

STATEMENT OF BRUCE FEIN\*  
ON BEHALF OF CAMPAIGN FOR LIBERTY

RE: THE USA PATRIOT ACT: DISPELLING THE MYTHS

BEFORE THE HOUSE JUDICIARY COMMITTEE

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Mr. Chairman and Members of the Subcommittee:

I am grateful for the opportunity to speak on behalf of the Campaign for Liberty about the USA Patriot Act. Provoked largely by the gruesome abominations of 9/11, the legislation was born of fear and uncertainty from abroad. Fear, however, is the fount of tyranny. James Madison, father of the Constitution, warned centuries ago in opposing the tyrannical Alien and Sedition Acts of 1798: “Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger real or pretended from abroad.” At the constitutional convention of 1787, Madison similarly recognized the inclination of government to wave a banner of foreign danger to excuse the destruction of domestic liberties: “The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.”

The 342-page USA Patriot Act passed without inquiry into whether arming the government with muscular investigatory tools justified the corresponding intrusions on the right to be left alone—the right most valued by civilized people. The Patriot Act was portrayed as a necessary defense against foreign agents and international terrorists. Citizen liberties were relegated to extras in a Cecil B. De Mille cinematic extravaganza

Despite the good intentions of its architects, the Patriot Act betrays bedrock constitutional principles. The individual is the center of the Constitution’s universe. Aggrandizing government is the center of the Patriot Act. The Constitution salutes freedom and citizen sovereignty over absolute safety and citizen vassalage. The Patriot

Act turns that hierarchy on its head. Where experience and facts are inconclusive as regards the need for government authority, the Constitution's default position is liberty. Under the Patriot Act, if a threat passes a microscopic threshold of danger, a Big Brother government is exalted, a descendant of the 1% doctrine. The authorization of "lone wolf" surveillance under the Foreign Intelligence Surveillance Act (FISA) is exemplary. It has never been employed, yet it is defended as a cornerstone of the nation's defense against a second edition of 9/11.

The Alien Act of 1798 was similar. It answered political or popular fears of French immigrants. The President was empowered to deport unilaterally any immigrant thought "dangerous to the peace and safety of the United States." During its two-year life, the President never once invoked the Act's deportation authority. Congress sensibly declined to renew it.

The makers of the Constitution venerated man's spiritual nature, his moods, and his intellect, to borrow from Justice Louis D. Brandeis. They sought to protect Americans in their beliefs, their attitudes, their seclusions, and their challenges to conventional wisdom. They crowned citizens with the right to be left free from government encroachments, the hallmark of every civilized society. To protect that right, Justice Brandeis sermonized, "[E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." The Patriot Act, nevertheless, shrivels the right to be left alone from Government snooping and surveillance. It sneers at Benjamin Franklin's

admonition: “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”

Patriot Act champions boast that only a handful of judicial rulings have cast a cloud over its provisions, for instance, gag orders on National Security Letter recipients. But even the U.S. Supreme Court stumbles. In *Olmstead v. United States* (1928), the Court held conversations were outside the ambit of the Fourth Amendment because its text protected only “persons, houses, papers, and effects.” In *Katz v. United States* (1967), thirty-nine years later, the Court overruled *Olmstead* and held the Amendment protected “reasonable expectations of privacy.” As Saint Paul preached, “the letter killeth, but the spirit giveth life.” 2 Corinthians 3: 6. The Supreme Court sustained the constitutionality of race-based concentration camps for Japanese Americans during World War II. Congress repudiated the Court’s odious decisions in the Civil Liberties Act of 1988.

No federal court voided the Sedition Act of 1798, despite its flagrant trespass on free speech. Over 150 years later in *New York Times v. Sullivan* (1964), the Supreme Court denounced the Act as unconstitutional. Many Patriot Act provisions hinge on the decision of the High Court in *U.S. v. Miller* (1976), that bank records or other information “voluntarily” shared with third parties are outside a suspect’s zone of privacy protected by the Fourth Amendment. The *Miller* precedent seems increasingly anachronistic in the Age of the Internet in which a virtual diary of individual activities is in the hands of third party Internet Service Providers.

Moreover, extra-constitutional reasons explain the dearth of court challenges. The lion's share of information sought under the Patriot Act is aimed at third parties, not the target of surveillance or investigation. The former have little or no incentive to incur the legal costs and public opprobrium inherent in fighting the government. In addition, many recipients of Patriot Act demands, like telecommunications companies or banks, are motivated to cultivate government goodwill to preserve contracts or friendly regulatory relations. The government has also sought to stigmatize any opponent of the USA Patriot Act as semi-traitorous or un-American through its title or otherwise. Then Attorney General John Ashcroft decried its critics as "aiding and abetting terrorists." But in the true Republic created by our Founding Fathers, the people censure the government; the government does not censure the people. Finally, the vast majority of victims of illegal or unconstitutional surveillance under FISA are never informed of the spying. They do not know the government has compiled a dossier against them.

