Written by **Thomas R. Eddlem** on April 6, 2011

Anti-Fourth Amendment Patriot Act

Former U.S. Army Lieutenant and lawyer Brandon Mayfield may be the Patriot Act's most prominent innocent victim. The federal government imposed warrantless surveillance and a "sneak-and-peek" search of his home upon the innocent U.S. citizen and Muslim convert and arrested him on a "material witness" warrant, even though officials never intended to have him testify in court. In fact, Mayfield was under investigation for supposedly having had a role in the 2004 Madrid train bombings, as the FBI initially identified him (using his military service fingerprints) as one of the persons whose fingerprints were on a bag of bomb parts similar to those used in the bombing.

Just days before Mayfield's arrest, Spanish investigators told FBI officials that Mayfield's fingerprint was not a match to the "Latent Fingerprint No. 17" and that FBI officials had erroneously linked Mayfield to the bombing. Despite being cleared by Spanish authorities (and not having traveled to Europe since 1994), the FBI arrested Mayfield *anyway* and held him for two weeks without charges on the bogus "material witness" warrant. In the meantime FBI officials leaked to the media that Mayfield was a Madrid bomber, proven through fingerprint "evidence," and told his wife and family that he would be charged with crimes that qualified for the death penalty.

After unjustly imprisoning Mayfield for more than two weeks, ruining his private law practice (including taking all the confidential files of the clients he represents), and terrifying his family, the federal government was eventually forced to admit it had made a "mistake." Then-Attorney General John Ashcroft testified about what happened to Mayfield before the Senate Judiciary Committee on June 8, 2004: "That is an unfortunate situation which I regret. Anytime any American is detained and we later find out that the detention was not necessary for the maintenance of public safety, and that someone's liberties were offended, I think that's something to regret." The federal government subsequently issued a formal apology for Mayfield's treatment and agreed to pay him $2 million in compensatory damages.

"When legislation is written that waters down the standard of the Fourth Amendment, it is not the guilty who suffer, but the innocent," Mayfield wrote in a statement on renewal of the Patriot Act, which Congress is considering. "The Patriot Act weakened the requirements the government needed under the Foreign Intelligence Surveillance Act in order to bug my home and office, and this weakening of the law — now found unconstitutional — caused the framework designed to protect the innocent to fail."

Lives Ruined

Mayfield's experience with the Patriot Act and misuse of the "material witness" law was not unique. The

same happened to native-born American citizen Abdullah al-Kidd. A former football star at the University of Idaho, al-Kidd (born Lavni T. Kidd) converted to Islam during college and was abducted by FBI agents using the same "material witness" pretense. Though nominally held to testify in a case for the prosecution of Sami Omar Al-Hussayen, federal officials never intended to call al-Kidd to the stand to testify (Al-Hussayen was later acquitted at trial). To the contrary, al-Kidd's arrest in 2002 was quickly touted in federal press releases as a success in breaking up terrorist cells. FBI Director Robert Mueller testified before Congress that al-Kidd's arrest was one of five "major successes" in the FBI's efforts toward "identifying and dismantling terrorist networks."

The original "material witness" warrant claimed al-Kidd was planning to flee the country to Saudi Arabia, purchasing a one-way airplane ticket for $5,000 cash. In reality, al-Kidd had purchased a round trip ticket for $1,700, as he had a scholarship to study Islam at a Saudi university. His wife and child planned to remain at home.

The FBI held al-Kidd in dehumanizing conditions in federal prison for 16 days, chaining him to the floor next to a toilet and forcing him to be naked in a cold cell exposed to male and female guards for prolonged periods of time. "I'm a material witness, but these guys are convicts, federal inmates, and they're being treated better than me," al-Kidd later told the *New York Times*. After al-Kidd was released from prison, he was sentenced to some three years of virtual house arrest. He was ordered to live at his father-in-law's house in Nevada, not to travel out of state, and to see a probation officer weekly — even though he had never committed a crime.

The defense contractor al-Kidd worked for, uncomfortable with the FBI director pegging him as a terror suspect before Congress, fired him. He was unable to find work, and he lost his scholarship to study in Saudi Arabia. Al-Kidd's marriage broke up from the financial strain, and he lost custody of his daughter. "Here I am now, 31, and that dream is shrinking and shrinking," al Kidd told various press outlets. "My reputation is destroyed…. I keep getting 'no's' from jobs as if I'm an ex-felon." Al-Kidd eventually decided to emigrate to Saudi Arabia to take a job teaching English, but says he'd like to move back home to the United States permanently.

