

**CIVIL LIBERTIES UPDATE**  
**NEWSLETTER OF THE ACLU OF MASSACHUSETTS**  
**CIVIL LIBERTIES TASK FORCE**  
December 29, 2005

**CONTENTS**

**RIGHTSWATCH**

**A. EXECUTIVE ACTIONS**

- Constitutional crisis looms as Bush asserts right to evade law to spy on Americans
- FISA court on edge in wake of NSA spying resolutions
- Defense Department is spying on Americans – with much more to come
- FBI caught spying on domestic political groups
- FBI conducts warrantless radiation checks at Muslim sites
- Some FBI wiretaps can be evaded
- Investigation reveals FBI cover-up, retaliation against whistleblower
- Rice stonewalls on reports of torture, kidnappings & secret CIA-run prisons in Europe
- Council of Europe investigator says Rice did not come clean
- UN official attacks detention practices
- Human Rights Watch says US operated secret prison in Afghanistan
- Human rights group says US now holding 14,500 ghost detainees
- "Torture's long shadow" described by former Soviet prisoner
- Cheney provided "philosophical guidance" for torture
- Majority of Americans say torture OK in some instances
- Washington Post lists names of 444 Guantanamo detainees
- "Crazy" Pakistani spends four years at Guantanamo
- Lawyer claims federal court order ignored
- Americans protest outside Guantanamo camp
- Did Bush plan to bomb Al Jazeera headquarters in Qatar?
- Did US use drone to carry out targeted assassination?
- Former 9/11 Commission gives failing grades to security efforts
- Government infighting prevents disruption of money trail
- Airline watchlist contains 80,000 names
- New screening methods to be used at airports
- Cheney refuses to divulge travel costs
- Bush orders more efficiency, but no basic change in handling FOIA requests
- State Department screens out critical voices
- Immigration errors plague crime data base
- New York police infiltrate activist groups
- Miami police planning displays of shock and awe
- Denver commuter arrested for refusing to show ID

## **B. IN THE US CONGRESS**

- PATRIOT Act extended until February 3, 2006
- Torture: one step forward, two (or more) steps back
- House passes draconian immigration bill

## **C. IN THE COURTS**

- Latest moves in Padilla case cause meltdown of "enemy combatant" strategy
- In stunning ruling jury acquits Al-Arian of terror charges
- ACLU files first ever suit against former CIA director Tenet
- US student who alleged torture convicted of plotting to kill Bush
- Innocent detainees remain imprisoned at Guantanamo
- Judge prepares for death penalty phase of Moussaoui hearing
- Federal judges criticize incompetence of immigration judges

## **D. IN THE COMMONWEALTH**

- We have another month to pass Resolution Affirming Civil Liberties
- MBTA vendors arrested by JTTF
- Immigration round up in New Bedford causes panic
- Massachusetts residents sue to end citizenship delays
- Student fabricated story

## **RIGHTSWATCH**

### **A. EXECUTIVE ACTIONS**

#### **• CONSTITUTIONAL CRISIS LOOMS AS BUSH ASSERTS RIGHT TO EVADE LAW TO SPY ON AMERICANS**

After delaying publication of the story for a year, the *New York Times* on December 16 revealed that President Bush signed a secret executive order sometime in 2002 permitting the super-secret National Security Agency (NSA, nicknamed "No Such Agency") to eavesdrop on Americans within the US without getting warrants from the secret FISA court set up by the 1978 Foreign Intelligence Surveillance Act. The court had been established after the Congressional Church Commission revealed that the government had been spying on hundreds of thousands of Americans under the FBI's COINTELPRO operation. The government could go to the FISA court to get a warrant to wiretap suspected foreign spies without showing the level of evidence required by the Fourth Amendment. The standards the government had to meet to get a FISA warrant were lowered by the USA PATRIOT Act. According to the piece by James Risen and Eric Lichtblau ("Bush Lets US Spy on Callers Without Courts") the Bush Administration justified ignoring the 1978 law on two grounds. First, the Congressional Authorization for Use of Military Force resolution gave it the authority to do whatever was necessary to fight terrorism (But Tom Daschle, Senate Democratic leader at the time of the 9/11 attacks, wrote an op ed in the December 23 *Washington Post* stating that Congress

explicitly denied a White House request for war-making authority in the US). Second, even without that Congressional resolution Justice Department lawyers like John Yoo (author of notorious memos on torture) argued that the President had the "inherent authority" under the Constitution to take measures "which in less troubled conditions could be seen as infringements of individual liberties." In short, "national security" needs trumped the law and the concept of constitutional checks and balances. After the story broke, the *New York Times* refused to comment further on the story or its decision to delay publication. *Newsweek* revealed that *Times* publisher Arthur Sulzberger and executive editor Bill Keller had been summoned to the Oval Office by the President on December 6 in an effort to stave off publication. Once the piece was published, Bush, Cheney, Rice and other administration officials launched an aggressive offensive attacking the messenger - "Our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies and endangers our country," Bush declared in a December 17 radio address. As the Administration marshaled talking heads and lawyers to spin the story its way, the facts were proving inconvenient. For instance, it appeared that far from not giving Administration the "agility" it needed to deal with the bad guys, the 1978 FISA law had a 72 hour window for surveillance before officials were required to go to the FISA court to get a warrant. And far from the NSA doing a bit of discreet and carefully targeted surveillance of calls and emails between a handful Americans and Al Qaeda suspects in foreign countries, its ECHELON listening system operates by vacuuming up large quantities of communications and subjecting them to Total Information Awareness-style data mining (see Nicky Hager, "Exposing the Global Surveillance System, Covert Action Quarterly, December 26, 1997 and Robert O'Harrow, Jr, *No Place To Hide*, Free Press, 2005). Neither the Administration nor the NSA will comment on the extent of the spying, but Trent Duffy, a White House spokesman, said: "This is a limited program...These are designed to monitor calls from very bad people to very bad people who have a history of blowing up commuter trains, weddings and churches" (*New York Times*, December 28). Attorneys in terrorism cases are now planning to go to court to see if the government used NSA-obtained information against their clients. In Congress, where limited oral briefings about the spying program had been given to 14 members over the years without any public complaints, Rep. John Conyers (D-MI, the senior Democrat on the House Judiciary Committee) has filed a bill calling on Congress to determine whether there are grounds for impeachment and Senate Judiciary Committee head Arlen Specter (R-PA) says he will hold Congressional hearings on the matter. The ACLU has called for a special counsel to be appointed to investigate executive branch violations of the law and filed a Freedom of Information Act request in an attempt to find out the extent of the spying program. Apparently determined to tough it out, President Bush has implied that he will order an investigation into how the existence of the spying program became known to the *New York Times*.

