

Preemptive Prosecution – Cheney’s 1% Approach To Justice

In November 2001, Dick Cheney formulated his 1% Doctrine – **if there is just a 1 percent chance of the unimaginable coming due, act as if it is a certainty.**¹ The Cheney 1% doctrine has apparently become the basis for America’s response to potential domestic terrorism. Anyone with even a 1% possibility of involvement in terrorism must be immediately incarcerated notwithstanding a lack of evidence of a crime. This plan has been informally referred to as “preemptive prosecution”.²

Preemptive prosecution reverses traditional notions of justice in which a defendant is prosecuted based on evidence that the defendant committed a crime. Instead the emphasis is on acting quickly before the target can commit a crime, based on an analysis of what the target might do if not prosecuted. If there is a 1% chance that the target might commit a (terrorist) crime, then the defendants must be prosecuted and convicted of something. Preemptive Prosecution also silences opinions the government wants to suppress. If the opinions might lead others to commit terrorism, the 1% logic requires that the authors be prosecuted. (See the Al-Arian case where the defendant’s advocacy for Palestinians, was claimed to give material support to Hamas terrorists.)

Using criteria this loose guarantees that innocent persons will be convicted of crimes that they never had any intention of committing. Preemptive prosecution violates basic concepts of justice enshrined in the Constitution and Bill of Rights including the presumption of innocence, the right to be free of unreasonable search and seizures, due process, equal protection of the laws, and free speech. At present “preemptive prosecution” is directed primarily against Muslims, but in due time it can be expected to be applied to a wide range of problem defendants unless blocked by our judicial system. So far, however, neither the courts nor the Obama Administration have shown any enthusiasm for halting or restraining the practice.

The principle weapons in preemptive prosecutions are the Material Support for Terrorism statutes. These statutes are interpreted broadly to include almost any activity that might help a terrorist organization, even indirectly, and even if the defendant does not intend to provide such a benefit. Preemptive Prosecution begins with governmental “suspicion”. Although “suspicion” can arise in many contexts, there are five principle sources of suspicion:

1. Financing of Charities Abroad

Any Muslim who was engaged in providing charitable activity abroad at the time of 9/11 was automatically suspected of having provided material support to terrorism. After 9/11, the government seized the assets of virtually every Muslim charity without, in most cases, giving any due process justification for the seizure.

¹ By Cheney’s 1% rule, if a man in a bar noticed that another patron was giving him a hostile stare, and the man calculated that the patron had at least a 1% chance of attacking him, the man would be justified in preemptively shooting the patron to death in self defense. *Whose Counting: Cheney’s One Percent Doctrine*, by John Allen Paulos, ABC News, July 2, 2006. The Iraq “preemptive” war follows the logic of Cheney’s 1% rule.

² Abroad, the government has pursued a doctrine of preemptive war. At home, it has pursued a strategy of what might be called preemptive prosecution”. *Prophetic Justice* by Amy Waldman, (The Atlantic, October 2006)

The right of the government to do this is still being litigated. The government also pursued Material Support charges against many leaders. For example, in the Holy Land Foundation case involving charitable activities in Palestine (which was controlled in part by Hamas, a listed terrorist organization), the prosecution argued successfully that even though none of the charitable activities helped Hamas directly, the Holy Land defendant’s activities enhanced Hamas’ prestige, and allowed Hamas to transfer money from charitable activities to terrorism.

By contrast, Dr. Rafil Dhafir had a similar charity, but his charity was in Iraq, not Palestine; he could not be charged with Material Support because Saddam Hussein’s tyrannical government was not listed a listed terrorist organization. Instead the government framed Dr. Dhafir for Medicaid fraud. (Dr. Dhafir provided all of the required medicines and services for which he billed, but because the government claimed that there were bookkeeping errors as to who provided the medicine or services, he was not entitled to any reimbursement). This is classic preemptive prosecution - just try to convict the defendant of anything that will stick even if it is Medicaid fraud.

2. “Association” with Someone Connected in Some Way with Terrorist

The government claims, without any apparent justification, that there is a “vast” network of Muslims inside the US whose job it is to support terrorists although not engaging in terrorism themselves.³ The government’s attempts to identify such a vast network of terrorist supporters have resulted in a number of preemptive prosecutions based on the claim that even the smallest and most innocent assistance to someone working with a terrorist organization violates the material support statutes. Thus Syed Fa-had Hashmi was charged with Material Support when he allowed an acquaintance to stay at his apartment and leave a bag of clothes there for a week. (The clothes allegedly made their way eventually to a terrorist organization.) Ali Asad Chandia was convicted of Material Support, when he allowed a social visitor (who allegedly was helping terrorists) to use Chandia’s cell phone and order paint balls on his computer. Often the government starts with someone who appears to be a real terrorist, and then works its way back charging everyone who gave any help to the defendant, even if the government cannot show that these people intended to help terrorism. On some occasions the government has forced defendants to cooperate and provide the FBI with the names of “associates”. The “associates” are then investigated and the “associates of the associates” are investigated, and so on.

