

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

February 5, 2008

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### A. EXECUTIVE ACTIONS

#### **• WHITE HOUSE STRUGGLES TO MINIMIZE DAMAGE FROM DESTRUCTION OF CIA TORTURE TAPES**

On December 6, 2007, the *New York Times* reported that the CIA in 2005 had destroyed at least two videotapes made in 2002 that showed its agents submitting al-Qaeda suspects Abu Zubaida and Abd al-Rahim al-Nashiri to harsh interrogation techniques. When he learned from the newspaper that it intended to disclose this information, CIA Director Michael Hayden immediately wrote to CIA employees saying the tapes were destroyed to protect the identities of CIA officers which could expose them "to retaliation from al-Qaeda and its sympathizers" (*Washington Post*, December 7).

#### **Mukasey resists Congressional oversight**

In the two months since then, the Administration has maneuvered to block investigations into the matter by Congressional Intelligence and Judiciary Committees and the courts, and to insist that the matter is best left to the Justice Department. Attorney General Michael Mukasey initially told the House and Senate Judiciary Committees that they had no business knowing how the Justice Department would proceed as this could make it appear that it was "subject to political influence" and rejected appointing a special prosecutor (*Washington Post*, December 14). Congress refused to back off, and sent to the CIA unsigned subpoenas for documents and for the testimony of Jose Rodriguez, then-head of the CIA's clandestine service who destroyed the tapes after consultation with White House and CIA lawyers, top CIA lawyer John Rizzo. Rodriguez refused to testify without immunity.

#### **Mukasey forced to act**

Throughout December there was a steady drip-drip of embarrassing disclosures. It was revealed that in June 2005, five months before the tapes were destroyed, US District Court Judge Henry Kennedy ordered the Bush administration to safeguard all evidence regarding torture and abuse of detainees at Guantanamo Bay. The Associated Press reported on December 21 that the Administration was urging Judge Kennedy to back off any further involvement in the matter -- on January 6, 2008, the judge ruled that no court order had been violated since the two suspects were interrogated before they arrived at Guantanamo (*see In the Courts, below*). 9/11 Commission members expressed dismay that the CIA never provided them with the hundreds of hours of videotapes. Neither had they been provided to US District Judge Leonie Brinkema, even after she ordered the CIA to turn over tapes that might be relevant to the defense of Zacarias Moussaoui. On January 2, Attorney General Mukasey announced he was appointing federal

prosecutor John Dunham to oversee a criminal investigation. However, Dunham would not have the enhanced powers of a special prosecutor.

### **Waterboarding is torture – and torture is illegal**

That failed to stop the by-now steady drip of revelations. Jane Harman (D-CA), the ranking Democrat on the House Intelligence Committee in 2005, asked the CIA to declassify the letter she wrote to the agency in February 2003 urging that the tapes be preserved. National Intelligence Director John Negroponte had made a similar recommendation. Jason Leopold reported in the January 3 and January 7 issues of *Truthout* on the timing of the tape's destruction: CIA Inspector General John Helgerson (who was recently himself investigated on the orders of CIA head Michael Hayden) and his deputy Mary McCarthy had been conducting an investigation of CIA interrogation methods, and concluded that they violated the International Convention Against Torture. In November 2005, the same month the results of the investigation were reported in the *New York Times*, the tapes were destroyed. McCarthy, a career CIA official, was subsequently fired from the CIA for allegedly leaking information to the media (which she has strenuously denied). She went on to oppose Mukasey's appointment on grounds that he did not denounce waterboarding and to claim that the CIA had lied under oath during intelligence briefings.

### **Mukasey says waterboarding is torture if done to him; but it may be legal**

By the end of January the attorney general was showing signs of fatigue as Congress refused to let the issue drop. At a Senate Judiciary Committee hearing on January 30, he was asked by Senator Ted Kennedy, "Would waterboarding be torture if it was done to you?" "I would feel that it was," Mukasey replied (*Washington Post*, January 31). But was it illegal? Maybe not. "This is an issue on which people of equal intelligence and equal good faith and equal vehemence have differed," stated the attorney general, a statement that could have come from the mouth of his predecessor Alberto Gonzales. Mukasey also told the Committee that the Justice Department probe into the destruction of the tapes could be expanded to consider whether harsh interrogation tactics depicted on the tapes violated federal anti-torture laws. Will he decide whether waterboarding is or is not torture by then?

### **• WATERBOARDING IS TORTURE: TOM RIDGE**

While current Department of Homeland Security head Michael Chertoff stalled when asked if waterboarding constituted torture ("This is too important a discussion to have based on throwing one question at somebody"), his predecessor Tom Ridge stated to the American Bar Association and the Associated Press, "There's just no doubt in my mind – under any set of rules – waterboarding is torture." Ridge is an attorney with both a military and civilian background, a former Pennsylvania congressman and governor who now has his own homeland security consulting firm (*Associated Press*, January 18).

