COALITION FOR CIVIL FREEDOMS

The Entrapment and Governmental Overreach Relief Act (EGO Relief Act)

Summary

Liberty today is threatened by political encroachment and governmental overreach, in the name of National Security. At present there is no codified defense against entrapment, no check on the arbitrary expansion of security laws to include Constitutionally protected activities, and no prohibition against showing secret evidence to judges (but not the defense) in criminal trials. The government uses these legal loopholes to incarcerate political enemies rather than people who actually intended to commit crimes. The EGO Relief Act limits these abuses by:

A. Codifying (for the first time) an Entrapment defense to limit prosecutions of targets induced by the FBI to commit crimes created by the government,

B. Limiting material support to terrorism prosecutions to cases where there is proof that the target intends to support violence,

C. Providing that any classified evidence shown to the judge by the prosecution must also be disclosed to security-cleared defense counsel.

Language of the EGO Relief Act and an Explanation of its Purpose

1. AMEND USC Title 18 TO CODIFY AN ENTRAPMENT DEFENSE

Title 18 of the United States Code is hereby amended to add Section 28 as follows:

§ 28. Entrapment defense

(a) *Affirmative defense. Entrapment is an affirmative defense to a prosecution under any Federal statute. A person may not be held criminally liable for acts which they were induced to commit – without predisposition to engage in such activity – by law enforcement agents.*

(1) The inducement must be made by a law enforcement agent, including a private person who is working on behalf of law enforcement

(2) Burden of proof. The defendant must make prima facie showing of government inducement to commit the offense. If this burden is met, the defendant is entitled to a jury instruction that the government induced and encouraged the defendant to

commit the offense. In order for the defendant to be convicted, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the offense before the inducement.

(3) Predisposition. Predisposition must be proven by a showing that before the inducement, the defendant had already taken substantial steps toward committing the offense in question, which must be more than simply speech or expressions of religious belief protected by the First Amendment.

(4) This amendment shall be retroactive in all respects.

Under this amendment, *before* being targeted for a sting operation, the target must have been taking "substantial steps" toward committing such a crime. This means more than just making vague statements on the internet. "Substantial steps" could mean recruiting others to make specific plans to carry out a particular attack. It could mean starting to make bombs in order to carry out an attack. It could mean one individual with specific plans to carry out an attack.

The legal analysis would be similar to that utilized by courts to determine whether a threat is considered a "true threat" which can be prosecuted, or whether it is protected speech under the First Amendment. Seeking to prove that individuals are "predisposed" to criminal activity solely because they discuss general religious concepts like "jihad", or are strongly critical of governmental policy, without a "true threat" of violence, violates the First Amendment.

Why This Is Needed

There have been a number of unfair convictions where vulnerable people, often severely mentally ill, have been targeted in terrorism-related sting operations by the FBI, and convicted and sentenced to very harsh terms. In several of the cases, the entire plot was manufactured by government agents and the targets were convinced, sometimes by dangling huge sums of money, to participate. In other cases, vulnerable people – who would not otherwise have been interested in breaking the law - were manipulated into participating by the informant, who showed them images of atrocities or otherwise inflamed them.

The majority of the defendants thus far have been Muslim, but the FBI has also been starting to target some right-wing militia members in sting operations, and some left-wing activists as well. The targets can shift based on the prevailing political winds, and many different groups may find themselves in the cross-hairs.

Regardless of the beliefs of the targets, it is a matter of basic fairness that no one should be entrapped into committing a crime he or she would not have committed without the government inducement. Moreover, the selective profiling and targeting of any religious or political group for entrapment is highly inappropriate, and there need to be clear legislative guidelines established to prevent that. Such clarity is what this proposed legislation seeks to accomplish.

Legal Standard

There is an existing an entrapment defense, and it was discussed in several Supreme Court cases, such as *Jacobson v. US.*, 503 US 540 (1992), where the Court stated, "*Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce the commission of the crime so that the Government may prosecute*". The Supreme Court's holding was in accord with the law of most Western democracies where the use of entrapment by the government is considered illegal and immoral. There was an exception to the general rule against entrapment (see, i.e. *Mathews v. US, 485 US 56 [1988])* which held that entrapment would be permissible if the target was "predisposed" to engage in the crime.

