POST-9/11 CIVIL LIBERTIES UPDATE

A newsletter of the ACLU of Massachusetts' Civil Liberties Task Force

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RIGHTSWATCH

A. EXECUTIVE ACTIONS

• ***USA TODAY*: "NSA HAS YOUR PHONE RECORDS; 'TRUST US' ISN'T GOOD ENOUGH"**
This headline appeared above a May 12th *USA Today* editorial, spelling out the implications of the story the newspaper broke the day before about Verizon, AT&T and BellSouth handing over their phone call records to the Defense Department's National Security Agency (NSA) for its data mining operations: "The government is secretly collecting the phone records of millions of Americans" which, the paper says, is neither legal, useful, foolproof and is open to abuse – "Maybe not at first. Over time, however, this vast quantity of data is a potentially irresistible tool for government officials who want to zero in on individual Americans." According to the original May 11th story, the database is the "largest...ever assembled in the world." It could contain billions of phone records from over 200 million customers, and could be accessed not just by the NSA, but by the CIA, the FBI and the DEA. Qwest reportedly refused the government's request for calling records because of the "disinclination on the part of the authorities to use any legal process" (*New York Times*, May 13). The three companies account for 90 percent of the landlines in the country, and two-thirds of wireless phones, and AT&T and Verizon both have privacy policies that prohibit the disclosure of private call information. As lawsuits and complaints were

filed against them, both Verizon and AT&T issued statements denying that they had improperly shared telephone records with the NSA (*see "In the Courts" and "In the Commonwealth," below*).

• BUSH SAYS HE FIERCELY PROTECTS PRIVACY OF AMERICANS

On May 13, President Bush declared that the "privacy of all Americans is fiercely protected in all our activities" and that the government does not "listen to domestic phone calls without court approval. We are not trolling through the personal lives of millions of innocent Americans." The NSA may not be physically eavesdropping on tens of millions of calls, but as a May 12th *New York Times* editorial pointed out, "by cross-referencing phone numbers with databases that link numbers to names and addresses, the government could compile dossiers of what people and organizations each American is in contact with." According to the May 20th *Los Angeles Times*, "the NSA has abandoned data-mining techniques that would provide not only more protection for individuals' privacy but a better evaluation of their effectiveness. Such techniques are designed to keep call records anonymous until they are linked to suspected terrorists. If the feds are going to mine every citizen's records in search of suspicious patterns, the least they can do is use tools that minimize the exposure of the innocent."

• ACLU MOVES TO PRESSURE PHONE COMPANIES TO RESPECT PRIVACY OF CUSTOMERS

On May 24, ACLU affiliates in Massachusetts *(see "In the Commonwealth," below*) and 17 other states filed claims with state regulatory agencies or sent letters to state attorneys general and other officials demanding investigations into whether local telecommunications companies were allowing the NSA to spy on their customers. The national ACLU also sent a letter to the Federal Communications Commission (FCC) demanding an investigation. The FCC replied that it does not have the authority to review classified information.

• ATTORNEY GENERAL DENIES NEED TO GET A WARRANT, BUT...

Attorney General Gonzales invoked the 1979 Supreme Court ruling in *Smith v. Maryland* to explain why there was no need to get a warrant to obtain the phone records of tens of millions of Americans. The case involved the installation of a "pen register" surveillance device on a suspected robber's phone to monitor all his outgoing calls. The Attorney General said the court had declared that business records "do not enjoy Fourth Amendment protection." Since, in his view, phone records were business records, "there is no reasonable expectation of privacy in those kinds of records" (*Washington Post*, May 25). Gonzales neglected to mention the 1986 Electronic Communications Privacy Act (ECPA) that Congress passed as a response to *Smith v. Maryland*. This act requires court orders before call records can be turned over to the government. Title II of the Act, the Stored Communications Act (SCA), specifically forbids phone companies from turning over records to the government without a warrant or a court order. The law says providers of "electronic communications...shall not knowingly divulge a record or other information pertaining to a subscriber or customer...to any government entity." In March 2006, SCA was amended (as part of the renewal of the PATRIOT Act) to say that if the government was investigating an imminent terrorist act, companies could immediately, without a court order, turn over suspects' records. (It appears likely that the phone call records program was initiated immediately after 9/11, and not after March 2006). Under SCA, consumers have the right to sue and damages are set at a minimum of $1,000 FOR EACH VIOLATION. In a May 16 *Globe* op ed, Harvard Law School professor Laurence Tribe reminds us of the existence of the Fourth Amendment. "The technology deployed by NSA enables the agency to build a web with those numbers that can ensnare individuals – all individuals – just as comprehensively and intimately

as all-out eavesdropping. Even if one trusts the president's promise not to connect all the dots to the degree the technology permits, the act of collecting all those dots in a form that permits their complete connection at his whim is a 'search' if those Fourth Amendment words have any meaning at all...Privacy apart, this president's defiance of statutes by the dozens is constitutionally alarming. But the matter goes deeper still. Even if Congress were to repeal the laws securing telephone privacy, or if phone companies found loopholes to slip through when pressured by government, the Constitution's Fourth Amendment shield for 'the right of people to be secure' from 'unreasonable searches' is a shield for all seasons, one that a lawless president, a spineless Congress, and a complacent majority of citizens...cannot be permitted to destroy, for the rest of us and our children."

• POLL SHOWS MAJORITY ACCEPTS PROGRAM; ASSUMES IT WORKS

A *Washington Post*-ABC News poll conducted immediately after the story broke that phone call records were being turned over to the NSA had a 63 percent approval rate for the program, with only 35 percent saying it was unacceptable. The majority found that investigating potential terrorist threats was crucial, "even if it intrudes on privacy" (*Boston Globe*, May 13). Typical was the Verizon customer who told the May 12th *Boston Globe*, "I have nothing to hide, so I don't have a problem with it. If it's for the security of the country, it's OK with me." But does this program enhance safety or simply clog up the intelligence agency works? Jonathan David Farley, a science fellow at Stanford's Center for International Security and Cooperation, states that the "social network analysis" which the data mining is producing is based on "a false assumption: that you can work out who might be a terrorist based on calling patterns...guilt by association is not just bad law, it's bad mathematics" ("The NSA's Math Problem, *New York Times*, May 16). In the May 16 *Washington Post* columnist Eugene Robinson tried to understand how a nation that has cared so much about privacy and freedom could accept domestic electronic surveillance. "If a psychiatrist were to put the nation on a couch, the shrink's notes would read something like this: 'Patient feels vulnerable to attack; cannot remember having experienced feeling before. Patient accustomed to being in control; now feels buffeted by outside forces beyond grasp...Patient seeks scapegoats for personal failings (immigrants, Muslims, civil libertarians). Patient is by far most powerful nation in world, yet feels powerless. Patient is full of unfocused anger."

