this lack of power came during the Civil War when Abraham Lincoln considered suspending the writ of habeas corpus.<sup>40</sup> Attorney General Edward Bates opined that such power was granted only to Congress in Article I of the Constitution. Nevertheless, Lincoln suspended the Great Writ on April 27, 1861, arresting and jailing thousands of citizens.<sup>41</sup>

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34. *Id.* at 2 (quoting DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 26 (1980)).

35. 200TH ANNIVERSARY, *supra* note 31, at 4-5.

36. The practice lasted until 1853 when Attorney General Caleb Cushing abandoned his private practice and devoted full time to the government’s business. *See id.* at 11. Prior to that, the Attorney General lived in the capital only part-time. *Id.* By 1968, the Department of Justice’s annual budget was more than \$400 million and it employed 32,000 people. LUTHER A. HUSTON ET AL., *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 2 (1968).

37. 200TH ANNIVERSARY, *supra* note 31, at 7.

38. HUSTON ET AL., *supra* note 36, at 1.

39. *See* 200TH ANNIVERSARY, *supra* note 31, at 8.

40. U.S. Const. art. 1, § 9, cl. 2.

41. *See* MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 8 (1991); Thomas F. Carroll, *Freedom of Speech and of the Press During the Civil War*, 9 VA. L. REV. 516, 529-30 (1923). Bates eventually prepared



Some four thousand detainees were subsequently tried in military tribunals, over half of which were held in Missouri.<sup>42</sup> When Bates hesitated or appeared to disagree—as in the case of the arrest and imprisonment of Representative Clement Vallandigham from Ohio, who had encouraged desertion and charged the Lincoln administration with tyranny—the President sought other advice. As Lincoln would later explain to Congress, “These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a popular necessity; trusting then as now that Congress would readily ratify them.”<sup>43</sup> Only after the fact did Lincoln, whose actions had been without precedent,<sup>44</sup> require that his Attorney General write a defense of the detentions.<sup>45</sup> The reluctant Bates, who did not criticize the president at the time, was later quoted as saying, “There seems to be a general and growing deposition of the military . . . to engross all power, and to treat civil government with contumely, as if the object were to bring it into contempt.”<sup>46</sup>

Many nineteenth century Attorneys General operated much like Edward Bates, with little or no public activity; those who disagreed with the President tended to go along or resign rather than publicly challenge the President’s ac-

an argument justifying the President’s action and the continued his suspension of the writ. NEELY, JR., *supra*, at 14.

42. See NEELY, JR., *supra* note 41, at 46.

43. Message to Congress in Special Session, July 4, 1861, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 594, 600 (Roy P. Basler ed., 1946). In 1863, Congress enacted a habeas corpus statute, approving the President’s measure retroactively. Act of March 3, 1863, ch. 81, 12 Stat. 755.

44. James Madison had as much cause as Lincoln to suspend the Great Writ during the War of 1812 when Federalists leaders in several New England states called a convention to secede from the Union. However, Madison did nothing and said nothing publicly. Further, when General Andrew Jackson suspended civil liberties in New Orleans, he was fined. JOHN WILLIAM WARD, ANDREW JACKSON: SYMBOL FOR AN AGE 188-89 (1962). Both Madison and his Attorney General, William Pinckney, kept silent. Lincoln, on the other hand, was well aware of the Jackson case, as Congress had repaid the General’s fine decades later when Lincoln was in the House of Representatives. NEELY, JR., *supra* note 41, at 199-200.

Until 2001, the only wartime President who made such arbitrary arrests after Lincoln was Woodrow Wilson. BETTY HOUGHIN WINFIELD, TWO COMMANDERS-IN-CHIEF: FREE EXPRESSION’S MOST SEVERE TESTS 8 (Joan Shorenstein Barone Ctr., Research Paper R-7, 1992). This was not necessarily because of the rise in national security crises. Indeed, William McKinley during the Spanish American War, Harry Truman during the height of the Cold War and the Korean War, and Lyndon Baines Johnson and Richard Nixon during the Vietnam War all refrained from such drastic actions. *See id.*

45. NEELY, JR., *supra* note 41, at 10-11, 14.

46. *Id.* at 173 (quoting Bates’s private letter as later found in the Illinois State Register, Feb. 10, 1864). The Supreme Court did not question the suspension of the writ of habeas corpus during the war; however, after Lincoln’s death, the Court declared that military trials of civilians were unconstitutional where civil courts were still able to function. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

tions. Perhaps their reticence stemmed from their lack of power and their low budgets. In 1870, this situation changed as Congress passed another Judiciary Act, which established the Department of Justice and the new office of Solicitor General to represent government interests in court.<sup>47</sup> As a result of this statute, the Office of Attorney General gained more prominence in the twentieth century and enjoyed increased resources and greater power and recognition as a member of the cabinet.

