

STATEMENT OF BRUCE FEIN*

BEFORE

THE SUBCOMMITTEE ON INTELLIGENCE SHARING & TERRORISM RISK ASSESSMENT
COMMITTEE ON HOMELAND SECURITY

RE: THE FUTURE OF FUSION CENTERS: POTENTIAL PROMISE AND DANGERS

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Dear Ms. Chairwoman and Members of the Subcommittee:

The Soviet Union had its KGB, East Germany had its Stasi, and the United States should profit by those examples. It should abandon fusion centers that engage 800,000 state and local law enforcement officers in the business of gathering and sharing allegedly domestic or international terrorism intelligence. The vast majority conceive this task as synonymous with monitoring and disparaging political dissent and association protected by the First Amendment.

To a hammer everything looks like a nail. To an intelligence agent, informant, or law enforcement officer, everything unconventional or unorthodox looks like at least a pre-embryonic terrorist danger. The United States should not fall victim to the French Bourbon Monarchy disease of forgetting nothing, and learning nothing, as with the A. Mitchell Palmer Raids, McCarthyism, COINTELPRO, or Operation Shamrock.

Fusion centers are philosophically at war with freedom of speech and religion, the democratic process, and privacy. They pivot on the idea that the constitutionally legitimate and most effective way to forestall a second edition of 9/11 or a variation is to spy on American citizens in search of clues of an inclination towards future terrorism. Under United States law, an earmark of terrorism includes acts that, "appear to be intended...to influence the policy of a government by intimidation or coercion...." Any political dissident is thus a candidate for spying, who routinely makes his way into daily intelligence reports.

Under the standards employed by fusion centers and their tributaries to collect intelligence, participants in the Boston Tea Party, the Secret Committees of Correspondence, Paul Revere's Ride, and the Declaration of Independence would all have been subjects of suspicious activities reports, placed on a government watch list, and blacklisted from government and private employment. The anti-slavery movement ignited by William Lloyd Garrison would have been stillborn. Ditto for the movement for women's suffrage begun in Seneca Falls, New York in 1848, and featuring Susan B. Anthony's criminal prosecution for attempting to vote. The civil disobedience protests that ended the Vietnam War and Jim Crow would have been squelched. The FBI spied on Reverend Martin Luther King, Jr. by using warrantless electronic surveillance or otherwise because of the absurd suspicion that Communist influence had made him hostile to White Supremacist subjugation of his entire race.

Then National Security Adviser Henry Kissinger epitomized the presumption of guilt which warps the mind of the typical spy. He guided the FBI's investigation of a suspected aide who leaked the Nixon administration's secret bombing of Cambodia in 1969 to the *New York Times*. Wiretaps were initially placed on Morton Halperin, and were extended to others whom Kissinger suspected of undermining his White House influence. Two months of wiretaps and bugs yielded no useful clues, but Kissinger directed continuance of the surveillance to permit the targets an opportunity to establish a "pattern of innocence."

We do not need to speculate about fusion center mischief. On February 19, 2009, the North Central Texas Fusion System issued a "Prevention Awareness Bulletin" that might easily have been penned by recruits from East Germany's Stasi. In bold letters, the bulletin worries that freedom of speech, petitioning government for redress of grievances, and freedom of association are being exploited by Islamic groups to advance their "Islamic-based" goals (which are never defined) by peaceful and lawful means. In other words, democracy or free speech are

the enemy. The first page highlights: **“Middle Eastern Terrorist groups and their supporting organizations have been successful in gaining support for Islamic goals in the United States and providing an environment for terrorist organizations to flourish.”** It continues: “A number of organizations in the U.S. have been lobbying Islamic-based issues for many years. These lobbying efforts have turned public and political support towards radical goals such as Shariah law and support of terrorist military action against Western nations.”

