CIVIL LIBERTIES UPDATE
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A. EXECUTIVE ACTIONS

Restoring the Rule of Law Scorecard

In this and future Updates, we will provide a scorecard reflecting key decisions taken by the Obama Administration which either help restore the Rule of Law or continue Bush Administration policies. Decisions favorable to the Rule of Law will be assigned a PLUS 1; unfavorable decisions a MINUS 1; mixed decisions a PLUS or MINUS .05.

• OBAMA SIGNS EXECUTIVE ORDERS PLEDGING TO OPEN GOVERNMENT, CLOSE GUANTANAMO

Open government: On his first day in office President Obama announced that he was signing an executive order committing his Administration to "an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation and collaboration. Openness will strengthen our democracy" (Federal Register, January 26, 2009).
PLUS 1

Guantanamo: The President signed an executive order requiring the closure of Guantanamo no later than one year from the date of the order, ensuring that conditions at Guantanamo comply with the Geneva Conventions, halting the military commission proceedings for 120 days and establishing a review process of the cases of remaining detainees to determine whether they can be transferred to other countries or prosecuted – if so, how.
PLUS 1

Future detainee policy: Another executive order created a special task force under the attorney general and secretary of defense to review future detainee policy and submit a report to the President within 180 days.
PLUS 1

Interrogations: A fourth executive order revoked Bush Administration Executive Order 13440 and legal memoranda concerning interrogations issued under that Administration and requires all interrogations of detainees to follow

the Army Field Manual interrogation guidelines. The order requires the CIA to close all its secret detention facilities and all federal agencies to give the International Committee of the Red Cross access to detainees. **There are two worrying loopholes:** a special task force is set up to determine whether additional guidance is necessary for CIA interrogation practices. It will also examine the practice of the transferring detainees to third countries with guarantees that they will not be subjected to torture, implying that the practice of rendition may continue to be used in the future.
PLUS 0.5

• ADMINISTRATION THANKS UK FOR WITHHOLDING INFORMATION ABOUT TREATMENT OF DETAINEE
On February 4, the British High Court blocked the release of documentation about the extraordinary rendition and torture of Guantanamo detainee Binyam Mohamed - not on national security grounds, but because the Bush Administration had threatened that its release could endanger intelligence sharing between the US and UK. The Obama Administration thanked Britain "for its continued commitment to protect sensitive national security information" (McClatchey Washington Bureau, February 20).
MINUS 1

• ADMINISTRATION INVOKES "STATE SECRETS PRIVILEGE"
On February 9, the Administration told the Ninth Circuit Court of Appeals in an ACLU case involving the "extraordinary rendition" and torture of Binyam Mohamed and 4 other detainees that the court should throw out the case on "state secrets" grounds –the same argument used by the previous Administration. The court was told that allowing the case to go forward would put into jeopardy our national security by revealing things best kept secret.
MINUS 1

• ADMINSTRATION STALLS ON RELEASE OF LEGAL MEMOS ON TORTURE
On February 11, the Justice Department informed the ACLU that it needed more time to weigh "the legitimate confidentiality interests of the executive branch and the national security interests of the United States" before deciding whether to release Bush Administration legal memos justifying harsh interrogations – memos that the ACLU had been seeking in federal court for 5 years (Miami Herald.com, February 11). It later **reduced the time** it had requested to review the memos from 90 days to 30 days.
MINUS .05

• OBAMA ADMINISTRATION SIDES WITH BUSH ON BAGRAM

On February 20, in a two sentence court filing, the Obama Administration declared that it adhered to the "previously articulated position" barring detainees in the Bagram prison in Afghanistan from being able to challenge their detention in US courts. Like the detainees in Guantanamo, many Bagram detainees had been picked up in countries far from the battlefield and are being held in legal limbo (AFP, February 20). In the words of ACLU attorney Jonathan Hafetz, "They've now embraced the Bush policy that you can create prisons outside the law" (KansasCity.com, February 20).
MINUS 1

RULE OF LAW SCORCARD TALLY TO DATE: 0

Military Commissions, Torture, Guantanamo
Under the Convention Against Torture, the US has a treaty obligation to investigate and prosecute those responsible for torture. There is an 8 year statute of limitations for cases alleging torture. For proposals to hold Bush officials accountable – but not necessarily to bring prosecutions -- see In the Congress (below).

• MAJORITY OF AMERICANS WANT TO HOLD BUSH ADMINISTRATION ACCOUNTABLE
The results of a *USA Today*/Gallup Poll released on February 11 show that nearly two-thirds want investigations into the use of torture and warrantless wiretapping by the Bush Administration. Four in 10 favor criminal investigations and a quarter want investigations without criminal charges (*USA Today*, February 11). An earlier *Washington Post*-ABC News poll showed 58 percent supporting a ban on torture, and half of Americans favoring investigations into the handling of terrorist suspects (*Washington Post*, January 22).

• DETANIEES TORTURED TO DEATH AFTER RUMSFELD CHANGED THE RULES
Formerly classified pages from the 2004 Church Report that were released to the ACLU on February 11 through a FOIA lawsuit state that the interrogations that led to the death of two detainees at Bagram Air Base in Afghanistan were "clearly abusive." They took place just two days after then Secretary of Defense Rumsfeld authorized "aggressive interrogation techniques," leading to "interrogation policies and plans approved by senior military and civilian officials [that] conveyed the message that physical pressures and degradation were appropriate treatment for detainees in US military custody," according to a report issued by the Senate Armed Services Committee last December (Publicrecord.org, February 11). The classified pages describe the detainees being handcuffed to fixed objects above their heads to keep them awake for long periods of time, hooding, and the use of repeated "compliance blows" to

their legs. Other deaths under interrogation occurred at detention centers in Iraq, according to other newly released documents, which also reveal that Guantanamo detainees were recommended to be kept in prison after their scheduled release because of fear of bad press on their return home. (AlterNet, February 13).