However, even in cases where there was clearly classic entrapment, such as the Newburgh 4, the entrapment defense has never succeeded in a "terrorism" sting case. **This is due to the post-911 development of the "ready response" standard**, a legal doctrine not codified in any statute, which has essentially destroyed the entrapment defense **by re-defining predisposition**.

Under the 'ready response' standard, the jury is told that if the target does not back out of the government-induced plot, *that shows he or she was predisposed* to engage in terrorism. This definition of predisposition must be changed – it is not predisposition at all, but only measures the defendant's actions and state of mind *after* the informant has been manipulating them, often for many months.

Predisposition must instead be measured only by looking at the target's actions *before* contact with a government agent. That is what this amendment seeks to do.

Unfair Convictions Under the Old Practice

Newburgh 4

The Newburgh 4 were men who had served sentences for low level crimes in the past and were jobless and living in poverty when the FBI came into their lives. There was absolutely no evidence that any of the four had any predisposition to terrorism, or any ideology whatsoever. They were just trying to survive in impoverished Newburgh, NY when they were targeted in an FBI sting operation by informant Shahed Hussein. Hussein offered low level con artist James Cromite money, cars and jobs if he would participate in a plot – the two men were trying to con each other. When Cromite backed out, Hussein offered him $250,000 and that reeled him back in. Cromite then recruited 3 other men (including one who was schizophrenic, often homeless and who only wanted food) shortly before the 4 were arrested, offering them $5,000 each to participate. Even though the judge called this the "Unterrorism Case," the four were convicted and each sentenced to 25 years in prison in 2011.

Kansas Sting Case (Patrick Stein et al)

Patrick Stein, a Kansas militia member, believed reports that President Obama was allowing Muslims to take over America. He became afraid for his family and expressed the need to defend America. A man named Dan Day, who was unemployed and nearly homeless, found a flyer depicting what he thought was an ISIS flag (it was in fact a Palestinian flag), and gave it to the militia, who gave it to the FBI. The FBI then hired Day and assigned him to try to get Stein to agree to engage in violence against Muslims. Eventually, after months of prodding them with false information about local Somalis, the informant talked Stein and two other militia members into agreeing to be part of a (fake) FBI created bomb attack on a Muslim housing complex in Garden City, Kansas. The three men, comprising the "Kansas bomb plot," were then convicted of conspiring to use weapons of mass destruction. The face up to life in prison when sentenced in the end of January, 2019.

Rezwan Ferdaus

Rezwan Ferdaus, a mentally ill young man from Boston, was entrapped in a sting operation by an FBI informant who was himself addicted to drugs. Rezwan was suffering from hallucinations, and could not even control his bladder. He was very vulnerable to manipulation, and the informant convinced him to participate in an attack using a remote-controlled drone. Once Rezwan's parents convinced him to get psychiatric help, and he started taking medication, the government, realizing he may soon back out of the fake plot (as he had almost done before), moved in to arrest him. He was sentenced to 17 years for attempted material support to terrorism in 2012.

Shahawar Matin Siraj

Shahawar Matin Siraj, who has a very low IQ and was extremely vulnerable to suggestion, was entrapped in an FBI sting operation by an NYPD informant who befriended him and became a mentor to him. The informant later complained to a Washington Post journalist that he should have been paid more because he was so good at "getting people to the point" where they would violate the law. The informant enflamed Siraj by showing him Abu Ghraib photos and told him it was Islamically permissible to "kill the killers." Even though he told the informant he couldn't do anything without permission from his mother, he was arrested, convicted at trial of an attempted bomb plot, and sentenced to 30 years in 2007.

Adel Daoud

Adel Daoud, a seriously mentally-ill man from Chicago, was entrapped in 2012 in an FBI sting operation into a fake car-bomb plot. He was so mentally ill and delusional that he was found not competent for trial in 2016. After taking medication for close to two years, he was found to be competent, but then he, still apparently believing in reptilian overlords and the Illuminati, was

allowed to enter a rare "Alford" plea in 2018, pleading guilty in the bomb plot without actually admitting guilt. He is due to be sentenced in April, 2019.