The supreme folly of that disparagement of freedom of speech and association in search of political change was underscored by United States Chief Justice Charles Evans Hughes in *De Jonge v. Oregon* (1937): “These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”

The fusion center viewed with alarm constitutionally protected speech and activity which are the backbone of democracy and prevent the ideological landscape from turning into a petrified forest. Even the U.S Department of Treasury is scorned for hosting a conference entitled “Islamic Finance 101.” Counterparts to the fusion center report on political dissent can be found in every totalitarian or despotic country in the world, for example, Iran, Russia, or Burma. The fusion center bulletin continues:

“We give some examples of these lobbying activities.

The Council on American Islamic Relations (CAIR) presents itself as a Muslim Civil Liberties group yet it was named an unindicted co-conspirator in the Justice Department’s case in Dallas against the Holy Land Foundation, a Hamas-linked Islamic charity. CAIR’s agenda was best illustrated by founder Omar Ahmad who told the San Ramon Herald, *‘Islam isn’t in America to be equal to any other faith, but to become dominant. The Koran should be the highest authority in America, and Islam the only accepted religion on Earth.’*”

It speaks volumes about religious prejudice that the fusion center omitted mention of the many groups who espouse the supremacy of Judeo-Christian religions and declare that the United States is a Judeo-Christian nation (in contravention of the religious neutrality compelled by the Constitution). Presidential candidate John McCain, for instance, sermonized: “We are a Judeo-Christian nation.” In addition, speech urging the Koran as the highest authority in America is fully protected by the First Amendment no matter how politically disagreeable to the majority or to the fusion center zealots. Supreme Court Justice Oliver Wendell Holmes observed in *Gitlow v. New York* (1925): “It is said that this [Left Wing] manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at

its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result... If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”

The fusion center’s bulletin continues its attack on the Constitution’s celebration of religious accommodation and diversity with a *cri de coeur* against displays of sensitivity towards Islam and the possibility of altering American law accordingly:

“Taken in that context, pushing an aggressive, pro-Islam agenda that’s been increasingly successful in recent years takes on a new light. The following list taken in isolation seems rather innocuous: Muslim cab drivers in Minneapolis refuse to carry passengers who have alcohol in their possession; the Indianapolis airport in 2007 installed footbaths to accommodate Muslim prayer; Public schools schedule prayer breaks to accommodate Muslim students; Pork is banned in the workplace; etc.

Tolerance is growing in more formal areas. The Department of Treasury recently hosted a conference entitled ‘Islamic Finance 101’ which indicates the possibility that the government hopes to secure recycled petrodollars in exchange for conforming to Shariah economic doctrine. Christopher Holton of the Center for Security Policy refers to Islamic finance, or ‘Shariah-Compliant Finance’ as a ‘modern-day Trojan horse’ infiltrating the U.S. He said it poses a threat to the U.S. because it seeks to legitimize Shariah—a man-made medieval doctrine that regulates every aspect of life for Muslims—and could ultimately change American life and laws. A Houston bank now offers Islamic Financing for home loans.”

The fusion center would certainly have filed a suspicious activities report against Jesus for threatening pagan dominance in the Roman Empire by preaching monotheism. A Roman fusion center would probably have cheered the crucifixion because Christianity was endangering traditional Roman life and laws.

Next in the center’s intelligence cross-hairs are opponents of the global military projection of the United States who are viewed with anxiety because of their dissidence:

“A recent conference, titled ‘International Forum for Resistance, Anti-Imperialism, Solidarity between Peoples and Alternatives,’ was held on January 16-18, 2009, and hosted by the Consultative Center for Studies and Documentation (CCSD), a Hezbollah-affiliated think tank. The conference was co-sponsored by several international far left groups, including the International Campaign Against U.S. and Zionist Occupations, a coalition co-founded by the International Action Center (IAC). The keynote address was given by Naim Qassam, Hezbollah’s deputy secretary general. He talked about the need to rearm Hamas in Gaza and stated that ‘We must intensify the struggle against NATO’ and talked about finding a way to disrupt ‘the imperialist and Zionist war machines.’”

Every word that was treated with suspicion is protected by the First Amendment under *Brandenburg v. Ohio* (1969) and *NAACP v. Claiborne Hardware* (1982). Even speech that

encourages law violations is protected unless it is intended to provoke imminent lawless violence and is likely to have succeeded.