- **FISA COURT ON EDGE IN WAKE OF NSA SPYING REVELATIONS**

Federal district court judge James Robertson, one of 11 judges on the secret FISA court, resigned on December 20 reportedly out of concern that the court's proceedings had been tainted by the Bush Administration's using the NSA to spy on Americans. Other judges, who say they do not intend to resign but want more information about the government program, are also apparently troubled that government officials might have been using information obtained by the NSA to get FISA wiretap orders. A secret briefing is being arranged by presiding FISA court judge Colleen Kollar-Kotelly. According to the December 26<sup>th</sup> United Press International, Bush decided to forego warrants from the FISA court "because the court was challenging him at an unprecedented rate." The court had modified only two search warrant orders out of 13,102 applications during its first 22 years of operation. "But since 2001, the judges have modified 179 of the 5,645 requests for surveillance by the Bush administration...And, the judges also rejected or deferred at least six requests for warrants" in 2003 and 2004: "the first outright rejection of a wiretap request in the court's history." An anonymous government official said "the administration complained that the FISA process demanded too much: to name a target and give a reason to spy on it," preventing them from listening in on a huge volume of communications in hopes of finding something suspicious (*Boston Globe*, December 22).

• **DEFENSE DEPARTMENT IS SPYING ON AMERICANS – WITH MUCH MORE TO COME**

On December 14, NBC Nightly News revealed the existence of a hitherto secret 400-page Defense Department document listing more than 1,500 "suspicious incidents" that occurred during the pervious ten months. Among those incidents was a meeting by activists at a Quaker Meeting House in Lake Worth, Florida, to plan a protest against military recruiting at local high schools. Other "suspicious incidents" include an anti-war protest in Los Angeles featuring an effigy of the President and a December 2004 meeting to plan a protest against military recruiters in Boston. On December 15, the Pentagon stated that the program, called "Talon," was being reassessed and "suspicious activity" reports that had not been "validated as threatening" would be removed. According to the December 15 *Washington Post*, the Talon database, which "has been described by officials as a sort of neighborhood watch for the military," is managed by the Counterintelligence Field Activity (CIFA), a secret three-year-old Pentagon agency whose budget and size are classified. According to the November 28<sup>th</sup> *New York Times*, CIFA has a staff of more than 1,000 and a mission to "transform" the way counterintelligence is carried out, "fully utilizing 21<sup>st</sup> century tools and resources." A presidential commission on intelligence reportedly wants to give it the authority to investigate such crimes within the US as treason, sabotage and economic espionage, which would represent a significant militarization of domestic counterintelligence activity. A worried Senator Ron Wyden (D-OR) said of a proposed amendment to the 2006 Intelligence Authorization bill that would give the military a greater role in domestic spying, "We are deputizing the military to spy on law-abiding Americans in America. This is a huge leap without even a [congressional] hearing." A spokesman for

the Pentagon responded, "In the age of terrorism, the US military and its facilities are targets and we have to be prepared within our authorities to defend them before something happens."

- **FBI CAUGHT SPYING ON DOMESTIC POLITICAL GROUPS**

Heavily-censored documents obtained by the ACLU through a Freedom of Information Act request has revealed a pattern of spying by the FBI's Joint Terrorism Task Forces on anti-war groups and others that work on environmental issues, animal rights and poverty relief. Groups like People for the Ethical Treatment of Animals (PETA) have been labeled "domestic terrorists" in FBI files.

- **FBI CONDUCTS WARRANTLESS RADIATION CHECKS AT MUSLIM SITES**

On December 20 the *US New and World Report* revealed that the FBI was doing air monitoring for radiation at more than 100 Muslim sites, including mosques, homes and businesses, in the Washington DC area, and sites in at least five other cities. The Council on American-Islamic Relations Agency denounced the program for creating "the appearance that Muslims are targeted simply for being Muslims" (Associated Press, December 23). John Miller, assistant director of the FBI, stated that the agency "does not target any group based on ethnicity, political or religious belief" and he was "disappointed at the conclusions" reached by the Muslim group (*New York Times*, December 24). The FBI said it did not need warrants to carry out the air monitoring from public property.

- **SOME FBI WIRETAPS CAN BE EVADED**

According to the November 30<sup>th</sup> *New York Times*, a security flaw in wiretap technology permits some wiretap systems to easily be circumvented and numbers dialed to be falsified. For details see <http://www.cryptocom/papers/wiretapping>.

- **INVESTIGATION REVEALS FBI COVER-UP, RETALIATION AGAINST WHISTLEBLOWER**

The December 4<sup>th</sup> *New York Times* details the results of an investigation by the Justice Department's Inspector General into claims made by FBI whistleblower Mike German in 2002 that another FBI agent had mishandled a Florida terror investigation and falsified documents to cover up his mistakes, and that when German had reported the cover up his career had been derailed. German subsequently left the FBI. The Inspector General's report upholds most of German's assertions, but finds that the agency had been misled by an informant and "there was no viable terrorism case."