In light of the hostility toward Patriot Act dissenters generated by the Government and general concealment of violations, the diminutive number of federal court cases is readily understandable. Why bring a lawsuit and risk losing your neighbor, your friends, your job, and your public standing? It might equally be said in defense of Jim Crow that "separate but equal" must have been benign because so few blacks initiated lawsuits seeking its reversal (at the risk of their homes, families, ostracisms, and lives).

At least one Member of Congress has insinuated that a constitutional violation is harmless as long as the Government conceals the violation from the victim, for example, an unconstitutionally seized and retained email or phone call. That assertion seems first

cousin to the nonsense that government assassinations are innocuous if the victims are never acknowledged and their bodies are never found.

Every Founding Father—every Member of the Constitutional Convention of 1787—would have been appalled at the Patriot Act. They were electrified by patriot James Otis’ denunciation in 1761 of villainous Writs of Assistance—general search warrants which empowered petty officers to invade privacy and liberty on bare suspicion without oath. Otis elaborated: “It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book...Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner, also, may control, imprison, and murder any one within the realm.” Patriot John Adams was awed, and remarked, “[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”

The spirit of the Fourth Amendment was similarly captured in William Pitt’s forceful address to the British Parliament which reverberated throughout the American colonies: “The poorest man in his cottage may bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—but the King of England cannot enter. All his force dares not cross the threshold of the ruined tenement.”

The Patriot Act was misnamed. Thomas Paine lectured: “It is the duty of the patriot to protect his country from its government.” Accordingly, the true patriots of the Constitution and the Republic are the “band of brothers” who stood or are standing in

opposition. They understand that the secret of happiness is freedom. And the secret of freedom is the courage to accept risk as inherent to an enlightened and civilized existence. Proponents of the Patriot Act acted from weakness, not strength. I do not, however, question their motives. They are all honorable men and women. But as Justice Brandeis presciently observed: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent...The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.”

President John F. Kennedy taught, “Two thousand years ago, the proudest boast was “civis Romanus sum.” Today, among the disciples of liberty, the proudest boast should be, “I am an American.” On Gettysburg battlefield, seven score and eight years ago, President Lincoln noted that our forefathers “brought forth upon this continent a new nation, conceived in Liberty....” Repealing the Patriot Act would honor what they so nobly begot.

Persons are born with unalienable rights to liberty. Liberty for its own sake is the definition of America. Lectures that only citizens with something to hide would balk at invasions of liberty are counter-constitutional and un-American. The whole purpose of the Fourth Amendment is to saddle government with a heavy burden of demonstrating by indisputable evidence a compelling need to disturb the domain of any citizen before crossing his threshold. Non-particularized roving wiretaps justified to prevent surveillance targets from outfoxing the government miss the point. Making the

convenience of law enforcement or intelligence collection subservient to liberty is the Amendment's whole purpose.

The Government has been endowed with Patriot Act authorities for a decade—ample time to prove their indispensability to national security. Every provision should be repealed forthwith absent proof by the executive that but for the authority conferred an act of international terrorism would have succeeded. If the evidence is vague or inconclusive, the Constitution's default position favoring liberty dictates repeal.

Authorizing government to collect intelligence on citizens for non-law enforcement purposes offends the spirit if not the letter of the Fourth Amendment. Spying for domestic security predictably mushroomed during World War I and its aftermath fueled by the "Red Scare." President Calvin Coolidge appointed Harlan Fiske Stone as Attorney General in 1924. Stone was later appointed Chief Justice of the United States. His signature achievement was to terminate investigations or intelligence collection by the Bureau of Investigation, except for law enforcement. Stone observed, "The organization was lawless, maintaining many activities which were without any authority in federal statutes and engaging in many practices which were brutal and tyrannical in the extreme." He asked for the resignation of the Bureau Director William J. Burns, former head of the Burns Detective Agency, and directed that the activities of the Bureau "be limited strictly to investigations of violations of law, under my direction or under the direction of an Assistant Attorney General regularly conducting the work of the Department of Justice."

Citizen loyalty and love for the United States is the mainstay of national security. It is fostered by the Government's scrupulous adherence to constitutional limitations and restraints, not by coercion or suspicion that every citizen could be a Benedict Arnold. As World War II raged, Justice Robert Jackson observed: "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."

Patriot Act defenders argue that the absence of "bodies on the sidewalk" proves its respect for the Constitution and civil liberties. The argument misconceives the fundamental premises of America. Every citizen is born with the unalienable right to be left alone. Government is instituted to secure that right, not to cripple it. Government in the United States, as opposed to the People's Republic of China, has no business collecting or retaining information about citizens without "probable cause" to believe that a crime has been or will be committed by a target who is identified with "particularity; or, that a particularized search will unearth evidence of crime. Each and every Patriot Act investigation involving citizens triggered by less than probable cause or involving non-particularized targets or searches is an abuse of government power. At present, the

number of victims probably exceeds one million, including recipients of National Security Letters or targets of section 215 surveillances.