### **• CIA AGENTS TAKE OUT EXPENSIVE LIABILITY INSURANCE**

The January 20 *New York Times* reported that Wright & Company, a small insurance firm in Virginia, has been getting hefty government business ensuring its employees from charges of wrongdoing. "The insurance is popular with FBI agents, Secret Service officers, and Immigration and Customs Enforcement workers as well as CIA officers" -- including Jose Rodriguez, who has \$300,000 in coverage for legal fees.

### **• EXPERTS SAY CIA SHOULD BE TAPING INTERVIEWS**

While the investigation of the destroyed tapes continues, government and international experts in interrogation methods say that taping sessions is crucial in order to understand the nuances of what is being communicated. The failure of the CIA to tape all interrogations "indicates an outmoded level of secrecy and unprofessionalism...the way we communicate, the way we react and conceal, can be more revealing than what

we say...and none of that shows up on a transcript" (*Los Angeles Times*, December 23). Tapes would also help determine what techniques work and enable supervisors to see if interrogators failed to ask important questions or used inappropriate and illegal tactics.

- **THE ONLY GUANTANAMO DETAINEE TO BE SENTENCED IS NOW FREE**

David Hicks, the detainee who appeared before a Military Commission in Guantanamo last March and agreed to a plea bargain, left the Australian jail where he served his sentence on December 29. He is subject to a gag order and "control order" including a nighttime curfew (*New York Times*, December 29).

- **BIN LADEN'S DRIVER MAY SOON APPEAR BEFORE A MILITARY COMMISSION**

Navy judge Capt. Keith Allred has ruled that Salim Ahmed Hamdan was an "unlawful enemy combatant" who could be tried for war crimes under the Military Commissions Act (*Los Angeles Times*, December 21). The government has already twice attempted to try Bin Laden's former driver and bodyguard. Two days earlier, the same judge found that some of the approximately 300 detainees at Guantanamo might not be "unlawful enemy combatants," but instead might be entitled to prisoner-of-war status under the Geneva Convention.

- **ATTORNEYS ORDERED TO KEEP NAMES OF ACCUSERS FROM CLIENT**

Also awaiting trial before a Military Commission is Canadian Omar Khadr, who was 15 years old when he was captured in Afghanistan. According to the December 1 Associated Press, a US military judge has ordered his attorneys not to reveal the identities of the witnesses against him to anyone, including their client, in order to protect the witnesses from "possible terrorist retaliation." His attorneys have protested that the ruling makes it impossible for Khadr to provide information that could challenge the credibility of his accusers.

- **USE OF TORTURE MAY KEEP OTHER DETAINEES FROM BEING TRIED**

On December 13, UN Special Rapporteur Martin Scheinin told a press conference that US officials had informed him that of the remaining Guantanamo detainees, 80 were expected to be tried, 80 had been cleared for release and no decision had been made to either try or release the remaining 150, some of whom had been held six years without trial. "There is not evidence that could be presented...partly there may not be the evidence and partly the risk of issues of torture being raised is too high. Bringing them to court would bring to the court's attention the method through which the evidence, including confessions, were obtained" (Reuters, December 13). Others could remain endlessly in legal limbo because there is no place to send them due to legal obstructions posed by home countries and the likelihood that they would be tortured on their return. On December 3, *The Boston Globe* published a heartrending op ed by Boston attorney Sabin Willett, who represents a Guantanamo detainee who has been held for six years although he was deemed innocent in 2002 and again in 2003. He is now being "held alone in a metal cell, denied any contact with companions, books, news, the world" and has concluded that he will "never leave Guantanamo."

- **FORMER CHIEF PROSECUTOR FOR MILITARY COMMISSIONS SAYS THEY NOT FAIR**

On December 10, the *Los Angeles Times* featured an op ed by Air Force Col. Morris Davis explaining why on October 4<sup>th</sup> he decided to resign as chief prosecutor for the Guantanamo Office of Military Commissions. "I resigned on that day because I felt the system had become deeply politicized and that I could no longer do my job effectively or responsibly." He denounced the secrecy surrounding the commissions, their lack of honesty and impartiality and his dispute with Defense Department General Counsel William Hayes about whether to offer evidence obtained under waterboarding and

other "aggressive interrogation techniques some call torture." On December 19, the *Los Angeles Times* published a rebuttal by Air Force Brig. Gen. Thomas Hartmann, a legal advisor to the Office of Military Commissions. He contended that "military commissions are now moving forward fairly and transparently. As they continue, critics will see uniformed service members...conduct trials with the dignity, fairness and respect for law that defines American military justice."

• **CHIEF JUDGE OF MILITARY COMMISSIONS WAS FORMERLY THEIR CRITIC**

Col. Ralph H. Kohlmann, appointed the chief judge at Guantanamo in March 2007, wrote a paper for his Master's degree severely criticizing the Military Commission system five years earlier. He argued it would have serious "credibility problems" and the US would be better off trying terrorism suspects in federal courts (*New York Times*, December 13).