- **RICE STONEWALLS ON REPORTS OF TORTURE, KIDNAPPINGS & SECRET CIA-RUN PRISONS IN EUROPE**

Secretary of State Condoleezza Rice stolidly maintained the US does not torture and does abide by US law and US treaty obligations during a trip to Europe in early December. In the second half of November there had been a rising furor over reports of

secret CIA-run "black sites" on European soil. Italian prosecutors had charged 22 American CIA operatives with kidnapping Hassan Mustafa Osama Nasr in Milan in 2003 and EU Commissioner Franco Frattini said that any states that hosted secret CIA jails would face "serious consequences, including the suspension of the right to vote in the council" (*Boston Globe*, Nov. 29). Several other countries, including Spain and Austria, said they were conducting investigations into CIA rendition flights to or over their territory and would be requesting information from the US government. The Pentagon had ruled out giving any information, on grounds that it "would constitute a safety risk to both the detainees and our troops" (*Boston Globe*, Nov. 24). On December 5, Secretary of State Rice flew to Berlin, where she admonished European leaders for complaining about American methods which she said helped "save European lives." She denied that the US tolerated or condoned torture "under any circumstances" and said it "has not transported detainees from one country to another for the purpose of interrogation using torture" (*New York Times*, Dec. 6). The following day, a German car salesman, Khaled al-Masri, who had been kidnapped off a bus in Macedonia and turned over to the CIA, brought a pathbreaking suit against the US government with the help of the ACLU (see "In the Courts" below). Secretary of State immediately changed her tone, and did not challenge the new German Chancellor Angela Merkel when she stated, "I'm pleased to say we spoke about [this] individual case, which the government of the US has accepted as a mistake. I'm very happy that the secretary has repeated here that when such mistakes happen, they must be corrected immediately" (*Boston Globe*, Dec. 7). Rice moved on to the Ukraine where she announced that "as a matter of US policy" the US obligations under the UN Convention of Torture "extend to US personnel wherever they are, whether they are in the United States or outside the United States," thereby contradicting US Attorney General Gonzales, who maintains against the tide of legal opinion that the torture convention only has force of law on domestic soil (*Boston Globe*, Dec. 8). That seems to have defused her critics. According to reports, not a single European foreign minister directly questioned her about CIA prisons at a private dinner on December 8. They announced Rice had successfully "cleared the air" by assuring them the US did not permit torture and respected the principles of the Geneva Convention in the treatment of prisoners of war. On the very next day, the US refused to allow the International Committee of the Red Cross access to its ghost detainees, saying they were being kept incommunicado for reasons of national security and are not guaranteed any rights under the Geneva Conventions (*New York Times*, Dec. 10).

- **COUNCIL OF EUROPE INVESTIGATOR SAYS RICE DID NOT COME CLEAN**  
Dick Marty, the chief European investigator looking into claims of the existence of secret prisons in Europe, criticized Secretary of State Rice for stonewalling on the question of renditions and secret detention centers during her visit to Europe. He added that "I think it would have been difficult for these actions to have taken place without a degree of collaboration" by European governments (*Boston Globe*, Dec. 14).

- **UN OFFICIAL ATTACKS DETENTION PRACTICES**

Louise Arbour, the UN High Commissioner for Human Rights, stated on December 8th that "an absolute ban on torture, a cornerstone of the international human rights edifice, is under attack" and that "moves to water down or question the absolute ban on torture, as well as on cruel, inhuman or degrading treatment" are "particularly insidious." Despite the fact that she did not directly name the US, US ambassador to the UN John Bolton said that her remarks were "inappropriate" for Human Rights Day, and that she should have concentrated on condemning the human rights performance of countries like Burma and Zimbabwe.

• **HUMAN RIGHTS WATCH SAYS US OPERATED SECRET PRISON IN AFGHANISTAN**

According to a Human Rights Watch report released on December 18, eight detainees in Guantanamo told their attorneys they had been shackled to walls, kept in darkness for weeks, deprived of food and water, bombarded with loud music, and punched and slapped by US interrogators at a secret "dark prison" near Kabul. The Americans did not wear military uniforms.

• **HUMAN RIGHTS GROUP SAYS US NOW HOLDING 14,500 GHOST DETAINEES**

According to the Helsinki Human Rights group, at least 83,000 people have been held by the US without charges or trial or their names being made public since the "war on terror" began. The group estimates that approximately 14,500 are currently in US detention facilities (BBC World Service, Dec. 8)

• **TORTURE COULD HAVE LED TO ASSERTION OF LINK BETWEEN AL QAEDA AND IRAQ**

After Ibn al-Shaykh al-Libi, a Libyan in US custody, was handed over to Egypt for interrogation, he made statements alleging a connection between Al Qaeda and Iraq which were used by the Bush Administration to justify its invasion. Libi was one of about 150 captives who was shifted from country to country by the CIA for purposes of interrogation in the practice called "extraordinary rendition". Libi later said he had fabricated his assertions to get better treatment and the CIA decided he was an unreliable witness. He is now at Guantanamo Bay.

• **"TORTURE'S LONG SHADOW" DESCRIBED BY FORMER SOVIET PRISONER**

The December 18<sup>th</sup> *Washington Post* printed a chilling personal account of what it meant to be tortured for victim, torturer and the broader society. It was written by Vladimir Bukovsky, a human rights activist who had spent nearly 12 years in Soviet prisons, labor camps, and psychiatric hospitals. After describing how once Stalin's secret police, the NKVD, were given the "quick fix" of torture they "became nothing more than an army of butchers terrorizing the whole country but incapable of solving the simplest of crimes," he asks: "Why would democratically elected leaders of the US ever want to legalize what a succession of Russian monarchs strove to abolish? Why run the risk of unleashing a

fury that even Stalin had problems controlling? Why would anyone try to 'improve intelligence-gathering capability' by destroying what was left of it? Frustration? Ineptitude? Ignorance?...I have no answer to these questions, but I do know that if Vice President Cheney is right and that some 'cruel, inhumane or degrading' (CID) treatment of captives is a necessary tool for winning the war on terrorism, then the war is lost already...Today, when the White House lawyers seem preoccupied with contriving a way to stem the flow of possible lawsuits from former detainees, I strongly recommend that they think about another flood of suits, from the men and women in your armed services or the CIA agents who have been or will be engaged in CID practices. Our very rich experience in Russia has shown that many will become alcoholics or drug addicts, violent criminals or, at the very least, despotic and abusive fathers and mothers. If America's leaders want to hunt terrorists while transforming dictatorships into democracies, they must recognize that torture, which includes CID, has historically been an instrument of oppression – not an instrument of investigation or of intelligence gathering...If it isn't stopped, torture will destroy your nation's most important strategy to develop democracy in the Middle East....Finally, think of what effect your attitude has on the rest of the world, particularly in the countries where torture is still common, such as Russia, and where its citizens are still trying to combat it. Mr. Putin will be the first to say: 'You see, even your vaunted American democracy cannot defend itself without resorting to torture.' Off we go, back to the caves."

