

**CIVIL LIBERTIES UPDATE
NEWSLETTER OF THE ACLU OF MASSACHUSETTS
CIVIL LIBERTIES TASK FORCE**

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RIGHTSWATCH

A. EXECUTIVE ACTIONS

• **DESPITE STUMBLES ADMINISTRATION IS CONSOLIDATING ITS POWER**

The Bush Administration may have faced some setbacks recently, but on the matters it really cares about – reauthorizing the USA PATRIOT Act and getting a Congressional sanction for the President's "inherent authority" to spy on Americans without a warrant – things are going its way (*see "In the Congress", below*). In the April 2006 *Atlantic Magazine*, James Bamford (author of a book about the NSA, *The Puzzle Palace*) writes, "NSA personnel, the customs inspectors of the information superhighway, have the ultimate goal of intercepting and reviewing every syllable and murmur zapping into, out of, or through the United States. They are close to achieving it."

• **SANDRA DAY O'CONNOR WARNS OF ROAD TO DICTATORSHIP**

On March 9 former Supreme Court justice Sandra Day O'Connor told a group of corporate lawyers at Georgetown University that threats to the judiciary "pose a direct threat to our constitutional freedom." She alluded to statements made by former Republican House leader Tom DeLay and Senator John Cornyn on the Terry Schiavo case. Pointing to current and former autocracies as evidence of where interference with

the judiciary could lead, she said: "It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings." According to the March 13 *UK Guardian*, NPR's Nina Totenberg was the only reporter in the audience, and only she and the *Chicago Daily Law Bulletin* immediately publicized the speech. The March 19 *New York Times* mentioned the speech and said that Supreme Court Justice Ruth Bader Ginsburg had made a similar one, stating that the courts were a safeguard "against oppressive governments and stirred-up majorities." Justice Ginsburg also reported that she and Justice O'Connor had received Internet death threats for citing foreign court rulings in their decisions.

• **JUSTICE DEPARTMENT REPORT REVEALS EAVESDROPPING VIOLATIONS**

The semi annual report compiled by Justice Department Inspector General Glenn Fine on problems related to the USA PATRIOT Act revealed that more than 100 possible eavesdropping violations had been reported to the intelligence oversight board over the past two years, including cases where FBI agents tapped the wrong phone, collected the wrong emails, and listened to conversations after warrants had expired (*Washington Post*, March 9). The report, which was released after the reauthorization of the PATRIOT Act by Congress, analyzed the mistakes made by the FBI in regard to the Muslim attorney Brandon Mayfield's fingerprint identification. It stated that Mayfield's house and office were searched under a FISA warrant and that a Section 213 "sneak and peek" warrant was not used in his case. The Inspector General "did not find evidence that the FBI misused any of the provisions of the Patriot Act in conducting its investigation of Mayfield. However, the increased information sharing permitted by the Patriot Act amplified the consequences of the FBI's fingerprint misidentification in the Mayfield case." The report denied that Mayfield's religion was a factor in the case, or that he was mistreated during his confinement. Fine reported that an investigation was underway into the Department's use of material-witness warrants to detain suspects, its use of National Security Letters and its treatment of antiwar protestors. According to Rep. John Conyers Jr. (D-MI), "Despite the Bush Administration's attempt to demonize critics of its anti-terrorism policies as advancing phantom or trivial concerns, the report demonstrates that the independent Office of the Inspector General has found that many of these policies indeed warrant full investigations." The ACLU welcomed the report but said "too many of the government's powers are shrouded in secrecy to be confident this report presents a full picture of possible government abuses. An innocent American who may have had his or her home searched under a delayed notification 'sneak and peek' warrant, or had their medical records seized under Section 215 of the Patriot Act, would never know that these awesome powers have been misused against them and therefore would not have any reason to report them to the Inspector General." It urged the Inspector General to review the NSA program.

• **PARTIAL REVIEW OF NATIONAL SECURITY AGENCY UNDERWAY**

The Office of Professional Responsibility of the Justice Department, headed by H. Marshall Jarrett, is undertaking an investigation of the role played by Justice

Department lawyers in NSA spying without warrants. But the Department says it will not look at whether the program was legal, but rather assess "whether department lawyers complied with their professional obligations" (*New York Times*, February 16).

- **FBI SEARCHES FOR SOURCES OF LEAKS; MEDIA UNDER ATTACK**

Journalists and their possible government sources are the targets of FBI investigations involving polygraphs and threats that reporters could be prosecuted under the espionage laws. Federal employees have received letters threatening severe consequences if they discuss unclassified issues related to the NSA program and other national security matters. According to the executive editor of the *New York Times*, Bill Keller, "I don't know how far action will follow rhetoric, but some days it sounds like the administration is declaring war at home on the values it professes abroad." The FBI is investigating the *Sacramento Bee* about stories it ran involving the Lodi terrorism case.

- **NATIONAL SECURITY WHISTLEBLOWERS SAY LIVELIHOOD DESTROYED**

Five soldiers and civilians who had attempted to expose fraud or abuse in their jobs with the FBI, NSA, Defense Department and Energy Department told a Congressional Committee that they had been "retaliated against, in some cases by having their security clearances revoked or their careers ruined" (Truthout, February 21). Specialist Samuel Provance, who revealed that senior officers had covered up detainee abuse at Abu Ghraib, was demoted, humiliated, placed under a "gag order" and lost his security clearance. Russell Tice, who was one of the sources for the *New York Times* expose of warrantless domestic spying by the NSA, said the Defense Department harassed him in various ways, including by spreading rumors that he had bipolar disease. Sibel Edmonds, the translator who reported her concerns about sabotage, corruption and incompetence to her seniors in the FBI, was gagged. The Supreme Court agreed with lower courts that her lawsuit suing the FBI would compromise "state secrets." She has founded the National Security Whistleblowers Coalition.