• **BUSH WANTS TO CONTROL MILITARY LAWYERS**

According to Charlie Savage in the December 15 *Boston Globe*, the Bush Administration is seeking veto power over the promotions of members of the Judge Advocate General (JAG) corps. Former JAG officers have denounced the move, claiming the new Pentagon regulation would end military lawyers' ability to serve as a check-and-balance on presidential power and undermine their independence to speak out against White House illegality. Former Bush Administration legal advisor John Yoo, author of an infamous torture memo, has recently co-written a law review article sharply critical of the JAG's unwillingness to endorse the Administration's treatment of detainees.

• **HEAD OF JOINT CHIEFS FAVORS CLOSING GUANTANAMO**

On January 13, two days after world-wide protests marking the sixth anniversary of the opening of Guantanamo demanded that it be shut down, Admiral Mike Mullen toured the prison facility. He admitted to reporters that the treatment of terrorist suspects had been "pretty damaging" to the image of the US and that he'd like to see it closed (*Boston Globe*, January 14). He added he was unaware of "any immediate consideration" in the Administration to shut it down.

• **ONLY OFFICER CONVICTED IN ABU GHRAIB SCANDAL HAS CONVICTION THROWN OUT**

On January 10 the commander of the Military District of Washington threw out the only conviction pending against Lieutenant Col. Steven Jordan. Jordan had been cleared at a court martial of failing to properly supervise the 11 lower-ranking soldiers convicted of their roles in the abuse, but had been found guilty of disobeying an order not to talk about the investigation. Now that conviction has been thrown out, leaving the only officer criminally charged in the scandal with a clean record (*Boston Globe*, January 11).

• **CANADA PUTS US ON ITS TORTURE LIST**

A manual compiled for diplomats by the Canada Department of Foreign Affairs lists the United States among the countries that potentially torture or abuse prisoners alongside Syria, Iran, Israel, Afghanistan and China (*New York Times*, January 18). In late November the Federal Court of Canada ruled that it was inappropriate to designate the United States as a Safe Third Country for refugees.

• **EUROPE PARTICIPATED IN EXTRAORDINARY RENDITION FLIGHTS**

According to the November 25<sup>th</sup> *London Sunday Times*, Portugal, Spain, Greece, Italy and perhaps other European nations colluded with the extraordinary rendition program by allowing flights ferrying some 700 kidnapped suspects to occur through their airspace. NATO was frequently involved in giving clearance for the flights. The Associated Press reported on January 31 that the CIA secretly used both Denmark and the semiautonomous Danish territory of Greenland to transport prisoners.

- **FINAL RULES ISSUED FOR REAL ID; HUGE PROBLEMS REMAIN**

The REAL ID Act was rammed through Congress without hearings in May 2005. On January 11, 2008, the Department of Homeland Security issued its final regulations and chose to ignore the many unworkable statutory provisions of the Act, instead of fixing them. The regulations delay its implementation until 2114 for people born after 1964. Those born before 1964 will need a REAL ID driver's license to enter federal buildings and board planes at the end of 2117. The legislatures of 17 states have passed resolutions or statutes against REAL ID compliance.

- **FBI TO TRACK MILLIONS IN ITS \$1 BILLION DATABASE**

The FBI is planning to build at its Clarksburg, West Virginia headquarters the world's biggest computer database of physical characteristics of terrorist suspects and criminals. "Next Generation Identification" will include digital images of their faces, iris scans, fingerprints and palm patterns, according to the December 23 *Boston Globe*. Already the Department of Defense is storing database images of Iraqi and Afghan citizens and detainees, as well as DNA samples, and the Department of Homeland Security has been using iris scans at some airports to verify the identities of passengers. The FBI is approaching the UK, Canada, Australia and other countries about sharing their biometric data. Today, there are 900,000 local, state and federal law enforcement officers who can tap into the existing FBI database of 55 million sets of electronic fingerprints. It receives 100,000 requests a day.

- **FBI FAILURE TO PAY BILLS LEADS TO WIRETAP DISCONNECTIONS**

A report by Justice Department Inspector General Glenn Fine has found that "more than half of the nearly 1,000 FBI telecommunications bills reviewed by investigators were not paid on time," resulting in lost evidence when the agency was denied access to wiretaps by phone companies. The lost information was reportedly retrieved when the bills were paid (*Boston Globe*, January 11).