• BUSH SIGNED EXECUTIVE ORDER PERMITTING HARSH TREATMENT

Among the documents released to the ACLU was an FBI email dated May 22, 2004, stating that President Bush had signed an Executive Order approving the use of military dogs, sleep deprivation, stress positions, loud music, the use of hoods and other harsh techniques against Iraqi detainees. "We have also instructed our personnel not to participate in interrogations by military personnel which might include techniques authorized by Executive Order but beyond the bounds of FBI practices," the email said (PublicRecord.org, January 2).

• CHENEY SAYS 33 DETAINEES WERE SUBJECTED TO "ENHANCED INTERROGATION"

In a series of TV and press interviews defending "War on Terror" policies in the waning days of the Bush Administration, Vice-President Cheney told the *Washington Times* that "about 33" detainees were waterboarded by the CIA. "Was it torture? I don't believe it was torture. We spent a great deal of time and effort getting legal advice, legal opinion out of the Office of Legal Counsel...The CIA handled itself, I think, very appropriately" (*The Raw Story*, December 22).

• OBAMA APPOINTEES DO NOT SPEAK WITH ONE VOICE ON TORTURE

In their confirmation hearings, Attorney General Eric Holder said waterboarding was torture, but Dennis Blair, a retired admiral who is now director of national intelligence, declined to say it was since "I'm hesitating to set a standard here which will put in jeopardy some of the dedicated intelligence officers who checked to see that what they were doing was legal and then did what they were told to do" (*Wall Street Journal*, January 22). He pledged to run counterterrorism programs "in a manner consistent with our nation's values, consistent with our Constitution and consistent with the rule of law" (*New York Times*, January 23). In his confirmation hearing, Leon Panetta, now the head of the CIA, said he would consider using methods that went "beyond those permitted under the new rules" in some circumstances, such as "a ticking bomb situation" and would also continue the practice of "rendition" if third countries promised not to torture (*New York Times*, February 6). In her confirmation hearing for the post of Solicitor General, Elena Kagan said she believes the government can hold suspected terrorists without trial. Dawn Johnsen, the

new head of the Office of Legal Counsel, has said she was "appalled" by Bush Administration OLG memos authorizing torture.

• TOP BUSH OFFICIAL SAYS DETAINEE WAS TORTURED

Susan Crawford, a retired judge who was the chief Bush Administration official in charge of deciding whether to bring Guantanamo detainees in front of military commissions, has stated, "We tortured Mohammed al-Qahtani. His treatment met the legal definition of torture" when explaining why she did not recommend his case for prosecution (*Boston Globe*, January 14). President Bush and Vice-President Cheney have repeatedly said the interrogations did not involve torture.

• BINYAM MOHAMED BECOMES FIRST DETAINEE SENT HOME UNDER OBAMA

Binyam Mohamed, an Ethiopian national and British resident whose rendition was being challenged by the ACLU, had been arrested in Pakistan in April 2002, turned over to US authorities, and then allegedly sent to Morocco to be tortured (including having his genitals sliced) before being sent to Guantanamo in 2004. He was once accused of planning to detonate a radioactive "dirty bomb" in the US but the Pentagon dropped all charges against him last October. His defense attorneys said the "dirty bomb" charge had been based on false coerced confessions. He recently was on a life-threatening hunger strike. On February 23, he became the first detainee to be released from Guantanamo under President Obama. He was sent to Britain, where he faces no charges and was immediately released. The Bush and Obama Administrations went to great lengths to prevent existing evidence of his torture from being released by British authorities to his lawyers who brought suit on his behalf in American courts. "It is still difficult for me to believe that I was abducted, hauled from one country to the next, and tortured in medieval ways – all orchestrated by the United States government," Mohamed said in a statement released by his attorneys on his arrival in London (WashingtonPost.com, February 23).

• GUARDS REPORTEDLY "GET THEIR KICKS IN" AT GUANTANAMO

On February 23, the day Mohamed arrived in England, Attorney General Holder visited Guantanamo and Admiral Patrick Walsh, an Obama envoy to Guantanamo, presented a Pentagon report stating that conditions at the prison camp were in line with the Geneva Conventions. The ACLU immediately called the report a "whitewash" (AFP, February 23). Attorneys for some of the detainees have told Reuters (February 25) that abuse at Guantanamo Bay has worsened sharply since President Obama took over as prison guards "get their kicks in" before the camp is closed. According to attorney Ahmed Ghappour, "in my experience there have been many, many more reported incidents of

abuse since the inauguration..it's 'hey, let's have our fun while we can.'" Admiral Walsh said he looked at 20 allegations of abuse, 14 of which were substantiated.

• NEWLY RELEASED DETAINEE DESCRIBES HIS RENDITION, TORTURE

Writing in the Huffington Post (February 20), Mohamed Farag Bashmilah, a citizen of Yemen, described being held in CIA-run "black sites" from October 2003 to May 2005, tortured and humiliated in Jordan and Afghanistan, and then sent back to Yemen where he was held for a further year, presumably at the behest of the US government. "During my detention, I agonized constantly about my family back in Yemen, knowing they had no idea where I was. They never once received information about who had taken me, why I was taken, or even whether I was alive..My father passed away while I was disappeared and I am still distraught thinking that he died without knowing whether I was dead or alive. I continue to suffer from bouts of illness that medical doctors attribute to the treatment I experienced in the 'black sites.' My physical symptoms are made worse by the anxiety caused by never knowing where I was held, and not having any form of acknowledgement that I was disappeared and tortured by the US government. I believe that acknowledgement is the first step toward accounting for a wrongdoing." He then appealed to the Obama Administration to establish an independent commission of inquiry into the treatment of "War on Terror" detainees.

• DETAINEE DESCRIBES BEATINGS, SAYS HE NEVER ASKED ABOUT TERRORISM

Mustafa Ait Idir, an Algerian who was taken from the streets of Sarajevo in October 2001 after being cleared by a Bosnia court of charges that they were plotting to blow up the US embassy in Sarajevo, was released in December after nearly 7 years at Guantanamo. During that time he said he was never questioned about terrorism allegations brought against him but instead was interrogated about different Islamic organizations and charities in Bosnia (*Boston Globe*, December 19). He described being repeatedly beaten by guards who would enter the cells in groups of six or seven and first spray the inmates with a kind of gas. In November 2008 a federal court ordered the immediate release of Idir and four other men seized in Bosnia and then sent to Guantanamo.