• SENATOR SAYS TWO FISA JUDGES KNEW OF PHONE CALL PROGRAM

Republican Senator Orrin Hatch has reported that at least two of the FISA chief justices had been informed about the ongoing hand over of phone records to the NSA. When asked whether they approved of the operation he said, "That is not their position, but they were informed" (*Boston Globe*, May 17).

• GENERAL WHO DESIGNED WARRANTLESS NSA SPYING PROGRAM BECOMES HEAD OF CIA

After the sudden forced departure on May 5 of Porter Goss from his job as director of the CIA and resignation of two other top officials -- one of whom (Goss' friend Kyle Foggo) is involved in a corruption scandal, the Bush Administration nominated former NSA head General Michael V. Hayden to the position that is traditionally under civilian control. Rep. Peter Hoekstra (R-Mich.), the chair of the House Intelligence Committee, termed Hayden "the wrong man at the wrong place at the wrong time" because of his military background and involvement in the NSA's warrantless domestic spying (*Washington Post*, May 9). Others praised Hayden for his expertise and ability to rescue the CIA from the funk in which it had plunged due to rivalries with the Defense Department (which contains the NSA, Defense Intelligence Agency, National

Reconnaissance Office, National Imagery and Mapping Agency, as well as the intelligence units inside each branch of the armed services), the politicization of intelligence and Goss' hapless leadership. The May 13 *New York Times* reported that immediately after 9/11, General Hayden resisted Vice-President Cheney's demand to unleash warrantless NSA eavesdropping on domestic calls wholly within the US. Hayden argued that one end of the conversation had to be outside the US for the program to be legal. "But critics of the program say the law does not allow spying on a caller in the US without a warrant, period – no matter whether the call is domestic or international." General Hayden's understanding of civil liberties protections had been on display at the National Press Club on January 23, 2006 when he insisted four times that under the Fourth Amendment you do not need "probable cause" to do a search. At the same press conference he claimed the NSA program was narrowly "focused" and "targeted" when it was in fact building a massive database of the phone records of hundreds of millions of Americans. The General said, "We are going to keep America free by making Americans fell safe again." He is also responsible for spending $1.2 billion on a classified program called Trailblazer which was supposed to help the NSA sift through the 650 million intercepted messages it collects everyday, according to a 2002 Congressional report (*New York Times*, May 18). Trailblazer, with cost overruns of "a couple to several hundred million" dollars, had to be abandoned. A 2003 Senate Intelligence Committee report expressed frustration with the NSA's "lack of progress" in remedying its technical problems, and none of Hayden's modernization plans were completed by the time he left the NSA. In spite of the anticipated heat over Hayden's role in NSA spying, the Congressional hearing took place with relatively few words of dissent and a Senate vote of 78-15 in his favor on May 26. Republican Senate Judiciary Chairman Arlen Specter voted against the General to protest the administration's failure to keep Congress informed of the warrantless surveillance program. All major US spy agencies are now under the control of military men.

• INVESTIGATION INTO EAVESDROPPING ENDS WHEN CLEARANCES DENIED BY NSA

On May 10, the Justice Department's Office of Professional Responsibility (OPR) closed its inquiry into the role of Justice Department lawyers in the NSA warrantless spying program after the NSA refused to grant OPR lawyers the necessary security clearance.

• BUSH CLAIMS THE POWER TO IGNORE 750 LAWS (AND COUNTING...)

Thanks to *Boston Globe* staff writer Charlie Savage, including in his revealing front page article in the April 30 *Globe*, we know that President Bush – who has never vetoed a piece of legislation - has attached "signing statements" to no fewer than 750 laws, in which he has asserted that he has the power to set aside sections of those laws which conflict with his understanding of the Constitution. On May 28, Savage reported that Vice President Cheney's chief of staff David Addington, one of the authors of the Administration's torture policy, scrutinizes bills for anything that may place a limit on presidential power. Savage brought to light the signing statement the president added to the renewed USA PATRIOT Act in which he said "he did not feel obliged to obey requirements that he inform Congress about how the FBI was using the act's expanded powers." Citing his commander-in-chief role, Bush has declared he can set any efforts of Congress to regulate the military, and can take funds from authorized programs and use them for secret operations without informing Congress. In August 2004 and soon after the disclosure of the NSA's program of warrantless spying on Americans in December 2005, Congress passed laws forbidding the military from using intelligence that was not "lawfully collected." Bush added signing statements saying only he could decide whether the military could use that intelligence. When Congress passed new regulations for military prisons in October 2004 in

response to the Abu Ghraib scandal, the president said he could ignore them all, including a provision requiring the Pentagon to retrain guards on the humane treatment of detainees. He also stated that he did not have to abide by McCain's anti-torture amendment. As for Congress' attempt to create a post for an inspector general in Iraq, Bush wrote that the inspector general "shall refrain" from investigating any national security matter or crime that the Pentagon preferred to investigate itself. Bush is not the first president to use signing statements – his father had issued 232 and Clinton 140: but all previous presidents combined had issued fewer than the current president. And none were as expansive as those issued by the current president, who has used them not just to override Congress but to reject Supreme Court rulings, especially in the area of affirmative action and equal protection. Conservative Chicago Law School professor Richard Epstein said it was "scandalous" for the Administration to argue (as Cheney has since the Iran-Contra scandal) that the commander in chief can set aside statutes in national security matters *(Boston Globe*, May 28). And according to New York University Law School professor David Golove, who is an expert on issues of executive power, Bush's actions threaten to "overturn the existing structures of constitutional law." If Congress is unwilling to challenge him, the Constitution can simply "disappear." *(See "In the Congress", below, for the challenge mounted by two Massachusetts Representatives)*. Republican Senator Arlen Specter, head of the Senate Judiciary Committee, reacted strongly to the signing statements: "There may as well soon not be a Congress...And I think that most members don't understand what's happening....What's the point of having a statute if...the president can cherry-pick what he likes and what he doesn't like?" (*Boston Globe*, May 10). Inexplicably, the signing statement story was almost entirely ignored by the rest of the mainstream media, including by the *New York Times*, which apparently regarded a "story" about a draft of a proposed change in ACLU national board policy to be more newsworthy (May 24).