- **NEW GOVERNMENT AGENCY TO USE PRIVATE CONTRACTORS TO SPY INSIDE THE US**

Tim Shorrock, author of the forthcoming Simon & Shuster book *Spies for Hire: The Secret World of Outsourced Intelligence*, wrote in the November 27 *Corpwatch* about plans of the Bush Administration to create an agency relying heavily on private security contractors to carry out surveillance within the United States. The National Applications Office (NAO) will coordinate an intelligence-sharing system managed with the help of private contractors like Boeing and BAE Systems to determine how classified information collected by the NSA, the National Geospatial-Intelligence Agency (NGA) and other spy satellites is utilized by the federal government and domestic law enforcement. "The NSA and the NGA have a close relationship with the supersecret National Reconnaissance Agency (NRO), which builds and maintains the US fleet of spy satellites and operates the ground stations where the NSA's signals and the NGA's imagery are processed and analyzed. By law, their collection efforts are supposed to be confined to foreign countries and battlefields. The National Applications Office was conceived in 2005 by the Office of the Director of National Intelligence (ODNI), which Congress created in 2004 to oversee the 16 agencies that make up the US intelligence community. The ODNI, concerned that the legal framework for US intelligence operations had not been updated for the global 'war on terror,' turned to Booz Allen Hamilton of McLean, Va., one of the largest contractors in the spy business. The company was tasked with studying how intelligence from spy satellites and photoreconnaissance planes could be better used domestically to track potential threats to security within the United States." The Boaz Allen plan was endorsed in May 2007 by Director of National Intelligence Michel McConnell, a former Boaz Allen executive vice-president and has been pronounced an "idea whose time has arrived." According to Shorrock, the NAO was

supposed to be launched last October, but this was delayed when Congress insisted on more information after plans for the agency were leaked by the *Wall Street Journal* last August. Rep. Jane Harman warned that "it will terrify you if you really understand the capabilities of satellites...even if this program is well-designed and executed, someone somewhere else could hijack it."

- **FUSION CENTERS LOSING ANTI-TERROR FOCUS**

According to a report by the Government Accountability Office, only two of the 43 state "fusion centers" (in Kansas and Rhode Island) established to pool intelligence focus exclusively on preventing terrorism. The others concentrate on all crimes, including drugs and gangs (Associated Press, November 29). The report found problems in hiring and training, and stated that federal agencies such as the FBI and Homeland Security Department refused to accept each others' clearances, in violation of the law.

- **WHITE HOUSE ROUTINELY "RECYCLED" BACK UP TAPES OF EMAILS**

During the first three years of the Bush Administration, the emails of White House personnel were routinely destroyed, as it used the same backup tape over and over on a daily basis. Despite court orders and demands from Congressional oversight committees and the National Archives and Records Administration, it failed to archive millions of emails for at least 473 separate days (*Washington Post*, January 22).

- **JUDGE RULES WHITE HOUSE VISITOR LOGS ARE PUBLIC**

In a ruling striking down White House claims to executive privilege, Judge Royce Lamberth of the Federal District Court in Washington ordered the White House on December 18<sup>th</sup> to turn over visitor logs being maintained by the Secret Service to groups that have requested them in a FOIA lawsuit. The Administration is expected to appeal.

- **ADMINISTRATION TOLD TO SPEED UP DECLASSIFICATION**

The secrecy-driven Bush Administration has been warned by the Public Interest Declassification Board that it is taking much too long making information public, and urged the creation of a national declassification program under the US archivist (*Boston Globe*, January 10).

- **RESEARCHERS CITE 935 FALSE STATEMENTS TO JUSTIFY WAR WITH IRAQ**

The January 23 *New York Times* has reported on the research of two nonprofit journalism organizations that found President Bush and other Administration officials steadily and repeatedly made false statements about Iraq in the build up to the war. "In short, the Bush administration led the nation to war on the basis of erroneous information that it methodically propagated and that culminated in military action against Iraq."

- **9/11 COMMISSION EXECUTIVE DIRECTOR CONSULTED WHITE HOUSE**

According to Philip Shenon's *The Commission: The Uncensored History of the 9/11 Investigation*, 9/11 Commission Philip Zelikow exchanged frequent calls with the White House, including Karl Rove, tried to minimize Bush Administration responsibility for the attacks, and to make a tie between Iraq and Osama bin Laden. Zelikow was a close friend of Condoleezza Rice's and had written a book with her in 1995. The 9/11 Commission also never got around to looking at files containing NSA intercepts and the Administration insisted some of its findings would not be made public.

- **REPORT SAYS NATIONAL GUARD & RESERVES DANGEROUSLY WEAKENED BY IRAQ WAR**

According to a report by the Commission on the National Guard and Reserves, the wars in Iraq and Afghanistan have opened up an "appalling" readiness gap in the ability of the National Guard and reserves to defend US soil (*Washington Post*, February 1). Since 9/11, nearly 600,000 reservists have been sent abroad as part of the "war on terror"

putting the US in a position where it may have to rely on a draft in the near future.