• DETAINEE TORTURED, HELD FOR SIX YEARS, NEVER CHARGED WITH ANY CRIME

On January 6, *The New York Times* described the six-year ordeal in US custody of a Pakistani national, Muhammad Saad Iqbal, who was arrested in Indonesia in 2002, and "rendered" to Egypt where he says he was subjected to electric shocks, given drugs, covered with a hood and deprived of sleep for six months.

He was then moved to Bagram where he was at times shackled and handcuffed in a small cage and further interrogated, and a year later moved on to Guantanamo, where he tried to hang himself twice and went on three hunger strikes. He was released in August after he was deemed no longer to be an "enemy combatant." His lawyers are planning to sue the US government for illegal detention.

• AFGHAN DETAINEE WHO HAD WORKED WITH AMERICANS SENT HOME

Haji Bismullah, who had been part of the pro-American Afghan government until the head of a rival clan who coveted his job told Americans he was a Taliban sympathizer, was sent home in mid January after nearly six years in Guantanamo. According to the January 19 *New York Times*, "In the last three months, at least 24 detainees have been declared improperly held by courts or a tribunal – or nearly 10 percent of the population at the detention camp in Guantanamo Bay, Cuba, where about 240 men remain." Mr. Bismullah always insisted he was innocent and gave military officials the name of his brother who would vouch for him, but officials claimed the brother was "not reasonably available" as a witness. The head of the rival clan turned out to be in league with the Taliban.

• GUANTANAMO GUARD DESCRIBES A REGIME OF CRUELTY AND ABUSE

Brandon Neely, who was an army private serving as a prison guard at Guantanamo when the prison was first opened, has described its conditions in detail in a 15,000 word document compiled by law students at the University of California at Davis. "Neely describes the arrival of detainees in full sensory-deprivation garb, he details their sexual abuse by medical personnel, torture by other medical personnel, brutal beatings out of frustration, fear and retribution, the first hunger strike and its causes, torturous shackling, positional torture, interference with religious practices and beliefs, verbal abuse...an isolation regime that was put in place for child detainees...The Neely account shows that health professionals are right in the thick of the torture and abuse of the prisoners – suggesting a systematic collapse of professional ethics driven by the Pentagon itself " (*Harper's Magazine*, February 15).

• "I WAS SLOW TO RECOGNIZE THE STAIN OF GUANTANAMO"

This was the headline given to the January 18 *Washington Post* op ed by Darrel Vandeveld, a former lieutenant colonel in the Army Reserve and prosecutor of the Office of Military Commissions at Guantanamo Bay. "Warning signs appeared early on, but I ignored them...I had heard stories about abuse at Guantanamo, but I brushed them off as hyperbole. When one of the detainees I was prosecuting, a young Afghan named Mohammed Jawad, told the court

that he was only 16 at the time of his arrest, and that he had been subject to horrible abuse, I accused him of exaggerating and ridiculed his story as 'idiotic.' I did not believe that he was a juvenile, and I railed against Jawad's defense attorney, whom I suspected of being a terrorist sympathizer." Vandeveld describes how he comes to understand that Jawad was not lying about his age and about the coercive treatment to which he had been subjected. "Eventually I learned of evidence from field reports suggesting that he was innocent...It took me a long time to obtain this evidence. I had sought it repeatedly, and military investigators had repeatedly denied me access to it." When he was not able to get Jawad released, "I sank deeper and deeper into despair." Finally, he decides to appear before the military commission not as a prosecutor, but as a "reluctant but determined witness for the defense." He ends by arguing that calls for a new national security court should be firmly rejected and that instead, the handful of real terrorists at Guantanamo should be tried in federal court. The rest should be given "an immediate and intensive program of rehabilitation that will allow them to reintegrate into the societies from which they were removed on the flimsiest of legal bases."

• FRENCH COURT THROWS OUT CASE AGAINST FIVE FORMER DETAINEES

Ruling that information gathered during Guantanamo interrogations was inadmissible and that this was the only evidence against them, a French appeals court has thrown out convictions brought against five French detainees who were returned from Guantanamo to France in 2004 and 2005. They were arrested on their return and convicted in 2007 of criminal association with a terrorist enterprise (*New York Times*, February 25).

• JURISTS CONDEMN "WAR ON TERROR" POLICIES

On February 16, an "Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights" convened by the International Commission of Jurists denounced policies resulting in torture, rendition and secret detentions and the fact that "War on Terror" measures intended to be temporary have now become permanent (*Jurist Legal News and Research*, February 18). "Seven years after 9/11 and sixty years after the adoption of the Universal Declaration of Human Rights, it is time for the international community to re-group, take remedial action, and reassert core values and principles of international law. Those values and practices were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism."

• WILL BAGRAM BE THE NEW GUANTANAMO?

According to the January 5th *Time Magazine*, the prison for "unlawful enemy combatants" on the 4,000-acre US military base in Bagram, Afghanistan now has 670 detainees who are treated more harshly than the detainees in

Guantanamo. The US is building a new prison on the site that can hold an additional 1,000. Human rights lawyers are now in federal district court in Washington DC demanding that Bagram detainees get the same habeas corpus rights as those extended to Guantanamo detainees by the US Supreme Court last summer. The Bush Justice Department argued that the courts should not interfere with how the military was conducting the war and treating "captured aliens" and the Obama Administration has agreed. But many of those in Bagram were picked up in third countries far from any battlefield and are now in a "legal netherworld" (NPR, January 7).

• TORTURE HAS GONE MAINSTREAM

There have been 897 incidents of torture on prime-time TV shows from 2004 to 2007, while there were only 110 incidents in the previous seven years. Rick MacArthur, the publisher of *Harper's Magazine*, told Amy Goodman that "there's been a tremendous dramatic increase in the number of torture scenarios in mainstream entertainment, because people are getting used to the idea. It's become part of the culture" (*Democracy Now*, December 23). MacArthur also reported that Donald Rumsfeld's vacation home, Mount Misery, is the place where Frederick Douglass had been taken as a teenager to be beaten by the estate's owner at the time, slave-breaker Edward Covey.