- **TURF ISSUES STILL PLAGUE INTELLIGENCE AGENCIES**

Intelligence agencies still need to be better coordinated and transcend bloated bureaucracy and interagency rivalry, as well as overlapping responsibilities with a failure to clearly define roles, according to John Brennan, interim director of the National Counterterrorism Center. Former Clinton administration National Security Council official Steven Simon said, "If people weren't fighting each other or scrambling for resources or trying to clarify who does what, they could be doing more to make us safe" (*New York Times*, February 28). Two agencies which are having a difficult time defining their distinctive roles are the CIA's Counterterrorist Center and the National Counterterrorism Center (which makes its classified Web site accessible to 5,000 government analysts).

- **NEW NATIONAL SECURITY DIVISION SET UP IN DEPARTMENT OF JUSTICE**

The reauthorized USA PATRIOT Act has established a National Security Division

within the DOJ headed by a new Assistant Attorney General for National Security. On March 21 Kenneth Wainstein, US Attorney for the District of Columbia, was nominated for that position and \$67 million in funds has been requested to fund its activities and the salaries of 225 employees. The new division is supposed to help enable more vigorous oversight of the intelligence community.

- **FBI TARGETS PEACE GROUP FOR ADVOCATING "PACIFISM"**

Documents acquired by the ACLU under the Freedom of Information Act show that the Pittsburgh Joint Terrorism Task Force and FBI regarded the Pittsburgh-based Thomas Merton Center for Peace and Justice as "a left-wing organization advocating, among many political causes, pacifism" (*Boston Globe*, March 15). Other memos detail surveillance of the Center during leaflet distribution and antiwar demonstrations in 2002 and 2003. One memo stated: "A female leaflet distributor who appeared to be of Middle Eastern descent inquired if [confidential source's name withheld] was an FBI agent. No other TMC participants appeared to be of Middle Eastern descent."

- **FBI STILL ASPIRES TO COMPUTER OVERHAUL**

A report by the Justice Department has concluded that it could take another half billion dollars to carry out an overhaul of FBI computers, but even then the agency still might not be able to share files adequately. Last year it scrapped the Virtual Case File system, which had cost \$170 million. Lockheed Martin is likely to get the contract for the new system.

- **CIVIL LIBERTIES BOARD HAS YET TO MEET**

More than a year after it was created in the intelligence overhaul following the 9/11 Commission report, the Privacy and Civil Liberties Oversight Board has not yet met or been given adequate funding. The board chairwoman, Carol Dinkins, is a longtime friend of the Bush family and treasurer of Bush's first campaign for governor of Texas. Its lone Democrat, Lanny Davis, has been a Bush friend since Yale days. Its vice chair, Alan Raul, who was general council for the Agricultural Department, is the only member with civil liberties expertise. Other members include the former Bush Administration Solicitor General Theodore Olson whose wife died on 9/11, and a retired Air Force general and chief security officer at General Electric, Francis X Taylor, according to the February 20 *New York Times*.

- **HUNTING ACCIDENT UNDERSCORES CHENEY'S PENCHANT FOR SECRECY**

After shooting his hunting partner in mid February, the vice president's inclination was to do what he has always done: hunker down behind a wall of secrecy. On March 25, 2003 Bush signed Executive Order 13292 giving the vice president the same power the president possessed on matters of classification. The number of classified documents has risen sharply since then: it now stands at 15.7 million, according to the February 17 *Boston Globe*. It was recently discovered that the Pentagon, CIA, Defense Intelligence

Agency and Justice Department have taken nearly 10,000 documents totaling 55,000 pages from the open shelves at the National Archives and re-classified them. The court system is also becoming ever more secret. The AP reported on March 5 that over the last three years, more than 5,000 federal defendants have had their records sealed after they entered into plea bargains.

- **AMERICANS WORRY ABOUT GOVERNMENT SECRECY**

According to a mid March Scripps Howard News Service poll, 59 percent of Americans think the federal government is excessively secretive, and 45 percent were as critical of secrecy in state and local governments. 62 percent said public access to government records was essential to good government. Nearly everyone supported the Freedom of Information Act.

- **FREEDOM OF INFORMATION ACT REQUESTS TAKE TOO LONG**

The Associated Press has found lengthy backlogs in getting information in response to Freedom of Information Act requests (the National Archives on average takes 1,631 days to respond), and a clamp down on the amount of information released by the FBI, CIA and Defense Departments. About 30 percent of federal agencies had failed to submit their required annual FOIA reports to the Justice Department.

- **NEWLY-RELEASED DOCUMENTS SHED LIGHT ON WHO IS AT GUANTANAMO -- AND WHY**

In response to a Freedom of Information Act request from Associated Press, US officials released 5,000 documents related to the Combatant Status Review Tribunal hearings at Guantanamo Bay. Many of the detainees who appear before the panels dispute being classified as "enemy combatants" and tell of being "kidnapped" for bounties and of confessions made as a result of torture. The often surreal nature of what passes for "due process" at Guantanamo is exposed by these documents. According to the March 6, 2006 *New York Times*, "An Afghan referred to by the single name Muhibullah denied accusations that he was either the former Taliban governor of Shibarghan Province or had worked for the governor. The solution to his case should have been simple, Mr. Muhibullah suggested to the three American officers reviewing his case: They should contact the Shibarghan governor and ask him. But the presiding Marine Corps colonel said it was really up to the detainee to try to contact the governor... 'How do I find the governor of Shibarghan or anybody?' the detainee asked. 'Write to them,' the presiding officer responded. 'We know that it is difficult but you need to do your best.' 'I appreciate your suggestion, but it is not that easy,' Mr. Muhibullah said." On March 20 the *Boston Globe* printed its analysis of 366 transcripts of military hearings. It found that 259 detainees proclaimed their innocence; 107 admitted they had been fighters (many enlisted to fight against the Russians in the Chechnyan conflict); 53 acknowledged being at a camp associated with Al Qaeda; 28 said they had worked for the Taliban; 26 went to Afghanistan to either wage jihad or to fight against the Northern Alliance; 2 fought for money; and 2 embraced the label of "enemy combatant."