- **CHENEY PROVIDED "PHILOSOPHICAL GUIDANCE" FOR TORTURE**

On November 20, retired US Army Col. Larry Wilkerson, former chief of staff for former Secretary of State Colin Powell, told CNN that torture may be ongoing in US prison facilities, and that the "flexibility" and "philosophical guidance" for the practice originated with Vice President Cheney. Secretary of Defense Rumsfeld was his "implementer."

- **MAJORITY OF AMERICANS SAY TORTURE OK IN SOME INSTANCES**

According to an AP-Ipsos poll conducted in the US and seven allied countries, 61 percent of Americans believe torture is justified in rare occasions. The number who endorse it under special circumstances in South Korea, France and Britain is considerably higher (*Boston Herald*, Dec. 8).

- **WASHINGTON POST LISTS NAMES OF 444 GUANTANAMO DETAINEES**

For the past four years, *Washington Post* researchers have been piecing together information about exactly who is imprisoned in Guantanamo Bay. They have thus far identified 444 men, 117 of whom have been sent back to their home countries for further detention or release. The list of names with their 32 different nationalities was published on [washingtonpost.com](http://washingtonpost.com) on December 13. Approximately 558 detainees are currently being held in Guantanamo.

- **"CRAZY" PAKISTANI SPENDS FOUR YEARS AT GUANTANAMO**

The December 18<sup>th</sup> *New York Times* described the ordeal of Muhammad Saad Iqbal, a Pakistani national who has spent nearly four years at Guantanamo despite being regarded from the beginning of his captivity as a braggart with a habit of making up stories to make himself seem important, not a terrorist. Having spent long periods in isolation, he tried at least on once occasion to commit suicide and has now been termed "fully crazy."

- **LAWYER CLAIMS FEDERAL COURT ORDER IGNORED**

According to Lt. Cmdr Charles Swift, whose client Salim Abhmed Hamdan faces charges before a Military Commission, Guantanamo authorities are ignoring a federal court order that Hamdan be removed from isolation and put back in the general prison population because of his deteriorating mental health. He also said authorities were seeking to undermine his client's faith in his attorney.

- **AMERICANS PROTEST OUTSIDE GUANTANAMO CAMP**

On December 12, 25 members of Witness Against Torture, who marched 66 miles across Cuba, began a fast outside the gates of the US Naval Station at Guantanamo Bay. They were expressing solidarity with the estimated 32 detainees who were still participating in a 4-month long hunger strike to protest conditions and their indefinite detention (*Boston Globe*, Dec. 13). Frida Berrigan, a daughter of the late Philip Berrigan, was among the protestors.

- **DID BUSH PLAN TO BOMB AL JAZEERA HEADQUARTERS IN QATAR?**

Yes, according to the British newspaper the *Daily Mirror*, but British Prime Minister Tony Blair talked him out of it. Two men involved in leaking a top-secret government memo to the *Daily Mirror* have been charged with violating Britain's Official Secrets Act (*Salon.com*, Nov. 30). The alleged April 2004 incident has been widely reported in Britain, but not in the US. Al Jazeera has been characterized by Secretary of Defense Rumsfeld as "vicious," "inexcusably biased" and abetting terrorists, and its offices in Kabul and Baghdad have been bombed by the US military "by mistake." To get a "less biased" view of the war across to local audiences, the US military is writing its own stories, having them translated into Arabic, and paying Iraqi newspapers to print them. A dozen Iraqi journalists are reportedly being paid several hundred dollars a month to win the hearts and minds of their compatriots (*New York Times*, Dec. 1). The propaganda operation has been contracted out to a Washington-based outfit called the Lincoln Group which was incorporated in 2004 by two young men with no experience in public relations, a 30-year-old Briton and a 31-year-old former US Marine intelligence officer. It also has a \$100 million dollar contract from the Special Operations Command in Tampa to produce short news programs, web-based products and support psychological operations. Senator John Warner, head of the Senate Armed Services Committee, expressed concern about the propaganda program, while Defense Department officials in Baghdad said it was necessary if they were going to get the truth to the Iraqi people (*Boston Globe*, Dec. 2). A long piece in the December 11 *New York Times* describes the

Lincoln Group projects and the role played in the US propaganda campaign by other private and government agencies such as Rendon Group, Army psychological operations units, and the US Agency for International Development (USAID).

- **DID US USE DRONE TO CARRY OUT TARGETED ASSASSINATION?**

That is what NBC reported happened when a house in Miran Shah, Pakistan was destroyed by a missile, reportedly killing Hamza Rabia, an alleged Al Qaeda leader (*Boston Globe*, Dec. 8). Fragments of the missile bore designations which identified it as a Hellfire missile carried by unmanned remote-control US Predator drone aircraft.

- **FORMER 9/11 COMMISSION GIVES FAILING GRADES TO SECURITY EFFORTS**

The 10-member bipartisan 9/11 Commission has recreated itself as a nonprofit group, the 9/11 Public Discourse Project, to pressure the government to carry out needed security reforms. In a report card issued on December 5, it handed out 5 "Fs", 12 "Ds" and two incompletes and only one top gradw – an "A-" for the government's "vigorous effort against terrorist financing." The group was especially critical of ongoing turf issues and the failure of agencies to share intelligence information, the failure of the government to secure chemical and nuclear plants and weapons of mass destruction, the way antiterrorism funds were allocated by the Homeland Security Department, and the failure of the government to create clear standards for the treatment of detainees.

- **GOVERNMENT INFIGHTING PREVENTS DISRUPTION OF MONEY TRAIL**

A report by the Government Accountability Office says that although the Bush Administration has made the cutting off of cash to terrorist groups a prime aim of its "war on terror," turf battles among the various agencies involved and the reliance on poorly-trained private contractors have hurt efforts to disrupt the money trail in 26 priority countries. The State Department disputed the findings, saying that its coordination with the Treasury Department and other agencies "is one of the most successful examples of interagency cooperation" (*New York Times*, Nov. 29).