• FUROR ERUPTS IN CONGRESS OVER FBI SEARCH

Members of Congress who "played dead when the executive branch refused to provide it with information" (*New York Times* editorial, May 26), who "barely worked up enough gumption to express its disapproval" about "the shameful torture and humiliation of prisoners in Iraq" and the incarceration of "hundreds of uncharged men at Guantanamo Bay," (*Boston Globe*, May 30), who failed to rouse themselves over reports that presidential signing statements were undermining Congressional legislation, and who shrugged at revelations that the executive branch was ignoring the law to carry out warrantless domestic wiretapping of Americans, rose in bipartisan indignation after FBI agents – with a warrant -- conducted a first-in-history raid on the closed Rayburn office building on Saturday night, May 20th. They refused to have a House attorney observe as they removed files and a copy of a computer hard drive from the office of Rep. William Jefferson (D-LA) as part of a corruption probe. With Dennis Hastert, the Republican speaker of the House, and Nancy Pelosi, the Democratic minority leader, together claiming that the "separation of powers" had been violated and demanding that the files be returned, and Attorney General Gonzales and FBI chief Mueller saying they would quit if the files were returned, President Bush put the seized material under seal for a 45 day "cooling off period." According to the May 27 *New York Times*, executive branch officials viewed the Congressional protest "as largely a proxy fight for battles likely to come over criminal investigations" associated with the Jack Abramoff scandal. On May 28, Senate leader Bill Frist broke with his colleagues and endorsed the raid, saying "nobody in government is above the law of the land, period" (*New York Times*, May 29) while other Republicans vigorously denounced the raid at a Congressional hearing (*see "In the Congress," below)*.

• ATTORNEY GENERAL MAY USE ESPIONAGE LAWS TO GO AFTER JOURNALISTS

Attorney General Gonzales appears to have scoured the legislative record to find statutes which, he said on May 20, "would seem to indicate" that journalists could be prosecuted for publishing classified material (*New York Times*, May 24). One is the loosely worded 1917 Espionage Act that prohibits anyone with unauthorized material about the national defense from telling others (although according to the April 30 *New York Times*, its legislative history indicates it was not meant to apply to newspapers). There is also a 1950 law that bars publication of government codes and "communications intelligence activities." According to the Attorney General, speaking on an ABC News program, "We have an obligation to enforce those laws. We have an obligation to ensure that our national security is protected." (*New York Times,* May 22). The 1917 Espionage Act is currently being used to prosecute two former members of the American Israel Public Affairs Committee (AIPAC) for receiving classified information from a Defense Department analyst Lawrence Franklin and passing it on to foreign officials and reporters.

• ASHCROFT SPOKESMAN SAYS JUSTICE DEPARTMENT SUBPOENAS AN "ABUSE OF POWER"

Mark Corallo, the former chief spokesman for John Ashcroft when he was Attorney General, has strongly criticized current Attorney General Gonzales for issuing subpoenas to reporters for *The San Francisco Chronicle* to identify their sources for articles they wrote on the use of steroids in baseball. "This is the most reckless abuse of power I have seen in years," he stated. "They really should be ashamed of themselves" (*New York Times*, June 1).

• VETERANS' DATA STOLEN, RAISING FEARS OF MASSIVE IDENTITY THEFT

On May 3 a database containing the personal records on 26.5 million military veterans (including Social Security numbers, birth dates, addresses, phone numbers and health information) was stolen from the Virginia home of a Department of Veterans Affairs employee who reportedly had taken it home to work on it. Jim Nicholson, the secretary of the Department, and law enforcement officials were not informed about the theft for thirteen days and veterans whose identity may have been compromised only found out about it nineteen days later when the first news stories appeared. The May 24 *New York Times* reported that "while investigators had no reason to dispute the employee's account, they were nonetheless puzzled why little else of value besides the data-laden disks were stolen. In an added twist, the officials said investigators were having trouble finding the employee but did not think that he was necessarily trying to be evasive." On May 30, the supervisor of the still unnamed employee resigned. According to the May 23 *New York Times*, before this latest theft, records of some 55 million persons had been lost, stolen, or hacked into, with the biggest debacles involving CardSystems Solutions, ChoicePoint, CityFinancial, DSW and Bank of America. On June 1, Associated Press reported that 1.3 million records – including names and social security numbers – of Texas Guaranteed Student Loan Corporation borrowers had disappeared, bringing the number of those at risk of identity theft because of just these 7 instances to a staggering 82.8 million persons.

• VERIZON TELLS CREDIT BUREAUS WHO PAYS BILLS ON TIME

Calling the practice a "free gift to the public," Verizon Communications says it is reporting to Equifax, Experian and TransUnion on those Massachusetts customers that pay their phone bills on time. Those who are late in payments will have that reflected in their credit records. According to the May 21st *Boston Globe*, customers with unlisted phone numbers are upset that those numbers are being shared with credit bureaus fearing (among other things) identity theft.

• PRIVACY AT A PREMIUM IN THE BRAVE NEW POST 9/11 WORLD

A US Government Accountability Office report says that the Departments of Justice, State and Homeland Security spent $19 million in fiscal 2005 to buy commercially-collected data – which is often inaccurate – to mine for "terrorist activity." In this way they get around the Privacy Act of 1974, which restricts the government from doing such data collection directly (*BusinessWeek*, May 29).

• FBI ISSUED 9,254 NATIONAL SECURITY LETTERS IN 2005

For the first time the Administration has made public the number of National Security Letters issued under the USA PATRIOT Act. According to figures handed over to Congress in late April, 9,254 NSLs were issued for the records (not counting telephone subscriber information) of 3,501 people. 155 warrants were issued under Section 215 of the PATRIOT Act, which enables the seizure of business records, including library records. In 2005, the FISA Court approved 2,072 warrants for secret wiretaps and searches of suspected terrorists and spies, twice as many as were issued in the year before the 9/11 attacks.