- **PENTAGON LAWYER CAMPAIGNED AGAINST INTERROGATION METHODS**

According to the February 27 *New Yorker*, Alberto Mora, a Republican appointee and Bush supporter who served as general counsel of the Navy until his retirement last January, sharply disagreed with the Administration's interrogation policy, saying it violated the law, verged on torture and could expose senior officials to prosecution. Mora repeatedly urged the Pentagon's general counsel to put a stop to authorized techniques that "could rise to the level of torture, although the intent surely had not been to do so" and asked, "had we jettisoned our human rights policies?" (*New York Times*, February 20). Secretary of Defense Rumsfeld finally retracted some of the interrogation techniques when Mora said he was planning to issue a formal memorandum on the matter.

- **UN DEMANDS US SHUT GUANTANAMO**

The final 54-page report written by a UN-appointed independent panel of experts on torture released in mid February states that the US has been using practices that "amount to torture" at Guantanamo and demands that the US permit a "full and independent investigation" at Guantanamo and allow the United Nations access to other detention centers including its secret sites. One of the report's authors told the Associated Press that Guantanamo detainees should be released or brought before an independent court in either the US, their countries of origin or an international tribunal (*The Metro*, February 17-19, 2005). On February 16 UN Secretary-General Kofi Annan stated that "I think sooner or later there will be a need to close the Guantanamo [camp], and I think it will be up to the government to decide, and hopefully to do it as soon as possible" (Associated Press, February 17). Secretary of Defense Rumsfeld called the UN Secretary-General "flat wrong" and maintained that "we have several hundred terrorists – bad people, people that if let back out on the field would try to kill Americans. That's just a fact." (*Boston Globe*, February 18). White House spokesman Scott McClellan dismissed the report and insisted the US had always treated detainees humanely: "We know that Al Qaeda detainees are trained in trying to disseminate false allegations." (*New York Times*, February 17). The February 18th *New York Times* editorialized about the UN report: "The Bush administration offered its usual weak response, that President Bush has decided that there is a permanent state of war that puts him above the law. And that is exactly the problem: by creating Guantanamo outside the legal system for prisoners who, according to Mr. Bush, have no rights, the United States is stuck holding these 500 men in perpetuity. The handful who may be guilty of heinous crimes can never be tried in a real court because of their illegal detentions. A vast majority did nothing or were guilty only of fighting on a battlefield, but the administration refuses to sort them out...Now the only solution is to close Guantanamo Bay and account for its prisoners fairly and openly. The United States then needs a prison policy that conforms to the law and to democratic principles."

- **ARCHBISHOP TUTU CALLS FOR GUANTANAMO TO BE SHUT DOWN**

On February 17 South African Archbishop Desmond Tutu told the BBC that Guantanamo was a stain on the character of the United States and should be shut down. He said the rule of law had been "subverted horrendously" and that the muted public outcry, especially in America, was "saddening."

- **FORMER DETAINEE PUBLISHES BOOK ABOUT GUANTANAMO**

A book by former British detainee Moazzam Begg entitled *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back* (Free Press) was released in the UK on March 6, 2006. It gives what is to date the most revealing look at both Bagram and Guantanamo camps and the lawless way the US is fighting its "war on terror". It will be published in the US by the New Press this fall.

- **NEW YORK TIMES: BAGRAM RIVALS GUANTANAMO**

The February 26th *New York Times* featured an expose of conditions at the US military-run Bagram prison north of Kabul, Afghanistan, where 500 "terror suspects" have been declared to be enemy combatants and held in conditions of "rigorous secrecy" for up to three years in total "legal limbo." According to former detainees and military sources, "Men are held by the dozens in large wire cages, sleeping on the floor on foam mats," rarely saw daylight, and often used plastic buckets for latrines. The horrific physical abuse that led to at least two deaths in December 2002 has reportedly declined since an Army investigation. Many former prisoners say they were wrongly detained as a result of personal vendettas or the failure to pay bribes demanded by local police. They have no access to lawyers and are not told why they are being held. The Americans are hoping to transfer the 450 Afghan detainees being held at Bagram and 100 Afghans now held at Guantanamo to a former Soviet jail outside Kabul which contractors are refurbishing as a high security prison.

- **PENTAGON SAYS BAGRAM DETAINEES HAVE "BEST POSSIBLE LIVING CONDITIONS"**

This was Colonel James Yonts' response to the *New York Times* report. Col. Yonts, who is the US military spokesman in Kabul, said "we hold them for two reasons: to question them and get intelligence from them, or because they've committed violence against the coalition or the people of Afghanistan" (*Boston Globe*, February 27).

- **AMNESTY REPORT SAYS DETAINEE ABUSE CONTINUES IN IRAQ**

According to "Beyond Abu Ghraib: Detention and Torture in Iraq," an Amnesty International Report released on March 6, the US military and its allies are holding some 14,000 prisoners in Iraq who are being deprived of "their right to challenge the lawfulness of their detention before a court" and in some cases are being subjected to torture and other abuse. Detainees held in facilities controlled by Iraqi authorities have been beaten with plastic cables and subjected to electric shocks. The US military and British Foreign Office denied the allegations (*New York Times*, March 7).

- **US TO ABANDON ABU GHRAIB AS NEW PICTURES SUGGEST EXTENT OF ABUSE**

With hundreds of graphic pictures of prisoner abuse and torture at Abu Ghraib now featured on www.salon.com, the US has announced that it will be turning over the notorious prison to the Iraqi government, and relocating its Abu Ghraib detainees to a new detention center being constructed at Camp Cropper, a military base at Baghdad airport where "high-value detainees" are currently being held. Among the pictures on the salon.com website are those of detainees with what appear to be bloody dog bites.