• ATTORNEY GENERAL ORDERS PROBE OF USE OF STATE SECRETS PRIVILEGE

On the same day as the Obama Administration invoked state secrets privilege in an effort to get an "extraordinary rendition" lawsuit thrown out of court, Attorney General Holder ordered a review of the times the doctrine was used by the Bush Administration to shield controversial actions from lawsuits (*Boston Globe*, February 10). In a 1953 ruling in *Reynolds v. US*, the Supreme Court opened the door to the use of the doctrine when it backed the Air Force in permitting documents to be kept secret that would have shed light on why a B-29 plane carrying five Air Force crewmen and four civilian contract engineers exploded in mid flight. The Air Force said withholding the information was necessary because the plane was on a secret mission and disclosing the records would harm national security. In 1996, the documents were discovered on the Internet. They revealed that it was poor maintenance that had caused the crash (*Washington Post*, February 22). No national security issues were involved. The Bush Administration is responsible for approximately 90 percent of the times the doctrine has been invoked in court.

• ACLU URGES OBAMA NOT TO CREATE ON-SHORE GUANTANAMO SYSTEM

Arguing that US courts can be used to try suspects, the ACLU, Amnesty, Human Rights First and Human Rights Watch wrote a letter to President-Elect

asserting that "it is not possible to create a brand new system of justice from scratch in the United States without enduring years of litigation and controversy. Any new national court system or regime that allows detention without due process will be challenged" (December 18, 2008).

Building the National Security Surveillance State

• NSA WHISTLEBLOWER SAYS ALL US COMMUNICATIONS WERE MONITORED

The day after George Bush left office, Russell Tice, a former analyst for the NSA, told MSNBC's Keith Olbermann that spying by the agency involved a dragnet of ALL communications. "The National Security Agency had access to *all* Americans' communications – faxes, phone calls, and their computer communications...It didn't matter whether you were in Kansas, in the middle of the country, and you never made foreign communications at all. They monitored *all* communications" (RawStory, January 21). He was involved in monitoring US journalists and news agencies, with the NSA collecting their communications 24 hours a day. In a second appearance on Olbermann's show, Tice said that the NSA was combining information from phone wiretaps with data from credit card and other financial records for data mining purposes. "This could sit there for ten years and then potentially it marries up with something else and ten years from now they get put on a no-fly list and they, of course, won't have a clue why" (*Wired*, January 23). "This is garnered from algorithms that have been put together to try to just dream up scenarios that might be information that is associated with how a terrorist could operate. And once that information gets to the NSA, and they start to put it through the filters there...and they start looking for word recognition, if someone just talked about the daily news and mentioned something about the Middle East they could easily be brought to the forefront of having that little flag put by their name that says 'potential terrorist'." *New York Times* reporter James Risen, one of the reporters who broke the NSA warrantless wiretapping story, told Olbermann that NSA monitoring of journalists was probably intended "to have a chilling effect on potential whistleblowers in the government to make them realize that there's a Big Brother out there that will get them if they step out of line." In a separate interview Senator Jay Rockefeller said he could have been targeted too.

• NSA CREATES AND MINES GIANT META-DATABASES

According to investigative journalist Wayne Madsen, the NSA carried out wiretapping with the cooperation of major US telecommunication carriers in a program codenamed "STELLAR WIND" and searched a huge number of met-databases containing emails, faxes and text messages of hundreds of millions of people in a program codenamed "PINWALE" (Online Journal, February 11).

PINWALE reportedly burrows into the text portions of the email to search for particular words or phrases. "Not only are text communications between US persons in the United States and recipients abroad contained in PINWALE meta-databases but text messages between US persons within the United States are also held in the databases." Madsen speculates that the material captured by STELLAR WIND has been used to prosecute Democratic officials around the country. According to the October 26 *Baltimore Sun*, "The NSA's colossal Cray supercomputer, code-named the 'Black Widow,' scans millions of domestic and international phone calls and emails every hour...The Black Widow, performing hundreds of trillions of calculations per second, searches through and reassembles key words and patterns, across many languages."

• LAW STUDENTS SHOW RACIAL PROFILING AT HEART OF "OPERATION FRONT LINE"

Students at Yale Law School's National Litigation Project filed FOIA requests with ICE offices around the country that netted thousands of pages of heavily-redacted case files involved in Operation Front Line. This was a secret government operation conducted by ICE and the FBI from May 2004 to February 2005, ostensibly aimed at terrorist cells that might be planning an attack during the 2004 presidential campaign or on Inauguration Day. "A sweeping immigration enforcement campaign justified on national security grounds didn't result in a single arrest for terror-related charges," according to the students who analyzed the files (*New Haven Advocate*, November 22). Calling it a sham, they reported that this "massive fishing expedition that hinged on racial profiling" resulted in 504 arrests, mostly for identity theft and credit card forgery. Operation Front Line had been featured as "The October Plan" in a CBS News broadcast on September 17, 2004, which described it as "a massive counter-offensive of interrogations, surveillance and possible detentions" to disrupt a terrorist plot. ICE and the FBI at the time strongly denied targeting people because of where they were from or their religion.

• FBI HARVESTS A THOUSAND TIPS A DAY ABOUT SUSPICIOUS ACTIVITY

In the run-up to the inauguration, the FBI launched a program called e-Guardian to gather tips of suspicious activity and share them with local police in order to prevent a terrorist attack (Associated Press, January 13). A thousand tips were coming in a day from the public. "Officials say e-Guardian is part of a bigger, faster national system of suspicious activity reporting spanning law enforcement agencies, the Department of Homeland Security and a section of the Office of the Director of National Intelligence." The FIB hopes to spread the program to all 18,000 different law enforcement agencies in the county.

• "ACTIVIST" UNMASKS HIMSELF AS FEDERAL INFORMANT

Brandon Darby, who posed as an activist from Austin, Texas, announced in an open letter posted on Indymedia that he was a government agent. He will give testimony in a trial of two Texas men arrested during the Republican National Convention on charges of possessing Molotov cocktails (*New York Times*, January 5). Documents given to defense attorneys show he carried out "a thorough surveillance operation that dated back to at least 18 months before the Republican gathering." In 2005, Darby had been a "visible member" of the group Common Ground Relief in New Orleans after Katrina.