• LIBRARIANS WHO RECEIVED NATIONAL SECURITY LETTERS SPEAK OUT

On May 30, nearly a year after receiving a National Security Letter and being threatened with prosecution and jail if they talked about it, four Connecticut librarians spoke in public for the first time after the US Second Circuit Court of Appeals upheld a district court judge's overturning of the gag. Peter Chase, George Christian, Barbara Bailey and Janet Nocek, who all have leadership roles at the Library Connection in Windsor, Connecticut, had sought help from the ACLU which filed a lawsuit in the name of "John Doe." They expressed their frustration at their inability to take part in the debate over the reauthorization of the USA PATRIOT Act, and explained that library consortia had once considered hiring a lawyer to lobby against provisions of the PATRIOT Act but decided against it when the government assured them that it wasn't interested in library records. "We trusted them but apparently we shouldn't have," Mr. Chase said (*New York Times*, May 31). According to Mr. Christian, "The fact that the government can and is eavesdropping on patrons in libraries has a chilling effect, because they really don't know if Big Brother is looking over their shoulder."

• INSPECTOR GENERAL: PROBLEMS STILL PLAGUE FBI

In testimony before the Senate Judiciary Committee, Justice Department Inspector General Glenn Fine reported that in the years 2004 and 2005 "the FBI has made some progress in addressing some of its critical challenges, but more progress is clearly needed" (May 2 Report on FBI Oversight). It still doesn't have "a modern, effective case management and records system." It still has problems recruiting intelligence analysts, linguists and people for technology position and high turnover in management positions. It still has a problem ensuring "the reliability of its scientific methods" as seen in the Brandon Mayfield case with its botched fingerprint identification. And it still faces major challenges safeguarding civil rights and civil liberties with "FBI agents intercepting communications outside the scope of the order from the FISA Court; FBI agents continuing investigative activities after the authority for the specific activity expired; and third parties providing information that was not requested by the National Security Letter. Not all possible violations were attributable solely to FBI conduct....third parties such as telephone companies were involved in or responsible for possible violations in approximately one-quarter of the cases in both years we examined." Fine reported that the there was still "inaccurate or inconsistent information related to persons" in the Terrorism Screening Center consolidated watch list, which contains more than 235,000 records. He also stated that 1,143 field agent

positions had been taken away from investigating traditional criminal matters and put in terrorism-related programs, resulting in a 45 percent reduction in the number of criminal-related cases opened by the FBI.

• MUELLER ASKED WHY FBI IS SPYING ON PEACE GROUPS

When FBI director Robert Muller faced the Judiciary Committee, he was sharply attacked by Senator Leahy of Vermont for permitting the agency to conduct surveillance of anti-war groups. After Leahy cited particular FBI memos noting the number of people of Middle East descent in attendance at peace group meetings, Muller responded that "those memos are an outgrowth of an investigation to identify an individual. We were not concerned about the political dissent."

• BEEFED UP POLICE INTELLIGENCE UNITS AND FUSION CENTERS SPY ON ACTIVISTS

A long investigative piece in the May 8 *US News and World Report* details the surveillance or harassment by city and county police - "in the name of homeland security" - of "animal-rights and antiwar protestors, union activists, and even library patrons surfing the Web." According to the report, "federal officials have funneled hundreds of millions of dollars into once discredited state and local police intelligence operations. Millions more have gone into building up regional law enforcement databases to unprecedented levels...but even its biggest boosters worry about a lack of training and standards...Guidelines for protecting privacy and civil liberties have lagged far behind the federal money." More than 100 police departments now have intelligence operations and some 6,000 state and local cops now have federal security clearance and see classified intelligence reports. Their centers of operation are called the "fusion centers" and exist in 31 states. Eventually 70 fusion centers are planned nationwide, "providing a coast-to-coast intelligence blanket." The Massachusetts Commonwealth Fusion Center has 18 analysts and 23 field-intelligence officers. No one appears to know the rules for what information gets deposited into the databases maintained (and widely shared) by fusion centers, as federal money has been made available "without guidance or structure, technical assistance or training," and civil liberties concerns have taken a back seat to "fighting terrorism." A spokesman for the fusion center in California had told the *Oakland Tribune*: "You can make an easy kind of a link that, if you have a protest group protesting a war where the cause that's being fought against is international terrorism, you might have terrorism at that protest. You can almost argue that a protest against [the war] is a terrorist act." The Department of Homeland Security in 2003 had required states to report on the "potential threat elements" (PTEs) in their midst: Vermont reported that it had none, but Texas unearthed 2,053 PTEs and North Carolina detected 506 PTEs, giving police intelligence units plenty of work to do and federal funds to do it with. The fusion center databases raise the same questions of quality and security of "intelligence" as the vast database maintained by the Matrix system, which "ripped through billions of public records and matched them with police files, creating instant dossiers" and gave federal and state authorities a list of 120,000 "suspects" with "high terrorist factor" scores.

• HOMELAND SECURITY GRANTS FOR PORK OR SECURITY?

The federal government is cutting homeland security funds by a third, leading to a 40 percent reduction in grants to New York City and Washington DC and a nearly 30 percent reduction in grant money to Boston and surrounding areas. New York officials were outraged over reports that the Department of Homeland Security had decided that New York City had no national monuments or iconic buildings, leading to the decision to cut its funds (*Boston Globe*, June 2). The DHS later admitted that omitting the Statue of Liberty was an oversight. Three cities that had not

previously received funds – Fort Lauderdale, Orlando and Memphis – are now getting money, and Louisville and Omaha are getting more than last year. Massachusetts will get $41 million (down from $58.8 million), with $18.2 million going to Boston (down from $26 million). According to a June 2 *New York Times* editorial, "The new grants...are more about pork barrel politics than security."

• US MUSLIMS HARASSED IN AIRPORTS AND AT BORDERS

The June 1, the *New York Times* described the "traveling while Muslim" predicament facing Muslim Americans who have been treated with suspicion, humiliated, roughed up and have routinely faced long delays when trying to get on an airplane or cross from Canada back into the United States. The ACLU is bringing a lawsuit to demand better treatment of Muslim and Arab Americans.

• EUROPEAN COURT INVALIDATES DEAL GIVING US PASSENGER INFORMATION

On May 30, the European Court of Justice, the highest court in the European Union (EU), ruled that the EU had overstepped its authority when it did an end run around the European Parliament and hammered out a deal to transmit to US officials 34 categories of information (including phone numbers, credit card numbers and other personal information) about passengers traveling to the United States. The accord remains in operation for the next four years and then, if a new agreement is not reached, the US might deny airplanes from Europe landing rights.