- **ANOTHER ABU GHRAIB TRIAL ATTEMPTS TO PIN ABUSE ON LOW-RANKING SOLDIER**

Sergeant Michael Smith, an army dog handler at Abu Ghraib, has been charged with using his unmuzzled dog to threaten and assault detainees. Sgt. Smith has been quoted in an Army report as saying the dogs were supposed to be muzzled during interrogations but "from what I was told, we weren't doing interrogations. Having the dogs bark at detainees was psychologically breaking them down for their interrogation purposes" (*Boston Globe*, March 13). A witness at Sgt. Smith's trial, Sgt. John Ketzer, said there was a competition to frighten detainees into soiling themselves.

- **WHO IS THE ICONIC FIGURE AT ABU GHRAIB?**

After the *New York Times* identified him as Ali Shalal Qaissi, a neighborhood mayor in Baghdad in a March 11, 2006 profile, Salon.com disputed Qaissi's identity as the man at Abu Ghraib standing hooded in a black covering on a box with wires connected to his fingers. A week later Mr. Qassis admitted he was not the man in the photograph, but maintained that he had been treated in the same way. His lawyer Susan Burke said, "The sad fact is that there is not only one man on the box."

- **SENIOR CONGRESSIONAL AIDE REPRIMANDED**

Captain Christopher Brinson, deputy chief of staff for Rep. Mike Rogers (R-AL), led a platoon of Army reservists that included Charles Graner, Jr who received 10 years in prison for his role in the Abu Ghraib abuse. Eight days after Graner was photographed grinning behind a pyramid of naked prisoners, Brinson sent him a memo praising him for "doing a fine job." In January 2006 Brinson received a reprimand from the Army. His lawyer declined to discuss the reason for the reprimand, but said he was unaware of the abuse taking place at the prison (*Boston Globe*, March 11).

- **ACLU ASKS UN HUMAN RIGHTS COMMITTEE TO HOLD US ACCOUNTABLE**

Citing instances where the US government had violated the International Covenant on Civil and Political Rights, the ACLU on March 13 urged the 18-member UN Human Rights Committee "to join us in our effort to hold the US government accountable."

- **HALLIBURTON WINS \$385 MILLION CONTRACT TO BUILD PRISONS FOR IMMIGRANTS**

Halliburton's subsidiary KBR won a contract to build new detention facilities for the Bureau of ICE to house immigrants who are being arrested in record numbers. In the Southern District of Texas alone, there was a 345 percent increase in immigrant prosecutions between 2003 and 2004.

- **OSCAR-WINNING ACTOR BARRED FROM US**

The Irish actor Ruaidhri Conroy, star of the action short "Six Shooter" which just won an Academy Award, was detained at Los Angeles airport for a day when he tried to enter the country to attend the Academy Awards ceremony in Hollywood. He was then escorted onto a plane and sent back to Ireland. Why? He had overstayed a visa by two days in 1998 when he was in New York acting in a play.

- **SCHOOL BUS DRIVERS TRAINED TO SPOT TERRORISTS**

A Department of Homeland Security program called "School Bus Watch" (a subset of "Highway Watch") intends to train 600,000 school bus drivers around the country to look out for terrorists. Stating that the more people watching, the safer the community would be, a trainer in Norfolk, Va. told 250 drivers that "the terrorist is not going to be able to do some of their casing and rehearsal activity without being detected by one of you" (*New York Times*, February 9).

- **NEW YORK POLICE USED 'PROACTIVE ARRESTS' AGAINST PROTESTORS**

An internal report into the policing of demonstrations, including the World Economic Forum protest in 2002, reveals that the New York Police Department used undercover officers to infiltrate political gatherings and "distribute misinformation within the crowds" (*New York Times*, March 17). Demonstrators who were arrested were held for up to 40 hours without seeing a judge.

B. IN THE US CONGRESS

- **REAUTHORIZED PATRIOT ACT SIGNED INTO LAW**

On March 9, a day before 16 provisions of the USA PATRIOT Act were due to expire, President Bush signed into law H.R. 3199 (the USA PATRIOT Improvement and Reauthorization Act) and legislation containing minor changes offered by Senator Sununu of New Hampshire (passed separately as S. 2271). The legislation found its way to his desk after a 89-10 vote in the Senate on March 2 and a 280-138 vote in the House on March 7. Inexplicably, both Massachusetts senators supported the bill that was opposed on civil liberties grounds by Senators Akaka (D-HI), Bingaman (D-NM), Byrd (D-WV), Feingold (D-WI), Harkin (D-IA), Jeffords (I-VT), Leahy (D-VT), Levin (D-MI), Murray (D-WA), and Wyden (D-OR). But all ten Massachusetts House members opposed it. Under special rules the bill needed a two-thirds majority to pass in the House, and only received two votes more than necessary. The opposition to the reauthorized Act was led by Senator Feingold, who stated that "Americans want to defeat terrorism, and they want the basic character of this country to survive and

prosper. They want both security and liberty, and unless we give them both – and we can if we try – we have failed."

The reauthorized PATRIOT Act resoundingly fails to balance security and liberty and makes only a minimal effort to restore checks and balances.

The positive features are these:

- The original PATRIOT Act's overbroad definition of domestic terrorism remains but assets can only be forfeited if the organization or individual is involved in a serious federal crime.
- Any business or third party that receives a National Security Letter or Section 215 order requiring it to hand over the records of employees or customers has the right to consult with a lawyer and decide whether to challenge the demand.
- There are new hoops for the FBI to jump through to get a Section 215 order to obtain "tangible things" from libraries, bookstores and other businesses. These include the requirement that they provide "a statement of facts" demonstrating the relevance of their request and detailing the "tangible things" they are after to the FISA court. The Director of the FBI may delegate authority to request such an order either to the Deputy Director or the Executive Assistant Director for National Security but no further.
- "Minimization" procedures have been added to Section 215, limiting the government's retention of information about people with no connection to a suspected spy or terrorist.
- Libraries which are not Internet Service Providers cannot be issued with National Security Letters (which are written without any judicial oversight).
- The Justice Department must annually report on the number of times it has used Section 215 and the Inspector General of the Justice Department will report on any abuses.

