The ACLU in the Courts Since 9/11

The judiciary was established as a check on the other two branches of government. It is the first line of defense for individuals who believe their civil liberties have been violated and for many, the last resort.

Since Sept. 11, 2001 the American Civil Liberties Union has received many complaints about government secrecy, domestic spying, discrimination, illegal search and seizure, detentions without charges and government attempts to stifle dissent. Because actions taken by the Bush administration and Congress under the pretext of rooting out terrorism threatened fundamental constitutional protections without making us safer, the ACLU took its concerns to the courts.

In some cases, the ACLU filed direct challenges to unconstitutional policies; in others, it filed friend-of-the-court briefs supporting lawsuits filed by others. Here is a summary of its recent litigation to safeguard democracy in a time of crisis:

SECRECY: CHALLENGES UNDER THE FREEDOM OF INFORMATION ACT AND RELATED STATE LAWS

Center for National Security Studies, et al. v. U.S. Department of Justice
On Dec. 5, 2001, the ACLU, the Center for National Security Studies and others filed a challenge to the federal government's refusal to disclose basic information about individuals arrested and detained since Sept. 11, 2001. On Aug. 2, 2002, U.S. District Court Judge Gladys Kessler ordered the government to release the names of detainees and their attorneys. "Unquestionably," she said in her opinion, "the public's interest in learning the identity of those arrested and detained is essential to verifying whether the government is operating within the bounds of law." She did not order the release of the date of arrest, location of arrest or location of detainees, and her order allowed for any detainee to opt out of the disclosure requirement by requesting that his/her name be kept secret. Furthermore, Judge Kessler issued a stay of her order after the government sought an expedited appeal in the D.C. Circuit Court of Appeals. Plaintiffs then filed a cross-appeal. Oral argument before the appeals court took place on Nov. 18, 2002.

On June 17, 2003, the U.S. Court of Appeals for the District of Columbia upheld by a 2-1 vote the government's continuing refusal to release the names of more than 700 people detained in connection with the 9/11 investigation. The decision repeatedly refers to national security concerns as a justification for the unprecedented secrecy. However, a report issued by the Department of Justice's own Inspector General makes clear that many people with no connection whatsoever to terrorism were picked up indiscriminately and haphazardly in the government's post-9/11 sweep.

> *Status:* On Jan. 12, 2004, the U.S. Supreme Court denied the petition for certiorari, declining to review the decision by the Court of Appeals.

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ACLU of New Jersey v. County of Hudson
This case stemmed from the denial of a Nov. 28, 2001 request by the ACLU of New Jersey under state law for the names of all Immigration and Naturalization Service detainees held in Hudson and Passaic County jails. The lawsuit, filed on Jan. 22, 2002 in New Jersey Superior Court, argued that New Jersey state law requires disclosure of the information. On March 27, 2002, in a widely quoted opinion, New Jersey Superior Court Judge Arthur D'Italia granted access to the records, calling secret arrests "odious to a democracy." The government announced its intention to appeal and was granted a 45-day stay of the ruling. On April 22, the Department of Justice issued an interim regulation that purported to override state law in New Jersey and elsewhere by prohibiting state and local officials from releasing the names of INS detainees housed in their facilities.

> *Status:* On the basis of the Justice Department's interim regulation, the state court of appeals reversed the trial court, and the New Jersey Supreme Court declined further review, effectively ending the case.

ACLU of Massachusetts FOIA request
On Dec. 9, 2002, the ACLU of Massachusetts filed a Freedom of Information Act request seeking details on government surveillance of college professors and students nationwide. The request was prompted by disclosures that a police officer at the University of Massachusetts campus at Amherst was recruited by the Federal Bureau of Investigation to spend several days a week working exclusively for its Anti-Terrorism Task Force. In its request, the ACLU asked for information that would allow it "to assess the nature and scope of FBI activities at U.S. colleges and universities," including records about the enlistment of campus security officers to serve the interests of the FBI, any guidelines or documents about questioning of students and faculty, and the name of every university campus security or police officer recruited after Sept. 11, 2001 who is now working under the direction and control of the FBI. In Oct. 2003, the ACLU of Massachusetts renewed its request on behalf of various media clients.

> *Status:* The FBI issued a response that it does not keep records on the activities of its local Anti-Terrorism Task Forces and was, therefore, unable to comply with the FOIA request.

ACLU, et al. v. U.S. Department of Justice
In Aug. 2002, the ACLU filed a Freedom of Information Act request demanding that the Department of Justice provide information about the pervasiveness of domestic spying. It made the request jointly with the Electronic Privacy Information Center, the Freedom to Read Foundation, and the American Booksellers Foundation for Free Expression.

> *Status:* When the Attorney General failed to respond to the FOIA request, the ACLU and its coalition partners filed suit to force a response. After the suit was filed in October 2002, the Attorney General released approximately 350 pages of responsive material. The released records provide a glimpse into the nature and extent of FBI surveillance after the Patriot Act.
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> In May 2003, a federal district judge in Washington held that the FOIA does not require the Attorney General to disclose further information about the FBI's use of new

surveillance power. The judge found, however, that public advocacy groups had advanced a "compelling argument that the disclosure of this information will help promote democratic values and government accountability." The ACLU is hopeful that the court's decision will be useful in persuading Congress to step up its oversight of FBI surveillance.

Under mounting public pressure to declassify information on how the Department of Justice is using powers granted by the Patriot Act, Attorney General Ashcroft finally relented.

After the Attorney General announced publicly that the FBI had never used Section 215, the ACLU filed a second FOIA request seeking an unredacted copy of the records. Judge Huvelle strangly rejected the government's attempt to delay disclosure of the records, ruling that the ACLU is entitled to expedited processing of the request.

The court agreed with the ACLU that the information "unquestionably implicates important individual liberties and privacy concerns" given "the ongoing debate regarding the renewal and/or amendment of the Patriot Act."

The government asked the court to withhold the documents until a date after the Presidential election and after the crucial debate over the extension of certain "sunset" provisions of the Patriot Act had concluded, but the court rejected this argument and ordered the FBI to release the documents over a period of six weeks.

On June 17, 2004, the FBI, compelled by the court's order, released a set of records, including an FBI memorandum, dated October 15, 2003, which reveals that the FBI submitted an application for an order under Section 215 of the Patriot Act less than a month after the Attorney General announced the provision had never been used. The records disclosed to the ACLU do not indicate how many times the FBI has invoked Section 215 since October 2003.

Among the other documents released by the FBI is an e-mail that acknowledges that Section 215 can be used to obtain physical objects, in addition to records. It states that the FBI could use Section 215 to obtain a person's apartment key. The Attorney General has previously acknowledged that Section 215 can be used to obtain computer files and even genetic information.

Another document released by the FBI is an internal FBI memo, dated October 29, 2003, acknowledging that Section 215 of the Patriot Act can be used to obtain information about innocent people. The memo contradicts the government's assertion, made repeatedly on the public record, that Section 215 can be used only against suspected terrorists and spies. A second FBI document release is expected in early July.

National Council of La Raza, et al. v. U.S. Department of Justice

On April 14, 2003, the ACLU filed a Freedom of Information Act lawsuit on behalf of a coalition of seven groups seeking disclosure of a new Department of Justice policy granting local police unprecedented powers to enforce non-criminal immigration laws. According to the lawsuit, the Attorney General has adopted a new policy that allows state and local police to arrest

and detain certain immigrants who are believed to be in violation of non-criminal provisions of the federal immigration laws. Despite repeated requests, the Department has refused to release the new policy or its legal basis to the public. The ACLU said in legal papers that the Attorney General has overruled a 1996 Justice Department policy, and that the change "would constitute a dramatic departure from prior policy and practice on an issue of national importance, with profound consequences for citizens and immigrants alike."

> *Status:* The government filed a summary judgment motion in the district court, which the ACLU opposed. A decision is pending.

Rebecca Gordon, et al. v. FBI, et al.
On April 22, 2003, the ACLU of Northern California filed a federal lawsuit challenging secret "no fly" and other transportation watch lists. The lawsuit, filed in federal district court, follows two Freedom of Information Act and Privacy Act requests filed in the preceding five months. The lawsuit was necessary because the government had refused to confirm the existence of any protocols, procedures or guidelines as to how the "no fly" lists were created or to detail how they are being maintained or corrected and, importantly, how people who are mistakenly included on the list may have their names removed. The lawsuit seeks immediate disclosure of the requested records.

The ACLU filed the FOIA and Privacy Act requests on behalf of itself and peace activists Jan Adams and Rebecca Gordon last November. Earlier in 2002, both women were told by airline agents that their names appeared on a secret "no fly" list at San Francisco International Airport (SFO). The women were briefly detained by San Francisco Police while their names were checked against a "master" list. On March 12, the ACLU filed a records request with airport officials under the San Francisco Sunshine Ordinance and the California Public Records Act. On April 8, airport authorities released nearly 400 pages of documents which confirm that approximately 339 air passengers, between September 2001 and March 2003, were stopped or questioned at SFO in connection with the "no fly" list and other watch lists. An earlier Public Records Act request to airport officials had confirmed the existence of the "no fly" list, and that Gordon's and Adams' names had been checked against a "master" list.