The center also perceived critics of the U.S. war in Iraq as good candidates for terrorism. Its bulletin degenerates into a version of Japan's pre-World War II thought police:

"IAC was founded by former U.S. Attorney General Ramsey Clark. The IAC delegation led by Clark included former Congresswoman Cynthia McKinney. The IAC views Hezbollah and Palestinian terror groups like Hamas and groups fighting U.S. forces in Iraq as legitimate popular resistance forces and a bulwark against U.S. imperialism and 'Israeli terrorism.'"

The center thus urges law enforcement to place the IAC on its watch list for believing in bad ideas:

"The IAC also has operations in the United States including one of the main anti-war and anti-Israel protest movements in the U.S. called ANSWER, Act New to Stop War and End Racism. Law enforcement should be aware of activities in their area."

The center looks askance at Islamic groups aping the promotional and advertising gimmicks of Madison Avenue to promote their ideas by exploiting freedom. Apparently only Christian organizations should stoop to self-promotion through blogs, chat forums, and hip hop music:

"Islamic radicalization have been reported by such groups as Hizb-ut-Tahir who have a goal of overthrowing governments and replacing them with a caliph. They take advantage of growing tolerance in the U.S. Some of their marketing schemes have included hip hop fashion boutiques, hip hop bands, use of online social networks, use of video sharing networks, chat forums and blogs. They have been especially active in California, New York, Wisconsin, and Chicago. They target universities for recruitment."

Advocating the overthrow of the government as an abstract theory, not as an imminent and active plan, is protected speech under the First Amendment. See *Yates v. United States* (1957).

The center concludes with a peroration that all law enforcement officers should be as aggressive and vigilant in monitoring the free speech and freedom of association activities of Islamic organizations as is North Central Texas. It betters the exhortations of the Japanese thought police:

"Given the stated objectives of these lobbying groups and the secretive activities of radical Islamic organizations, it is imperative for law enforcement officers to report these types of activities to identify potential underlying trends emerging in the North Central Texas region."

The North Central Texas fusion center is not an aberration. All government spies or law enforcement officers tend to interpret anything unorthodox or unconventional as subversive—even hair length. A February 20, 2009 report of the Missouri Information Analysis Center (MIAC) asserted that right wing militia members are usually supporters of presidential candidates Ron Paul, Chuck Baldwin and Bob Barr. Since I spoke at Mr. Paul's Campaign for

Liberty convention in Minneapolis and am a professional and personal colleague of Bob Barr, MIAC probably has me on a watch list for right wing militia members.

A July 2008 ACLU Fusion Center Update by Mike German and Jay Stanley reported on the open-ended suspicious activity intelligence collection efforts of the LAPD and its spread nationwide. The intelligence initiatives are dragnets for protected First Amendment activity aimed at altering the policies of the United States. The Update notes:

“In April 2008, the *Wall Street Journal* and the *Los Angeles Times* both reported on a new Los Angeles Police Department order that compels LAPD officers to begin reporting “suspicious behaviors” in addition to their other duties—creating a stream of “intelligence” about a host of everyday activities that, according to documents, will be fed to the local fusion center.

LAPD Special Order #11, dated March 5, 2008, states that it is the policy of the LAPD to “gather, record, and analyze information of a criminal or *non-criminal nature*, that could indicate activity or intentions related to either foreign or domestic terrorism,” and includes a list of 65 behaviors LAPD officers “shall” report.

The list includes such innocuous, clearly subjective, and First Amendment protected activities as:

- taking measurements
- using binoculars
- taking pictures or video footage “with no apparent esthetic value”
- abandoning vehicle
- drawing diagrams
- taking notes
- espousing extremist views

...[T]he LAPD’s collection of “non-criminal” information runs afoul of Title 28, Part 23 of the Code of Federal Regulations, which states that law enforcement agencies: shall collect and maintain criminal intelligence information concerning an individual *only if there is reasonable suspicion that the individual is involved in criminal conduct or activity* and the information is relevant to that criminal conduct or activity.