• "REGISTERED TRAVELER" PROGRAM FACES BACKGROUND CHECK CONUNDRUM

After proposing to do background checks in advance on "trusted" passengers as part of a "registered traveler" program, the Transportation Security Administration (TSA) is backing away from the program that was due to be rolled out in June. According to the May 16th *New York Times*, corporate travel managers are worried about the "potential effects on the career of an employee who for one reason or another (including a possible mistake in databases) is rejected during the federal background check" with no way to appeal the decision since the criteria for the background checks is secret. The TSA has meanwhile been encouraging private companies to develop detection technology like "Verified Identity" which is being used in Orlando Florida at a cost of $80 per passenger per year to streamline the screening system.

• PORK DELAYS BIOMETRIC CARD

Also delayed is production of the "Transportation Worker Identification Credential," a card containing biometrics intended for airport, railway and maritime workers. Rep. Harold Rogers (R-KY), the chair of the House Homeland Security Appropriations subcommittee, has reportedly been diverting funds intended for the project to the town of Corbin, Kentucky in his legislative district.

• STATES SPENDING HUNDREDS OF MILLIONS ON SCHOOL DATA SYSTEMS

As states seek to comply with the No Child Left Behind Act that requires detailed reporting on student achievement, some are spending as much as $60 million to computerize school district records into one database, only to be told that projects would require $180 million or so to complete. "It metastasized way beyond the original concept," an education analyst said of Idaho's projected $180 million project (*New York Times*, May 15).

• AIR MARSHALS HIT MENTALLY ILL MAN WITH 11 BULLETS

Rigoberto Alpizar, the mentally ill man shot and killed by federal air marshals at Miami International Airport last December after they thought they heard him say he had a bomb, was shot 11 times. State prosecutors called the killing of Alpizar "legally justified."

• UN COMMITTEE AGAINST TORTURE URGES GUANTANAMO TO BE SHUT DOWN
On May 19, ten UN human rights investigators charged with monitoring compliance with the Convention Against Torture published a hard-hitting report that urged the US to close Guantanamo Bay and other secret prisons and rescind "any interrogation technique – including methods involving sexual humiliation, 'water boarding,' 'short-shackling' and using dogs to induce fear – that constitute torture or cruel, inhuman or degrading treatment or punishment...in order to comply with its obligations under the convention" (*Boston Globe*, May 20). The Convention Against Torture had been signed by President Reagan and ratified by the Senate in 1994. The Committee also urged the US to stop its practice of "extraordinary rendition." A US delegation attending the Committee hearing in Geneva insisted that the US does not use torture. However, the delegation reported that there had been 29 deaths in detention due to abuse and 800 investigations into allegations of mistreatment in Afghanistan and Iraq, and 103 courts-martial resulting in 89 convictions. Human Rights Watch says it only knows of 54 courts-martial, only 10 of which resulted in more than one year in jail.

• BRITISH ATTORNEY GENERAL SAYS GUANTANAMO SHOULD BE CLOSED
On May 10, Attorney General Lord Goldsmith declared that "the existence of Guantanamo Bay remains unacceptable. It is time in my view that it should close...The historic tradition of the US as a beacon of freedom, of liberty and of justice deserves the removal of this symbol" (*Boston Globe*, May 11) Goldsmith also denounced military tribunals and demanded fair trials for detainees.

• BUSH AGREES!
On May 7, President Bush told a German television network that he would like to close Guantanamo and "get people to a court" (*Boston Globe*, May 8)

• DEBATE CONTINUES ON INTERROGATION TECHNIQUES
According to Secretary of Defense Rumsfeld, there is still no agreement on the techniques to be included in the new Army Field Manual on Interrogation (which has been under revision for a year) and whether some should be kept secret. Rumsfeld, appearing before the Senate Appropriations Subcommittee on defense, refused to say whether there would be a uniform standard for regular prisoners of war and those he calls "enemy combatants" who are to be afforded Geneva Convention protections (*Boston Globe*, May 18). One administration official claimed there was nothing in the McCain anti-torture amendment which "prohibited treating prisoners of war or unlawful combatants differently" (*Los Angeles Times*, May 11).

• MELEE AT GUANTANAMO AS DETAINEES ATTACK GUARDS
On May 18, several prisoners tried to commit suicide at Guantanamo and prisoners then fought guards for an hour, according to the May 20th *Boston Globe*. The military used a 12 gauge shot gun and rubber grenades to bring the situation under control. The incident occurred at the medium-security part of the prison, where the most "compliant" inmates are held, and happened on the day that 16 Saudi detainees were sent back to Saudi Arabia. "American officials have said the Saudi record on human rights of prisoners is an obstacle in releasing Saudis to their own country" since authorities "use beatings, whippings, sleep deprivation and other forms of abuse

of prisoners" (*New York Times*, May 18).

• UIGHURS SENT TO ALBANIA

Five Uighurs - Turkic Muslims from western China -- who were determined in late 2003 not to be "enemy combatants" have been sent from Guantanamo to Albania where they know no one, do not speak the language, and are reported by their Boston lawyer Sabin Willett to be in danger of being sent back to China which considers them terrorists: "The impoverished country where they were dumped without community, common language, family, or prospects is ill-suited to withstand the strident demands of the most powerful communist dictatorship on earth. These men never wronged the US in any way. What has happened is shameful" (*Boston Globe*, May 18). They were released just a few days before their case was due to be heard by a US appellate court. According to a May 12th article by Joanne Mariner in *FindLaw*, 141 other Guantanamo detainees (including 10 more Uighurs) have been cleared for release but are still at the prison. Many would face torture if sent home.

• HUNGER STRIKE EXPANDS AT GUANTANAMO

After introducing restraint chairs for forced feeding, the military had reduced the number of detainees on a hunger strike that began last August from over a hundred to three. Now it is up to 75 again, according to the May 30th *Boston Globe*. Navy Commander Robert Durand said it was an "attention-getting" device. Lawyers for the detainees say what they want is a chance at a fair trial.

• "HIGH VALUE" SUSPECTS NOT ON GUANTANAMO LIST

On May 15, in response to a Freedom of Information Act lawsuit brought by the Associated Press, the Pentagon handed over a list of 759 detainees who have been held at Guantanamo since it was opened four years and one-half ago. The list raises questions about the whereabouts of "high value" detainees who were believed to be involved with 9/11, such as Khalid Shaikh Mohammed and Ramzi Binalshibh.