In early July 2003, the Transportation Security Administration responded to the ACLU's FOIA request with the release of heavily redacted documents. An ACLU analysis of the TSA response found it to be "entirely incomplete." Even so, the response confirms that the TSA maintains at least two watch lists – the "no fly" list and a "selectee" list that establishes which air passengers are singled out for additional security measures. It also sheds light on some troubling inadequacies: the TSA lacks protocols for ensuring that First Amendment-protected activity is not cause for being placed on a list, does not track how many times individuals are incorrectly stopped, lacks instructions for airlines on how to respond to list matches, and provides no guidance to state and local law enforcement.

The FBI responded to the FOIA request in early Dec. 2003. However, an ACLU analysis of the response determined that it too failed to answer a number of crucial questions. Most importantly, the 94 pages of documents turned over by the FBI are silent on how Americans falsely listed as potential terrorists can have themselves removed from the list. The disclosure also does not address whether the FBI tracks "no fly" list matches or whether Americans are being singled out on the list based solely on First Amendment protected activity. The documents

do confirm, however, that not only are the lists being culled together by the "FBI, CIA, and probably other [intelligence] agencies," but that the list is being disseminated widely in America and overseas to both embassies and the military.

> *Status:* The government filed a summary judgment motion in January 2004. The ACLU is filed a cross-motion for summary judgment and oral arguments took place on April 9, 2004. In mid-June the judge ruled that the government had made frivolous claims concerning the need to withhold materials for purposes of national security, and ordered that the government comply with the FOIA request.

ACLU MATRIX FOIA requests

On Oct. 30, 2003, the ACLU filed simultaneous state Freedom of Information Act requests in Connecticut, Florida, Georgia, Michigan, New York, Ohio, Pennsylvania and Utah concerning those states' participation in the "MATRIX" database surveillance system. In addition, the ACLU released an Issue Brief explaining the problems with the program. The MATRIX (or Multistate Anti-Terrorism Information Exchange) is essentially a state-run equivalent of the Pentagon's highly controversial Total Information Awareness program - a data-mining program that Congress terminated based on overwhelming privacy concerns.

According to Congressional testimony, MATRIX is operated by the for-profit company Seisint Inc. of Boca Raton, Florida. The program gathers large quantities of information about individuals from government databases and corporations that sell aggregated personal information. It then makes those dossiers available for search by federal and state law enforcement officers. While company officials have refused to disclose details of the program, according to news reports and our FOIA requests, information in the MATRIX includes, driver's license photographs, court, bankruptcy and property records, voter registrations, professional licenses, gun licenses, and the names and addresses of family members, neighbors and business associates. The ACLU's requests, which were filed under individual states' open-records laws, follow a federal FOIA request filed Oct. 17, 2003. The goal of the requests is to find out what information sources the system is drawing on – information program officials have refused to disclose – as well as who has access to the database and how it is being used.

> *Status:* The ACLU released documents on Jan. 21, 2004, obtained through a series of state FOIA requests, which prove that data mining is central to the MATRIX system and reveal that federal authorities have been deeply involved in developing the state-run effort. Documents turned over by the Pennsylvania State Police discuss a "data mining application, called FCIC Plus," which is described as containing a "terrorism factor information query capability." A slide show obtained from the Michigan Department of State Police contains charts graphically describing how police information from multiple states will be combined with commercial databases containing "20+ Billion Records From 100's of sources." The documents reveal that not only were federal officials present at inaugural organizational meetings, but that the data mining application "FCIC Plus" was developed "with the help of the FBI, INS, DEA, and the U.S. Secret Service."
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> On May 20, 2004, the ACLU released further documents obtained through subsequent FOIA requests revealing that MATRIX was under the direct managerial control of the U.S. Department of Homeland Security, and that Florida Governor Jeb Bush gave a personal briefing on the program to Vice President Dick Cheney. Based on this

information, the ACLU has written to Nuala O'Connor Kelly, Chief Privacy Officer of DHS, asking her to investigate DHS's role in the MATRIX program. In its letter to Kelly, the ACLU asks her to conduct an investigation of how the MATRIX operates, what the role of DHS has been, and how it has been utilized by the department. According to a document obtained through an ACLU open-records request to the state of New York, DHS in July 2003 approved a request for $8 million for the operation and expansion of the MATRIX. However, DHS informed MATRIX officials that in exchange for the $8 million, the agency would enter into a "Cooperative Agreement" rather than a grant, under which DHS would "maintain managerial oversight and control" of the MATRIX.

Another document obtained by the ACLU indicates that MATRIX operators sent to federal law enforcement authorities a list of 120,000 names of individuals who had been scored with a high "terrorism quotient." Seisint, the company that operates MATRIX, claimed that scores of arrests resulted from the list.

Other documents include Governor Bush's "briefing points" for a meeting on MATRIX with Vice President Cheney, at which he sought the Vice President's support for additional federal funds for the program. Other documents show that Governor Bush has personally taken a lead role in selling the program to other states. The documents do not, however, answer a key question about the system: what kinds of private-sector information sources it relies upon in its attempt to detect terrorists.

States including Alabama, Texas, California, Georgia, Kentucky, Louisiana, New York, Oregon, South Carolina, Utah and Wisconsin have withdrawn from the MATRIX program, citing both privacy and financial concerns.

ACLU, et al. v. Department of Defense, et al.
On June 2, 2004, the ACLU along with the Center for Constitutional Rights and medical and veterans' groups charged the Department of Defense and other government agencies with illegally withholding records concerning the abuse of detainees in American military custody. The Freedom of Information Act lawsuit, the first of its kind, argues that the withholding of documents violates the government's obligation to comply with a FOIA request filed by the ACLU, CCR, Physicians for Human Rights, Veterans for Common Sense and Veterans for Peace.

Filed in Oct. 2003, the FOIA request was directed to the Departments of Defense, State, Homeland Security, and Justice, as well as the CIA. The request expressed concern – since validated by the Abu Ghraib photographs – that detainees in U.S. custody were being subjected to abuse and even torture. The FOIA request also cited reports that detainees were being turned over or "rendered" to foreign countries with poor human rights records, as a way to sidestep domestic and international laws prohibiting torture.

The lawsuit notes that there is "growing evidence that the abuse of detainees was not aberrational but systemic, that in some cases the abuse amounted to torture and resulted in death, and that senior officials either approved of the abuse or were deliberately indifferent to it."

The lawsuit seeks a court order requiring the immediate release of the records sought by the October 2003 FOIA request, which asked the government to disclose: records of the abuse or torture of detainees held at Abu Ghraib and other overseas detention facilities, and records of investigations and inquiries into that abuse; records of the deaths of detainees in United States custody and records of investigations and inquiries into those deaths; policies governing the interrogation of detainees in United States custody; policies governing the "rendition" of detainees to countries known to use torture; and records describing any measures taken by the government to address concerns expressed by the Red Cross.

> *Status:* On July 6, 2004, the ACLU filed a preliminary injunction in the U.S. District Court of the Southern District of New York seeking an expedited release of the records requested under the FOIA. A hearing on the motion will likely be scheduled by mid-July.

ACLU Response to Mistreatment of Prisoners/Detainees

The ACLU sent letters to President George Bush and Attorney General John Ashcroft on June 16, 2004 calling for the establishment of an independent commission to review current policies, including the Geneva Conventions and their application on detainees, to examine the extent of abuse, mistreatment and torture, and to recommend reforms. The letters also called for the appointment of a special counsel to determine the extent of criminal wrongdoing, including violations of federal law prohibiting torture and breaches of the Geneva Conventions, in the mistreatment of prisoners at Abu Ghraib, Guantánamo Bay, and elsewhere.

ACLU of Northern California Peace Fresno FOIA

On January 29, 2004, the ACLU of Northern California and members of a Fresno peace group filed requests under the Freedom of Information Act and the Privacy Act seeking information about the government's infiltration of a local group, Peace Fresno. The requests were filed with the offices of the FBI and U.S. Attorney, who maintain a Joint Terrorism Task Force with local law enforcement agencies in the Fresno area.

Peace Fresno members discovered one of its members had actually been a government agent when the *Fresno Bee* published an obituary on September 1, 2003, about Aaron Kilner's death in a motorcycle accident. In his obituary, Kilner – known to Peace Fresno as Aaron Stokes – was identified as a member of the Fresno County Sheriff's Department's "anti-terrorist team." The California Constitution prohibits such infiltration without some specific suspicion of criminal activity.

The group has already filed requests for information under the California Public Records Act with the Fresno County Sheriff's Department and the Fresno Police Department. Those agencies denied having any records regarding Peace Fresno or its members and refused to turn over requested manuals, pamphlets and procedures related to intelligence and surveillance.