- **AIRLINE WATCHLIST CONTAINS 80,000 NAMES**

A Swedish newspaper has reported that the watchlist distributed by the US for pre-flight checks now contains some 80,000 names. Sixteen names were listed on the classified list before 9/11. The list has a "no fly" section which keeps passengers off planes and a "selectee" section which requires passengers to go through additional security screening before flying. According to the paper Svenska Dagbladet, 2,000 passengers at the Stockholm airport had to be specially cleared this year because of name matches on "selectee" list (reported in Agence France Presse, Dec. 8). In the United States, the Transportation Security Administration (TSA) has said that the 30,000 passengers who have been delayed for additional screening over the past year because their names mistakenly appeared on a "selectee" TSA list can fill out a "Passenger Identity Verification Form" to be moved to a new "clearance" list which will be

separately checked by airline employees at ticket counters.

- **NEW SCREENING METHODS TO BE USED AT AIRPORTS**

The TSA has announced that airlines will soon be lifting the ban on small metal scissors and other tools and sharp objects in hand luggage despite complaints from some Members of Congress and airport officials. Instead they will be focusing on detecting explosives, and will be conducting random searches of passengers even if they have not been identified as suspicious by the computer system. The new search policy will be more intrusive and comprehensive. A November 17<sup>th</sup> Reuters news agency report says that airports may soon be installing "a new walk-through airport lie detector " which was made in Israel and tested in Russia. "The software will almost always pick up uncontrollable tremors in the voice that give away liars or those with something to hide, say its designers at Israeli firm Nemesysco." The air marshal program is apparently here to stay. On December 7, air marshals at Miami International Airport shot and killed Rigoberto Alpizar, an American citizen from Maitland, Florida. They said they thought the agitated passenger had a bomb in his backpack. His wife said he was mentally ill and had not taken his medication.

- **CHENEY REFUSES TO DIVULGE TRAVEL COSTS**

In keeping with his long-term aversion toward public disclosure of information, Vice-President Cheney is refusing to abide by a law (Section 1353 of Title 13 of the US Code) that requires the annual reporting of travel expenses of more than \$250 received from outside groups. His office says that the requirement applies to the "head of each agency of the executive branch" and since the Office of the Vice President is not an "agency of the executive branch" the reporting requirements do not apply (*Boston Globe*, Nov. 30).

- **BUSH ORDERS MORE EFFICIENCY, BUT NO BASIC CHANGE, IN HANDLING FOIA REQUESTS**

On December 14 President Bush signed an executive order to streamline the processing of FOIA requests while keeping in place former Attorney General John Ashcroft's policy of restricting access to government information if any reason can be cited for doing so. Four million FOIA requests were made by the media and public last year.

- **STATE DEPARTMENT SCREENS OUT CRITICAL VOICES**

According to the December 4 *Boston Globe*, the State Department has been excluding private citizens who are critical of the President's Iraq policy from participating in the US Speakers/Specialist Program, which is overseen by Undersecretary of State Karen Hughes. An anonymous government official said, "There's definitely a political litmus test. You don't have to be a Republican, but you better not have said anything against them."

- **IMMIGRATION ERRORS PLAGUE CRIME DATABASE**

When police check records of people they stop in the NCIC (National Crime Information

Center) database and get a "hit" for an immigration violation, chances are good that they are getting a "false positive." This was the conclusion of a report carried out by the New York University School of Law for the Migration Policy Institute (MPI) entitled "Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-04." Using data released by the Department of Homeland Security as a result of a FOIA lawsuit, the report found that the NCIC database was wrong in 42 percent of the cases in which it identified non citizens stopped by local police as immigration violators. Maine had 90 percent false positives, the highest in the nation. Michael Wishnie, the report's co-author states, "The data suggest that asking police untrained in immigration law to detain people based on bad records is of dubious law enforcement value. This likely damages police credibility, increases their legal liability, and undermines public safety by discouraging immigrant victims and witnesses from cooperating with police" (MPI Press Release, Dec. 8).

- **NEW YORK POLICE INFILTRATE ACTIVIST GROUPS**

On December 22 the *New York Times* reported that New York police had conducted surveillance on and infiltrated anti-war and other protest groups. The piece included visual evidence taken from videotapes. The Police Department disputed the report, claiming that plainclothes police regularly attend protests to maintain order and stop crimes, not to spy.

- **MIAMI POLICE PLANNING DISPLAYS OF SHOCK AND AWE**

"We want that shock. We want that awe. But at the same time, we don't want people to feel their rights are being threatened," said Miami Police Chief John Timoney when describing how the police are going to carry out random "in-your-face" shows of force to keep off guard whatever terrorists may be lurking in the shadows (*Boston Globe*, Nov. 30). Timoney said there was no specific terror threat aimed at the city, but it could be a potential target.

- **DENVER COMMUTER ARRESTED FOR REFUSING TO SHOW ID**

Deb Davis is a Denver commuter whose bus route crosses the property of the Denver Federal Center. On September 26, at the gate of the Federal Center, a security guard boarded the bus and asked her for an ID. She refused, stating that she was just trying to get to work on a public bus and did not have to show an ID. The guard then called his supervisor, and a federal policeman demanded her ID. When she refused to show it, he got a second officer who said everyone had to show an ID when they were asked by the police. When she again said she was simply trying to get to work she was grabbed, jerked out of her seat and off the bus, handcuffed and thrown into the back of a police cruiser. At the Denver Federal Center police station her purse was searched while the two policemen tried to figure out what to charge her with. Eventually they wrote up several tickets, released her, and told her if she ever entered the Denver Federal Center again she would go to jail. On December 9<sup>th</sup> she faced federal criminal misdemeanor charges in a US district court, represented by the ACLU.