Several provisions that sound promising are in fact cosmetic. For instance:

- Although the new language provides for the right to counsel and the right to challenge the gag order accompanying Section 215, it does so under terms that are illusory. The gag remains in place for a year. Only then can it be challenged. All a high-level government official has to say is that the disclosure would harm national security or diplomatic relations for the gag to be upheld by a court. The court must consider this assertion "conclusive" unless it can be somehow be demonstrated that it was made in bad faith.
- The same kind of language applies to gag provisions that accompany National Security Letters, despite a ruling that NSLs were unconstitutional in a case the ACLU won in federal court.
- The Act continues to allow records that are NOT connected to an international terrorist or spy to be obtained using either Section 215 or a National Security letter, despite the additional requirements in the application process for a Section 215 court order (there is no court involved in the issuing of NSLs).
- New time limits have been added to "sneak and peek" searches. But the initial 30-day period under which they can be kept secret can be indefinitely extended by the court, and secret search warrants can be issued by the court to search any home or office

without any link to terrorism whatsoever. (Nearly 90 percent of the sneak and peek warrants that have been obtained by the Bush administration involve cases that have nothing to do with terrorism).

- There is some enhanced court oversight of government secret eavesdropping and secret search orders without a target or location being named. But law enforcement can still obtain what amounts to a blank or general warrant, allowing the government to eavesdrop on a telephone conversation or secretly search a home or business and fill in the names and locations later. There is still no requirement that the government ensure that a suspect is using the telephone it is monitoring.

Some amended provisions are entirely punitive:

- National Security Letters that are issued by the FBI for financial records and internet or phone logs without a court order are now termed National Security Subpoenas. Businesses that do not comply can be held in contempt by courts.
- Any employee who intentionally discloses a demand for such records can go to jail for five years.

Some worrying new provisions have been added to the Act:

- Under Title VI, the "Secret Service Authorization and Technical Modification Act," the Secret Service is expanded to include a new uniformed police division. The Secret Service can limit access to "national special security events" and arrest demonstrators who enter a security perimeter or restricted building and charge them with felonies that can lead to fines and terms of up to ten years in prison. It is now a federal crime to produce, possess or transfer a false identification document that can be used to gain access to any restricted area. This section can have a dire impact on free speech, permitting the Secret Service to create wide "exclusion zones" even when "protected persons" such as the President are not expected to be present.
- The Act creates a new National Security Division in the Department of Justice.
- New death penalties have been added to federal crimes linked to terrorism without adequate consideration by Congress.
- Section 507 permits the US Attorney General to certify that a state's system of providing counsel to indigent criminal defendants is adequate in capital cases, a power that had been previously possessed by the federal courts.
- Section 402 forces more organizations and charities to check people against flawed government watchlists (which run to more than 220 pages of small print) and dramatically boosts Treasury Department penalties for the failure to do so.
- A very broad "Combat Methamphetamine Epidemic Act" stiffens criminal penalties and requires strict reporting procedures on the part of retail vendors and internet sellers of substances (including those available in pharmacies) that are used in the manufacture of methamphetamine.

The Act has been made permanent except for three four-year sunsets attached to:

- Section 215 (the so-called library provision).
- Section 206 (roving wiretaps which allow multiple phones to be tapped without requiring law enforcement ascertain that a suspected foreign terrorist is using the phones).

- the "lone wolf provision" (which was added by the 2004 Intelligence Act and applies FISA secret surveillance powers to non US citizens without requiring a showing that they are acting for a foreign power or terrorist group).

Congressional critics of the reauthorized Act are now focused on passing legislation such as the SAFE Act, and amendments sponsored by Senator Feingold (D-WI), Patrick Leahy (D-VT), Jeff Bingaman (D-NM), Arlen Specter (R-PA) and Rep. Jane Harman (D-CA) designed to safeguard constitutional rights.

• **REPUBLICAN SENATORS POISED TO "LEGALIZE" ILLEGAL DOMESTIC SURVEILLANCE**

After the Bush Administration adamantly refused to provide any concrete information about its warrantless domestic spying program, the Senate Intelligence Committee shied away from plans to hold a full-committee investigation into the scope of the program. Instead, the Republicans on the Senate Intelligence Committee, led by its chair, Senator Pat Roberts of Kansas, announced on March 7 that they had reached an agreement with Vice-President Cheney on proposed legislation which would allow warrantless wiretapping for up to 45 days. If the Administration chooses not to go to the FISA court for a warrant after 45 days, the Attorney General would need to certify that the surveillance was necessary to protect the country and inform a new seven-member "terrorist surveillance subcommittee" of the Intelligence Committee why a warrant had not been sought. The Administration would have to report to the subcommittee every 45 days thereafter so Congress could exercise its "oversight" function. The subcommittee would not have the authority to intervene if the wiretapping appeared unjustified, and the President would still be able to claim he had the "inherent authority" to carry out the surveillance. Senate Republican leader Bill Frist, who terms warrantless domestic spying "constitutional, lawful and critical," praised efforts to "buttress" the program by providing it with statutory authority (*New York Times*, March 1, 2006). Democrats on the Intelligence Committee accused Republicans of giving in to White House pressure: "You can't legislate properly unless you know what's going on," said Senator John D. Rockefeller IV of West Virginia (*Boston Globe*, March 8). A March 9th *New York Times* editorial was harshly critical of the Senate's "breathhtakingly cynical" plan: "Faced with a president who is almost certainly breaking the law, the Senate sets up a panel to watch him do it and calls that control...There are moments when leaders simply have to take a stand. It seems to us that one of them is when Americans are in danger of the kind of unchecked surveillance that they thought had died with J. Edgar Hoover, Watergate and spying on Vietnam protesters and civil rights leaders."