• GENERAL DENIES HE AUTHORIZED USE OF DOGS TO FRIGHTEN DETAINEES

Maj. Gen. Geoffrey Miller, the highest ranking officer to testify at any trial into abuse at Abu Ghraib, told the court-martial of dog handler Sgt. Santos Cardona that he never said dogs should be used to intimidate prisoners. Instead he said military dogs could help with "custody and control" of detainees" (*New York Times*, May 26). Miller, the former commander at Guantanamo, was sent to "Gitmoize" Abu Ghraib in August 2003 in the effort to obtain intelligence about the growing insurgency. On June 1 Sgt. Cardona was found guilty of scaring prisoners with his dog.

• "GRAY AREA" HIGHLIGHTED IN COURT MARTIAL

On June 1, a military jury acquitted Pfc. Damien Corsetti, a former Army interrogator, of beating and sexually humiliating an Al Qaeda suspect at Bagram, Iraq. Capt. Carolyn Wood, the officer in charge of interrogators, testified under a grant of immunity that although they were supposed to follow the basic Army Field Manual on interrogations, they were also authorized to use sleep deprivation and stress positions and other techniques. Another interrogator, Marshall Skaggs, said sitting on detainees and some forms of humiliation that Pfc. Corsetti used were in a "gray area...kind of in between just talking to them and the area of actual physical abuse" (*New York Times*, June 2).

• RED CROSS ATTACKS UNITED STATES FOR NOT PERMITTING VISITS

The International Committee of the Red Cross (ICRC) has issued a statement condemning the US for not permitting it to visit people being held in secret detention, according to the May 13th *Boston Globe*. Such visits are mandated by the Geneva Convention.

• HUGE IMMIGRATION RALLIES FIRE UP OPPONENTS

As immigrants and supporters have taken to the streets by the million to demand that the draconian anti-immigration bill passed by the House last December be shelved and to call for real immigration reform, right-wing talk shows and websites have inflamed xenophobia and fears that "they" are taking over the country. According to the Southern Poverty Law Center, racist groups are using the furor over immigration as a rallying cry, fueling a 33 percent jump in the number of racist hate groups since 2000 (*USA Today*, May 16). In an effort to influence new immigration legislation (see *"In the Legislature," below*) supporters of strong border enforcement have sent an estimated 10,000 bricks to Congress bearing personal messages like "Stop the Invasion, Build a Wall" and "No Amnesty" (*New York Times*, May 31).

• BORDER WITH MEXICO BEING MILITARIZED

President Bush in a May 15th speech said he wasn't going to militarize the border, but it's difficult to know how else to interpret his announcement that he would be sending 6,000 National Guard troops to regain "full control." The "Border Patrol will remain in the lead," the president said, apparently to address Posse Comitatus concerns. He also recommended a "guest worker" program, an expansion of immigration detention facilities, a path to citizenship for some undocumented workers and a digitalized worker identification system. The *New York Times* on May 18th reported that under the "Secure Border Initiative" arms dealers Lockheed Martin, Raytheon and Northrop Grumman could win contracts of more than $2 billion to beef up border security with giant airships, unmanned aerial vehicles, and the "Terminator family" of sensors and video equipment which Raytheon provides for US troops in Iraq. And then there is the 370-mile 15-foot high wall, with accompanying double fences, sensors, video surveillance, and tactical military equipment that Senate has agreed to fund at an estimated cost of between $1.48 billion and $4.44 billion despite poll results that show 66 percent of Americans oppose using fencing to control immigration. Has Halliburton been awarded the contract yet?

• HALLIBURTON SUBSIDIARY TO BUILD NEW DETENTION CAMPS

Kellogg Brown & Root, a subsidiary of Halliburton which is implicated in massively overcharging on its Iraq military contracts, has been awarded a $385 million contract "for establishing temporary detention and processing capabilities to augment existing ICE Detention and Removal Operations Program facilities in the event of an emergency influx of immigrants, or to support the rapid development of new programs" (*The Progressive*, April 18). Halliburton reported that 2005 was "the best in our 86-year history."

• ICE ANNOUNCES EXPANSION OF "EXPEDITED REMOVAL" PROGRAM

The Bureau of Immigration and Customs Enforcement (ICE) is building a new detention facility in Texas which, in the words of an ICE spokesperson, "enables us to have deterrence with dignity by allowing families to remain together" while they await deportation through the Expedited Removal program that applies to immigrant who have spent 14 days or less in the country or are arrested within 100 miles of a border with Mexico or Canada or within 100 miles of a coastal border.

• FEDS PRESSURE POLICE TO ENFORCE IMMIGRATION LAW; SOME STATES ARE

COMPLYING
The May 7 *Boston Globe* reports that there is growing federal pressure on local police to help with the crackdown on undocumented immigrants. Some Florida and Alabama police have been trained to make immigration arrests, some California counties are going to enter into training agreements, and Arizona has a new law allowing police to prosecute immigrants for conspiring to smuggle themselves into the country. Arizona sheriff Joe Arpalo, who favors chain gangs and pink underwear for inmates, putting them in tents in the desert and giving children a taste of real prison, has created a posse of hundreds of volunteers to capture the undocumented. Georgia has passed a law requiring local police officers to check the immigration status of people arrested for drunken driving or a felony, and is training them to start the deportation process for undocumented persons found during traffic stops or drug arrests. The state also requires employers to verify the status of workers. At least 14 other states are working on similar legislation. But many police departments say they don't have the resources to turn into agents of ICE, and in many states efforts to pass punitive anti-immigrant legislation have been defeated.

• LAW AIMED AT IDENTIFY THEFT BEING USED AGAINST IMMIGRANTS
The Identity Theft Penalty Enhancement Act, which was passed by Congress in 2004 to move against fake ID rings, is now being used against immigrants who purchase fake birth certificates and other IDs, often thinking they are buying the seller's own authentic documents. People are being put in jail for two years under the law, and are then being deported.