> *Status:* Having failed to receive sufficient reply to their FOIA request, the ACLU of Northern California and Peace Fresno filed a formal complaint with California Attorney General Bill Lockyer on April 21, 2004. The complaint asked Lockyer to investigate the role of the Fresno County Sheriff's Department Anti-Terrorism Unit in conducting surveillance of peace and social justice groups; issue specific guidelines to the Fresno County Sheriff Department clearly stating that law enforcement may not monitor or spy

on individuals or groups involved in First Amendment activity without reasonable suspicion of a crime; and publicly release his office's findings about the surveillance. The groups also sent a letter to Senator Barbara Boxer (D, CA), asking that she take steps to protect the privacy rights of Peace Fresno members and request a full accounting of the FBI's involvement in the surveillance of the group. In late June, 2004, Attorney General Lockyer agreed to open a formal investigation into the intelligence gathering practices of the Fresno County Sheriff.

SECRECY: CLOSED HEARINGS

Detroit Free Press v. Ashcroft
This lawsuit challenged a government policy imposing a blanket ban on media and public access (including family members) to immigration hearings of people detained after Sept. 11, 2001. A Sept. 21, 2001 memo from Chief Immigration Judge Michael Creppy to all immigration judges required the closure of all deportation proceedings to the public and the press when directed by the Justice Department.

The ACLU and its Michigan affiliate filed the challenge on behalf of Rep. John Conyers (D-MI), the Detroit News and the Metro Times, a weekly newspaper. Their reporters were among hundreds turned away from deportation hearings in the case of Rabih Haddad, a Muslim community leader from Ann Arbor who had co-founded an Islamic charity suspected of supporting terrorist activities. The ACLU challenge was consolidated with one brought by the Detroit Free Press. On April 4, 2002, Judge Nancy G. Edmunds of the U.S. District Court in Michigan granted the ACLU's motion for a preliminary injunction against use of the policy in Haddad's case and held that the newspapers had established a likelihood of success on the claim that the blanket closure of deportation hearings was unconstitutional.

Status: On Aug. 26, a three-judge panel of the Sixth Circuit Court of Appeals unanimously upheld Edmunds' opinion; it was the first such decision by a federal appellate court. In that much-quoted opinion, Judge Damon Keith wrote, "Democracies die behind closed doors." On Jan. 22, 2003, the Sixth Circuit denied the government's petition for a rehearing before the full court.

On April 13, 2004, the Department of Homeland Security released new guidelines, providing that the closing of immigration hearings to the press and public, bond decisions and other procedural steps will be taken only on a case-by-case basis – in contrast to the blanket approach closed hearing ban adopted by the Justice Department after 9/11.

North Jersey Media Group, Inc. and New Jersey Law Journal v. Ashcroft
This was a second challenge to the government policy blocking media and public access to immigration hearings of people detained after Sept. 11. The national ACLU and the ACLU of New Jersey filed the case on March 6, 2002 in the U.S. District Court in New Jersey on behalf of two local media organizations whose reporters had been blocked from attending routine proceedings.

On May 29, Chief U.S. District Judge John W. Bissell rejected the government's blanket policy of secrecy, in a ruling that he said applied not just in New Jersey but also nationally. Without the ban on secrecy, Judge Bissell said, "the government could continue to bar the public and press

from deportation proceedings without any particularized showing or justification. This presents a clear case of irreparable harm to a right protected by the First Amendment." The government asked for a stay of the ruling, which was denied by Judge Bissell and then denied on appeal by the Third Circuit Court of Appeals. The stay was ultimately granted by the U.S. Supreme Court, pending the outcome of arguments in the Third Circuit, which took place on Sept. 17, 2002.

> *Status:* On Oct. 7, 2002, a three-judge panel of the Third Circuit ruled 2–1 that immigration hearings involving people detained after Sept. 11 may be closed by the government without the input of the court. On Dec. 4, a request for a rehearing of the case by the full Third Circuit was denied by a 6-5 vote. The ACLU filed a petition for *certiorari* asking the Supreme Court to review the case.
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> On May 27, 2003, the Supreme Court declined the ACLU's request. In its brief opposing Supreme Court review, the government said it was not currently conducting any more secret hearings and that its policies relating to secret hearings are under review and will "likely" be changed.

SURVEILLANCE

Green, et al. v. TSA, et al.
The ACLU filed the first nationwide, class-action challenge to the government's "no fly" list on April 6, 2004. The lawsuit was filed on behalf of seven U.S. citizens in federal district court in Seattle, and names Department of Homeland Security Secretary Tom Ridge and Transportation Security Administration Director David M. Stone and their respective agencies as defendants.

The "no fly" list is compiled by the TSA and distributed to all airlines with instructions to stop or conduct extra searches of people suspected of being threats to aviation. Many innocent travelers who pose no safety risk whatsoever are stopped and searched repeatedly.

The lawsuit asks the court to declare that the "no fly" list violates airline passengers' Constitutional rights to freedom from unreasonable search and seizure and to due process of law under the Fourth and Fifth Amendments. The ACLU is also asking the TSA to develop satisfactory procedures that will allow innocent people to fly without being treated as potential terrorists and subjected to humiliation and delays.

The individual plaintiffs named in the class-action lawsuit are: Michelle D. Green, 36, a Master Sergeant in the U.S. Air Force; David Nelson, 34, an attorney from Belleville, Illinois; John Shaw, 74, a retired Presbyterian minister, from Sammamish, Washington; David C. Fathi, 41, a senior staff attorney with the ACLU National Prison Project in Washington, D.C.; Mohamed Ibrahim, 51, a Coordinator for the American Friends Service Committee in Philadelphia; Alexandra Hay, 22, a student at Middlebury College in Vermont who is studying abroad in Paris; and Sarosh Syed, 26, a Special Projects Coordinator at the ACLU of Washington in Seattle.

The individuals represented in the lawsuit, the ACLU said in legal papers, "are innocent of any wrongdoing and pose no threat to aviation security." Indeed, even after several obtained letters from the TSA stating that they were not a threat, they were still subject to delays and the stigma of enhanced searches, interrogations and detentions.

(More)

Many passengers on the "no fly" list have expressed concern that they may have been singled out because of their ethnicity, religion or political activity. Their concern is heightened by the fact that the lists appear to have been shared widely among U.S. law enforcement agencies, internationally and with the U.S. military.

> *Status:* The government filed a motion to dismiss on June 7, 2004, and the ACLU filed an opposition to this motion on June 30. Oral arguments will take place in summer 2004.

In re Appeal from July 19, 2002 Opinion of the United States Foreign Intelligence Surveillance Court

In the first case of its kind, the ACLU and a coalition of civil liberties groups filed a friend-of-the-court brief before a secret appeals court, urging it to reject the Justice Department's radical bid for broadly expanded powers to spy on U.S. citizens. The issue in this case – which focused a spotlight on the ultra-secret Foreign Intelligence Surveillance Court – was whether the Constitution and the USA PATRIOT Act adopted by Congress after the Sept. 11 terrorist attacks permit the government to use looser foreign intelligence standards to conduct criminal investigations in the United States. The ACLU said that expanding government surveillance powers "would also jeopardize other constitutional interests, including the First Amendment right to engage in lawful public dissent, and the warrant, notice, and judicial-review rights guaranteed by the Fourth and Fifth Amendments."

> *Status:* The ACLU filed its brief on Sept. 20, 2002 and the review court accepted it on Sept. 24, but held a hearing in which it allowed only the government to appear. On Nov. 18, ruling for the first time in its history, the review court issued a decision approving the Justice Department bid to broadly expand its powers to spy on U.S. citizens. On Feb. 1, 2003, the ACLU, the National Association of Criminal Defense Lawyers and two Arab-American organizations filed a motion to intervene and petition for certiorari with the U.S. Supreme Court asking it to review this expansive new interpretation of the government's surveillance powers. On March 24, 2003, the Supreme Court rejected that request. The ACLU will continue to press Congress and the courts to curb abuse of government spy powers, noting that the Court's action was not a ruling on the merits of the challenge.

Muslim Community Association of Ann Arbor v. Ashcroft

On July 30, 2003, the ACLU filed the first legal challenge to the USA PATRIOT Act, taking aim at Section 215 of the law, which vastly expands the power of FBI agents to secretly obtain records and personal belongings of innocent people in the United States, including citizens and permanent residents. The lawsuit contends that Section 215 of the PATRIOT Act violates constitutional protections against unreasonable searches and seizures as well as the rights to freedom of speech and association. Specifically, we allege that Section 215 violates the Fourth Amendment by allowing the FBI to search and seize records or personal belongings without a warrant, without showing probable cause – and without ever notifying even innocent people of the searches; it violates the First Amendment, allowing the FBI easily to obtain information about a person's reading habits, religious affiliations, Internet surfing and other expressive activities that would be "chilled" by the threat of investigation; and it further violates the First Amendment by imposing a "gag order" that prohibits those served with Section 215 orders from telling anyone – ever – that the FBI demanded information, even if the information is not tied to

a particular suspect and poses no risk to national security. The lawsuit, filed in federal court in Detroit on behalf of six advocacy and community groups from across the country, names Attorney General John Ashcroft and FBI Director Robert Mueller as the defendants.