Along with increased power and visibility, however, came increased volatility and controversy. During wartime stresses, some twentieth century Presidents went through several Attorneys General during a term of office. For example, Lyndon Johnson had three different Attorneys General during the Vietnam War; Richard Nixon went through four. Other Attorneys General were involved in scandals. Thus, Warren G. Harding's former Attorney General, Harry M. Daugherty, was tried for fraud during the Teapot Dome revelations, and Richard Nixon's former Attorney General, John Mitchell, was convicted for criminal conspiracy to obstruct justice during Watergate.

### III. FOUR MODELS OF ATTORNEYS GENERAL

As the Attorney General has become a more visible part of the executive, patterns of behavior have begun to emerge as models for comparing various wartime Attorneys General with the current one. As the nation's chief law enforcement officer, the Attorney General has broad discretion with respect to the type of actions he can take. Such actions can differ dramatically depending on that individual's legal interpretations for a particular President. An examination of Attorneys General during twentieth century wartime crises reveals four primary models of action.

The first model involves the *coordinator*, the person who facilitates the President's wishes no matter how constitutionally questionable those actions may be. This model involves Attorneys General who are forceful during national crises but who are not closely identified with overt infringement of civil liberties. This Attorney General works behind the scenes, allowing the President to be the public face for such aggressive actions. Thomas Gregory, who served under Woodrow Wilson during World War I, is an example of a *coordinator*.

An Attorney General who becomes more ambitious and publicly initiates aggressive actions independently can be termed the *extreme aggressor*. Although this archetype carries out the President's orders, it also takes them to an extreme and can serve as a front for an administration's aggressive actions. Two twentieth century Attorneys General fit this model: Mitchell Palmer, who served under President Wilson during the Red Scare years following World

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47. Act of June 22, 1870, ch. 150, 16 Stat. 162.

War I,<sup>48</sup> and John Mitchell, who served under Richard M. Nixon during the Vietnam era.

If an Attorney General fitting the model of the *extreme aggressor* becomes so identified with draconian government actions that he eventually takes the heat publicly or in the courts, he moves beyond the *extreme aggressor* model and becomes an administration's scapegoat. We can label this type of Attorney General the *extreme aggressor-fall guy*. Attorney General John Mitchell fits this model as well.

Finally, some Attorneys General attempt to temper the administration's drastic actions. Termed the *leveler*, this Attorney General quietly disagrees with the President's aggressive actions and tries to urge a different course. Francis Biddle, who served under President Roosevelt during World War II, fits this model.<sup>49</sup>

These four models are fluid and may overlap. Moreover, this essay does not suggest that no other models for an Attorney General's behavior exist. Rather, it views the proposed models as providing the most useful explanations of typical Attorney General behavior in times of crisis. Each model is discussed separately below.

### A. The Coordinator

One of the most repressive periods in United States history occurred during World War I when some two thousand people were prosecuted for disloyalty under the Espionage and Sedition Acts.<sup>50</sup> Those Acts criminalized speech interfering with the war effort and allowed the Postmaster to refuse to mail materials violating the Act.<sup>51</sup> The prosecutions were primarily for expressing opposition to the war rather than for overt acts of disloyalty.<sup>52</sup> Such cases involving speech were as trivial as claims "that a referendum should have preceded [the] declaration of war, . . . that war was contrary to the teachings of Christ," and that the Red Cross and the YMCA were disloyal for discouraging women from knitting socks for the war effort.<sup>53</sup> Such prosecutions were often aimed at political groups that were not so much dangerous as they were abhorrent to the Wilson administration. The 1,055 citizens convicted under the Acts

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48. See Donald Johnson, *The Political Career of A. Mitchell Palmer*, 25 PA. HIST. 345 (1958).

49. FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 407 (1990).

50. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 52 n.30 (Atheneum 1969) (1941).

51. See Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219 (Espionage Act); Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553 (Sedition Act). For discussion of these acts, see CHAFEE JR., *supra* note 50, at 36-42.

52. HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917-1921*, at 45-49 (1960).

53. CHAFEE JR., *supra* note 50, at 51.

included more than 150 members of the International Workers of the World (I.W.W.), one Senate nominee, and the Socialist Party's 1916 presidential candidate, Eugene V. Debs.<sup>54</sup> The Postmaster General's censorship under the Espionage Act was equally discriminatory, including suppression of so-called socialist or radical literature, such as the *Nation*, and a *New York World* telegram criticizing the Postmaster General.<sup>55</sup>

President Woodrow Wilson and Attorney General Thomas Gregory were largely responsible for the government's repressive actions during World War I. They both lamented the lack of adequate federal laws to deal with vocal opposition to the war and German propaganda.<sup>56</sup> In 1917, the Wilson administration thus pressed Congress to pass the Espionage Act. Despite numerous successful prosecutions under the Act, Wilson and Gregory remained dissatisfied. Believing that the Espionage Act did not reach enough propaganda because of stringent intent requirements, they pressed for the Sedition Act in 1918.<sup>57</sup> The Sedition Act created nine new offenses, including speaking, writing, or publishing "any disloyal, profane, scurrilous, or abusive language."<sup>58</sup> It also punished disloyal utterances, attempts to obstruct the sale of U.S. bonds, or attempts to cause contempt of the government of the United States, the Constitution, the flag, or a military uniform, as well as any language inciting resistance to the United States or its cause.<sup>59</sup>

Attorney General Gregory's actions during World War I reflect those of a coordinator. Gregory worked diligently to fulfill President Wilson's aims and seldom expressed his disapproval of the administration's aggressive actions. In some areas Gregory was quite active. For example, Gregory convinced President Wilson that the American Protective League (APL), a private vigilante organization with some 250,000 members working under the auspices of the government, was necessary to the war effort.<sup>60</sup> Even after APL members acted as *agents provocateurs*, indulged in illegal arrests and searches, and impersonated federal officers, "Gregory kept up a bold front."<sup>61</sup> In other areas Gregory remained more discrete. Although he was skeptical about the existence of an internal threat to national security,<sup>62</sup> he did little to counter local vigilante at-

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54. ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976*, at 115-19 (rev. ed. 2001).

55. CHAFEE JR., *supra* note 50, at 99 & n.105.

56. SCHEIBER, *supra* note 52, at 23; REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, 103rd Cong., at A9 (1997).

57. SCHEIBER, *supra* note 52, at 23-24.

58. Act of May 16, 1918, ch. 75, § 3, 40 Stat. 553.

59. *Id.*

60. HAROLD M. HYMAN, *TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 272-73* (1959).

61. SCHEIBER, *supra* note 52, at 49; *see also* HYMAN, *supra* note 60, at 272-79.

62. RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 47* (1987).

tacks on pacifists, German-Americans, Socialists, and other alleged traitors.<sup>63</sup> When a Collinsville, Illinois, townsman accused of being a German spy was dragged into the street, wrapped in a flag and murdered, the Attorney General did publicly denounce the acts although it took the President four months to condemn such vigilante justice. As a general rule, Attorney General Gregory did not play a more obviously public role in the government's World War I excesses than did President Wilson. Such actions are consistent with the *coordinator* model.

### B. The Extreme Aggressor

In 1919, Thomas Gregory resigned and was replaced by A. Mitchell Palmer, whose actions were even more excessive than Gregory's. Palmer thus exemplifies the *extreme aggressor* model of an Attorney General's behavior. Because President Wilson was occupied with passing the League of Nations treaty in the Senate in the years after World War I, Palmer primarily operated on his own. When Wilson later became incapacitated, Palmer was responsible for some of "the greatest executive restriction[s] of personal liberty in the history of this country."<sup>64</sup>

Although he acted with Wilson's approval early in his tenure, Palmer eventually began to act independently. In 1920, after a succession of anarchist bombings, one of which occurred at the Attorney General's doorstep, Palmer initiated a series of raids that resulted in the deportation of thousands of labor union radicals and members of the Communist Party—all without due process of law.<sup>65</sup> As part of his response to the bombings, Palmer implored Congress to provide greater funding to prevent radicals from destroying the government.<sup>66</sup> With those appropriations, Palmer created the Bureau of Investigation within the Justice Department to secretly gather information on radical activities.<sup>67</sup> He chose J. Edgar Hoover as deputy director of this division, which eventually became the modern FBI.