B. IN THE US CONGRESS

• SENATE PASSES IMMIGRATION BILL; IT IS CONDEMNED BY THE HOUSE
On May 25, by a vote of 62 to 36, the Senate passed the Comprehensive Immigration Reform Act of 2006 (S.2611). It was immediately condemned by Rep. James Sensenbrenner, whose harsh "enforcement only" immigration bill that would criminalize the undocumented had passed the House last December. Under the complicated and disjointed Senate bill, depending on how long they have lived and worked in the US, an uncertain number of the estimated 12 million undocumented in the US would have some sort of obstacle-strewn path to citizenship under a three-tiered system. It is not at all clear how this would work in practice: how would the Department of Homeland Security sort out the estimated 2 million who are slated for deportation because they have been here without documents for less than two years and the more than two million who have been here between two to five years and have to go out of the country and apply for a green card to re-enter? The bill would also establish a new guestworker program with the possibility of ultimately obtaining permanent status, a new agricultural worker program (AAgJOBS), and the "Dream Act" for individuals brought to the US at age 15 or younger at least 5 years before the enactment of the Act. The bill makes an effort to reduce immigration backlogs that splits families. It more than doubles the number of employment-based visas, reduces the number of "diversity visas" (which have largely gone to people from Africa) and increases the number of visas for people with advanced degrees. The "basic pilot" electronic Employment Eligibility Verification System (EEVS) - which is now used on a voluntary basis by a few thousand employers - will be made mandatory and applied to all 50 million annual new hires. Although many improvements have been made to Title III of the bill which mandates EEVS (including some anti-discrimination, due process and privacy protections), it is based on a badly flawed "basic pilot" program that is characterized by high error rates, and represents a giant step towards a National ID system. The bill adds to the list of acts considered "aggravated felonies" that are automatic grounds for removal – under the bill if you enter the country with false papers

seeking asylum or have been working in the country for years with a false Social Security number you can be immediately expelled. If you are a legal resident and fail to notify the government of an address change you can be penalized. The bill also gives Border Patrol officers new powers to jail and deport without a judge's review, authorizes the use of the National Guard to patrol the border with Mexico until 2009, proposes building a 370 mile wall along the border with Mexico (the House wants a 700-mile-long wall), and designates English as the national language. Unless otherwise provided by law, there would be no legal entitlement to have documents in other languages and English and civics tests can be made more difficult to pass. The House and Senate are now supposed to meet in conference committee and somehow reconcile the two versions of "immigration reform."

• REPS. FRANK AND MARKEY SEEK TO MAKE PRESIDENT OBEY THE LAW

On May 4, the two Massachusetts Congressmen announced they were sponsoring legislation to end the "alarming pattern" of presidential signing statements, under which the administration "is blatantly and deliberately violating the fundamental constitutional principle of the right of Congress to make the laws of this country" (*Boston Globe*, May 5). The legislation will include provisions cutting off funds "in cases where the administration has attempted to pick and choose which parts of the law it will follow" and will instruct attorneys for the House to file "appropriate" lawsuits against the president "to defend the right of the Congress to legislate...We believe that this resolution will give every member of the House the opportunity to make clear whether or not he or she stands behind the fundamental principles of government set forth in the US Constitution."

• FLURRY OF BILLS ADDRESS DOMESTIC NSA SURVEILLANCE

Since there has been no investigation of the NSA warrantless spying program, the House and Senate are groping in the dark as they attempt to address the issue through a welter of legislation. The worst bills - Terrorism Surveillance Act (S. 2455), National Security Surveillance Act (S. 2453) and the House Intelligence Authorization Bill (H. Res. 5090) would fail to rein in the president and make judicial oversight optional. Others -- Foreign Intelligence Surveillance Improvement and Enhancement Act (S. 3001), NSA Oversight Act (H. Res. 4976) and the Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA Act (H. Res. 5371) -- put FISA back in the picture. Senator Russ Feingold's Resolution Relating to the Censure of President Bush (H. Res. 398) focuses on the need for an investigation to decide if the president should be censured. The Surveillance Activities Commission Act (S. 2362) would set up a commission to report on surveillance activities, while a Specter amendment would bar funds to the NSA program until Congress is fully briefed.

• SENATE COMMITTEE SEEKS DETAILS ABOUT SECRET CIA PRISONS

In late May, the Senate Intelligence Committee crafted legislation requiring the Administration to submit reports on the location of secret CIA jails and the treatment of terrorism suspects.

• HOUSE TO SUMMON GONZALES TO JUSTIFY OFFICE SEARCH

Republican Rep. James Sensenbrenner, chair of the House Judiciary Committee, has said he will demand that Attorney General Alberto Gonzales and FBI head Robert Mueller appear before the Committee to explain why the FBI searched Rep. William Jefferson's office on May 20. House Members claimed that the Justice Department had not exhausted other means for obtaining Rep. Jefferson's files, that the search was an attempt by the executive branch to cow Congress, that it amounted to a violation of separation of powers, and that taking a computer hard drive was "tantamount to taking every piece of paper in the office" and a violation of constitutional

privilege for legislative documents (*New York Times*, May 31). Rep. Darrell Issa (R-CA) said Congress could consider impeaching the Attorney General.

C. IN THE COURTS

• SUPREME COURT LIMITS PROTECTED SPEECH OF WHISTLEBLOWERS

On May 30 by a 5-4 ruling in *Garcelli v. Ceballos* (with Kennedy, Roberts, Scalia, Thomas and Alito in the majority), the Supreme Court came down against an employee who said he was demoted for writing a memo questioning whether a sheriff's deputy lied in a search affidavit. The Court held he was discharging official duties when he wrote the memo, and was not entitled to the same free speech protections a private citizen would have. The case had been re-argued after Justice O'Connor left the court, and there are indications that the court would have tipped in the other direction had Alito not replaced her.

• US HIDES KIDNAPPING AND TORTURE BEHIND "STATE SECRETS" PRIVILEGE

On May 18, the US District Court for the Eastern District of Virginia bought the government's argument that allowing the case brought by Khaled el-Masri to go ahead would jeopardize state secrets. El-Masri, who was represented by the ACLU, was the victim of the CIA policy of illegal abduction and detention known as "extraordinary rendition." A German citizen, he was kidnapped while on vacation, flown to a prison in Afghanistan where he was beaten, shackled and injected with drugs, only to be dumped at night on a hill in Albania five months later, as a case of mistaken identity. The ACLU had argued that all the information needed to establish CIA culpability is already public. According to attorney Ben Wizner, "The court's decision gives the government a blank check to shield even its most shameful conduct from any scrutiny or accountability."