## **B. IN THE US CONGRESS**

### **• PATRIOT ACT EXTENDED UNTIL FEBRUARY 3, 2006**

The tumultuous Congressional debate over the re-authorization of the USA PATRIOT was put on hold on December 22 when both Houses agreed to a five weeks' extension of the 16 provisions of the Act that are due to sunset on December 31, 2005. The rest of the Act is already permanent. Congress now has until February 3 to see if it can hammer out a version of the Act acceptable to both Houses. On December 16, by a vote of 52-47, Senate Republicans failed to reach the 60 votes necessary to overcome the filibuster led by Senators Russ Feingold (D-Wisconsin) and Larry Craig (R-Idaho), which prevented the Senate from voting on the version of the Act passed by the House two days before. As news broke that Americans were being spied on by the National Security Agency (see "Executive Actions" above), five Republican Senators joined Democrats to vote against ending the filibuster. In addition to Senator Craig, they were Chuck Hagel (Nebraska), Lisa Murkowski (Alaska), John Sununu (New Hampshire) and Senate Majority Leader Bill Frist, who did so in order to be able to call a new vote at any time. The Senate then approved a six-month extension of the Act, which President Bush supported (after heaping Democrats with blame for refusing to agree to the House version). Wisconsin Republican James Sensenbrenner, Jr., chair of the House Judiciary Committee, insisted on a shorter extension, even though Congress is due to spend much of January debating the Supreme Court nomination of Samuel Alito, Jr. Senator Edward Kennedy (D-MA), a member of the PATRIOT Act conference committee, had pushed to restore more checks and balances to the Act, and finally refused to endorse the PATRIOT Act conference report which was passed by the House (see summary below). In an eloquent statement on December 14 detailing his reasons for wanting to reform the USA PATRIOT Act, Russ Feingold – who had been the only Senator to oppose the PATRIOT Act in October 2001 – gave credit "to the American people who stood up, despite the dismissive and derisive comments of government officials, and said with loud voices – the Patriot Act needs to be changed. These voices came from the left and the right, from big cities and small towns all across the country. So far, over 400 state and local government bodies have passed resolutions calling for revisions to the Patriot Act. I plan to read some of these resolutions on the floor during this debate. There are a lot of them." It could have been a very long filibuster!

### **Highlights of Conference Report on H.R. 3199, The USA PATRIOT Improvement and Reauthorization Act**

- It makes virtually all of the expiring provisions permanent without restoring checks and balances.
- Personal records from businesses, bookstores, libraries, doctors' offices, etc. can still be obtained using a secret FISA order, or a national security letter (NSL) that can be issued by an FBI official without court oversight. These records do not need to be tied to a suspected terrorist or a spy.

- The potentially permanent gag order remains for both secret FISA orders and NSLs, some 30,000 of which have been issued ANNUALLY since 2001. Only the recipient's lawyer can be told that records have been obtained. In the case of NSLs, the gag can be challenged in court, but the court must accept as "conclusive" the government's assertion that disclosure would harm national security, reducing efforts to challenge the gag to window dressing.
- Sneak-and-peek searches, not limited to terrorism cases, have new 30 and 90-day time limits – more window dressing, since these limits can be renewed indefinitely, allowing such searches to remain secret for months or years.
- Secret eavesdropping and search orders are still permitted that do not name a target or a location.
- New death penalties and new crimes are created without adequate Congressional consideration. For instance, the number of contraband cigarettes that qualifies as a federal crime is decreased from 60,000 cigarettes to 10,000. Other new federal crimes: videotaping or photographing bridges, garages, tracks, warehouses if recordings were made with the intent of doing harm. Attacking someone near such facilities with a weapon (the list of weapons includes a small pocket knife or box cutter) is potentially a capital offense. Holding an unauthorized sign at an event designated by the Secret Service as a "national special security event" can lead to a year in prison.
- Right of habeas corpus in some capital cases has been taken away from state judicial authority and given to the US Attorney General.
- New four-year sunset has been added to only three provisions - Section 215 (personal records), 206 ("roving" wiretaps) and "lone wolf" provision (of Intelligence Reform Act), making scores of other new surveillance powers permanent.

• **TORTURE: ONE STEP FORWARD, TWO (OR MORE) STEPS BACK**

On December 16<sup>th</sup>, two days after the House voted 308-122 to endorse language similar to the anti-torture amendment proposed by John McCain in the Senate, the *Boston Globe* announced, "Bush accedes to McCain in backing ban on torture". The *New York Times* on its front page reported a "stinging defeat" for the President and "a particularly significant setback for vice-president Dick Cheney, who since July has led the administration's fight to defeat the amendment." But was it really? The *New York Times* editorial page on the same day did not think so, pointing out that "Attorney General Alberto Gonzales made it crystal clear that the administration would define torture any way it liked" and that the McCain amendment was "attached to a malignant measure – introduced by Senator Lindsey Graham, Republican of South Carolina, and now co-sponsored by Senator Carl Levin of Michigan, the top Democrat on the Senate Armed Services Committee – that would do grievous harm to the rule that the government cannot just lock you up without showing cause to a court." The Graham/Levin amendment strips Guantanamo detainees of most of their habeas corpus rights, making it impossible for them to dispute conditions of their interrogation and confinement. Detainees would only retain the ability to appeal to a federal court to challenge the determination of their enemy combatant status by a Combatant Status Review Panel (where they can't see the

evidence against them or be represented by a lawyer) and to appeal to federal court only when they are sentenced to death or ten years or more in prison by a Military Commission. Furthermore, there is NO appeal for detainees who are determined NOT to be enemy combatants, but are held indefinitely anyway. Termed by the American Bar Association "an enormous change to our fundamental legal system," the Graham/Levin amendment also permits US military tribunals to use evidence obtained through the torture of prisoners in other countries. (By contrast, on December 8 the British high court ruled that information obtained under torture is never admissible evidence). According to Human Rights Watch, this is the first time the US Congress has permitted courts to use confessions obtained through torture. And Senator McCain supports it! McCain's anti-torture amendment was also revised through discussions between the senator and the White House to allow CIA officials accused of torture to argue in court that they believed they were carrying out orders, thereby potentially undermining any prosecution of their actions. According to the December 14<sup>th</sup> *New York Times*, the Army has approved new secret interrogation techniques that are included in a ten-page classified addendum to the new US Army Field Manual on Intelligence Interrogation. Since the McCain amendment states interrogation techniques must conform to those stipulated in the revised US Army Field Manual on Intelligence Interrogation, this could be bad news indeed. On December 19 Congress passed the \$453 billion National Defense Authorization Act containing the McCain legislation and the Department of Defense Appropriations Act to which the McCain and Graham/Levin amendments had been attached. They were signed into law by the President Bush on December 21.