Rather than criticize the LAPD efforts, the Office of the Director of National Intelligence said the LAPD program “should be a national model.” Not surprisingly, in June 2008 the Departments of Justice and Homeland Security teamed with the Major City Chiefs Association to issue a report recommending expanding the LAPD SAR program to other U.S. cities.

In fact, just a few weeks before the LAPD order was issued, the Director of National Intelligence published new “functional standards” for suspicious activity reports that a program like the LAPD’s would generate. The sequential timing of the DNI’s functional standards, the LAPD SAR order and the Major City Chiefs recommendations creates more than a little suspicion that these efforts are closely coordinated.”

Among other things, the Update recounts a flagrant abuse of intelligence gathering in the case of Dr. Moniem El Ganayni, who had assailed the FBI verbally for its treatment of Muslims. His security clearance was improperly revoked. He underwent seven hours of questioning focusing on his religious beliefs and service as an imam in the Pennsylvania prison system, his political views on the war in Iraq, and his speeches in local mosques criticizing the FBI. The Maryland State Police counterterrorism spying debacle displays the same brainless disregard for the Constitution, for example, viewing as potential terrorists protestors against the death penalty.

Core First Amendment principles will never be honored by law enforcement officers or public officials. Their psychological preoccupations are order and the status quo; they viscerally fear or are perturbed by the prospect of change or challenges to the existing power structure. Further, they are rewarded financially and professionally by the volume of intelligence collected. There are no serious quality controls because few if any are fit to separate the terrorist wheat from the innocuous chaff. There are no reliable earmarks of a would-be terrorist. Some are rich. Some are poor. Some are devout. Some are religiously indifferent. Some are educated. Some are without schooling. Timothy McVeigh was not a prime suspect in the immediate aftermath of the Oklahoma City bombing. Arab Muslims were. Brendon Mayfield was erroneously linked to the 2004 Madrid train bombings. Habeas corpus has resulted in discrediting the enemy combatant status of more than 90% of the Guantanamo detainee petitioners. Since anything might be a clue as to a possible psychological inclination to commit terrorism, everything is fair game for intelligence collection. But when everything is relevant, nothing is relevant. Finding something useful in the mass of undifferentiated intelligence reports and analysis is thus akin to looking for a needle in a haystack. That may explain why there is no credible evidence that fusion centers have frustrated a single terrorist plot—their primary *raison d'être*.

The fusion centers and their tributaries should cease collection of intelligence that might arguably bear on intentions relating to domestic or international terrorism, i.e., intentions to seek to change government policies, because they invariably encroach on constitutionally protected speech.

The Founding Fathers were not frightened by ideas. They believed that it was better to be free than to seek a risk-free existence. They would have repudiated the 1% doctrine of former Vice President Dick Cheney. It decreed that anything carrying a 1% probability of occurrence must be treated as an absolute certainty like the force of gravity if terrorism is implicated. The spirit of the 1% doctrine is also the spirit of fusion centers.

They have never learned cardinal lessons from the United States Supreme Court. In *Abrams v. United States* (1919), Justice Holmes lectured: “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even

more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

In *Whitney v. California* (1927), Justice Brandeis elaborated: "[W]e must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form."

Supreme Court Justice and Nuremburg Robert Jackson underscored the dangers of viewing dissident ideas or symbols with suspicion in *West Virginia State Bd. of Education v. Barnette* (1943): "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its

pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.”

Fusion centers dampen and cast a cloud over free speech and association. Their intelligence collection efforts insinuate that political dissent is unpatriotic or dangerous and threaten to make dissenters targets for law enforcement or candidates for terrorism watch lists. The greatest threat to liberty is an inert people, which is what fusion centers induce by placing a price on the exercise of fundamental democratic freedoms.

In sum, what Oliver Cromwell said of the British Long Parliament applies equally to fusion centers that have proliferated after 9/11 in the vain hope of aborting terrorism before conception: “You have sat too long for any good you have been doing lately ... Depart, I say; and let us have done with you. In the name of God, go!”