2. AMEND 18 USC 2339B TO REQUIRE VIOLENT INTENT IN MATERIAL SUPPORT FOR TERRORISM CHARGES.

The Amended Statutory Language under the EGO Relief Act

Section 2339B(a)(1) of title 18, United States Code, is amended by inserting "intending to support violent terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii)), of the group" before "shall be fined". This amendment shall be retroactive in all respects.

The amended portion of the statute would read as follows:

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

***(a)** Prohibited activities.*
(1)** Unlawful conduct. Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so,* ***intending to support violent terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii)) of the group, *shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act [8 USCS § 1182(a)(3)(B)]), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [22 USCS § 2656f(d)(2)]).*

(b) This amendment will be retroactive in all respects.

WHY THIS IS NEEDED

In 1996 Congress declared what was called "material support" to terrorism to be illegal, and included any property or services to any organization designated by the State Department as a Foreign Terrorist Organization. (In 2001 the law was amended to specifically include "expert advice or assistance.") The law allowed prosecution without any evidence that the defendant intended to support violence.

A First Amendment challenge to the law was filed in 1998 by the Humanitarian Law Project (HLP), which represented the PKK (a Turkish Kurdish separatist group closely related to the Kurdish group the US has long supported in Syria) and the Tamil Tigers (a now-defunct Sri Lankan separatist group.) The HLP had been working with groups like this to try to convince them to raise their grievances legally rather than violently. Under the material support law, the HLP could be charged with material support to terrorism by doing this work.

The HLP case wasn't decided by the Supreme Court until 2010, and the HLP lost - the decision weakened the First Amendment by holding that speech – even speech advocating peace – could be prosecuted as material support to terrorism. It also criminalized completely nonviolent charitable contributions, made with *no* intent to support violence. The law, which has mainly been used to prosecute Muslims, could also have been used to prosecute many others, for example Republican political leaders who advocated in 2011 for a "designated foreign terrorist group," the Mujahedeen Khalq (MEK), which supported regime change in Iran.

Perhaps the most unfair prosecution under the material support law has been that of the Holy Land Five, where leaders of what had been the largest Muslim charity in the US were singled out and eventually convicted (after a second trial – the jury was deadlocked the first time) and essentially given *life sentences* for providing completely nonviolent and desperately needed charity to civilians in Gaza. Incredibly, it was conceded that the HLF didn't even give anything to any designated terrorist group, but instead gave charity through "Zakat Committees" in Gaza, the same way the US Agency for International Development (US AID) supports civilians in Gaza. However, an anonymous Israeli agent was allowed to testify in the HFP case that he could "smell Hamas" on the Zakat Committees, and in the second trial in 2008 a Texas jury convicted the five defendants, who have been locked up since 2004, their appeals long exhausted.

3. AMEND Title 18 U.S.C. APPX SECTION 4 (Classified Information Procedures Act) TO PROVIDE THAT ALL CLASSIFIED EVIDENCE SHOWN TO THE COURT MUST ALSO BE PROVIDED TO SECURITY CLEARED DEFENSE COUNSEL

The Amended Statutory Language under the EGO Relief Act

Title 18 U.S, C. Appx Section 4 (Classified Information Procedure Act) is hereby amended by adding a subdivision (a) stating

"(a) Whenever the prosecution provides the court with classified information pertaining to a particular case, that same information shall also be provided to defense counsel, if said defense counsel has the requisite security clearance."

AND

By re-designating the previous section 4 as subdivision (b) of section 4 and amending it to read as follows (additions in bold text and deleted material struck as shown):

"(b) The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. ***Nothing stated in this subsection shall alter the requirement that defense counsel with the requisite security clearance must be provided with the classified documents in question. Defense counsel will not divulge any such classified information to his or her client unless said client also possesses the requisite security clearance.***

The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court ~~*alone*~~ ***along with security-cleared defense counsel****. If the court enters an order granting relief following such* ***a*** ~~*an ex parted*~~ *showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.*

This amendment will be retroactive in all respects.