Abdullah al-Kidd eventually sued former Attorney General John Ashcroft in federal court for his deliberate abuse of the material witness statute, which was perhaps based upon Patriot Act surveillance, and won an appellate court decision. "Some confidently assert that the government has the power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime but merely because the government wishes to investigate them for possible wrongdoing," Federal Judge Milan D. Smith, Jr. wrote in the 2-1 decision by the Ninth Circuit Appellate Court in 2009 in favor of al-Kidd. Smith went on to call such views "repugnant to the U.S. Constitution" and a "painful reminder of some of the most ignominious chapters of our national history."

Shredding the Fourth

The U.S. Supreme Court heard the case in March, and from the reports about debate before the court, there's surprisingly little outrage among the justices over imprisoning an innocent American citizen. Moreover, some of the court's most vocally "originalist" justices are those who appear most willing to sign away the Fourth Amendment's explicit requirement of probable cause in its protection against unreasonable searches. Justice Antonin Scalia replied to questioning during the al-Kidd case: "But the Fourth Amendment doesn't say you need probable cause. There are situations where you can conduct a search without probable cause. There's the Terry search. There's administrative searches. There's a lot

of exceptions." Scalia's "Terry search" remark recalls the 1968 Warren court decision *Terry v. Ohio*, which alleged a "stop and frisk" exception to the Constitution's Fourth Amendment where a policeman may "stop and frisk" the clothes of a suspect without probable cause (the court said searches were okay with "reasonable suspicion"). The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It's difficult to tell which is more troubling: that Scalia would so blatantly ignore the plain text of the Fourth Amendment, which requires a judicial branch warrant, supported by an oath, probable cause, and specificity, or that he would so readily rely on an anti-Fourth Amendment decision by the post-Warren Court, the most activist court in U.S. history. The Fourth Amendment clearly contains a short preamble declaring the purpose of the amendment ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"), followed by four specific requirements designed to prevent unreasonable searches. Scalia's "interpretation" of the plain English of the Fourth Amendment is no different from the Left's dishonest "interpretation" of the Second Amendment that it only supports an "organized militia" (from the amendment's preamble) and not a declaration that "the right of the people to keep and bear arms shall not be infringed."

The Supreme Court's rejection of the plain text of the Fourth Amendment since the *Terry* case has emboldened the executive branch to further erode this key part of the Bill of Rights. Since the September 11 attacks, the federal government has come to believe it doesn't need a warrant or specificity to search the private property of American citizens. The Patriot Act allows the FBI to issue its own search warrants — without judges — so long as they call them "National Security Letters" (NSLs), and NSLs have served as the federal impetus to engage in the widespread data mining of Americans' personal information. An internal Justice Department review of FBI use of NSLs found that they had "circumvented the requirements of the Electronic Communications Privacy" law passed by Congress, contained "factual misstatements," and often had nothing to do with any active investigation requested by prosecutors. The Cato Institute's Julian Sanchez summarized the Inspector General's report, noting that the FBI had subpoenaed many more documents than they even have staff to review:

> Just in fiscal 2008, the FBI alone collected 878,383 hours (or just over 100 years) of audio, much of it in foreign languages; 1,610,091 pages of text; and 28,795,212 electronic files. A recent review of FBI backlogs by the Office of the Inspector General found that fully a quarter of the audio collected between 2003 and 2008 remained unreviewed (including 6 percent of counterterror acquisitions and 31 percent of counterintelligence acquisitions, the two categories covered by FISA wiretaps). Let that sink in for a second: They have literally years worth of audio material alone that the Bureau itself can't be sure of the contents of, never mind any kind of independent oversight body.

The FBI demanded under the Patriot Act that Internet service providers (ISPs) install recording devices to spy on their customers at will, using a barrage of NSLs to demand the data. Nick Merrill of Calyx Internet Access, an ISP start-up, was one of those telecommunications providers. He sued in court to stop the attack on his customers' privacy. But he had to sue anonymously in order to avoid being charged under the Patriot Act with a felony that could earn him five years in prison. NSLs come with a

gag order. Merrill endured six years of silence before winning (in part) a court case that allowed him to inform the world that he had to install wiretapping devices on his servers, though he remains gagged about the contents of the NSL he was served back in 2004. Merrill observed that "one of the things that leapt out at me about this letter was that it was not signed by a judge. It was signed by someone from the FBI. You know, it seemed to me that that undercuts the whole system of checks and balances that we have, and I didn't believe it was legal. And I had been reading about, you know, all the new powers under the PATRIOT Act, and it just seemed to me that I didn't have much choice but to say something about it."