> *Status:* The government filed a motion to dismiss the ACLU challenge on Oct. 3, 2003, arguing that the suit fails to state a claim and that the plaintiffs lack standing. On Nov. 3, 2003, the ACLU responded, filing an opposition to the government's Motion to Dismiss. The opposition to the government's Motion stated that fear of the PATRIOT Act has caused dramatic decline in memberships and donations at mosques and forced a church-sponsored group that aids refugees to change its record-keeping practices. Coalitions representing more than two-dozen civil rights immigrant and First Amendment advocacy organizations joined the ACLU, filing three separate "friend-of-the-court" briefs saying that the law also violates their members' First Amendment rights to free speech and free association as well as their right to privacy under the Fourth Amendment. The argument took place Dec. 3, 2003, before U.S. District Court for the Eastern District of Michigan.
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> On June 17, 2004, the FBI, compelled by the order of the U.S. District Court for the District of Columbia, complied with an ACLU Freedom of Information Act Request, releasing records that reveal they had invoked Section 215 of the PATRIOT Act only weeks after Attorney General Ashcroft publicly declared that this power had never been used, discrediting one of the government's central arguments for dismissal. The government filed a letter with the court regarding an upcoming report to Congress on the use of Section 215. The ACLU responded with a letter on June 17, which included an attachment proving that the government has sought Section 215 orders. A decision is pending.

United States v. Battle

A group of United States citizens was charged with attempting to travel to Afghanistan in order to contribute their services to the Taliban and Al-Qaida. The government said in legal papers that agents secretly entered people's homes to install bugging devices that remained in place for months. The devices recorded the conversations of everyone in the house, including children and visitors. In this case, one of the first of its kind, the court was asked to review the constitutionality of wiretap evidence obtained under the Foreign Intelligence Surveillance Act (FISA), which was recently expanded under Section 218 of the PATRIOT Act. Prior to the PATRIOT Act, the government could only use these wiretaps to gather foreign intelligence, not to gather evidence of criminal activity.

On Sept. 19, 2003, the ACLU filed an *amicus* brief arguing that the government is using its expanded wiretap powers under the PATRIOT Act to bypass the Fourth Amendment in criminal cases involving United Sates citizens, including the probable cause and notice requirements. The brief shows that the government obtained a broad wiretap order from a secret foreign intelligence court even though its purpose was to introduce the evidence in a criminal case. The ACLU urged the federal district court in Portland to suppress the evidence because the wiretap orders did not comply with Fourth Amendment protections against unreasonable search and seizure.

> *Status*: The defendants pled guilty immediately before the suppression hearing. Accordingly, the court never resolved the constitutional issues raised by the ACLU.

National Council of La Raza, et al. v. Ashcroft, et al.
On Dec. 17, 2003, the ACLU along with civil rights and immigrant defense organizations filed a federal lawsuit challenging an initiative by Attorney General John Ashcroft to enlist state and local police in the routine enforcement of federal immigration laws. The lawsuit charges that the Justice Department and Federal Bureau of Investigation have unlawfully entered civil immigration information into a federal criminal database, the National Crime Information Center (NCIC), accessed by state and local police millions of times each day, subjecting immigrants to the risk of unlawful arrest by state and local police. More than 60 local police and sheriff departments around the country, numerous law enforcement organizations, and the National Conference of State Legislatures, the National Association of Counties and the National League of Cities have publicly stated their opposition to state and local police engaging in the routine enforcement of immigration law. Despite such opposition, the Justice Department is already planning to further expand the NCIC database by adding the names of any foreign students who have allegedly violated their status, which could be based on such technical matters as not taking enough units, failing a class or a university's failure to keep its records up to date. The plaintiffs in the lawsuit are National Council of La Raza, American-Arab Anti-Discrimination Committee, Latin American Workers Project, New York Immigration Coalition and UNITE, represented by attorneys with the ACLU, the New York Civil Liberties Union, Washington Square Legal Services, Inc., The Bronx Defenders, and the law firm Cleary, Gottlieb, Steen & Hamilton.

In a related case (discussed more fully above) the ACLU filed a lawsuit in April 2003 under the Freedom of Information Act to compel the Justice Department to disclose a legal policy memorandum that the Department widely proclaimed as concluding that local police have the "inherent authority" to enforce civil immigration status violations. That lawsuit remains pending.

Status: The case is pending.

ACLU, et al. v. Ashcroft, et al.
On April 28, 2004, the American Civil Liberties Union and New York Civil Liberties Union disclosed documents in a sealed case in federal court involving the PATRIOT Act's expanded "National Security Letter" power. The lawsuit challenges the constitutionality of a provision that allows the Federal Bureau of Investigation to demand sensitive customer records from businesses without judicial oversight. The ACLU was forced to file the lawsuit about the National Security Letter power under seal to avoid penalties for violating a strict gag provision, which it is also challenging on First Amendment grounds. The case was filed in the Southern District of New York on April 6, but it took nearly three weeks to reach an agreement with the government that allowed the ACLU to disclose anything about the case without fear of penalty. Many details about the lawsuit remain under seal.

The lawsuit argues that the National Security Letter provision violates the First and Fourth Amendments because it authorizes the FBI to force disclosure of sensitive information without adequate safeguards. The FBI can issue a National Security Letter without obtaining prior judicial approval, without demonstrating a compelling need to justify the disclosure, and without specifying any mechanism that would allow a recipient to contest the demand.

The lack of such safeguards allows the government to unmask anonymous speakers, violating a tradition of anonymous speech that goes back to the Federalist Papers. Protecting this right is

especially critical given the large number of Internet users who use pseudonyms to engage in legitimate political speech. The ACLU first obtained information about the use of National Security Letters last March through a Freedom of Information Act lawsuit.

The defendants in the lawsuit include Attorney General John Ashcroft and FBI Director Robert Mueller. The case is assigned to Judge Victor Marrero.

> *Status:* On May 25, 2004, the ACLU made public its brief and supporting documents in the case, which had previously been under seal. Among the documents is a heavily censored declaration that confirms, for the first time, the existence of the ACLU's anonymous client in the case.
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> The ACLU also released a declaration from Internet expert Simson Garfinkel, a friend-of-the-court brief filed by the Electronic Frontier Foundation, Salon.com, the U.S. Internet Industry Association and others, and another friend-of-the-court brief filed by the American Library Association, the American Booksellers Foundation for Free Expression and the Freedom to Read Foundation.
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> The briefs detail the groups' concerns that the law will have a chilling effect on communications online. As Garfinkel and the advocacy groups pointed out in their filings, the National Security Letter provision covers not only ISPs but any group that allows users to send messages from its website, such as the ACLU or Moveon.org.
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> The government filed its brief, along with secret evidence, on June 28, 2004. The case will be fully briefed and argued by Fall 2004.

MATERIAL WITNESS DETENTIONS

United States v. Osama Awadallah
Osama Awadallah, a Jordanian-born college student, was charged last year with making two false statements during a grand jury proceeding arising out of the terrorist attacks of Sept. 11.

Awadallah was held by the U.S. government -- often shackled and in solitary confinement -- for a total of 83 days, from Sept. 21 until Dec. 13, 2001. He was initially held on a material witness warrant. After his appearance before a grand jury 20 days following his detention, he was indicted on charges of perjury because he had denied knowing the name of one of the Sept. 11 terrorists.

In May 2002, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York dismissed the perjury charges against him and ruled that his detention as a material witness without being charged was unlawful. Authorities "made several misrepresentations and omissions" to get an arrest warrant for Awadallah and then misapplied the material witness statute to have him testify before a grand jury, she said. "If the government has probable cause to believe a person has committed a crime, it may arrest that person," she wrote. "But since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation." Scheindlin also criticized authorities for treating Awadallah in a manner "more restrictive than that

experienced by the general [prison] population." He was kept in prolonged solitary confinement even before he was charged with a crime.

> *Status:* The ACLU filed a friend-of-the-court brief urging a federal appeals court to uphold the ruling that the government unlawfully used the material witness statute to detain Awadallah. On Nov. 7, 2003, the Second Circuit reinstated the charges against Awadallah, and held that the material witness statute could be used in connection with grand jury proceedings. The court noted, but did not discuss at length, the ACLU's argument that the government must either bring a witness before the grand jury promptly or else release the witness after preserving his or her testimony through deposition. The opinion cannot, therefore, be read as a blanket endorsement of long-term detention under the material witness statute.

In re Application of the United States for Material Witness Warrant (Abdallah Higazy)
At issue in this case is the government's attempt to suppress a report concerning a confession obtained from an Egyptian student arrested for alleged involvement in the World Trade Center attack. The student, Abdallah Higazy, was arrested in Dec. 2001 and charged with lying about ownership of a ground-to-air radio that reportedly had been found in a safe in his room at a hotel at the World Trade Center, where he was staying when the attacks occurred. Federal Judge Jed Rakoff ordered Mr. Higazy held without bail after the federal government reported to the judge that Mr. Higazy had confessed to owning the radio in an FBI interrogation. Two weeks after the supposed confession, another person came forward to claim the radio, and Mr. Higazy was fully exonerated.