• **SENATOR DEWINE INTRODUCES "TERRORIST SURVEILLANCE ACT OF 2006"**

The Senate agreement with the White House on NSA spying was incorporated into the "Terrorist Surveillance Act of 2006" which Senator Mike DeWine (R-OH) introduced on March 16. If passed, it would give congressional approval to the illegal program, despite the fact that an investigation of it had still not occurred. The proposal would

allow Americans' phone calls and emails for 45 days without any court oversight. After that period, the Administration could either seek a FISA order or notify the subcommittee of its intent to continue with the surveillance without a warrant. Subcommittee members would not be permitted to share the information they receive with other members of full Intelligence Committees or other duly elected Members of Congress. Surveillance could be initiated on the belief that one party to an international communication is "affiliated" or somehow "supports" any group that might be involved in terrorism. Lawful conduct could trigger the indefinite surveillance of innocent Americans. The bill would also impose harsh penalties on whistleblowers who make disclosures about the illegal program by enabling them to be fined for up to \$1 million and imprisoned for up to 15 years. The DeWine bill would undermine both FISA and the long-standing requirement that all members of the Intelligence Committees in Congress be kept apprised of surveillance programs.

- **SENATOR FEINGOLD TAKES A STAND: CALLS FOR BUSH TO BE CENSURED**

On March 12 Senator Russ Feingold of Wisconsin, the only Senator to oppose the USA PATRIOT Act in 2001, announced that he would introduce a measure in the Senate to censure President Bush for breaking the law with his domestic surveillance program. "What the president did by consciously and intentionally violating the Constitution and laws of this country with this illegal wiretapping has to be answered, the Democratic Senator told ABC News. "Proper accountability is a censuring of the president, saying: 'Mr. President, acknowledge that you broke the law, return to the law, return to our system of government'" (*New York Times*, March 13). The last time a president was censured by the Senate was in 1834, when President Andrew Jackson was censured for removing the nation's money from a private bank. While Republicans and columnists accused him of "grandstanding," his fellow Democrats declined to endorse the measure, fearing that swing voters might be alienated and ignoring the widespread public support for the measure indicated in polls. Senator Feingold stated he had proposed a censure measure instead of impeachment because he wanted to avoid triggering a political backlash. But according to the March 16 *New York Times*, the "call for censure" is a "rallying cry to Bush's base." Neither party seems prepared to consider rallying the 85 million Americans represented by cities, towns and state legislatures that have passed more than 400 resolutions demanding that civil liberties not be sacrificed in the name of the "war on terror."

- **THREE MASSACHUSETTS CONGRESSMEN TAKE A STAND**

Massachusetts Representatives John Tierney, John Olver and Michael Capuano have brought to 29 the number of co-sponsors of the resolution put forward by John Conyers Jr. (D-MI) demanding a special committee to examine possible wrongdoing by President Bush and decide whether there are "grounds for possible impeachment."

- **HOUSE INTELLIGENCE COMMITTEE TO CONSIDER REVISING FISA**

Rather than press for a full investigation of the warrantless domestic spying, the House

Intelligence Committee is planning a review of whether the 1978 FISA legislation needs to be "modernized." It has sent the Justice Department a list of 27 questions they would like answered, and the White House has reportedly agreed to brief between 7-12 legislators on some operational details of the spying program. Republicans on the Intelligence Committee rejected a Democratic proposal that would have asked the administration to produce legal advisory opinions and intelligence reports related to the warrantless surveillance program.

• FEAR MONGERING AROUSES CONGRESS TO DEFY BUSH AND SCUTTLE PORTS DEAL

Congress may be paralyzed when it comes to protecting civil liberties, but it demonstrated its ability to be more hawkish on domestic security than the President when it swiftly raised a bipartisan alarm against the \$6.8 billion contract obtained by the world's third largest port company, Dubai Ports World, to manage terminal operations at six American ports. (The US Customs Service and Coast Guard would continue to be in charge of port security). Dubai is part of the oil-rich United Arab Emirates, which has close economic and military connections with the US. The contract had been approved after a brief review led by Treasury Department officials. It was apparently not regarded as controversial since nearly a third of US ports are already managed by foreign-based firms and the Administration is eager to expand lucrative business connections with the Middle East. After President Bush threatened to use his veto for the first time if Congress barred the deal, we were faced with the strange situation of the Administration suggesting that Congress was motivated by anti-Arab bias, while Republicans joined Democrats in placing a rhetorical question mark over the president's national security instincts. The real security issue – the Administration's failure to devise effective screening procedures for cargo entering the US – remained unaddressed. The 9/11 Commission weighed in to say that Congress was debating the wrong question and should instead be seeing if cargo was adequately screened for bombs (they had given cargo screening a "D" in the report card they issued on homeland security in 2004). On March 15, the day that Dubai Ports World announced that its leases to run the terminals would be sold to US companies, Congress voted 377 to 38 to express its opposition to the company running any port terminals in the US. Amid the cross fire insinuations of racism, xenophobia, pandering, cronyism, corruption and incompetence, Thomas Friedman in his February 24 *New York Times* column pointed out that Republicans knew that "if they don't distance themselves from Mr. Bush, some Democrats are going to play this very evocative, very visual 'giving away our ports to the Arabs' card against them in the coming elections. Yes, you reap what you sow...Congress should focus on the NSA wiretapping. not this. As a country, we must not go down this road of global ethnic profiling – looking for Arabs under our beds the way we once looked for commies."