• **BUSH APPENDS "SIGNING STATEMENT" JUST HOURS BEFORE STATE OF UNION ADDRESS**

According to the February 1 *Los Angeles Times*, hours before he gave his State of the Union address the president appended a signing statement to portions of the latest defense bill he deemed might not be "consistent with the constitutional authority of the president." The measures would bar the Administration from establishing permanent bases in Iraq or controlling Iraqi oil resources, would establish a congressional commission to review military contracts in Iraq, would protect contractor whistleblowers and stop the military and intelligence agencies from taking more than 45 days to respond to Congressional requests for information.

• **BRATTLEBORO RESIDENTS WANT TO IMPEACH BUSH FOR WAR CRIMES**

A measure that will be before the March town meeting in Brattleboro, Vermont if organizers gather a thousand signatures asks, "Shall the Selectboard instruct the town attorney to draft indictments against President Bush and Vice President Cheney for crimes against our Constitution, and publish said indictment for consideration by other municipalities?" Supporters claim it is rooted in the tradition that produced the Declaration of Independence (*New York Times*, December 29).

• **TSA SCREENER BOARDS PLANE WITHOUT TICKET OR BOARDING PASS**

A passenger and baggage screener seeing his parents off at Kennedy International Airport got on the plane with them. He was arrested after notifying a flight attendant when the doors shut for take-off and has been charged with criminal trespass (*New York Times*, December 7).

• **ARMED PASSENGER CLEARS SECURITY CHECKPOINT IN WASHINGTON**

But before he boarded his plane he realized he carried a gun and returned voluntarily to the Reagan National Airport checkpoint, according to the January 23 *Washington Post*.

• **NEW PASSPORT CARDS TO CONTAIN CHIP THAT CAN BE READ FROM 40 FEET**

In an effort to reduce waiting time at border checkpoints, the federal government is planning to issue optional passport cards equipped with RFID chips that can be read from a distance, enabling officials to check travelers against terrorist and criminal watchlists while they wait (*Washington Post*, January 1). Privacy experts have complained that the government is using the type of RFID chip "designed to track goods – pallets of toilet paper at Wal-Mart," that it can easily be cloned, and that a reader with a strong signal would be able to read it from 40 feet away.

• **8.3 MILLION AMERICANS SUFFERED IDENTITY THEFT IN 2005**

The January 2 *Washington Post* reported that this was the most recent estimate available. Far more were at risk since "the crown jewel in identity theft – the Social Security number – can be mined easily in the government's own records, creating a measure of social insecurity for millions."

• **ARAB STUDENTS CHOOSE TO STUDY ELSEWHERE**

The crackdown on issuing Middle East visas and indignities encountered at airports have produced a sharp decline in the number of foreign students from Persian Gulf countries who are applying to attend universities in the US. According to the December 23 *Boston Globe*, they are finding Australia more welcoming. One student from Dubai turned down a full scholarship to attend Harvard University's Kennedy school, fearing visa hassles (*Washington Post*, December 20). The 500,000 foreign students who studied in the US last year poured \$14.5 billion into the economy.

- **BLACKWATER SEEKS US/MEXICO BORDER PATROL CONTRACT**

The private security firm Blackwater, which is being investigated for crimes in Iraq, is piloting its remote-controlled unmanned aerial vehicle Polar 400 in Potrero, California along the border with Mexico. The firm, which reportedly hopes to win a big Homeland Security contract, has been met with anti-Blackwater rallies (*New York Times*, December 11).

- **ICE TARGETS WORKERS, NOT EMPLOYERS**

After promising to crack down on employers who employed undocumented workers, the Bureau of Immigration and Customs Enforcement (ICE) is continuing to focus its efforts on rounding up workers, according to a DHS year-in-review summary. 92 employers were arrested in 2007 and 17 firms faced criminal fines or other forfeitures. The Bush Administration is struggling to fix the Internet-based E-Verify program through which employers are supposed to check the Social Security numbers of employees, which has resulted in a large number of false positives (*Boston Globe*, December 26). According to the November 28 *Los Angeles Times*, as many as 10 percent of foreign-born US citizens were told by the system they were not eligible to work, even though they were in fact legally eligible for employment.

- **SURVEY SHOWS IMPACT OF IMMIGRATION RAIDS**

In a Pew Center poll, two-thirds of those polled among the 47 million Hispanics who live in the US said their lives had been made more difficult by the fight over immigration; 53 percent worry that a family member could be deported; and 75% disapprove of workplace raids (*New York Times*, December 14).

- **PUBLIC SHOWS MIXED VIEWS ON IMMIGRATION ISSUES**

Peter Schrag writing in *The Nation* on January 5 describes the results of polls showing 69 percent of US adults believe the undocumented resident population should be reduced; 76 percent say they should not get driver's licenses; 43 percent agree that when they encounter local police they should not be arrested if they have not committed a crime; 58 percent support "a program of giving illegal immigrants now living in the US the right to live here legally if they pay a fine and meet other requirements" while 43 percent say immigration is a good thing.