Judge Rakoff then demanded that the government explain how it had obtained a confession from Mr. Higazy. After the government refused to complete the investigation and to provide a report to Judge Rakoff, he ordered that it do so by Oct. 31. The government filed a report that day but asked that it not be released to the public.

The NYCLU then entered the case as co-counsel for Mr. Higazy and filed a motion with Judge Rakoff arguing that well-established law required disclosure of the report. The NYCLU also argued that the current national controversy over coerced confessions made release of the report particularly important.

> *Status:* On Nov. 22, 2002, the federal government informed Judge Rakoff that it agreed with the position of the NYCLU and would consent to release of the report. Judge Rakoff released the report on Nov. 25.

DISCRIMINATION LAWSUITS

Edgardo S. Cureg et al. v. Continental Airlines, filed in U.S. District Court in the District of New Jersey.
Michael Dasrath et al. v. Continental Airlines, filed in U.S. District Court in the District of New Jersey.
Hassan Sader et al. v. American Airlines Inc., filed in U.S. District Court in the Northern District of Maryland.

Arshad Chowdhury v. Northwest Airlines Corporation, filed in U. S. District Court in the Northern District of California.
Assem Bayaa et al. v. United Airlines, filed in U.S. District Court in the Central District of California.
These five lawsuits filed by the national ACLU and its affiliates in New Jersey, California and Maryland on June 4, 2002 accuse American, Continental, Northwest and United Airlines of discrimination against five men who were ejected from flights based on alleged prejudices of airline employees and passengers. The American-Arab Anti- Discrimination Committee is a plaintiff in two of the cases and a private law firm, Relman and Associates, is co-counsel in the Chowdhury and Bayaa cases.

> *Status:* One case was settled. The airlines filed motions to dismiss the charges in three of the remaining cases, all of which were denied. One airline (United) is in bankruptcy proceedings. Further litigation is pending.

Samar Kaukab v. Maj. General David Harris
The ACLU of Illinois filed this case on Jan. 16, 2002 on behalf of Samar Kaukab, a 22-year-old U.S. citizen who was pulled out of a group of airline passengers and subjected to repeated and increasingly invasive searches based on her ethnicity and her religion. Ms. Kaukab's religion was evident because she was wearing a traditional head covering for Muslim women known as a hijab.

> *Status:* The ACLU has arrived at a settlement in principle with Argenbright, the private security company conducting the searches.

Gebin v. Mineta
A challenge to the citizenship requirement for continuing employment imposed on screeners at the Los Angeles and San Francisco International Airports, filed Jan.17, 2002 by the ACLU and its affiliates in California, on behalf of the Service Employees International Union and nine airport screeners.

As part of the Aviation and Security Transportation Act, noncitizens were barred from working as screeners even though no such requirement was put in place for airline pilots, flight attendants, mechanics or members of U.S. military. This provision of the new law affected an estimated 8,000 noncitizen screeners, most of whom lost their jobs as a result.

> *Status:* On Nov. 13, 2002 a federal district judge in California denied a government motion to dismiss the ACLU challenge. Two days later, on Nov. 15, the same judge granted a court order that allows qualified, noncitizen airport screeners to remain on the job or be considered for jobs they lost. On May 20, 2003, the Ninth Circuit sent the case back to the district court for reconsideration based on a relatively minor change in the federal law.

Hamdy Abou-Hussein v. American Eagle Airlines, Inc.
The ACLU of Massachusetts filed a complaint with that state's Commission Against Discrimination on behalf of a U.S. citizen of Egyptian descent who last November was prevented from boarding a flight to Washington, D.C. from Logan Airport. Mr. Abou-Hussein is employed

by a Navy contractor and has a security clearance to do underwater structural inspections of battleships before they are launched.

> *Status:* The administrative complaint is pending, along with a separate complaint filed with the Federal Aviation Administration.

Rajcoomar v. U.S. Department of Transportation
In Sept. 2002, the ACLU filed a claim for damages on behalf of a 54-year-old Florida doctor of Indian descent who was handcuffed and detained by air marshals in Philadelphia because they "didn't like the way he looked." In letters sent to lawmakers in Philadelphia and Florida, ACLU officials described how Dr. Bob Rajcoomar became a victim of racial profiling after a flight on which air marshals subdued an unruly passenger and held other passengers at gunpoint for 30 minutes, refusing to allow anyone to get up, even to use the bathroom, after the disruptive passenger was subdued and shackled to his seat. After the plane landed, marshals also handcuffed Dr. Rajcoomar without explanation and turned him over to the Philadelphia police, who detained him for four hours.

On April 14, 2003, the ACLU filed a federal lawsuit against the Transportation Security Administration (TSA) for civil rights violations stemming from the wrongful arrest of Dr. Rajcoomar. The lawsuit seeks damages and other sanctions on behalf of Dr. Rajcoomar and his wife Dorothy. In September, the ACLU sent a letter to the TSA urging federal officials to investigate the reckless actions of air marshals and to take steps to improve air marshal training or otherwise safeguard the public.

> *Status:* On July 31, 2003, the ACLU announced an important victory in the case. The settlement will – for the first time ever – require an agency within the U.S. Department of Homeland Security (DHS) to substantially alter its policies and training procedures. In an order issued on July 29, Judge John P. Fullam outlined the three-part settlement in which the U.S. DHS and its TSA agreed to revise internal policies and training procedures to ensure there would be no repetition of the incident involving Dr. Rajcoomar. The settlement includes a substantial undisclosed compensation to Dr. Rajcoomar and his wife, and requires a written apology to Dr. Rajcoomar from Admiral James M. Loy, first Administrator for the TSA.

Hay v. DHS, et al.
This case arose in late 2003, after a Pennsylvania resident, Alexandria Hay, appeared on a "no-fly" list. Hay was told on two separate occasions that her name was on the list. The ACLU filed a lawsuit seeking to remove Hay's name from the list and to force the government to establish a system for challenging the list.

> *Status:* The case was settled on Jan. 2, 2004, five days after the ACLU filed the lawsuit. The government said it would send an official to the airport to ensure Hay could board her flight. The government also provided an official form for challenging the "no-fly" list.

Hussein v. City of Omaha
The ACLU of Nebraska filed a federal civil rights lawsuit on June 9, 2004, against the city of

Omaha on behalf of Lubna Hussein, a Muslim woman who was told she must remove her religious garb in order to accompany her children at a municipal swimming pool.

In June and August 2003, Hussein took her three children, ages 9 and under, to the Deer Ridge municipal pool in Omaha, only to be turned away at the gate after informing city employees that she could not wear a bathing suit without violating her religious beliefs. She was told by pool employees that she could not be in the pool area in her street clothing, even though she observed other people in the pool area who were not wearing bathing suits. On one occasion, officials told Mrs. Hussein that her children could enter but that she would have to remain outside and observe them from the other side of the pool fence.

In following her religion, Mrs. Hussein is required to keep all of her body covered except her face and hands. Each time that she tried to enter the pool, Mrs. Hussein observed other individuals who were allowed inside without bathing suits.

The ACLU complaint charges that the policy, and the city's actions in enforcing it, violated Mrs. Hussein's rights under the 14th Amendment to equal protection under the law, as well as a number of federal civil rights statutes.

The ACLU is seeking a court order declaring the pool policy unconstitutional, as well as compensatory and punitive damages for the humiliation, embarrassment and suffering experienced by Mrs. Hussein and her children, plus attorneys' fees.

Status: It is unknown when the case will be set for trial.

DETENTION

Jose Padilla v. George W. Bush
U.S. citizen Jose Padilla was arrested on May 8, 2002 on a material witness warrant when he arrived at an airport in Chicago. Attorney General Ashcroft subsequently announced that Padilla was an agent of Al-Qaida who was involved in a plot to explode a "dirty" nuclear bomb in the United States. Padilla was never formally charged with a crime. He was later brought to New York, where the grand jury investigating the Sept. 11 terrorist attacks is based. In June, President Bush declared Padilla an "enemy combatant." Padilla was then placed in military custody in a Navy brig in Charleston, South Carolina.

The ACLU filed a friend-of-the-court brief on Sept. 26, 2002 supporting a challenge to the government's decision to detain Padilla in a military jail without charges, trial, or access to a lawyer. On Dec. 4, 2002, Judge Michael B. Mukasey of the Southern District of New York rejected the government's claim that it could hold Padilla indefinitely without any judicial scrutiny or access to counsel. Although acknowledging that the government's determination is entitled to deference, Judge Mukasey ruled that Padilla is entitled to a court hearing to contest his designation as an "enemy combatant," and to meet with his lawyer to prepare for that hearing. Judge Mukasey reaffirmed that ruling in a separate opinion issued on March 11, 2003. The government then appealed the case to the Second Circuit.