• WITH XENOPHOBIA ON THE RISE, CONGRESS MAY FURTHER ERODE IMMIGRANT RIGHTS

The national media barely reported the fact that tens of thousands of demonstrators had

taken to the streets of Washington DC (March 7) and possibly more than a 100,000 rallied in Chicago (March 10) to protest the punitive immigration legislation (HR 4437) which passed the House last December (see December 29, 2006 Update). The Senate is now considering its own version "immigration reform". A 300-page-bill incorporating a guest worker program put forward in early March by Senate Judiciary Committee Chairman Arlen Specter (R-PA) was less draconian than the Sensenbrenner's House bill, but it still contained many worrying provisions:

- Like HR 4437, it criminalizes immigrants without papers, and could require local police to enforce federal immigration laws. This would almost certainly lead to increased racial profiling and unwarranted detentions, and force people who "look or sound like immigrants" to carry proof of citizenship or legal status at all times. It would also prevent people from reporting crimes due to fear of arrest and deportation.
- It would allow low-level immigration officers to detain and deport without a hearing anyone found within 100 miles of the border if the officer thinks he or she is an undocumented migrant. Violating the fundamental right of due process, this provision could lead to the deportation of people who may not be "illegal", as well as legitimate asylum seekers.
- It provides for the indefinite detention of undocumented people who cannot be returned to their countries of origin. Under this provision someone could spend his or her entire life in prison for simply entering the US.
- It requires employers to use the "Basic Pilot Project" to match personal and biometric information against federal databases, building the groundwork for a national ID.
- All future appeals in deportation and asylum cases would be sent to a court in Washington DC, where a single judge would have the authority to dismiss them. Currently the liberal Ninth US Circuit Court of Appeals hears about half the nation's immigration appeals.

Senate Judiciary Committee members put forward dozens of amendments to Specter's bill, and Senate Majority Leader Bill Frist (R-TN) has been rushing the Judiciary Committee to complete its work by March 27. Then Committee members announced they were nearing a compromise that would enable undocumented immigrants who work in the US to apply to become permanent residents and eventually citizens if they met certain criteria (including fines, background checks, payment of back taxes) within an eight year period. With that development, Senator Frist stunned his colleagues by suddenly introducing his own harsh enforcement bill into the full Senate. It would increase the number of border guards, expand border fencing, and speed up deportation of undocumented immigrants and leave out any guest worker program. "Our country needs security at our borders in order to slow the flow of illegal immigration and make America safer from foreign criminals and terrorist," the Tennessee senator said, apparently staking out themes for his presidential bid. Seventy-one House members simultaneously released a letter declaring that the Judiciary Committee's compromise was "fundamentally incompatible" with the punitive vision of immigration reform embraced by the House late last year.

C. IN THE COURTS

• **BROOKLYN JUDGE GIVES GREEN LIGHT TO TORTURE**

On February 17 Brooklyn District Court Judge David Trager threw out the lawsuit brought by Maher Arar, a Canadian engineer who was kidnapped from JFK airport by US officials, held incommunicado in a Brooklyn detention center and then sent to be tortured in a Syrian dungeon for nearly a year. He was released when no Al Qaeda connection could be found. Judge Trager said he could not second guess the Administration's foreign policy and allow a case to proceed that could result in the disclosure of state secrets. "A judge who declares on his or her own...authority that the policy of extraordinary rendition is under all circumstances unconstitutional must acknowledge that such a ruling can have the most serious of consequences to our foreign relations or national security or both" (*Toronto Star*, February 17). The February 26 *New York Times* declared the judge's ruling to be "both chilling and ripe for prompt overturning...With the Bush administration claiming imperial powers to detain, spy on and even torture people and the Republican Congress stuck largely in enabling mode, the role of judges in checking executive branch excesses becomes all the more crucial. If the courts collapse when confronted with spurious government claims about the needs of national security, so will basic American liberties."

• **MOUSSAOUI CASE STAGGERS ON DESPITE GOVERNMENT MISDEEDS**

A few days after US District Court Judge Leonie M. Brinkema barred Transportation Security Administration Agency witnesses from testifying in the trial of Zacarias Moussaoui on the grounds that their testimony had been coached by TSA attorney Carla Martin, the judge relented and said she would permit the government to introduce new witnesses if their testimony was not similarly tainted. The case is being held to determine whether Moussaoui, the so-called "20th hijacker," faces the death penalty or life imprisonment. 9/11 families have been watching a live feed from the Alexandria, Virginia federal courthouse. The government is trying to demonstrate that if Moussaoui had been honest with them after his arrest on a visa violation three and a half-weeks before 9/11, the attacks could have been prevented. When the trial resumed, FBI Special Agent Harry Samit expressed his frustration at failing to get his FBI superiors to permit the Minnesota FBI field office to apply for a FISA warrant to search Moussaoui's belongings even when he told them he was trying to prevent an airplane from being hijacked and flown into the World Trade Center. Former FBI whistleblower Colleen Rowley has made similar claims that the agents on the ground were blocked when they tried to do their job, but she has not been asked to testify at the trial. According to the March 21 *Boston Globe*, "Much of Samit's testimony may have backfired on the government. The jury easily could have been left with the impression of an FBI so at odds with itself that it not only missed critical clues of an impending terrorist attack but did not know how best to coordinate efforts to stop it." Former Attorney General John Ashcroft used the FBI's failure to apply for a warrant to search Moussaoui's belongings as evidence that its hands were tied by existing legislation and to make the case for

giving it expanded powers under the USA PATRIOT Act. But critics say the failure to apply for a warrant to conduct the search demonstrates bureau inadequacies, careerism, and poor training in using existing FISA procedures.

- **GUANTANAMO DETAINEE BRINGS CASE THAT TESTS NEW LAW**

Lawyers for Mohammed Bawazir have gone to federal court claiming their client was tortured when he was subjected to violent force-feeding through a nasal tube when strapped in a restraint chair in an effort to break his hunger strike. The government has asked district court judge Gladys Kessler to decline to rule in the case in deference to Detainee Treatment Act (Graham-Levin Amendment) which Congress passed late last year to strip Guantanamo detainees of most of their habeas corpus rights. At issue in the federal courts is the question of whether or not the law applies retroactively to detainees like Mr. Bawazir who were already in custody when it was enacted.