Initially, there was little outcry regarding Palmer's activities. In fact, it appeared that Congress and the American people supported repressive action against radicals, as evidenced by Congress's introduction of over seventy peacetime sedition acts from 1918-1920.<sup>68</sup> Even the press did not criticize Palmer's actions. As law professor Zechariah Chafee notes, the initial silence of

63. See JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* 135-37 (1999).

64. See CHAFEE JR., *supra* note 50, at 214-15.

65. See FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 35-39 (1980).

66. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 229 (Greenwood Press 1981) (1963).

67. *Id.* at 229-30.

68. Patrick S. Washburn, *Espionage and Sedition Acts*, in *HISTORY OF MASS MEDIA IN THE UNITED STATES* 206-07 (Margaret A. Blanchard ed., 1998).

the press about the infringements of civil liberties was deafening. Such a lack of media attention was understandable given that Palmer continued to enforce the Espionage and Sedition laws against his critics even after World War I had ended. For example, a year after the armistice, Palmer closed down the office of the *Seattle Union-Worker*, which had advocated that the upcoming election was a way for workers to fight back against the governing class after the Centralia, Washington, shootings of innocent working men.<sup>69</sup>

By 1920, however, the Attorney General's actions were so intolerable that the country's notables could no longer remain silent. Former presidential candidate and Supreme Court Justice Charles Evans Hughes said in an address at Harvard Law School,

We have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly after the military exigency had passed and in conditions for which they were never intended, and we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged.<sup>70</sup>

"Palmer Raids," as they came to be called, exemplified the extension of executive power during the "Red Scare." Mitchell Palmer's actions were far more extreme than those of Attorney General Gregory who coordinated with Wilson to achieve the administration's goals through legal changes. In contrast, Palmer saw legal rules as inhibiting his office's efficiency and thus disregarded them. Unlike Gregory, Palmer's aggressive actions were widely publicized as newspapers covered the raids and announced deportations. In fact, Palmer set up a public relations office to ensure such publicity. His actions were likely self-serving as he had designs on the presidency.<sup>71</sup> As people began to regard the Red Scare and the Palmer raids as excessive, however, Palmer's machine backfired and ruined his political career.

### C. *The Extreme Aggressor-Fall Guy*

When an *extreme aggressor* pushes the limits of executive power too far, this Attorney General may also take the blame if public opinion turns. In such situations, the Attorney General becomes a scapegoat for an administration's actions. He is publicly humiliated during a presidency and pays more dearly for such actions than simply suffering public opprobrium. John Mitchell,

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69. CHAFEE JR., *supra* note 50, at 104.

70. *Id.* at 102. Other leaders also joined Hughes's outcry. See Harlan Grant Cohen, Note, *The (Un)favorable Judgment of History: Deportation Hearings, The Palmer Raids and the Meaning of History*, 78 N.Y.U. L. REV. 1431, 1461-65 (2003).

71. HIGHAM, *supra* note 66, at 229.

Richard M. Nixon's Attorney General, exemplifies this *extreme aggressor-fall guy* model.

During the Nixon presidency, renowned for its numerous infringements of civil liberties and abuses of power, Attorney General Mitchell was extremely aggressive in protecting the administration from its critics, often at the behest of the President. His use of lawsuits and subpoenas against the administration's enemies was unprecedented. The administration also manipulated public information with selective news leaks and used wiretaps and other intrusive surveillance to investigate and identify opponents.<sup>72</sup>

For example, Attorney General Mitchell acted at the President's request to stop the *New York Times* and *Washington Post* from publishing the *Pentagon Papers*.<sup>73</sup> When the President wanted to prosecute Daniel Ellsberg, who had leaked the Vietnam War documents, Mitchell complied.<sup>74</sup> Mitchell's Justice Department also carried out domestic surveillance operations to investigate and monitor what was ostensibly a radical threat from the civil rights and anti-war movements, to punish those who criticized the president, and to prevent disclosure of certain (especially negative) information.<sup>75</sup> The operation's aim was to facilitate President Nixon's wishes by providing J. Edgar Hoover with the names of people suspected of leaking White House information.<sup>76</sup> In general, Mitchell cooperated with Hoover's surveillance efforts although he was more clandestine than Palmer had been. The Justice Department also terrorized reporters by subpoenaing their materials and threatening Espionage Act prosecutions for publishing confidential information.