• NSA, PHONE COMPANIES, FACE LAWSUITS; GOVERNMENT INVOKES 'STATE SECRETS" PRIVILEGE

The ACLU is representing a prominent and politically diverse group of journalists and lawyers in a lawsuit against warrantless NSA domestic spying which will have a hearing before Judge Anna Diggs Taylor in Detroit on June 12. The government has asked the judge to dismiss the case and also one brought by the Center for Constitutional Rights in New York invoking its "state secrets" privilege. According to the Justice Department, the legality of the president's actions could be judged only by understanding "the specific threat facing the nation" and "that understanding is not possible without revealing to the adversaries we are trying to defeat what we know about them and how we are proceeding to stop them" (*Boston Globe*, May 28). It filed a similar motion in the lawsuit brought by the Electronic Frontier Foundation against AT&T in Northern California. Meanwhile, class action suits against phone companies have been filed by the ACLU and by private law firms in Texas, Illinois and New York. Among the plaintiffs in the Illinois lawsuit is author Studs Terkel.

• RUMSFELD CLAIMS IMMUNITY IN TORTURE LAWSUIT

Secretary of Defense Rumsfeld, Lt. General Ricardo Sanchez, former Brig. General Janis Karpinski and Col. Thomas Pappas have claimed they are immune from liability in the lawsuit brought by the ACLU and Human Rights First in March 2005 that seeks to hold them accountable for the torture and abuse of detainees held by the US military in Iraq and Afghanistan. On May 25, the two organizations filed their response to the immunity claim, stating that the Constitution prohibits policies of torture or cruelty against civilians detained in US military custody and the

courts must be able to hold government officials accountable.

• MOUSSAOUI TO SPEND REST OF LIFE IN PRISON

On May 3, the jury in the Zacarias Moussaoui case announced that they had not agreed on the death penalty for a defendant whom they believed had limited knowledge of the 9/11 attacks. According to the May 12th *Boston Globe*, only one juror held out against the death penalty but didn't say why. On May 4, Judge Leonie Brinkema sentenced him to prison for life, saying he would be denied his wish to die as a martyr, and will instead "die with a whimper" (*New York Times*, May 5). A few days later, Moussaoui wrote that he wanted to withdraw his guilty plea, saying he had lied on the stand, and that he never met the hijackers and had not known anything about the 9/11 operation. Judge Brinkema said it was too late. In a videotape posted on the internet on May 23, Osama bin Laden declared that Moussauoi had no role in the September 11th attacks, and neither did Guantanamo detainees.

• AL-ARIAN GIVEN ADDITIONAL 19 MONTHS IN PRISON

Dr. Sami Al-Arian, who was acquitted of serious terrorist charges by a Florida jury after a 6-month trial that was the centerpiece of the Bush Administration's anti-terror efforts, pleaded guilty to a lesser charge on which the jury had deadlocked in order to avoid a retrial and agreed to be deported. It was expected that he would be immediately released from prison and sent out of the country. Instead, on May 1, Judge James Moody castigated the former university professor as a "master manipulator" and sentenced him to the maximum permitted under the sentencing guidelines, more even than the prosecution had requested (*New York Times*, May 2). The judge even rebuked him for things that the jury said he had not done. Al-Arian has spent the last 3 and ½ years in solitary confinement in a federal prison.

• MAN FOUND GUILTY OF PLOT TO BLOW UP NEW YORK SUBWAY

Shahawar Matin Siraj, a 23-year-old Pakistani immigrant, was convicted by a federal jury in Brooklyn of plotting to blow up a Manhattan subway station in 2004. The defense had argued that he had been entrapped by a paid informer who received about $100,000 for activities that included attending 575 prayer services over 13 months, recording the license plate numbers of people who visited the mosque, and preparing 350 reports based on his visits to two mosques and an Islamic bookshop. The trial brought to the surface the extent of surveillance in the Muslim community, which was the focus of *New York Times* articles on May 17 and May 28. "It's like a police state here," a public high school teacher said, "We do not feel that we are living in the most free country in the world" (May 17).

D. IN THE COMMONWEATH

• ACLU OF MASSACHUSETTS DEMANDS PHONE RECORDS PROBE

On May 24, ACLUM filed a complaint with the Massachusetts Department of Telecommunications and Energy (DTE) on behalf of its 22,000 members and the mayors of Newton, Somerville, Northampton and Chicopee. The complaint requests that the DTE act in accordance with Massachusetts law and hold a public hearing into whether the phone companies were turning over customer records without warrants. The law says a hearing shall take place if a mayor requests it. ACLUM also filed a separate request asking the DTE to adopt regulations that prohibit phone calling records from being turned over without specific legal authority and notice to customers.

• NEW NATIONAL GUARD INTELLIGENCE UNIT PLANNED FOR MASSACHUSETTS
As if there were not enough intelligence agencies in the Bay State, the National Guard is intending to establish a "Distributed Ground Station unit" which will process and disseminate "real-time intelligence" and "bolster the state's homeland defense capabilities" (*Boston Globe*, May 10).

• CAMBRIDGE STILL A SANCTUARY CITY
On May 8, the Cambridge City Council voted unanimously to declare the city a sanctuary for undocumented immigrants. The resolution, similar to one the Council had passed in 1985, instructs police and other local agencies not to inquire about person's immigration status. It also expressed opposition to the US House of Representative's anti-immigration bill, denounced workplace raids and sweeps of immigrant homes by US officials and rejected the use of "illegal" and "alien" to describe human beings. Similar resolution efforts are under consideration in Somerville and Chelsea.

• OTHER MASSACHUSETTS TOWNS MAKE ANTI-IMMIGRANT RULES
Some Massachusetts towns are passing new ordinances designed to keep out the undocumented, claiming that immigrants are bringing diseases into their communities, putting a financial burden on taxpayers and driving down property prices. Milford, Everett, and Weymouth are among the towns that are taking these actions, according to the May 21 *Boston Globe*.

• BOSTON HOSPITALS TO LOSE OUT ON HIGH-PAYING PATIENTS
A ten-year-old program established by Saudi Arabia to bring patients to the US for medical care has been shut because of the long delays in getting visas since 9/11. The Saudi government had spent large sums on medical bills and living expenses for thousands of patients and their families, many who came to Boston. According to a PartnersHealthcare spokesman, the loss of Saudi patients will mean less money to help cover the costs of Boston's uninsured poor (*Boston Globe*, May 17).

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