WHY THIS IS NEEDED

When the Classified Information Procedures Act (CIPA) was passed in 1980, its purpose was to limit "graymail," or the use of classified evidence by criminal defendants who *already possessed government secrets* – they could use this to scuttle the case against them by threatening to release the secrets. Congress did not intend CIPA to "infringe on the defendant's right to a fair trial or change the existing rules of evidence." However, over the years the courts have interpreted CIPA to do just that, in cases where the defendants have *no access* to any secret evidence.

There are a number of cases where secret evidence has been given to judges – and influenced their decisions – but has not been shown to defense attorneys, even those who obtained the proper security clearance. This amendment would fix that by requiring that when classified evidence is given to the judge in a criminal case, it also must be provided to security-cleared defense counsel.

As pointed out in a law review article by law professor Ellen Yaroshefsky, a noted expert on legal ethics, this has eroded the Sixth Amendment right to confront evidence, and the adversary system itself. She stated (at Page 4):

> "…[T]he use of secret evidence is distorting the adversary system.
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> In Article III courts, we presume that the defendant, through counsel, has access to incriminating and exculpatory facts, has the opportunity to thoroughly investigate the case, to cross-examine witnesses and, if he chooses, to testify on his own behalf and to present witnesses. We expect and require the lawyer to mount a zealous defense. These fundamental ethical mandates for counsel are called into question in a growing number of

> criminal prosecutions, notably those that *result from the work of intelligence agencies* or other government agencies that classify information. In such cases, because information that is material and relevant is not readily available to the defense, the defendant is placed at a significant disadvantage…"

In the case of Yassin Aref, highly incriminating classified evidence - which turned out to be false - was given to the judge, but not to security-cleared defense counsel, resulting in many significant rulings against the defense. This secret evidence was also provided to the appeal court, while everyone else was made to leave the courtroom. The legal standard, set forth in Aref's case, is that in order for the evidence to be provided to the defense, the judge must find that it is "helpful to the defense." *False* incriminating evidence would not be seen as helpful, yet in our adversary system the judge would not investigate to see if the evidence holds up – that task falls to the defense. Clearly, defense counsel cannot do his or her job when not allowed to see this material, or even have any idea what it is that is being given to the court.

In the Aref case the FBI initiated a sting operation against him and a co-defendant, based on the false impression (derived from false and misleading classified evidence) that he supported terrorism. While Aref, who was only brought in to witness a loan from the informant (Shahed Hussain, a career con artist who was recently implicated in the worst transportation disaster in the US since 2009) to his co-defendant, never said or did anything indicating support for terrorism, he was still convicted based only on *comments by the informant*. Aref, who was acquitted of most of the counts against him, would likely have been entirely acquitted but for the secret evidence, which led the *judge* to tell the jury that the FBI had "good and valid reasons" for targeting him. The conviction, while not reversed, has been widely recognized as being unfair[1].

Rather than reversing the conviction, the courts have instead used the Aref case to justify withholding classified evidence from security-cleared defense counsel in all cases unless the judge thinks it is "helpful to the defense." As explained above, we have an adversary system where the defense needs to investigate evidence to see if it holds up under scrutiny. As it stands, CIPA doesn't allow that. This needs to be fixed and this amendment would accomplish that.

[1] The book, "*Terrorism Since 911: The American Cases,"* edited by John Mueller, a professor at Ohio State University, is a good example of reactions to the case. While Mr. Mueller is sympathetic to the government in many ways, he believes that this case was unfair, stating, "Aref was brought into the fold of the operation as a witness to the loan exchange between Hossain and the informant... Aref, like Hossain, had no intention of fighting for this cause, or seeking glory. He was not trying to socialize himself into a group. He merely wanted to help a friend with a transaction. Neither Hossain nor Aref conveyed any hatred for, or the will to act against, American values or United States' policy." (2015 edition, Albany case section, at 3.) Mueller also said, "... Unlike other cases where entrapment has been alleged, the defendants in this case never expressed any intent of engaging in terrorist activities. On multiple occasions, Aref and Hossain criticized involvement with terrorist groups and in terrorist plots..." (2015 edition, Albany case section, at 10)