- **ICE AGREES NOT TO SEDATE DEPORTEES**

After the ACLU brought a lawsuit against ICE which had forced at least 56 deportees to take psychotropic drugs during a 7 month period in 2006-7, ICE agreed to stop drugging deportees as they were being loaded onto airplanes (*The Associated Press*, January 12, 2008).

- **ONE OUT OF EIGHT PEOPLE IN US IS A NEWCOMER**

This is the highest level of foreign-born residents in the United States since 1920s, according to a survey conducted by the Center for Immigration Studies in Washington (*New York Times*, November 29).

- **HUGE BACKLOG IN CITIZENSHIP APPLICATIONS**

People applying to be naturalized face a wait of up to 16 to 18 months, twice the usual length of time, according to the January 25 *Boston Globe*. "The backlog is the result of millions of applications for citizenship, green cards, and work permits that swamped immigration offices last summer before hefty fee increases went into effect July 30." More than a million citizenship applications are pending in the US and more than 800,000 green card applications.

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

- **WHAT WILL CONGRESS DO ABOUT THE "PROTECT AMERICA ACT"?**

On January 29, Congress passed a two-week extension of the Protect America Act (which was due to expire on February 1) after President Bush threatened to veto a 30-day extension. The president, the vice-president and national intelligence head Mike McConnell have used the drumbeat of fear and threats to try to induce Congress to give them everything they want. At the time of writing (February 5), the Senate is wrangling over whether to give immunity from lawsuits to telecommunication companies that cooperated with the government's warrantless domestic surveillance of Americans. (There is evidence that this cooperation pre-dated 9/11.) Many senators, Democrats and Republicans alike, have close ties with telecoms and support the FISA Amendments Act (S.2248), being pushed by Intelligence Committee head Senator Jay Rockefeller, the recipient of \$42,000 in political donations this year from the executives of AT&T and Verizon. It is almost identical to the Protect America Act. According to an investigative report by Matt Renner in Truthout, five of the 12 Democratic Senators who broke with their party and voted against a much better Senate Judiciary Committee bill are "Honorary Senate Chairs" of a think tank called Third Way which is closely aligned to the telecoms (January 31). To date, Senator Majority Leader Harry Reid has been prevented from bringing the Rockefeller bill to the floor for a vote by opposition within his own party and Christopher Dodd's threatened filibuster.

Any bill that comes out of the Senate will have to be reconciled with the Restore Act (HR 3773), passed by the House of Representatives last November 15. Although it does not include retroactive immunity for telecoms, the Restore Act does not go far enough to protect Americans from warrantless wiretapping and to restore our Fourth Amendment rights. It does not require individual warrants before government agents seize material from Americans on American soil, but instead allows the government to apply for a "blanket" or general warrants from the FISA court without specifying the person or "facilities, places, premises or property" to be under surveillance. It leaves the decision of how to handle U.S. information intercepted by wiretaps in the hands of the Administration instead of requiring that it be destroyed. And it gives the government seven days to carry out "emergency" surveillance on U.S. persons without going to the FISA court, and permits the government to keep seized information, even if it turns out there is no real "emergency."

*The ACLU is urging Congress to oppose the final passage of any bill that extends the government's warrantless wiretapping authority or grants retroactive immunity to companies that participated in the warrantless surveillance of Americans. Rather than pass a bad bill, Congress should allow the Protect America Act to sunset. In that eventuality, current programmatic orders could operate for an additional year and new surveillance would revert to the requirements of the FISA statute which has been amended dozens of times since its passage in 1978 to meet the needs of the intelligence community.*

- **HOUSE BANS CIA FROM USING WATERBOARDING**

By 222-199, the House of Representatives approved a compromise House-Senate amendment drafted by the intelligence committees to a bill for more than \$43 billion authorizing intelligence operations in 2008. The amendment bans the use of waterboarding and other forms of cruel, inhuman and degrading treatment. CIA operatives would be required to follow the Army Field Manual's interrogation standards. The bill also requires reporting to the intelligence committees on the use of private contractors in intelligence work. In the Senate hearings conducted in January, Attorney General Mukasey and other Administration officials refused to say whether waterboarding was a form of torture (*see Executive Actions, above*). Senate Republicans have kept the bill from moving to a vote and the Bush Administration has threatened to

veto the measure.

• **CONGRESS APPROVES – AND PRESIDENT SIGNS – OPEN GOVERNMENT ACT OF 2007**

On New Year's Eve President Bush signed into law an Act that requires agencies to respond to requests under the Freedom of Information Act (FOIA) within 20 days, and establish a tracking number if the request takes longer. Agencies that do not comply within 20 days would be denied the right to charge for copying costs. The Act includes private government contractors under the scope of FOIA. It had passed the House unanimously by voice vote after language was stripped from it which explicitly reversed former Attorney General Ashcroft's order that agencies should lean against releasing information if they thought national security was implicated. There was strong media support for the Act.