• HOMELAND SECURITY INVOLVED IN SPYING ON PEACEFUL PROTEST

How did the Maryland State Police decide which anti-war groups to spy on in 2005 and 2006 and which to classify as "terrorists" in an internal database? According to the February 17 Associated Press, they got that information from the US Department of Homeland Security. Among the groups named in state police surveillance documents are People for the Ethical Treatment of Animals, Amnesty International, a group opposing utility bill increases, and the DC Anti-War Network (Baltimoresun.com, January 5).

• WHAT SHOULD THE FUSION CENTERS DO TO GET BANG FOR THE BUCK?

An article on the January 26 Global Security Newswire reports that there is considerable disagreement among all the various agents (military, federal, state agencies, local sheriffs, police departments) involved in Fusion Centers about whether their focus should be on terrorist threats or "other kinds of criminal activity as well, such as gangs and drug rings." The feds have fought to keep the centers focused on counterterrorism. State and local officials argue for an 'all-crimes' approach" in order to maximize the use of Homeland Security funds at a time when general purpose grants to police departments have been cut.

• TSA "BEHAVIOR DETECTION" PROGRAM SNAGS THE INNOCENT

According to Transportation Security Administration figures, 180,000 airline passengers have been subjected to extra scrutiny and interviews because they appeared suspicious to "behavior detection officers" patrolling terminals and 1,266 have been arrested – often for possessing drugs or fake IDs. The program is now in 150 airports and the TSA will not say whether it has spotted a real terrorist suspect. According to psychologist Robert Levenson, observers may be able to tell if someone looks anxious, but they can't know whether that person is planning an attack "or something such as an extramarital affair" (*USA Today*, November 17, 2008).

• VISA WAIVER PASSENGERS MUST NOW REGISTER ONLINE, GIVE VERY SENSITIVE INFORMATION

Starting on January 12, travelers from the UK, Germany and some 32 other countries in the US Visa Waiver Program must register with the US Department of Homeland Security for an Electronic System of Travel Authorization before they can travel to the US (CNET News, January 12). They have to give personal data, including information about diseases, mental disorders, and convictions for certain crimes in order to be screened for travel. The information will be archived for 12 years.

• GREEN CARD HOLDERS MUST GIVE DIGITAL FINGERPRINTS

Beginning on January 18 in an expansion of the US VISIT program, "nearly all aliens" with the exception of Canadians on short visits will have to provide biometric photos and digital fingerprints on entry to the US. The US VISIT database will be made interoperable with FBI databases and local law enforcement officials. While US VISIT has expanded its data collection, it has yet to build the exit portion of the program which is designed to track when people leave the country, leading critics to say it just wants to collect data on people (Nextgov, December 22).

• BUSINESSES OPPOSE MASSIVE NEW RECORD COLLECTING BY DHS

The Department of Homeland Security has ordered businesses to hand over electronic records about private planes, cargo, and travelers and is considering requiring private-jet passengers to be checked against terrorist watch lists. Businesses have complained that the policies cost too much and the sensitive information can be lost or stolen, but have been rebuffed by the DHS. According to the January 6 *USA Today*, "The US Chamber of Commerce and four other groups have sued to block a policy requiring federal contractors to send information about employees electronically to the department to verify that they can work legally in the USA."

• PATRIOT ACT USED AGAINST PASSENGERS WHO BEHAVE BADLY

Some 200 airline passengers have been prosecuted for committing an "act of terrorism under the PATRIOT Act," according to the January 25 *Boston Globe*. Tamera Freeman had uttered a profanity when her children spilled a Bloody Mary in her lap and hurled a can of juice onto the floor – she lost custody of her children, spent 3 months in jail before being released on probation and was prohibited from flying. Other passengers were charged with disrupting a flight when they became drunk and raised their voices. Not a single one of those prosecuted under the PATRIOT Act had tried to hijack a plane or had physically attacked the crew.

• MUSLIM PASSENGERS FORCED OFF FLIGHT IN WASHINGTON, DC

On New Year's Day, AirTran ordered nine Muslim Americans off the plane after two teenage girls sitting nearby became alarmed when their heard Inayet Sahin

say that sitting near the engines would not be safe if there was an accident or explosion. The teenagers told their parents, who told a flight attendant, who told two federal air marshals on board, who called both the FBI and airport police. Although the FBI quickly cleared the passengers of wrongdoing, an AirTran gate agent prevented them from booking a new flight because she did not know about the clearance (*Washington Post*, January 3). The airline later apologized and offered to pay for replacement tickets.

• PASSENGER TOLD TO REMOVE SHIRT BECAUSE OF ARABIC SCRIPT
Raed Jarrar has received $240,000 in compensation for being told by JetBlue that he could not fly unless he removed his shirt. The Arabic script was frightening the other passengers. He eventually covered it with a shirt provided by JetBlue and was moved from the front to the back of the plane (AFP, January 5).

• MUSLIM WOMAN JAILED FOR REFUSING TO REMOVE SCARF
An American Muslim was arrested at the Douglasville, Georgia Municipal Court after she refused to take off her headscarf in accordance with the court policy of no headgear (UPI, December 17). Ordered by the judge to be held in jail for 10 days, she was released later in the day when her husband complained to *The Atlanta Journal-Constitution*.

• MISSING WHITE HOUSE EMAILS HAVE BEEN FOUND
A week before the Bush Administration was to leave the White House, it told a federal judge that it had met its obligation by locating 14 million missing emails and transferring them to the National Archives. It took $10 million to find the emails (*Washington Post*, January 15).

• US ARMY IS PREPARING FOR CIVIL UNREST
A report from the US Army War College's Strategic Studies Institute says the US military must prepare for a "violent strategic dislocation inside the United States" that could be provoked by "unforeseen economic collapse" or "loss of functioning political and legal order" (Newsmax.com, December 23). The Defense Department is reportedly planning to deploy 20,000 troops nationwide by 2011 to help respond to civil disturbance. Troops under the US Northern Command are already active in Arizona along the border with Mexico (*Phoenix Business Journal*, December 3).