Section 206 of the Patriot Act authorizing roving wiretaps to collect foreign intelligence; section 215 authorizing orders to seize any “tangible thing” like books or computer hard drives to protect against international terrorism or clandestine intelligence activities; section 505 authorizing National Security Letters to seize customer records of financial institutions, credit bureaus, and telecommunications providers by the government’s assertion of relevance to preventing international terrorism or clandestine intelligence activities; and, section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 authorizing surveillance against hypothetical “lone wolf” international terrorists are all abusive of citizen liberty because they encroach on the right to be left alone without probable cause to believe the target is implicated in crime.

Since 9/11, the nation has witnessed approximately 170,000 murders. But that ghastliness has not provoked the suspension of habeas corpus or civil liberties in a quest for absolute safety. The Supreme Court lectured in *United States v. United States District Court*, 407 U.S. 297, 314 (1972): “The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.”

The Patriot Act, in isolation, is no mortal blow to the Constitution. But James Madison instructed: “It is proper to take alarm at the first experiment upon our liberties.

We hold this prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much ...to forget it.”

Many argue that the Constitution is an unaffordable luxury in confronting the danger of Al Qaeda. The Supreme Court’s answer in *Ex Parte Milligan* (1866) is unanswerable: “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence....”<sup>1</sup>

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<sup>1</sup> Violations of the Patriot Act compound the abuse inherent in investigations without probable cause to suspect crime. Estimating their frequency is problematic. Implementation of the Act is shrouded in secrecy; and, the involved parties have little incentive to disclose compounded abuses. The absence of public documentation of a single sanction against a government official despite thousands of violations publicly reported by the Inspector General of the Department of Justice is worrisome.

The climate of antagonism towards liberty fostered by the Patriot Act has facilitated abusive application, as chronicled below.

**A. Brandon Mayfield.** Brandon Mayfield is an attorney, a veteran of the United States Army, a Muslim, and a United States citizen. The government aggressively investigated him under the Patriot Act for alleged complicity in the March 11, 2004 bombings of several commuter trains in Madrid, Spain,

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despite definitive exculpatory evidence supplied by the Spanish National Police. He was detained for two weeks. He was subject to electronic surveillance with no showing of probable cause to believe he was complicit in crime. His home was repeatedly invaded and scoured. He was consistently followed, and his “shared and intimate” rooms were “bugged.” Personal information obtained as a result of the investigation was shared among several intelligence agencies and stored in government databases.

**B. Sami Al-Hussayen.** Sami Al-Hussayen was known to his Moscow, Idaho community as a family-oriented father of three who, shortly after the Sept. 11 attacks, organized a blood drive and a candlelight vigil that condemned the attacks as an affront to Islam. The government investigated and detained him for providing “expert advice or assistance” to international terrorists outlawed by a Patriot Act amendment to 18 U.S.C. 2339. His alleged crime was volunteering to use his computer skills to run Websites for a Muslim charity. While the charity generally promoted peaceful religious teachings, prosecutors alleged that buried deep within the Web sites were a handful of violent messages — written by others — encouraging attacks on the United States and donations to terrorist organizations. Al-Hussayen was eventually acquitted of all terrorism-related charges.

**C. Tariq Ramadan.** Tariq Ramadan is an Oxford University professor and a leading Muslim scholar who advocates the peaceful integration of Muslim values and western culture. His lectures include a discussion on “Why Islam Needs a Feminist Movement” and “Muslim Democrats in the West and Democratization in the Muslim World: Prospects for Engagement.” In August 2005, at the invitation of Prime Minister Tony Blair, Professor Ramadan accepted an invitation to join a U.K. government taskforce to examine the roots of extremism in Britain.

Professor Ramadan has been a consistent critic of terrorism and those who use it. In October 2001, Professor Ramadan publicly deplored the September 11 attacks, saying to fellow Muslims, “Now more than ever we need to criticize some of our brothers . . . You are unjustified if you use the Koran to justify murder.” Professor Ramadan publicly condemned the kidnapping of two French journalists in Iraq in August 2004; the attacks on Jewish synagogues in Istanbul in November 2003; and the terrorist bombing in London in July 2005.

In January 2004, Professor Ramadan was offered a tenured position as the Henry R. Luce Professor of Religion, Conflict and Peacebuilding at the University of Notre Dame’s Joan B. Kroc Institute for International Peace Studies. Professor Ramadan was granted a specialized nonimmigrant visa on May 5, 2004, but on July 28, just nine days before Professor Ramadan and his family were to move to Indiana, he was informed that his visa had been revoked. Professor Ramadan was not directly provided an explanation for the revocation and neither Professor Ramadan nor the University of Notre Dame has ever received a written explanation. At a press conference on August 25, 2004, however, Russ

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Knocke, a spokesman for the Immigration and Customs Enforcement division of the Department of Homeland Security, cited the ideological exclusion provision of the Patriot Act as the basis for the revocation.

**D. Wiretapping of Children.** After FOIA requests and a review of FBI responses, the Electronic Frontier Foundation discovered that, in 2005, FBI Agents devoted five consecutive days to monitoring the telephone conversations of two “young children” under a roving wiretap mandate.