• **BILL ATTACKS ABUSE OF POWER ON SEVERAL FRONTS**

On October 14, 2007 Rep. Ron Paul (R-TX) introduced **H.R. 3835, the American Freedom Agenda Act (An Act to Restore the Constitution's Checks and Balances and Protections against Government Abuses)**, which would repeal the entire Military Commissions Act and do much more: it would keep evidence obtained from torture out of trials; prevent people from being labeled as "terrorists" through the use of secret evidence; end extraordinary rendition as currently practiced; enable Members of Congress to challenge presidential signing statements and assert the president does not have the constitutional authority to ignore the Foreign Intelligence Surveillance Act (FISA).

**C. IN THE COURTS**

• **US SUPREME COURT HEARS ARGUMENTS IN GUANTANAMO CASE**

On December 5 the Supreme Court heard arguments in the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States* which test the constitutionality of the provision of the Military Commissions Act stripping habeas corpus from Guantanamo detainees. The cases were brought on behalf of 37 detainees labeled "enemy combatants" who have been in Guantanamo for up to six years and have been seeking to have their claims of innocence heard before a federal court. In its 2004 decision in *Rasul v. Bush*, the Supreme Court ruled that the ancient right to habeas corpus, which guarantees a review by a neutral fact-finder to determine if a person has been unjustifiably imprisoned, *did* extend to Guantanamo since the Cuban prison was under total US control. In 2006 Congress passed the Military Commissions Act denying the Great Writ to Guantanamo detainees. The Bush Administration is now arguing that the president and Congress have made it clear that the men should not have their day in federal courts, which should stop interfering with the prosecution of the "war on terror." Also under scrutiny are the legitimacy of the Guantanamo-based Combatant Status Review Tribunals (CSRTs) as neutral fact-finding bodies. Evidence has been presented of detainees who had been cleared by intelligence agencies of any involvement with terrorism being kept for years in Guantanamo on the basis of flimsy and inappropriate allegations presented to the CSRTs. For instance, a German detainee Murat Kurnaz was kept in Guantanamo for 4 years after being cleared by US intelligence officials because his CSRT hearing was told by a military officer that he prayed while the US national anthem was sung and had an unusual interest in the guard schedule. US District Judge Joyce Hens Green who reviewed the CSRT classified record, concluded in January 2005 "that his treatment provided powerful evidence of bias against prisons" and deemed the CSRT proceedings illegal under US and international law. Her ruling was itself classified (*Washington Post*, December 5). During the oral arguments on December 5, Justices Roberts, Scalia, Thomas and Alito seemed to agree with the government position. The Supreme Court will decide by June whether to again affirm the right to

habeas corpus and overturn the February ruling of the US Court of Appeals for the DC Circuit, or endorse the Administration's position despite the Constitution provision that the right to habeas corpus shall not be suspended except in cases of invasion or rebellion. Justice Kennedy is expected to provide the swing vote.

**• APPEALS COURT SAYS ALL INFORMATION ON DETAINEES MUST BE TURNED OVER**

On February 1, in a 5-5 ruling (which lets an earlier 3-judge panel ruling stand) the full US Court of Appeals for the DC Circuit insisted that the government turn over to lawyers virtually all the information on 275 Guantanamo detainees who are appealing their detention to federal court, instead of picking and choosing what evidence to give them. Chief Judge Douglas Ginsburg stated that allowing the government to withhold information from detainees' lawyers "would render utterly meaningless judicial review" (*New York Times*, February 2).

**• JUDGE ORDERS JUSTICE DEPARTMENT TO PROVIDE EVIDENCE ON DESTRUCTION OF CIA TAPES**

In July 2005, Washington District Court Judge Richard W. Roberts ordered then CIA head Porter Goss and other Bush Administration officials "to preserve and maintain all evidence" regarding Guantanamo detainees. The destruction of the CIA tapes showing the harsh interrogation of at least two terrorism suspects occurred four months later. The original order came in the case of a challenge to his detention brought by Hani Saleh Rashid Abdullah. His lawyers maintained that suspects in CIA hands might have given evidence relating to their client. On January 24, the judge issued a new order, giving the Justice Department three weeks to report in writing on the destruction of the tapes and describe "the nature of any evidence potentially subject to the protective order that has been destroyed" (*New York Times*, January 25).

**• JUDGE DISTURBED BY TAPES' DESTRUCTION BUT WON'T HOLD CIA IN CONTEMPT**

On January 17, New York Federal District Court Judge Alvin Hellerstein expressed astonishment that the CIA had destroyed tapes that were an important part of an internal CIA review of interrogation methods and part of 2004 ACLU Freedom of Information Act requests dating from October 2003 and May 2004 (*Washington Post*, January 12). Judge Hellerstein had ordered the CIA in 2004 to produce or identify all records relating to the treatment of detainees in custody. Administration lawyers subsequently claimed that the tapes had not been turned over because they were in secret CIA operational files that are not subject to FOIA requests, and not investigative files, a matter disputed by both the ACLU and the judge. Rather than holding the CIA in contempt, Judge Hellerstein said he is considering the use of subpoenas to find out why the CIA did not turn over the tapes and other documents as he had ordered (*New York Times*, January 18).