Targeting Immigrants

• IMMIGRATION CRACKDOWN FAILS TO NET "HIGH PRIORITY TARGETS"

According to "Collateral Damage: An Examination of ICE's Fugitive Operations Program," a report compiled by the Migration Policy Institute, 73 percent of the 97,000 people rounded up by fugitive operations teams between the program's inception in 2003 and early 2008 were out-of-status immigrants without criminal records. The goal of the Fugitive Operations Program was to find and detain "dangerous fugitives" and those with outstanding removal orders. Under the program, agents had a 1,000 person annual arrest quota per team. Non citizens with criminal convictions accounted for just nine percent of total arrests in 2007 while 40 percent were ordinary status violators arrested in "undisciplined home raids" (Migration Policy Institute press release, February 4). Among the report's recommendations is that Fugitive Operations Team resources should be directed to "improving the often error-ridden database from which information about fugitive aliens is drawn."

• OVER 100,000 DEPORTEES HAVE CHILDREN WHO ARE US CITIZENS

A Department of Homeland Security study_indicates that among the recent 2.2 million deportations of immigrants from the US, 108,404 were parents of children with US citizenship (*Boston Globe*, February 14).

• IMMIGRANTS IN DEPORTATION HEARINGS HAVE NO RIGHT TO LEGAL DEFENSE; MUST GIVE DNA SAMPLES

On January 7, then Attorney General Michael Mukasey ruled that "there is no Fifth Amendment right to effective assistance of counsel in removal proceedings," shutting the door to possible appeals by immigrants who had lost cases due to mistakes on the part of their lawyers. The ruling was condemned by the ACLU, American Bar Association and immigrant rights associations. The Justice Department has recently required federal agencies to collect DNA samples from "detained" non citizens. "We should not be taking DNA, which contains highly personal information, from people merely upon suspicion that they've done something wrong," said the ACLU's Larry Frankel. "This completely reverses the notion someone is innocent until proven guilty" (World Socialist Web Site, January 18).

• LATINOS NOW LARGEST ETHNIC POPULATION IN FEDERAL PRISONS

Thanks to immigration sweeps, Latinos, who constituted only 13 percent of the US adult population in 2007, now make up a third of all federal prisoners. Seventy-two percent are not US citizens. "The immigration system has essentially become criminalized at a huge cost to the criminal justice system, to courts, to judges, to prisons and prosecutors," said the ACLU's Lucas Guttentag (*New York Times*, February 19). Over the last five years, federal immigration prosecutions have increased sharply while other federal prosecutions for organized crime, white-collar crime, drug trafficking, and public corruption have sharply declined ("Focus on Immigration Crimes is Said to

Shortchange Other Cases," *New York Times*, January 12). There are 200,000 prisoners in federal prisons, and 2.3 million inmates in all prisons and jails in the US.

• ICE CANCELS RHODE ISLAND CONTRACT FOLLOWING DEATH OF DETAINEE

The bureau of ICE has cancelled its contract to house immigration detainees at the Donald W. Wyatt Detention Facility in Central Falls, Rhode Island, for denying medical care and legal access to Hiu Lui Ng, a computer engineer from NY who died of cancer in its custody last year. He also suffered from a fractured spine, mental and physical abuse, and his constant pleas for medical attention were ignored. Another detainee committed suicide at Wyatt (*Providence Journal*, January 16). The December 27 *New York Times* ran a long piece about the Wyatt Detention Facility ("City of Immigrants Fills Jail Cells With Its Own") which was seen by authorities in the nearly bankrupt town of Central Falls in 1990 as a way of pulling in federal dollars ($101.76 per inmate per day). "In Central Falls, where many families have members without papers, a state campaign against illegal immigrants spread fear that also took a toll. People went into hiding and businesses lost Latino customers in droves. Slowly, the city awoke to its role in the detention system, and to the pitfalls of the bargain it had struck" – which included the town's failure to get much of the anticipated revenue since Wyatt is exempt from taxes. Across the country private prison companies that had overbuilt to cash in on the war on drugs in the 1980s have seen the immigration detention boom as an "immigrant gold rush" that "turned the private prison industry from bust to boom."

• WOMEN MISTREATED AT DETENTION CENTER IN ARIZONA

University of Arizona researchers looking into conditions at three federal immigration centers in Arizona have found that women face "severe hardships, including a lack of prenatal care, treatment for cancer, ovarian cysts and other serious medical conditions" *(New York Times*, January 21). One woman was in pain for six months before finally being take to a hospital where she was found to have a cyst the size of a five-month-old fetus.

• ACLU SAYS BORDER PATROL MAKES CALIFORNIA "CONSTITUTION-FREE ZONE"

The Immigration and Nationality Act of 1952 gives Border Patrol agents the authority to set up checkpoints and conduct the searches of cars and people within 100 miles of a US border. According to the ACLU, the 68 percent increase in Border Patrol manpower has expanded the targeting of US citizens and non citizens alike, and made much of California a "Constitution-free zone." In the words of the ACLU's Jay Stanley, "We're starting to see the tactics they use right on the border bleed out. The unmanned surveillance drones used on

the border are creeping inland. There's a new prevalence of car and person searches and checking license plates. We're seeing agents asking people what they are doing and demanding proof of citizenship far from the border" (*Santa Monica Mirror*, December 18-24).

• NAPOLITANO DELAYS IMPLEMENTATION OF E-VERIFY

Homeland Security Secretary Janet Napolitano, who favors the use of the E-Verify system to screen workers, is delaying requiring all federal contractors to use the system until it is determined whether the electronic system set up to do the screening can handle a surge in its workload (*Washington Post*, January 30). Participation in E-Verify is now voluntary.

B. IN THE US CONGRESS

• WILL THE BUSH ADMINISTRATION BE HELD ACCOUNTABLE?

Although not all Democrats are on board, some Members of Congress are determined to probe the actions of the Bush Administration. In late December – shortly after Vice President Cheney appeared on ABC News defending the use of waterboarding -- **Rep. Jerrold Nadle**r, the chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties -- called for the appointment of an **independent counsel** to investigate the actions of Dick Cheney, Donald Rumsfeld and other senior Bush Administration officials for violating the Convention Against Torture and the US Anti-Torture Act.