- **EGYPTIAN DETAINEE WINS SETTLEMENT IN ABUSE LAWSUIT**

The federal government will pay Ehab Elmaghraby \$300,000 to settle a lawsuit he brought contending that he had been abused and had his constitutional rights violated when he was detained in the Brooklyn federal detention center for nearly a year before being deported. He had been arrested at his Queens apartment on September 30, 2001 when federal agents came to the building to investigate his landlord who had applied for a pilot's license a few years before. His American wife left him after the FBI threatened her with arrest. Lawyers for the government maintain that by settling the case they are not admitting any fault. But Elmaghraby's lawyer said that the settlement "shows for the first time that the government can be held accountable for the abuses that have occurred in Abu Ghraib, Guantanamo Bay and in prisons right here in the United States" (*New York Times*, February 28).

- **ALBANY MOSQUE CASE PROCEEDING AFTER SECRET RULING**

On March 10 federal district court Judge Thomas McAvoy issued a secret ruling denying a motion for dismissal of a case against Mohammed Hossain and Yassin Aref. These two leaders of a mosque in Albany, New York were arrested in August 2004 after a year-long sting operation in which an FBI informer posed as a terrorist who was plotting to import a shoulder-fired missile and assassinate a Pakistani diplomat. Their lawyers had asked for the case to be thrown out on the grounds that evidence came from NSA wiretaps obtained without a warrant. The judge's ruling came days after the prosecution submitted classified documents to the court. Mr. Aref's attorney, Terence Kindlon, has federal security clearance, but even he cannot view the substance of the judge's ruling.

- **LYNNE STEWART'S ILLNESS DELAYS SENTENCING**

Lynne Stewart's treatment for breast cancer has delayed her sentencing until after July 31. The 66-year-old New York attorney faces 30 years in prison after being convicted of providing material aid to terrorism for allowing her client Sheik Omar Abdel Rahman to

be quoted in a press release. Federal district court Judge John Koeltl has denied her motions for a new trial after a juror claimed she had been pressured into making a guilty finding. She and her translator Mohamed Yousry are free on bail while another defendant in the case, paralegal Ahmed Abdel Sattar, is under total 24-hour lock-down in the Metropolitan Correctional Center.

- **MEMBERS OF ANIMAL RIGHTS GROUP CONVICTED OF TERRORISM**

In the first test of the Animal Enterprise Terror Act of 1992, six members of Stop Huntingdon Animal Cruelty (SHAC) were found guilty of using their website to incite attacks against a British company that ran an animal testing lab in New Jersey where they say up to 500 animals a day were killed as part of drugs and cosmetic research. The activists said they were not involved with the vandalism, death threats, computer hacking and pipe bombs used against those featured on its website, but the prosecution produced videotapes of speeches (including one in Boston by SHAC director Lauren Gazola) and web postings in which the word "we" was used to take credit for the violence. They face up to 23 years in prison.

D. IN THE COMMONWEALTH

- **EMERGENCY TOWN MEETINGS BEING HELD TO "RESTORE THE RULE OF LAW"**

In response to revelations of illegal government spying on Americans, and government practices of kidnapping, torture and secret detention, the ACLU of Massachusetts and members of the Massachusetts Congressional delegation are holding emergency town meetings to "Restore the Rule of Law." In January huge crowds turned out for meetings with Rep. Ed Markey in Lexington and at Boston's Faneuil Hall. In early March town meetings were held with Rep. Marty Meehan in Wayland and Rep. Barney Frank in Newton. On March 23 there is a meeting with Rep. Richard Neal in Chicopee, followed by one with Rep. Michael Capuano in Cambridge on March 27. Meetings are also scheduled on the Cape with Rep. Bill Delahunt (April 10) and Rep. Jim McGovern in Worcester (April 11). Check www.aclum.org for these and future Congressional meetings on the constitutional crisis facing the country, and information about how you can get involved in the campaign to "Restore the Rule of Law."

- **SENATE CIVIL LIBERTIES RESOLUTION STILL ALIVE**

While California became the eighth state to pass a resolution upholding civil liberties, the leadership in the Massachusetts legislature declined to move H.B. 1881 – the Resolution Affirming the Civil Rights and Liberties of the People of Massachusetts – onto the floor for a vote. In an effort to get something on the record to influence the PATRIOT Act reauthorization debate, H.B. 1881 was redrafted (with language about warrantless NSA spying added) as a non-bill numbered resolution for a vote of each separate body. In this way, it could be brought up quickly and would not have to go through a Committee hearing process. The House version stalled. But the Senate

resolution was presented to the legislature on March 8 by the leading Senate H.B. 1881 sponsor, Senator Nuciforo. The Republican leadership wanted to add amendments, which could stall further any consideration of the resolution. But there is still a chance that it will come to a vote next week (or later).

• **FEDERAL IMMIGRATION RAID IN BOSTON AREA LEADS TO WIDESPREAD FEAR, ARRESTS**

On March 6 a coordinated sweep through Revere, Malden, Chelsea, Everett and East Boston by Bureau of ICE (Immigration and Customs Enforcement) agents netted 30 undocumented immigrants, 26 of whom reportedly had deportation orders. A raid on February 21 in the Cape resulted in the arrests of nine Brazilian immigrants. Director of the New England ICE office Bruce Chadbourne has said that up to 6,000 people with deportation orders could be in the Boston area. Chadbourne admitted that none of those arrested on March 6 had committed crimes beyond some motor vehicle violations. The raids followed a month of fear for immigrant communities, with rumors spreading at Boston's Maverick Square and elsewhere that people were being stopped and asked for their identification. Both local police and ICE had denied participating in such activity (*Boston Globe*, February 19). In mid February the ICE signed a contract to move into a 35,000-square-foot facility in Lexington near Hanscom Airport where detainees who are due to be deported from the country will be processed on a 24-hour-a-day basis.

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