• **HOUSE PASSES DRACONIAN IMMIGRATION BILL**

By a vote of 239 to 182 the US House of Representatives on December 16 passed House Judiciary Committee chair James Sensenbrenner's "Border Protection, Antiterrorism and Illegal Immigration Control Act" (HR 4437). The bill requires employers to check the legal status of their employees through an expansion of the Basic Pilot Employment Verification System and requires a "permission system" to work, laying the groundwork for a national ID system. It requires mandatory detention for non-Mexican immigrants entering the country illegally who are found near the border, and the expulsion without a hearing of any person believed to be an undocumented immigrant who is found within 100 miles of the border. It gives state and local law enforcement "inherent authority" to enforce immigration laws, authorizes the Attorney General to designate groups as criminal street gangs and for their members to be detained and deported whether or not they have committed a crime. It establishes mandatory minimum sentences for non citizens who re-enter the US after being deported. It "bars aliens who are terrorists or security risks from becoming US citizens" (US Newswire, Dec. 16). It orders the further militarization of the Mexican border and the building of a 698-mile-long fence. The bill does not incorporate the "guest worker" program favored by President Bush. Neither does the final version include the provision advanced by the Republican right: ending the 14<sup>th</sup> Amendment's constitutional guarantee of citizenship

for everyone born in the country. In 1898 the Supreme Court had ruled that regardless of the legal status of parents, birth in the US constituted "a sufficient and complete right to citizenship" (*New York Times*, Dec. 8). At the last minute a provision was dropped which would make it a federal crime to live in the US illegally, turning millions of undocumented non citizens into felons, and criminalizing support given them by their families, friends, churches and other organizations. Thirty-six Democrats voted for the bill, and 17 Republicans opposed it – some because they said it did not go far enough. It moves on to the Senate in the new year – where it must be stopped!

### **C. IN THE COURTS**

#### **• LATEST MOVES IN PADILLA CASE CAUSE MELTDOWN OF "ENEMY COMBATANT" STRATEGY**

In an effort to prevent the case of Jose Padilla from again being heard by the US Supreme Court, the Bush Administration on November 22 brought criminal charges against him, ordering him to be moved from the military brig where he has been confined as an "enemy combatant" since mid 2002 and handed over to the civilian criminal justice system in Miami. In the transition, John Ashcroft's "dirty bomber" who later was accused of wanting to blow up apartment buildings has been downgraded in the Bad Guy stakes. He is being charged with being part of a "North American support cell" for jihadist campaigns in Afghanistan and elsewhere overseas. The charges make no mention of Al Qaeda or involvement in any US-based plots. The November 24<sup>th</sup> *New York Times* reported that the government decided it could not use evidence obtained under torture from two Al Qaeda operatives, who were apparently the source for the "dirty bomb" information. After the government's turnabout in the case involving the 35-year-old US citizen from Chicago, the plot took another unexpected turn. The conservative US Court of Appeals for the Fourth Circuit, which had ruled last September that the president did have the right to treat American citizens as "enemy combatants" and deprive them indefinitely of constitutional due process, refused to go along with the executive branch program. On December 21, a three-judge panel of the Fourth Circuit Court declined to allow Padilla to be transferred from military custody to civilian law enforcement on the grounds that the government appears to be trying to evade having the US Supreme Court make a definitive ruling in the case. In scathing language its opinion calls into question the "credibility" of the original allegations against Padilla and the government's overall legal strategy: "For, as the government surely must understand...its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake – an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants...can, in the end, yield to expediency with little or no cost to its conduct of the war against terror – an impression we would have thought

the government likewise could ill afford to leave extant. And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts." With the courts and executive branch deadlocked, Padilla remains entombed on the naval brig off South Carolina.

• **IN STUNNING RULING JURY ACQUITS AL-ARIAN OF TERROR CHARGES**

On December 6, a Tampa jury refused to convict former South Florida University professor Sami Al-Arian and his three co-defendants of any of the 51 criminal counts against them. The ruling was especially stunning because Al-Arian's attorney called no witnesses to rebut the 80 government witnesses and evidence from the 20,000 hours of taped conversations presented by the prosecution over a period of five months to make its case that Al-Arian was a member of a prohibited terrorist group, Palestinian Islamic Jihad, and that he and his co-defendants constituted a terrorist cell. Defense attorney William Moffitt told the jury that the government had not made the case that the defendants were involved in anything other than protected First Amendment activity. Former Attorney General John Ashcroft had repeatedly used the indictment of Al-Arian on February 20, 2003 to justify new powers given the government under the USA PATRIOT Act. After his indictment Al-Arian was fired from the university. After nearly 3 years in jail, he remains in prison while the government decides whether to bring a new case against him based on lesser charges over which the jury deadlocked. Officials have said if the government decides not to go for a new trial, it would probably bring separate immigration charges that require a lower burden of proof, and deport Al-Arian, a permanent US resident and stateless Palestinian (*New York Times*, Dec. 8).

• **ACLU FILES FIRST EVER SUIT AGAINST FORMER CIA DIRECTOR TENET**

On December 6, the ACLU filed a lawsuit, *El-Masri v. Tenet*, in a US district court in Virginia on behalf of Khaled El-Masri, a German citizen who was victimized by the CIA's policy of "extraordinary rendition." The lawsuit charges that George Tenet and other CIA officials violated US law and international human rights laws when, in December 2003, they had the 42-year-old El-Masri kidnapped off a bus in Macedonia where he was on holiday. He was then detained incommunicado, beaten, drugged, and transported to a secret CIA prison in Afghanistan where he was subjected to coercive interrogations and prevented from contacting a lawyer or his family. After months in inhuman conditions, he was dropped off on a hillside in Albania with no explanation. According to the ACLU, after the CIA realized they had abducted and detained an innocent man, El-Masri remained in detention for an additional two months. El-Masri, a father of five who has never been charged with any crime, had planned to be present at the press conference announcing the lawsuit and to discuss his experience with Members of Congress but he was denied entry to the US and sent back to Germany on the next available flight. Also named in the lawsuit are private American contractors who helped the CIA ferry its kidnapped victims around the globe, including Massachusetts-based Premier Executive Transport Services and Richmor Aviation, which leased a Gulfstream jet owned by Red Sox part-owner Phillip Morse to the CIA

(*Boston Globe*, Dec. 11).