For the most part, John Mitchell carried out President Nixon's wishes. In that sense, then, Mitchell acted as a *coordinator*. Yet, Mitchell also acted as aggressively as Attorney General Palmer had done sixty years previously. But whereas Palmer was largely responsible for his own downfall, Mitchell became a fall guy for an aggressive, secretive administration. By 1972, Mitchell had resigned to run the President's reelection campaign.<sup>77</sup> Yet, he became entangled in the Watergate scandal and the Nixon administration's other abuses of power, such as illegal campaign practices, wiretapping, undue influence on agencies such as the Internal Revenue Service, harassment of political enemies, and obstruction of justice. Although Mitchell acted according to the President's wishes, a storm of publicity surrounding various Nixon-related scandals made him the public face for the administration's abuses. Mitchell was indicted and sentenced to prison for obstruction of justice. As the most senior Nixon admini-

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72. JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* 111-76 (1984).

73. *Id.* at 126.

74. *Id.*

75. See POWERS, *supra* note 62, at 444-58.

76. *Id.* at 445-46. See also JOHN W. DEAN III, *THE WHITE HOUSE YEARS: BLIND AMBITION* 36-37 (1976).

77. J. ANTHONY LUKAS, *NIGHTMARE, THE UNDERSIDE OF THE NIXON YEARS* 138 (1973).

stration official convicted of a crime, John Mitchell became the administration's *fall guy*.

#### D. *The Leveler*

The final model, the *leveler*, is an Attorney General who disagrees with the President and primarily works behind the scenes to check an aggressive administration's infringements of civil liberties. Most *levelers* either come to accommodate an aggressive wartime president or resign in disagreement or protest. Either way, they are not the public face for an administration's actions. Francis Biddle, in his attempts to temper the Roosevelt administration's excesses toward Japanese-Americans during World War II, exemplifies this model.

After the attack on Pearl Harbor, many people feared that the country's Japanese-Americans were engaged in espionage and sabotage.<sup>78</sup> Although there was little evidence of Japanese-American disloyalty, prominent politicians began to clamor for immediate action.<sup>79</sup> Biddle tried, albeit unsuccessfully, to counter this anti-Japanese sentiment and strongly disagreed with the detention of all Japanese-Americans along the West Coast. In 1942, he argued to President Roosevelt that such detentions were disruptive, expensive, and unnecessary.<sup>80</sup> As he later recalled, "I thought at the time that the program was ill-advised, unnecessary, and unnecessarily cruel, taking Japanese who were not suspect, and Japanese-Americans whose rights were disregarded, from their homes and from their businesses to sit idly in the lonely misery of barracks while the war was being fought in the world beyond."<sup>81</sup>

Nevertheless, Biddle was unable to stop the increasing calls for action against Japanese-Americans from sources as diverse as California Governor Culbert Olson, California Attorney General Earl Warren, the California Farm Bureau Federation, the Hearst newspaper chain, and national columnist Walter Lippmann.<sup>82</sup> More importantly, Biddle could not counter the sentiment coming from the administration's officials, including Secretary of War Henry Stimson and General John DeWitt as well as the President.<sup>83</sup> By mid-February Biddle surrendered his fight. President Franklin D. Roosevelt signed Executive Order 9066 authorizing military officials to exclude and detain "any or all persons" from certain areas in the western United States designated as "military areas."<sup>84</sup>

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78. JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 70 (1954).

79. PETER IRONS, JUSTICE AT WAR 35, 60-61 (1983); TENBROEK ET AL., *supra* note 78, at 78-80.

80. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 78, 83 (1982) [hereinafter PERSONAL JUSTICE DENIED].

81. FRANCIS BIDDLE, IN BRIEF AUTHORITY 213 (1962).

82. See IRONS, *supra* note 79, at 41, 60-61.

83. *Id.* at 359-63; BIDDLE, *supra* note 81, at 209, 213, 226.

84. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).



For his part, Biddle made it clear that it would *not* be the Justice Department to carry out the evacuation;<sup>85</sup> however, he generally complied with the Roosevelt Administration's evacuation plans, even to the extent of writing a memorandum justifying the Executive Order and the detentions.<sup>86</sup> As a *leveler*, Biddle tried to ameliorate the effects of the administration's actions in other ways. He convinced the President that Italian-Americans should be removed from the category of enemy aliens and announced this decision in a Carnegie Hall speech on Columbus Day, 1942.<sup>87</sup> He also opposed Assistant Secretary of War John McCloy's pressure to indict a prominent naturalized Italian-American, insisting that any such action would have to be taken by Secretary of War Stimson.<sup>88</sup> In this case, Stimson sided with the Attorney General and nothing happened.<sup>89</sup>

Biddle attempted to avoid the public panic and the persecution of aliens and American citizens that characterized World War I and the Red Scare. As a moderator, Biddle worked to temper the actions of a wartime president who, while wishing to protect civil liberties 99 percent of the time, wanted his Attorney General to bear down on them the rest of the time.<sup>90</sup> Indeed, Roosevelt reminded Biddle that in the face of Attorney General Bates' refusal to carry out Lincoln's wishes during the Civil War, President Lincoln declared martial law.<sup>91</sup> Biddle's position as a *leveler* is aptly illustrated by his wartime statement that "[t]he first duty is to win the war. The second duty, that goes hand in hand with it, is to win it greatly and worthily, showing the real quality of our power not only, but the real quality of our purpose and of ourselves . . . ."<sup>92</sup>

### E. *The President's Influence on the Models*

Each model of Attorney General shows a different relationship with the President under whom he serves. Some Presidents control their Attorneys General's actions while others give them a freer rein. This relationship often determines whether the President or the Attorney General becomes the public face of the administration's restrictions on civil liberties.

During World War I, for example, Attorney General Gregory deferred to President Wilson's wishes and primarily worked behind the scenes to assure passage of the Espionage and Sedition Acts. As a *coordinator*, Gregory also

85. PERSONAL JUSTICE DENIED, *supra* note 80, at 85.

86. *Id.*

87. BIDDLE, *supra* note 81, at 229.

88. *Id.* at 220.

89. *Id.*

90. JAMES MACGREGOR BURNS, ROOSEVELT: THE SOLDIER OF FREEDOM 216 (1970).

91. *Id.*

92. Francis Biddle, Address at the University of Virginia Law School (Dec. 4, 1942), in DEMOCRATIC THINKING AND THE WAR 55 (William H. White Lectures at the Univ. of Va., 1944) (quoting Woodrow Wilson) (alteration in original).

carried out the President's repressive wartime measures. Such a relationship is consistent with the hierarchical power structure associated with a military, autocratic government. In such cases, the President is blamed for infringements of civil liberties. Because Presidents like Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt took very public stances in announcing or defending restrictions on civil liberties, the public could hold them accountable. The *co-ordinator* Attorney General acts more as an assistant implementing the Commander-in-Chief's orders.

On the other hand, when the government's aggressive actions become publicly connected to an Attorney General, as in the case of the *extreme aggressor*, often the President maintains a lower profile. The Attorney General's higher profile may be the will of a President who is preoccupied with fighting a war, or who is weak or prefers to be out of the spotlight. Regardless of the reasons, this Attorney General becomes associated with the administration's aggressive actions in the public's mind. The relationship between President Wilson and Mitchell Palmer exemplifies the relationship between a weak or preoccupied President and a strong, active Attorney General who appears to be acting independently.

Attorney General John Mitchell's relationship with President Nixon was more complicated than either of the above relationships. While Mitchell acted according to Nixon's wishes, he did so primarily behind the scenes. Thus, most of the excesses of the Nixon administration were attributed to the President himself. Eventually, the Watergate scandal and the Senate hearings regarding the Nixon administration's abuses of civil liberties forced Mitchell into the public arena, thus allowing Americans to associate him with those excesses. Whether Mitchell deserved to be a scapegoat for the Nixon administration is unclear. Without a Mitchell memoir, the extensive secrecy of the Nixon era and the lack of easy access to Justice Department documents prevent a full understanding of the extent of John Mitchell's role in the abuses of the Nixon Administration. The autobiographies of administration officials like Robert Haldeman, Henry Kissinger, and especially John Dean offer some clues that Mitchell merely implemented the President's requests.<sup>93</sup>

Finally, some Presidents act quite aggressively in spite of advice to the contrary from their Attorneys General. Francis Biddle, who exemplifies the *leveler*, argued against the excesses of past wartime administrations in trying to convince President Roosevelt not to detain Japanese-Americans during World War II. Yet, as an obedient subordinate, Biddle implemented the President's wishes while quietly finding ways to temper them.