**• PADILLA SENTENCED TO 17 YEARS: NO MENTION OF "DIRTY BOMB"**

The government says it is considering an appeal of the "lenient" sentence of 17 years in prison which Judge Marcia Cooke of the Federal District Court gave to former "enemy combatant" Jose Padilla, who was convicted with two-co-defendants of conspiracy and provision of material support to a terrorist organization. The judge said commented that "there is no evidence that these defendants personally maimed, kidnapped or killed anyone in the United States or elsewhere. There was never a plot to overthrow the US government" (*New York Times*, January 23). She gave Padilla credit for the three and one-half years spent in total isolation on a naval brig in South Carolina. Padilla's lawyers are meanwhile suing former Justice Department lawyer John Yoo and other former Administration officials including Donald Rumsfeld for the unconstitutional confinement of their client, a US citizen, and "gross physical and psychological abuse"

(*New York Times*, January 5).

- **US FAILS TO CONVICT TERRORIST SUSPECTS IN MIAMI**

On December 13, a Miami jury reported being hopelessly deadlocked and a mistrial was declared in the case of six of the seven indigent residents of the Liberty City neighborhood of Miami who were accused of plotting to blow up the Sears Tower in Chicago. The seventh man was acquitted. The government, which had termed the case an example of "home grown terrorism," was forced to admit that the men who were members of the Moorish Science Temple had never acquired weapons or equipment and posed "no immediate threat." A lawyer for the alleged ringleader Narseal Batiste maintained her client was entrapped by the promise of money and manipulated by FBI undercover informants, and "was nearly driven to tears as one of the informants persuaded him to take surveillance photographs of federal buildings around Miami" (*New York Times*, November 30). Batiste testified that the group was only feigning interest to con the informant out of \$50,000 for their Temple. After the verdict, the government has said it intends to retry the six who have not been acquitted (*Boston Globe*, December 14). They face 70 years in jail if convicted. The acquitted man, Lyglenson Lemorin, was immediately taken into custody by the Bureau of Immigration and Customs Enforcement and faces deportation to Haiti (*Associated Press*, December 19).

- **JUDGE RULES RAMADAN COULD BE DENIED ENTRY TO US**

A district judge in New York has upheld the government's decision to bar entry to the renown Muslim scholar Tariq Ramadan because of small donations he made between 1998 and 2002 to a Swiss charity that provides aid to Palestinians. The charity operates legally in Europe but was added to the US terrorist list in 2003 because it allegedly provided "material support" to Hamas. ACLU attorney Jameel Jaffer, who represented Ramadan, stated after the decision: "The court should have subjected the government's evidence to meaningful scrutiny, but instead it allowed the government to bar Ramada from the country without any evidence at all. The result of this decision is that foreign scholars will continue to be barred from the United States solely because of their speech" (ACLU press release, December 20).

#### **D. IN THE COMMONWEATH**

- **ACLU'S RACIAL PROFILING COORDINATOR WRONGLY DETAINED, COURT RULES**

On December 9, a federal jury in Boston ruled that King Downing, the national coordinator of the ACLU's Campaign Against Racial Profiling, had been wrongfully detained when he was stopped by state police when leaving Logan airport. Mr. Downing, a tall black man, maintained that Logan's "passenger behavioral screening system" or PASS encouraged racial profiling. The jury declined to strike down the PASS system after the state troopers who detained Downing, who had been trained in its use, claimed they were not using it at the time. The verdict was reached a day before the national ACLU released its report *Race & Ethnicity in America: Turning a Blind Eye to Injustice* that demonstrates that racism in the US remains "pervasive, institutionalized, systemic, and structural" (*Boston Globe*, December 10).

- **TERROR TRIAL IN BOSTON RESULTS IN THREE CONVICTIONS**

After being found guilty in Boston's federal district court, Emadeddin Muntasser, Samir Al-Monla and Muhamed Mubayyid face five years in prison and a \$250,000 fine for funneling funds through the now defunct charity Care International to fighters who were opposing the Soviets in Afghanistan before the rise of Al Qaeda and lying to federal agents. Attorney Norman Zalkind pointed out there was no evidence linking them to terrorism, no evidence that the money was being used for anything but

charitable purposes, and that the US was also supporting the mujahedeen fighters (*New York Times*, January 10).

• **ECUADORANS ARRESTED IN MILFORD SWEEP**

Before dawn on December 7, federal agents swooped down on 21 immigrants from Ecuador who were living in Milford. One of them was a successful businessman in the town. Daniel Tacuri, a Canari Indian who fled to the US because of the discrimination and mistreatment faced by indigenous people, had opened his own roofing business. He has been criminally charged with employing undocumented workers (*Boston Globe*, December 29).

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