• **US STUDENT WHO ALLEGED TORTURE CONVICTED OF PLOTTING TO KILL BUSH**

Ahmed Omar Abu Ali, a 24-year-old American student from Virginia who went to Saudi Arabia to study in 2002, was convicted on November 22 of planning to assassinate President Bush and providing support to Al Qaeda. Ali, who was arrested in Saudi Arabia in June 2003, claims to have been tortured into making a false confession. Evidence he says was extracted under torture was admitted into the Virginia court. He was also questioned by the FBI for four days while in the jail in Saudi Arabia. The FBI testified it did not read him his Miranda warnings or stop questioning him once he asked for a lawyer because their intention was to gather intelligence, not build a case against him. He faces life in prison.

• **INNOCENT DETAINEES REMAIN IMPRISONED AT GUANTANAMO**

A federal judge ruled on December 22 that it was illegal for the Bush Administration to hold two Chinese Uighurs who have been determined not to be "enemy combatants" at Guantanamo Bay. But Judge James Robertson also ruled that the court could not tell the President where to send them, and so they remain in their cells at Guantanamo Bay where they have been for the last four years. Because they cannot be sent back to China without fear of persecution, their Boston-based attorney Sabin Willett had argued they should either be allowed to live in the US or housed in the civilian portion of the camp until a country could be found which would take them.

• **JUDGE PREPARES FOR DEATH PENALTY PHASE OF MOUSSAOUI HEARING**

Federal judge Leonie Brinkema has chosen six sites where survivors of the 9/11 attacks can watch the death penalty phase of the Zacarias Moussaoui case on close-circuit television. Moussaoui has pleaded guilty to six conspiracy charges, but says he was not part of the 9/11 Al Qaeda attack because he was "not 9/11 material." His defense lawyers have been unable to get access to testimony from detained members of Al Qaeda which they believe can bolster his defense. But despite this, plans for the death penalty phase of the case are proceeding (*Boston Globe*, Nov. 23).

• **FEDERAL JUDGES CRITICIZE INCOMPETENCE OF IMMIGRATION JUDGES**

Several federal court judges who hear appeals from immigration courts have harshly criticized immigration judges for their "intemperate and humiliating remarks" and "disturbing pattern" of misconduct in rulings in asylum and other immigration cases (*New York Times*, Dec. 26). In 2002 former Attorney General Ashcroft had "streamlined" immigration courts by getting rid of judges seen as "liberal," according to a former member of the Board of Immigration Appeals. Federal judges have said that decisions by some immigration judges are "literally incomprehensible" and "incoherent", and show a "lack of familiarity with relevant foreign cultures." Immigration attorneys have

also been attacked by judges on the federal Ninth Circuit Court of Appeals for routinely failing to make court appearances or file documents on time (*The Recorder*, Nov. 11).

#### **D. IN THE COMMONWEALTH**

##### **• WE HAVE ANOTHER MONTH TO PASS RESOLUTION AFFIRMING CIVIL LIBERTIES**

It does not seem likely that the Resolution Affirming the Civil Rights and Liberties of the People of Massachusetts (H.B. 1881) will come to a vote at a special session before the state legislature resumes its session in early January. But we should be prepared to push hard for the passage of this Resolution after that date, since Massachusetts STILL has the opportunity to influence the delayed vote on the reauthorization of the USA PATRIOT Act! Please call your state senator and representative and ask them to support H.B. 1881. If you don't know who your state rep. or senator is, go to [www.wheredoivotema.com](http://www.wheredoivotema.com). You can get his or her phone number from [www.mass.gov/legis](http://www.mass.gov/legis) or call the State House at 617 722 2000. Let's start the New Year off with a victory for civil liberties!

##### **• MBTA VENDORS ARRESTED BY JTTF**

The Boston Joint Terrorism Task Force, led by the FBI, carried out a "national security" background check of some 65 out of 430 vendors on MBTA property, and found nine with administrative immigration violations, all of whom were arrested. Hassan Raiss, a Moroccan living in Stoneham, was taken into federal custody after an MBTA police detective tricked him by saying he had to come to MBTA headquarters to speak about his car registration. When he arrived he was arrested by Bureau of ICE officials (*Metro*, Dec. 7). According to Ali Noorani, executive director of the Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA), the operation would result in "the continued erosion of trust between law enforcement and the immigrant community" (*Metro*, Dec. 8).

##### **• IMMIGRATION ROUND UP IN NEW BEDFORD CAUSES PANIC**

On December 5, the Bureau of ICE and the Coast Guard raided fish processing plants in New Bedford and arrested 13 men who could not prove they were in the country legally. According to a December 9 *Boston Globe* editorial, "News of the raids spread via cellphones, and some immigrants fled their workplaces – an act that caused some to be fired... there's no victory in deporting a handful of immigrants whose only crime is trying to earn a living, especially when businesses need their labor."

##### **• MASSACHUSETTS RESIDENTS SUE TO END CITIZENSHIP DELAYS**

Twenty-nine lawsuits have been filed by Massachusetts immigrants against the Department of Homeland Security and US Citizenship and Immigration Services, seeking an end to the long background checks that have held up their applications for

citizenship for a year or two after their initial interview. Under federal law, a ruling on a citizenship application is supposed to be made within 120 days of an interview and examination. People with Middle East backgrounds appear to be facing the longest waits (*Boston Globe*, Dec. 17).

- **STUDENT FABRICATED STORY**

A student at UMass-Dartmouth who told a professor that he was visited at his home by agents of the Department of Homeland Security after he tried to borrow Mao's "Little Red Book" from the library made the story up. It was first reported in the *New Bedford Standard Times* (*Boston Globe*, Dec. 24).

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