On Dec. 18, 2003, the Second Circuit Court of Appeals ruled that a U.S. citizen arrested on American soil cannot be held at the sole discretion of the President without charges, trial or access to counsel. The court held that Padilla's detention violated a 1971 law enacted by Congress to prevent any repeat of incidents like the Japanese internment in World War II. The 2-1 decision found that Padilla's detention exceeded the authority of the executive branch and that Padilla must be either charged under the criminal justice system or released.

> *Status:* The government appealed and the Supreme Court accepted the case for review. Oral arguments took place on April 28, 2004. The ACLU had filed briefs in the lower courts and filed a brief in the Supreme Court case as well, highlighting the longstanding constitutional tradition favoring civilian justice over military justice except in very limited circumstances.
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> On June 28, 2004, the Supreme Court rejected the Bush administration's arguments that its actions in the war on terrorism are beyond the rule of law, ruling that "enemy combatants" held by the United States, such as Padilla, are entitled to challenge their detention in court. The Justices, however, evaded the substantive question of Padilla's right to counsel, saying that his case had been brought in the wrong venue and must be refiled in South Carolina, where Padilla is being held. It's worth noting that the Court's decision in *Hamdi v. Rumsfeld* may have strengthened Padilla's legal claim that, because he was arrested at O'Hare Airport rather than captured on the battlefield, he should not be subject at all to detention as an "enemy combatant." Padilla will undoubtedly now file a new court case in South Carolina to pursue his claim that he should be tried or released.

Hamdi v. Donald Rumsfeld

Yaser Hamdi is an American citizen who has been designated as an "enemy combatant" by the President after being captured by the Northern Alliance while allegedly fighting with the Taliban in Afghanistan. For the past two years, he has been held in military brigs, first in Virginia and then in South Carolina, without charges or trial and, until very recently, without any access to counsel. The government's position is that it can confine Hamdi in this condition indefinitely so long as it presents "some evidence," not subject to cross-examination or rebuttal, that supports the President's "enemy combatant" designation.

The ACLU filed a friend-of-the-court brief with the U.S. Court of Appeals for the Fourth Circuit in Oct. 2002, challenging the lawfulness of the government's decision to detain U.S. citizens. On Aug. 16, 2002, a federal district court judge in Richmond, Virginia, ordered the government to produce additional evidence to support its decision to designate Hamdi as an "enemy combatant." Rather than comply with the judge's decision, the government appealed. On Jan. 8, 2003, the Fourth Circuit held that the government's minimal showing was nonetheless sufficient to detain Hamdi as an "enemy combatant" and to deny him access to counsel.

> *Status:* Hamdi appealed to the U.S. Supreme Court, which agreed to hear the case. Argument is scheduled for April 28, 2004. The ACLU filed a friend-of-the-court in the Supreme Court arguing that: (1) the President lacks authority to designate American citizens as "enemy combatants" and subject them to indefinite military detention; (2) even if such authority exists, Hamdi is entitled to more due process than he has so far received to challenge the basis of that designation; (3) Hamdi must either be released or charged criminally if he is not an "enemy combatant;" and (4) Hamdi's treatment as an

"enemy combatant" is in any event unlawful because the government has failed to comply with the Geneva Conventions.

On June 28, 2004, the Supreme Court rejected the Bush administration's arguments that its actions in the war on terrorism are beyond the rule of law, ruling that "enemy combatants" held by the United States, such as Hamdi, are entitled to challenge their detention in court. Writing for an 8-1 majority in the case of American-born detainee Yaser Esam Hamdi, Justice Sandra Day O'Connor said the Court has "made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Four of the Justices (Souter, Ginsburg, Scalia and Stevens) said that they would go further and order Hamdi's immediate release, and Justice Souter in particular said that holding Hamdi incommunicado is a violation of the Geneva Conventions. Hamdi will now receive a federal court hearing in which he will have an opportunity to establish that he should not have been designated an "enemy combatant."

Rasul, et al. v. Bush, et al.
Al Odah v. United States

On Jan. 14, 2004, the ACLU joined a broad-based coalition in filing a friend-of-the-court brief calling on the Supreme Court to assure that the detainees being held at Guantanamo Bay have access to the courts to challenge the legality of their detentions. The brief supports an appeal in two related lawsuits filed by relatives of 16 Guantanamo detainees who argued that their continued detention without any legal process violates the government's constitutional and treaty obligations. Rather than rule on the merits, the U.S. Court of Appeals in the District of Columbia had ruled that the Guantanamo camps were part of the "sovereign territory of Cuba" and thus outside the jurisdiction of U.S. laws. The prisoners were effectively declared non-persons because no law protects them and no court may hear their pleas. The friend-of-the-court brief takes no position as to what process is due the prisoners, but argues that the Due Process Clause and the Geneva Conventions require the nation's courts to ensure some kind of process.

Status: The Supreme Court heard arguments in the case on April 20, 2004. The ACLU signed onto a brief arguing that the claim of the detainees can and must be heard by the federal courts to ensure that the United States government fulfills its basic obligations under the Due Process Clause and the Geneva Conventions.

On June 28, 2004, the Supreme Court rejected the Bush administration's arguments that its actions in the war on terrorism are beyond the rule of law, ruling 6-3 that prisoners seized as potential terrorists and held for more than two years at a U.S. military prison camp in Cuba may challenge their captivity in American courts. Writing for the majority, Justice John Paul Stevens said that the inmates' status in military custody is immaterial: "What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." The Guantánamo detainees will now have a right to press their claim in the lower courts that their detention is unlawful.

ACLU Complaint to the United Nations Working Group on Arbitrary Detention

The ACLU brought its first-ever submission to the United Nations Working Group on Arbitrary Detention on Jan. 27, 2004, presenting an official complaint on behalf of immigrants imprisoned and deported from the U.S. after 9/11. The Complaint, brought on behalf of 13 individuals, calls

on the U.S. government to maintain its high standards of justice for all despite the threat of terrorism, and to adhere to not just domestic constitutional standards, but accepted international human rights principles regarding liberty and its deprivations. The Complaint charges the government with arbitrarily and indiscriminately arresting immigrants unconnected to terrorism or crime, many of whom languished in jail for weeks and sometimes months even when it became clear that they were innocent of any charges related to terrorism.

Status: The Working Group forwarded the ACLU's Complaint to the U.S. government in May 2004.

SEARCH AND SEIZURE VIOLATIONS

In the Matter of 750A Miller Drive Leesburg, Va., et al.
The ACLU of Virginia filed a friend-of-the-court brief on May 3, 2002 on behalf of three Muslim establishments and ten Muslim families in Northern Virginia whose possessions government agents seized during raids in March. The ACLU argued that many of the items, especially books, magazines and pamphlets, should not have been taken because the First Amendment affords them extra protection against seizure. The ACLU also argued that the affidavits used as the basis for issuing the search warrants should be unsealed to determine whether the government had proper justification for taking the items.

Status: The court refused in May to unseal the affidavit for the warrants and rendered an unfavorable ruling on the return of property.

ASSET FORFEITURE / PROPERTY SEIZURE

Abdinasir Ali Nur v. U.S. Treasury Department
On Dec. 19, 2001, the ACLU of Washington filed claims with the U.S. Treasury Department on behalf of two Somali businessmen in Seattle, seeking fair compensation for more than $300,000 in losses during a November raid by agents who sought assets of a completely separate money-transfer business.

Status: The U.S. Treasury has reimbursed the men for $40,580 for checks it took in the raid. The ACLU continues to pursue claims for merchandise, including specially prepared halal meats (central to the religious practices of the Somali immigrants) destroyed in the raid; Nur estimated his losses at roughly $250,000. The ACLU is also seeking the return of money that local Somalis sought to send to relatives abroad, sums frozen since the raid.

FIRST AMENDMENT

ACLU of Illinois v. General Services Administration
In Dec. 2001, the ACLU of Illinois filed a lawsuit challenging Chicago's closing of Federal Plaza, a central venue historically used for demonstrations, prayer vigils and the distribution of

leaflets on important matters of public policy. The lawsuit was filed as an amendment to a pre-Sept. 11 complaint about overly restrictive leafleting policies.

> *Status:* In March 2002, the city reopened the plaza in response to the ACLU lawsuit, and settled the leafleting complaint seven months later. It agreed not to deny a permit solely because another group already holds one to use the plaza at that time. This agreement specifically protects the rights of counter-demonstrators to express opposing views. On Nov. 26, the court approved a settlement agreement between the two parties.

Consolidated Government of Columbus v. Roy Bourgeois, Jeff Winder, Eric Lecompte, and Ken "Doe"

In Oct. 2001, the ACLU of Georgia came to the defense of demonstrators barred from holding an annual protest march at the entrance to Fort Benning. The groups included School of the Americas Watch, which opposes the training of foreign soldiers in schools operated by the U.S. military. Although marches had been allowed in the past, the city cited a need for increased security after Sept. 11.