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93. See, e.g., DEAN III, *supra* note 76, at 37, 65-66, 73-76, 79, 91-93.

## IV. ATTORNEY GENERAL JOHN ASHCROFT

Where does John Ashcroft fit within these models? It is reasonably clear that he is not acting as a *leveler* to counteract the Bush administration's actions. There is no evidence that Ashcroft opposed any of the administration's intrusive legal measures. In fact, he has been openly supportive of them. The real question is whether Ashcroft's actions fit one of the other, more aggressive models, and what relationship he has with the President.

Ashcroft's actions have been public and aggressive. He advocated the passage of the USA PATRIOT Act, proposed other programs such as TIPS that eased restrictions on the FBI's surveillance of domestic protest groups, and developed regulations allowing the government to eavesdrop on certain attorney-client conversations.<sup>94</sup> He has also toured the country touting the benefits of the USA PATRIOT Act in an effort to counter its critics.<sup>95</sup> Although he has not sought to restrain the media to the extent seen during World War I, he has tried to intimidate reporters and his critics by implying that their criticism aids terrorists or is unpatriotic.<sup>96</sup>

Are Ashcroft's actions those of an "extreme aggressor" acting on behalf of a preoccupied President? Or do Ashcroft's actions reflect an aggressive Attorney General acting independently out of his own interests? One could posit that Ashcroft, like Attorney General Palmer during the Red Scare, does have political ambitions. After all, John Ashcroft was briefly a presidential candidate during the 2000 primaries. Or is Ashcroft a coordinator, carrying out President Bush's policies while being the public face identified with such actions?

Ashcroft's actions reflect aspects of both an extreme aggressor and a coordinator. For example, he has taken actions in his own interest by making dramatic pronouncements designed to gain media attention for the Department of Justice.<sup>97</sup> Such efforts are similar to Attorney General Palmer's attempts to garner publicity during the Red Scare. Ashcroft has further tried to manipulate that publicity by timing pronouncements to distract from administrative blunders. For example, some argue that Ashcroft's announcement of the capture of Jose Padilla, the alleged "Dirty Bomber," was timed to divert attention from a

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94. See *supra* notes 7-22 and accompanying text.

95. Press Release, American Civil Liberties Union, Justice Department Kicks off PATRIOT Act Roadshow; ACLU Doubtful Public Relations Offensive Will Change Minds (Aug. 19, 2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13334&c=262>.

96. See DOJ Oversight: Preserving Our Freedom While Defending Against Terrorism, Hearing Before the Senate Committee on the Judiciary, 107th Cong., (Dec. 6, 2001), available at [http://judiciary.senate.gov/testimony.cfm?id=121&wit\\_id=42](http://judiciary.senate.gov/testimony.cfm?id=121&wit_id=42).

97. See Vanessa Blum, *Advice and Dissent*, BROWARD DAILY BUS. REV., Aug. 22, 2003, at 8.

whistleblower's statements regarding the FBI's failure to detain some of the September 11th terrorists.<sup>98</sup>

Ashcroft's penchant for secrecy, however, is also reminiscent of Attorney General John Mitchell under Richard Nixon. In 2002, Ashcroft refused to provide information regarding the implementation of the USA PATRIOT Act in response to congressional requests.<sup>99</sup> He also declined to reveal the names and identities of persons detained in the massive round-ups after September 11th<sup>100</sup> and closed immigration proceedings to the public.<sup>101</sup> It is possible that such secrecy will backfire if Ashcroft, like John Mitchell, were to become a *fall-guy* should the Bush administration become involved in a scandal over the Justice Department's actions.