Senate Judiciary head **Patrick Leahy** has proposed a **"Truth Commission"** to get the facts. It would offer immunity from prosecution for everything but perjury. In an interview with Rachel Madow on February 11, Senator Leahy compared his proposal to the Church Commission that looked into Vietnam War era spying on anti-war protestors, the FBI COINTELPRO operation and CIA abuses. In response to the question, "If there wouldn't be prosecution...and they all legally got away with it – how would that stop these things from happening again?" the Senator replied that people offered immunity to testify under oath would be prosecuted for perjury if it turned out that they had lied, and that "you are also going to have some people that will refuse to testify, even though offered immunity. But with the evidence gathered from the others, they can be prosecuted." President Obama has said he would look into the "Truth Commission" proposal. But many in the legal and human rights community are concerned about Leahy's approach because under the Torture Convention, the US has the *obligation* to investigate and prosecute those found responsible for torture. And there is a further problem that the time taken by a Truth Commission could hold up criminal prosecutions, making it likely that the statute of limitations would run out – it is only eight years for torture and five

years for other crimes, although there is no limit for murder or defined war crimes.

In the House, at the opening of the 111th Congress, Judiciary Committee Chairman **John Conyers** proposed legislation creating a nine-member **bipartisan blue-ribbon panel** of outside experts with subpoena that would investigate the "broad range" of policies pursued by the Bush Administration, including torture and warrantless wiretaps. This "National Commission on Presidential War Powers and Civil Liberties" would gather the facts and make recommendations that could include prosecutions. Barney Frank is one of the bill's 24 co-sponsors.

It is unclear how far some key Democrats will want to go as ranking Members on the Intelligence Committees (Bob Graham, John Rockefeller, Jane Harman) as well as Nancy Pelosi were reportedly regularly briefed on the CIA's covert antiterror interrogation programs (*Wall Street Journal*, January 6).

• **LEGISLATION WOULD ROLL BACK ABUSE OF POWER**
After years of Congressional complicity in the Bush Administration's abuse of power, **S. 147 ("Lawful Interrogation and Detention Act"**) and its companion bill **H.R. 374** give Congress a role in ending key illegal actions in the "war on terror." The Senate bill has four co-sponsors (Feinstein, D-CA; Rockefeller, D-WV; Whitehouse, D-RI; and Wyden, D-OR). The House bill, introduced by Rep. Jane Harman (D-CA), is co-sponsored by Conyers (D-MI); Eshoo (D-CA); Nadler (D-NY); and Thompson (D-CA). The bills, which are currently in the Select Committee on Intelligence and the Committee on Armed Services, do the following:
• Require the closure of the detention facility at Guantanamo Bay within one year.
• Require that the remaining detainees: either be transferred to military or federal civilian detention facilities in the US for further proceedings; be transferred to an international tribunal operating under the authority of the United Nations; be transferred to their home countries or a different country if consistent with international and US law; be released from further detention; be held "in accordance with the law of armed conflict."
• Require that interrogation techniques used by the CIA accord with those authorized by the United States Army Field Manual.
• Prohibit interrogations by contractors or subcontractors of the Central Intelligence Agency.
• Require that the International Committee of the Red Cross be notified about and given access to detained individuals.
• Require that the President report to Congress about his plan to implement the closure of Guantanamo and transfer the remaining detainees.
Please ask Senators Kennedy and Kerry and your Representative to consider either signing onto this legislation or drafting their own legislation putting Congress on record against the Bush Administration's "war on terror" detentions and use of torture. At the same time, you can ask your Members of Congress to repeal the Military Commissions Act and create a special committee to learn the truth about unlawful and inappropriate activities by government officials in the post 9/11 era.

• MASSACHUSETTS DELEGATION TAKES LEAD IN PUSHING STATE SECRETS PROTECTION ACT OF 2009

No sooner had the Obama Administration invoked "state secrets privilege" in an effort to get the ACLU extraordinary rendition case *Mohamed et al v. Jeppesen Dataplan, Inc*. thrown out of court, than Senator Kennedy and Congressmen Conyers and Delahunt, among others, reintroduced legislation that would prevent the government from hiding behind an overly-broad interpretation of state secrets privilege to protect itself from scrutiny. The bill would require the government to disclose evidence behind its claim of state secrets privilege to judges, instead of merely insisting that the evidence exists. The legislation would also allow the defense to make a counterclaim, would establish new safeguards for protecting classified information and provide a way for judges to report on cases to Congress.

• REPUBLICANS SEEK TO MOVE AHEAD WITH REAL ID

Rep. Elton Gallegly (R-CA) and three other Republican co-sponsors have introduced H.R. 140 proposing to withhold highway funds from states that are in non compliance with REAL ID. As governor of Arizona, current Department of Homeland Security head Janet Napolitano had signed a law prohibiting the implementation of REAL ID on the grounds that it lacked adequate federal funding. Napolitano is, however, a proponent of "enhanced drivers' licenses and it is unclear what stance she will take on REAL ID as DHS head (*Arizona Capitol Times*, January 9). Since REAL ID was enacted in 2005, more than half the states have passed measures against their participation or urging Congress to amend or real it, while five states have taken steps to be in compliance with the law.

C. IN THE COURTS

• APPEALS COURT HALTS RELEASE OF DETAINEES INTO THE US

After a federal district judge ruled last October that 17 Chinese Uighurs held in Guantanamo Bay must be released into the United States because they are not enemy combatants and no other country will take them except China, where their safety would not be guaranteed, the US Court of Appeals for the DC Circuit overturned that ruling (*New York Times*, February 17). The appeals court argued that only the executive branch, not the courts, could make decisions about immigration and a judge has no authority to free them. An editorial in the February 19 *Washington Post* urged the Obama Administration to order the men freed and allow at least some of them to live in the United States.