> *Status:* On Nov. 16, 2001, Federal Magistrate G. Mallon Faircloth ordered that the protest go forward in accordance with President Bush's charge for Americans to get back to their lives. As Faircloth saw it, his job was "to protect the American way of life," which in Columbus included the annual School of the Americas Watch march.

School of the Americas Watch v. Consolidated Government of Columbus, Georgia

On Nov. 13, 2002, the ACLU of Georgia filed a lawsuit challenging last-minute plans by the City of Columbus to conduct mass searches of over 10,000 marchers at the upcoming School of Americas demonstration on Nov. 17th. The ACLU asked for an immediate hearing and requested that the court stop the City's plan to search all protesters.

> *Status:* The ACLU lost the hearing and filed an 11th Circuit appeal on Feb. 13, 2003, which was denied.

Peace and Justice Coalition v. Pleasantville

The ACLU of New Jersey threatened to sue the City of Pleasantville for trying to bar a post-Sept. 11 rally by the Peace and Justice Coalition under an overly restrictive local ordinance. The city had erected numerous obstacles to the permit application process and threatened to arrest demonstrators.

> *Status:* After the ACLU entered the case, the City agreed to revise its policy. However, after negotiations over the revised ordinance proved unsatisfactory, the ACLU filed a First Amendment lawsuit in May 2003. The City subsequently agreed to revise the ordinance again, this time eliminating the overly restrictive provisions.

City of Lynchburg v. Payden-Travers

Acting on behalf of local anti-war protesters, the ACLU of Virginia challenged the Lynchburg City Code, which prohibits groups of more than five people from gathering in a public forum for a planned demonstration.

During Oct. 2001, Jack Payden-Travers and other members of the Lynchburg Peace Center began protesting the war in Afghanistan every Friday at the Monument Terrace in Lynchburg. During one of these demonstrations, Payden-Travers was arrested for protesting in a group of more than five without a permit. He was convicted of the misdemeanor in Lynchburg District Court on Dec. 11, 2001, and appealed his conviction to the Circuit Court. The ACLU filed a motion to dismiss the charges, arguing that the permit ordinance violates the First Amendment rights of free speech and public assembly.

> *Status:* On April 23, 2002, the judge held that the ordinance violated the First Amendment and dismissed the case against Payden-Travers. The City of Lynchburg filed a petition for appeal with the Virginia Supreme Court, which the ACLU opposed. The Virginia Supreme Court decided to hear the case. After the case was fully briefed, however, the City revised its ordinance and subsequently withdrew its appeal.

United States v. Richard Reid

The ACLU of Massachusetts filed a friend-of-the-court brief opposing a broad gag order that barred the accused "shoe-bomber's" lawyer from talking to other lawyers, including anyone in his office, about his case.

> *Status:* The government opposed the motion, but the court said that it was for the judicial branch, not the attorney general, to decide what was appropriate. The court gave Reid's attorney permission to expand the number of people he talked to as long as the discussion related to the defense of Reid. However, the court did not allow the attorney to talk to the press and public about the case, except about general matters such as how Reid was being treated in prison. The government did not appeal the court's decision and Reid subsequently pleaded guilty.

American-Arab Anti-Discrimination Committee and Imad Chammout v. City of Dearborn

On Jan. 21, 2003, the ACLU of Michigan filed a federal lawsuit against the City of Dearborn challenging the constitutionality of a city ordinance that makes it a crime to protest unless a permit is obtained at least 30 days before the event. The lawsuit was filed on behalf of the American-Arab Anti-Discrimination Committee, a national civil rights organization with offices in Dearborn, and Imad Chammout, a Dearborn resident and business owner.

Dearborn officials prosecuted Chammout in the spring of 2002 for participating in a march without a permit, a crime punishable by up to 90 days in prison and a $500 fine. The march, which was not organized by Chammout, was held to protest Israeli policies a few days after Israeli soldiers entered into a Palestinian refugee camp in Jenin. The ACLU also asked for a preliminary injunction barring enforcement of the waiting period because of strong likelihood that it would be found unconstitutional.

> *Status:* The ACLU request for a preliminary injunction was denied. Following discovery, both sides filed cross-motions for summary judgment. A judge subsequently ruled that the ordinance, as applied by the City of Dearborn, was constitutional as there was a reasonable basis for the 30-day delay period. An appeal is pending in the Sixth Circuit.

Handschu v. Special Services Division

In 1985, the New York Civil Liberties Union and others negotiated a comprehensive settlement agreement with the New York City Police Department establishing a set of procedures and safeguards designed to address past abuses regarding political surveillance. In 2002, the Police Department asked the Court to relax those restrictions in the wake of Sept. 11. The NYCLU opposed the motion.

> *Status:* On Feb. 11, 2003, U.S. District Judge Charles Haight argued that the original Handschu agreement could be modified to permit the NYPD to conform its practices to the new (and relaxed) FBI surveillance guidelines.

United for Peace and Justice v. City of New York
As part of a worldwide demonstration on Feb. 15, 2003, antiwar protesters requested permission to march past the United Nations in New York City. In an unprecedented response, the NYPD refused to allow any march at all, insisting instead that the demonstrators be routed to a stationary rally. The New York Civil Liberties Union sued on their behalf, seeking a preliminary injunction before the District Court.

> *Status:* The District Court denied the ACLU request, and the ACLU appealed the case to the Second Circuit on Feb. 5, 2003. On Feb. 12, 2003, the Second Circuit affirmed the District Court denial of the preliminary injunction.

Martens v. Giuliani
On May 30, 2001, the New York Civil Liberties Union filed a lawsuit in federal court challenging the New York City Police Department's (NYPD) policy of jailing people who commit minor offenses at protests and demonstrations. The policy is unconstitutional, according to legal papers filed by the NYCLU, because it treats people more harshly when they commit an offense at a protest than if they commit it elsewhere. As a result of this policy persons charged with minor offenses at demonstrations have been held in jail overnight.

The lawsuit was brought on behalf two protesters. One, Pamela Martens, a 54-year-old investment banker, was arrested at a protest in April held by the National Organization for Women. She was charged with blocking a crosswalk and disobeying an order to disperse. Instead of receiving a desk appearance ticket, Martens was held for several hours in police custody until she was arraigned. The second client, Charles King, is one of the leaders of Housing Works, a nonprofit advocacy group that provides housing and services to people with AIDS and H.I.V. The group occasionally participates in protests and acts of civil disobedience. Mr. King and other Housing Works employees have routinely been held overnight in jail, according to the NYCLU's complaint.

> *Status:* On July 12, 2001, the City settled, paying damages and attorney's fees. The NYPD agreed to rescind its policy of jailing people who commit minor offenses at protests and demonstrations, and sent a message to all commands announcing withdrawal of the policy.

ACORN v. City of Philadelphia
According to ACLU legal papers, at events attended by President Bush and other senior federal officials around the country, the Secret Service has been discriminating against protesters in violation of their free speech rights. Local police, acting at the direction of the Secret Service,

violated the rights of protesters in two ways: people expressing views critical of the government were moved further away from public officials while those with pro-government views were allowed to remain closer; or everyone expressing a view was herded into what is commonly known as a "protest zone," leaving those who merely observe, but express no view, to remain closer. In one example, retired steelworker Bill Neel, 66, was handcuffed and detained by local officials at a rally in western Pennsylvania after he refused to be herded into a remote "designated free speech zone" located behind a six-foot chain-link fence.

The ACLU national lawsuit, filed in Philadelphia on Sept. 23, 2003, originated earlier in the year when the ACLU of Pennsylvania sought enforcement of a 1988 decree requiring city officials to treat protesters fairly. That lawsuit was amended to include similar incidents around the country. The ACLU's legal papers listed more than a dozen examples of police censorship at events around the country, saying that all had been initiated at the behest of the Secret Service and that such incidents are on the rise. The incidents described took place in Arizona, California, Connecticut, Indiana, Michigan, Missouri, New Jersey, New Mexico, South Carolina, Texas and Washington, among other places. The Secret Service is named as the federal defendant in the lawsuit, along with the Philadelphia Police Department for its role in the recent demonstrations in that city.

> *Status:* The government filed a motion to dismiss, which was granted based on the plaintiffs lacking standing.

Abbate, et al. v. Ramsey et al.
Diamond, et al. v. District of Columbia
These cases stem from the unlawful arrest and detention of peaceful antiwar demonstrators and bystanders in and around Washington, D.C.'s Pershing Park on September 27, 2002. In the Abbate case the ACLU of the National Capital Area charged police officials with deliberately violating the constitutional rights of more than 400 individuals by directing them into a police trap and then arresting them although they had not violated the law. According to the ACLU lawsuit, filed along with the National Lawyers Guild D.C. Chapter, and the law firm of Covington & Burling in federal court on March 27, 2003, arrestees were charged with failing to obey a police order, but no order to disperse was ever given and people who tried to leave were physically prevented from doing so. The lawsuit also states that arrestees were unjustly detained for as long as 30 hours in tight handcuffs and painful wrist-to-ankle restraints, with limited access to food and toilets, and were denied access to lawyers and given false information about their legal options.