These gag orders are probably why more innocent victims of the Patriot Act are not publicly known. As with the NSLs, most of the Patriot Act abuse occurs behind the veil of secrecy. And of course, if the law that provides the basis for the abuse is not challenged, the abuses can be expected to multiply.

It's this kind of abuse of American citizens, through a direct attack on the four-fold protections of the Fourth Amendment, that has caused an increasing number of Americans and Congressmen to call for repeal or reform of the Patriot Act. Three provisions associated with the USA Patriot Act are scheduled to expire May 27, and Congress is considering several proposals to extend these provisions to allow wiretapping by the FBI and other national security officials without the constitutionally required "probable cause" or specificity in the warrant. Congress passed a 90-day extension of the Patriot Act in February.

Extending Tyrannical Abuses

The three provisions slated to expire are:

1. The so-called "library provision," section 215 of the Patriot Act, which allows national security investigators to issue a seizure order for "any tangible thing," including gun sales records, library records, medical records, or any other private information.

2. The "John Doe" provision, section 206 of the Patriot Act, which allows national security investigators to search the private information of people, even if it does not know the name of the target.

3. The so-called "Lone Wolf" provision, which was implemented in part by the original Patriot Act and strengthened by the Intelligence Reform and Terrorism Prevention Act of 2004 and allows national security investigators to search non-U.S. persons who aren't part of a known terrorist cell and don't have known ties to a foreign government.

The Patriot Act also includes a number of other changes to the law that do not have to be extended because they were made permanent in the original Patriot Act or in the 2006 USA PATRIOT Improvement and Reauthorization Act:

- Expanded definition of wiretapping to include computer and wireless tapping;
- National Security Letters;
- Extending the duration of after-the-fact warrants for wiretapping or searches of foreign intelligence or terror suspect targets under FISA courts from 45 days to 120 days;
- A sneak-and-peek provision allowing the federal government not to notify a target of investigation that their house or property has been searched;
- A "business records" search provision that allows the federal government to place equipment at

communications providers that allow it to wiretap at will and to take "any tangible thing" from a business related to an investigation, along with a provision that prohibits the businesses from announcing publicly they were wiretapped or searched (the gag order part was declared unconstitutional by U.S. courts);

• Increased authority for pen registers and other wiretap devices in communications and electronic devices.

Under the "library provision" set to sunset in May, a federal court that grants a warrant is not explicitly required to demand "probable cause" needed for a search warrant or seizure by the FBI required by the Fourth Amendment. Instead, the FBI must merely supply a "statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." "Reasonable grounds," according to the FBI, is not even close to the constitutional standard of "probable cause," although the Fourth Amendment defines "unreasonable" searches as ones that don't have a court warrant, supported by an oath, probable cause, and details of what's going to be searched and seized. The "John Doe" provision ignores the specificity requirement of the Fourth Amendment.

Senator Rand Paul (R-Ky.), a Senate Tea Party Caucus co-founder, announced his opposition to the Patriot Act renewal in a February 15 letter to his Senate colleagues because these two provisions (Library and John Doe) too closely resemble the Writs of Assistance that the British crown issued against American colonists just prior to the American Revolution:

> James Otis argued against general warrants and writs of assistance that were issued by British soldiers without judicial review and that did not name the subject or items to be searched.

He condemned these general warrants as "the worst instrument[s] of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever w[ere] found in an English law book." Otis objected to these writs of assistance because they "placed the liberty of every man in the hands of every petty officer." The Fourth Amendment was intended to guarantee that only judges — not soldiers or policemen — would issue warrants. Otis' battle against warrantless searches led to our Fourth Amendment guarantee against unreasonable government intrusion.

But Senator Paul is in the minority, certainly in his own party. The Senate adopted the 90-day extension of the Patriot Act by an 86-12 vote in February, with only one other Republican in opposition, Utah Senator Mike Lee (also a Tea Party Caucus co-founder). The House also adopted the 90-day extension by an overwhelming vote, with Republicans mostly favoring the bill. Even so, eight House members associated with the Tea Party opposed the Patriot Act renewal. (Thirty-one Representatives affiliated with the Tea Party voted to pass the Patriot Act extension.)

In his *New York Times* best-selling book *The Constitution in Exile*, former New Jersey judge and Fox Business Channel host Andrew Napolitano calls "the Patriot Act and its progeny … the most abominable, unconstitutional assaults on personal liberty since the Alien and Sedition Acts of 1798." Congress should be actively engaged in repealing more provisions of the Patriot Act, not extending the provisions scheduled to sunset, if they intend to honor their oath to "support and defend the U.S. Constitution."

Photo: NSA headquarters in Ft. Meade, Md.

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