• JUDGE REJECTS HABEAS CLAIMS OF TWO DETAINEES; ORDERS ANOTHER TO BE FREED "FORTHWITH"

Federal court judge Richard Leon ruled on December 30 that the government was properly holding a Yemeni, Moath Hamza Ahmed al Alwi, and a Tunisian, Hisham Sliti, as "enemy combatants" since there was evidence that they had ties to the Taliban and al Qaeda (*New York Times*, December 31). Neither detainee has been charged with a crime. The hearings were held behind closed doors, with the government presenting classified evidence that the detainees' lawyers were not permitted to see. Their lawyers are considering appeals. On January 14, he ruled that Mohammed El-Gharani, a Chadian national and Saudi resident who was just 14 years old when he was seized by Pakistani forces in a raid on a mosque in Karachi, should be immediately freed. El-Gharani was tortured in Pakistani custody, sold to US forces for a bounty, tortured in a prison in Kandahar and subjected to prolonged sleep deprivation, isolation and painful stress positions in Guantanamo. And as Judge Leon revealed, the government had no case against him. Among its allegations was that he had been a member of an al-Qaeda cell in London in 1998 – when he was 11 years old. (Andy Worthington, AlterNet, January 16). Worthington writes, "There is reason to hope that the ruling in El-Gharani's case will lead to the release of other men against whom the government's only evidence of alleged wrongdoing are statements made by other prisoners whose reliability has been called into doubt by government officials" – including false confessions obtained through torture. Since the court started hearing habeas corpus petitions after a landmark Supreme Court ruling last June, 23 men have been found not to be enemies of the United States. Twenty of them remain in Guantanamo, making their court victory seem hollow. Their lawyers are appealing to President Obama for their release (*New York Times*, February 26).

• RULING BY SECRET COURT UPHOLDS PROTECT AMERICA ACT

A partly redacted ruling by the secret Foreign Intelligence Surveillance Court of Review (FISC) – handed down last August but only made public in January – held that the government does not need a warrant to monitor electronic communications between Americans and suspected terrorists abroad (*Los Angeles Times*, February 2). In what might have been only its second ruling ever, the three-judge FISC, whose members are appointed by the Chief Justice of the Supreme Court, upheld the now-expired Protect America Act of 2007, and said that telecommunications companies must cooperate with the government surveillance of people outside the US. It is the first time an appeals court has ruled that the Fourth Amendment's requirement for warrants does not apply to foreign collection of intelligence involving Americans, according to the January 16 *New York Times*. The Foreign Intelligence Surveillance Court of Review was established in 1978 but did not hear a case until 2002, when it overturned the FISA court's restrictions on some FBI wiretaps.

• SUPREME COURT TO HEAR CASE OF "ENEMY COMBATANT" HELD IN US

The US Supreme Court has agreed to hear the case of Ali Salah al-Marri, a student from Qatar who was arrested in December 2001 in Peoria, Illinois, labeled an enemy combatant, and has been held without charges on a Navy brig in Charleston, South Carolina. According to the January 3 *New York Times*, *Al-Marri v. Pucciarelli* will force the Obama Administration to decide whether "the president may order the military to seize legal residents of the United States and hold them indefinitely without charging them with a crime." Briefs were due on February 20. Al-Marri is being represented by the ACLU. The evidence against him is partly attributed to Khalid Shaikh Mohammed, and may not be admissible in court if was obtained through torture. The al-Marri case is discussed at length in Jane Mayer's *New Yorker* article, "The Hard Cases: Will Obama institute a new kind of preventive detention for terrorist suspects?" (February 23).

• JUDGE RULES WARRANTLESS WIRETAPPING LAWSUIT CAN PROCEED

US District Court Judge Vaughn Walker ruled on January 6 that the defunct Al-Haramain Islamic Foundation has enough publicly-obtained evidence for its suit alleging that it was illegally wiretapped to go ahead. The judge had earlier blocked efforts of the group to use a classified document that had been accidentally turned over to it by the government. The charity was classified as a terrorist organization in September 2004.

• NEW YORKER TO SERVE STIFF PRISON SENTENCE FOR AIRING HIZBULLAH BROADCAST

Javed Iqbal, the Pakistan-born owner of a satellite TV company in New York, entered into a plea bargain in federal court in Manhattan to serve six and a half years in prison. Iqbal, a permanent resident with five children who has lived in the US for 20 years, was accused of using satellite dishes on his home in Staten Island to distribute broadcasts of the Lebanese television station, Al Manar. "Although Americans are granted freedom of speech under the First Amendment…the government contended in this case that Iqbal was not entitled to arrange the satellite broadcast of an organization designated as a terrorist group, regardless of the message" (Associated Press, December 31).

• GOVERNMENT TO TRY FOR THIRD TIME TO CONVICT MIAMI "TERRORISTS"

In 2007 and 2008 juries failed to agree with government claims that Narseal Batiste and his impoverished followers in Miami were plotting to bring down the Sears Tower in Chicago. Now the government is trying again, and relying again on its star witness, Elie Assad, a paid FBI informant who infiltrated the religious group. Batiste maintains that he was playing along with Assad in order to get

money for his outreach work. The accused men face up to 70 years in prison if convicted on all four charges, including conspiracy to support al-Qaeda, despite the fact that they did not obtain explosives or take any other steps to mount an attack on the Sears Tower (*New York Times*, January 26).

D. IN THE COMMONWEALTH

• CAMBRIDGE CITY COUNCIL VOTES UNANIMOUSLY TO OPPOSE DHS-FUNDED SURVEILLANCE CAMERAS

On February 2, and then again on February 9, the Cambridge City Council unanimously approved a policy order opposing the installation of Department of Homeland Security funded surveillance cameras. The votes followed a public education campaign organized by the ACLU of Massachusetts, with spirited testimony at City Council hearings. The Council also voted unanimously to request information from city agencies about what information – if any – they were transferring to the Commonwealth Fusion Center.

• BROOKLINE RESIDENTS CONTINUE THEIR CAMPAIGN AGAINST THE CAMERAS

After the Brookline Selectmen voted 3-2 to give their DHS-funded surveillance cameras a year's trial, residents are planning to expand their public education work and take the camera issue before the Town Meeting in May.

Nancy Murray
ACLU of Massachusetts
(617) 482-3170 x 314
nancy@aclum.org