Among those arrested were a retired U.S. Army Lieutenant Colonel and his daughter, a Maryland grandfather who was detained for more than 24 hours, and a man who suffered from broken ribs after being knocked down by the police. The true purpose of the mass arrests, the ACLU said, was to disrupt and prevent peaceful political demonstrations scheduled for that weekend. The class action lawsuit, which names as defendants D.C. Police Chief Charles Ramsey and officials in the District, seeks compensation for each person whose rights were violated and a court order prohibiting the government from using similar unconstitutional tactics in the future.

An internal Metropolitan Police Department investigation into the mass arrest found that all of the arrests were unlawful. The police report was released on Sept. 12, 2003, by order of federal

judge Emmet G. Sullivan, who is presiding over the lawsuit. The internal investigation confirmed that the police had confined hundreds of people in the park and then arrested them even though no police officer had seen them commit any crime.

The ACLU filed the Diamond class-action lawsuit, along with the National Lawyers Guild D.C. Chapter on Sept. 26, 2003, on behalf of approximately 200 people who were arrested outside of Pershing Park. One group of about 40 demonstrators was trapped and arrested on Connecticut Avenue and another group of about 150 people was trapped and arrested near Vermont Avenue and K Street. While it's possible that some of these people broke the law – for example, by parading in the street without a permit – the lawsuit alleges that the police trapped and arrested the entire group without any ability to distinguish between individuals who might have violated the law and individuals who did not. And like the Pershing Park arrestees, these individuals were detained after their arrests in physically onerous and unnecessary wrist-to-ankle restraints.

> *Status:* Both cases are now in discovery. The individual defendants, such as Chief Ramsey, have asserted immunity, which the ACLU has opposed. The case was heard in February 2004; a decision is pending.

U.S. v. Pickett

The ACLU of the National Capital Area filed a brief as a friend-of-the-court in the appeal of Capitol Police officer J.J. Pickett, who was convicted of making a false statement when he wrote a satirical note criticizing the department for its failure to train officers to deal with the anthrax threat in the fall of 2001. The ACLU brief, filed on behalf of 89 Capitol Police officers and the ACLU, asks the appeals court to overturn the conviction on the ground that satire is a form of commentary protected by the First Amendment, not a "false statement."

> *Status:* The DC Circuit Court of Appeals heard the case on Oct. 9, 2003. In early 2004, the Court of Appeals reversed Pickett's conviction and ordered that the charges against him be dismissed on the ground that the facts simply did not amount to a crime.

Local 10 ILWU v. City of Oakland

The Oakland Police Department and the City of Oakland violated the constitutional rights of dozens of demonstrators, dockworkers, legal observers and others who were injured at a peaceful anti-war demonstration, according to a federal lawsuit filed by the ACLU and a coalition of rights groups on June 26, 2003.

In legal papers, the groups said that their clients' First Amendment rights to freedom of speech, assembly and association were violated when the Oakland police opened fire on a peaceful anti-war protest on April 7, 2003. At least 40 people, including nine dockworkers from Local 10 of the International Longshore and Warehouse Union, were injured with large wooden bullets, sting-ball grenades and shot-filled beanbags. The lawsuit seeks damages for persons who were injured as well as an injunction to prevent the Oakland Police Department from repeating such practices against demonstrators in the future. The class action lawsuit was filed on behalf of 40 individuals by the ACLU, the National Lawyers Guild, Local 10, ILWU and a team of prominent civil rights attorneys including John Burris and James Chanin.

> *Status:* The case is pending.

(More)

Barber v. Dearborn Public Schools
This case arose on Feb. 17, 2003, when Bretton Barber, a junior at Michigan's Dearborn High School, wore a t-shirt to school that displayed a photograph of President George W. Bush with the caption, "International Terrorist." He was told to turn it inside out or go home. The school's assistant principal claimed that the shirt promoted terrorism and would cause a disruption, despite the fact that Barber wore the shirt for three hours without incident. On March 27, 2003, the ACLU of Michigan filed a lawsuit in federal court challenging the schools decision and charging school officials with violating the First Amendment rights of their students. According to the ACLU, there are strong indications that the reaction of school officials to Barber's t-shirt was prompted by their disagreement with its message.

> *Status:* On Oct. 1, 2003, Judge Patrick J. Duggan ruled in ACLU's favor, finding that Barber must be allowed to wear the shirt to school. In granting the order, Judge Duggan noted that, "there is no evidence that the t-shirt created any disturbance" in the school and that "the record…does not reveal any basis for [the assistant principal's] fear aside from his belief that the t-shirt conveyed an unpopular political message." Judge Duggan further rejected the school district's argument that the schoolyard is an inappropriate place for political debate. As he wrote in the decision, "In fact, as [the courts] have emphasized, students benefit when school officials provide an environment where they can openly express their divergent viewpoints and when they learn to tolerate the opinions of others."

Dobson v. Springettsbury Township
The ACLU of Pennsylvania filed this case in U.S. District Court for the Middle District of Pennsylvania on March 11, 2004, after Springettsbury Township attempted to charge more than $3,000 in parade permit fees to a group of three dozen peaceful protesters. The ACLU asked for an emergency hearing to block officials from assessing these fees, requiring officials to sign an indemnification agreement, and block the prohibition of protests on less than 30 days' notice.

> *Status:* The ACLU of Pennsylvania filed a Motion for a Temporary Restraining Order, which was granted on March 17, 2004. The judge scheduled a hearing for March 22 to determine whether the TRO would become a preliminary injunction. That hearing was, however, cancelled on March 19 due to a consent order that the parties entered into on that same day. A permanent injunction hearing was scheduled for April 19, 2004, but that too was cancelled due to the parties' agreement. The consent order of March 19, 2004 remains in place and trial in the case is scheduled for Feb. 7, 2005.

CPIS v. Colorado Springs
On March 15, 2004, the ACLU of Colorado sued the City of Colorado Springs, saying that city officials violated the First Amendment when they denied a permit request from six peace and justice activists to hold a protest on a public sidewalk across from a hotel hosting a North Atlantic Treaty Organization (NATO) conference last October. The ACLU lawsuit was filed in federal district court in Denver on behalf of Citizens for Peace in Space (CPIS), a Colorado Springs-based peace organization.

A week before the NATO conference, the ACLU wrote to city officials on behalf of CPIS, asking the city to permit a brief, peaceful demonstration in which six CPIS members, identified well in advance, could display signs for one hour at a specified time while standing on the public

sidewalk. As the ACLU noted, CPIS had engaged in similar activity without incident numerous times in the past. The group's members even offered to submit to the identical security procedures as the hundreds of media representatives who were permitted to enter the "security zone." The letter also pointed out that each of the CPIS members was already well known to the Colorado Springs police as being firmly committed to nonviolence.

Nonetheless, the city refused to permit the CPIS members to enter the "security zone." Instead, they were required to stand on the opposite side of a security checkpoint on Second Street, more than three blocks from the hotel entrance and more than two blocks from their requested location. This location was on a narrow, unpaved grassy strip between the road and the edge of a ditch. At this location the CPIS members could not be seen by delegates or by media representatives.

In addition to CPIS, the ACLU's clients include William Sulzman, Mary Lynn Sheetz, Sister Barbara Huber, Gerard Jacobitz, Donna Johnson, and April Pergl.

Status: The case is in discovery stages.

Conrad v. City of NY, et al.
Stauber v. City of NY, et al.
Gutman v. City of NY, et al.
Trial began on June 2, 2004, in federal court in three right-to-protest cases brought by the New York Civil Liberties Union challenging police practices at the February 15, 2003 anti-war demonstration in New York City. The cases are particularly important because they challenge practices that may be used during the protests at the Republican National Convention in August. These practices include: unreasonable restrictions on access to demonstration sites, unreasonable use of holding pens, the searching of demonstrators as a condition of entry to demonstrations, the reckless use of mounted officers in dispersing peacefully assembled demonstrators, and the prolonged detention in vans without access to food, water or bathroom facilities of demonstrators charged with minor offenses.

The individuals the NYCLU is representing in the lawsuits are: Ann Stauber, a 60-year-old diabetic woman in a wheelchair, who was herded into a holding pen on the street and forbidden to leave by the NYPD even after she told them that she urgently needed to find a bathroom and then return home to check her blood sugar – an officer forcibly stopped her when she attempted to leave and, in the process, broke the controls on her wheelchair; Jeremy Conrad, a 27-year-old law student, who was trapped in a barricaded area, injured when a horse stepped on him, arrested for complaining to police officers, and then detained in the back of a police van for about seven and a half hours without food, water or bathroom facilities; the late Jeremiah Gutman and his family, who were hemmed in by police as they attempted to march to the rally site – police offered either no information or inaccurate information to the trapped demonstrators, then, without warning, police on horses drove into the crowd, injuring Mr. Gutman who was trying to protect his young son.

Status: A decision is pending.

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