On September 19, 2004, Judge Victor Marrero of the Southern District of New York struck down Section 505 of the USA PATRIOT Act, that gave the Justice department unchecked authority to issue "National Security Letters" to obtain sensitive customer records from internet providers and other businesses with judicial oversight.<sup>102</sup> The court also found a broad gag provision in the law to be an "unconstitutional prior restraint."<sup>103</sup>

For the most part, Ashcroft appears to be acting in accordance with the President's wishes—i.e., he is "not deviat[ing] further than the law requires from the policies of the Presidential Administration of which [he is] a part."<sup>104</sup> Many of the administration's detractors, such as Senator Patrick Leahy, argue "John Ashcroft has been given his marching orders by the White House and is doing his best to carry them out."<sup>105</sup> According to Leahy, Ashcroft "is not an independent Attorney General. Every Attorney General has to decide what kind of AG he wants to be, and Ashcroft has decided to be the White House point man."<sup>106</sup> Such an assessment suggests that Ashcroft is acting as a coordinator but in a much more publicly aggressive manner than Gregory did during World War I. His actions are more akin to Palmer's although he acts to facilitate the wishes of an assertive President rather than those of a weakened or inattentive President. However, his secrecy places him outside of either Gregory or

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98. Frank Rich, *Distraction. Propaganda. Roll 'em!*, INT'L HERALD TRIB., June 26, 2004, at 7, available at 2004 WL 77531594.

99. ASSESSING THE NEW NORMAL, *supra* note 9, at 8-9.

100. *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 922-23 (D.C. Cir. 2003).

101. ASSESSING THE NEW NORMAL, *supra* note 9, at 12.

102. *Doe v. Ashcroft*, No. 04 Civ. 2614, 2004 U.S. Dist. LEXIS 19343 (2d Cir. Sept. 29, 2004).

103. *Id.* at \*118.

104. 200TH ANNIVERSARY, *supra* note 31, at 2.

105. Edward Klein, *We're Not Destroying Rights, We're Protecting Rights*, PARADE MAG., May 19, 2002, at 6.

106. *Id.* *See also* the column by Helen Thomas, *Bush Acting As Imperial President*, SEATTLE POST-INTELLIGENCER, July 3, 2002, at B6.

Palmer's model and suggests an analogy to John Mitchell who also had aspects of a coordinator and an extreme aggressor.

Ashcroft's actions, though heavily criticized, initially had a fair amount of public support, just as the public initially supported Mitchell Palmer during World War I. A 2002 survey found that almost half of the respondents believed that the First Amendment goes too far in protecting dangerous speech and that the media have been too aggressive in asking the government questions about the war on terror.<sup>107</sup> Some more recent surveys suggest that people are not troubled by the excesses of the USA PATRIOT Act.<sup>108</sup> Whether Ashcroft's aggressive actions will come back to haunt him in the way that Palmer and Mitchell's deeds did is still unknown.

### CONCLUSION

In 1978, Justice William Brennan spoke of the importance of examining historical infringements of civil liberties during times of war: "History shows in one example after another how excessive have been the fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows."<sup>109</sup> As Brennan noted, it is all too easy for a nation and a judiciary to be swept away by irrational passion in times of crisis, and that such actions viewed in more dispassionate times may be "subjected to the critical examination they deserve."<sup>110</sup> The current Attorney General would do well to listen to Justice Brennan's assessment and to learn from past models of Attorney General behavior. Past Attorneys General have made enormous and costly errors by ignoring civil liberties. Attorney General appeared to be making similar mistakes although the ongoing secrecy surrounding his work makes it difficult to assess his actions in depth. Whether those actions will hold up to "the critical examination they deserve" is still unclear. That Ashcroft shared characteristics of three of the four models of Attorneys General, however, is cause for concern.

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107. FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2002, at 2, 9-10 (2002).

108. See, e.g., Penny Brown Roberts, *Poll Finds Majority in La. Not Troubled by the Patriot Act*, BATON ROUGE ADVOC., Jan. 9, 2004, at 1A, available at 2004 WL 58390078.

109. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, Address Before the Law School of Hebrew University, Jerusalem, Israel 9 (Dec. 22, 1987), available at [http://www.brennancenter.org/resources/downloads/nation\\_security\\_brennan.pdf](http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf) (quoting WALTER GELHORN, AMERICAN RIGHTS 82-83 (1960)).

110. *Id.*