³In the Aref case, prosecutors, at a March 8, 2007 press conference, gave this classic preemption rationale for prosecuting Aref: **GREG WEST:** ...[t]errorist organizations send people to countries in advance to lay the ground work. They have a vast, vast network of people that they trust who can carry out whatever part of the operation is necessary at whatever time they are asked to do that. Our job is to figure out who all of these people are in the US and prevent that from happening. **REPORTER:** Do you claim that Aref was one of those people or not? **WILLIAM PERICEK:** I would say that there is a concern that he is one of those people...and that the sting preempted anything that might have happened later on.” (In fact no evidence was shown of a “vast vast” network of anyone other than FBI agents)

3. Entrapment by Agents Provocateur

The FBI apparently assumes that one of the best ways to catch terrorists is in mosques. The FBI has aggressively recruited Muslim criminals and offered to make their legal troubles end if they will go into mosques and try to entrap members in terrorist plots. A whole series of preemptive prosecutions have been based on such entrapment, including: The Newburgh 4, the Fort Dix 5, the Liberty City 6, the Hyatts and the Aref- Hossain case.. For example, in the case of the Newburgh 4, the FBI used the same agent provocateur as in the Aref - Hossain case, to see how many people he could involve in a plot to attack at synagogue by offering up to \$25,000 per person. Although this is obviously entrapment, the courts have so far not reined in the government's attempts to entrap members of a religious community. The FBI has also used agents provocateur to frame people that have already been labeled suspicious from some other source.

4. Warrantless (Illegal) Electronic Surveillance

The government has set up a series of secret electronic surveillance systems that monitor much of our communication. (The systems were formerly illegal but the Obama Administration may have adopted measures to try to make them appear more "legal". It is doubtful that such systems could ever be constitutional, but the government's activities are classified, and the courts have so far refused to decide the constitutional issue). These systems give "leads" to "suspicious" persons which the FBI may want to preemptively prosecute. The "secret" information is often wrong or misunderstood, but since it is classified, it cannot be corrected. Aref, for example, was targeted by secret surveillance.⁴

5. Everyday Reports of Citizen-Vigilantes

Some FBI entrapment schemes start with "tips" from the public. The Fort Dix 5 entrapment began when a drug store clerk developed some home movies of a family vacation and saw Muslim men saying "Allah Akhbar" and holding guns (at a rifle range where they liked to shoot for recreation.) The clerk informed the FBI, and the FBI sent in two agent provocateurs, who eventually tricked the family members into saying enough things that sounded incriminating that they were convicted.

Preemptive Prosecutions Focus on Character

Once a target has been selected for preemptive prosecution, the case tends to focus on the character or ideology of the target. Did the defendant's innocent act (like witnessing a document, or loaning a cell phone, or storing a bag), become a crime because the defendant's "character" or "ideology" show the act was intended to support terrorism?⁵ The Al-Arian trial, for example, centered on

⁴ In his July 10, 2009 Report on the Government's secret surveillance programs (PSP), the Inspector General said that PSP information was often "vague or without context" so it was often considered less "accessible and timely". The PSP provided numerous "leads" but since the leads were not "tracked" it was hard to say how reliable they were

⁵ In the Aref case, the prosecution at its March 8, 2007 press conference gave this classic explanation: "**William Pericek:** Well again you [ask] was he a terrorist? Well, I think he had that ideology. I think he expressed the ideology that he supported Islamic causes, fundamentalist Islamic causes, he supported groups that would engage in terrorism. Did he actually himself engage in terrorist acts? We

whether the defendant's pro-Palestinian words were academic inquiry, or support for Hamas, based on the defendant's "ideology". Under this approach many innocent acts, if done by someone with a terrorist "character" or "ideology", can become criminal Material Support for terrorism.

The government is very clever at taking statements of a defendant out of context to convince a jury of Americans, unsophisticated in the nuances of Middle Eastern thought and politics, that the defendant has the terrorist ideology. Any past mention by the defendant of the word "jihad" for example, is repeatedly paraded before the jury as a sign of the defendant's radicalism, even though the word means essentially "struggle" and can be used in many innocent contexts. In the Aref case, the government used a 10 year old poem written by the defendant in Kurdish Iraq which used the word "jihad", to demonstrate the defendant's terrorist ideology, notwithstanding that the poem was about the Kurd's struggle (jihad) against Saddam Hussein, and essentially agreed with US policy at the time. In the same way, displays of a strict observance toward Islam are presented as signs of a radical nature, notwithstanding that true fundamental Muslims are forbidden to commit suicide, or make war on civilians, or innocent persons.

The government tries to bring up the name Osama bin Laden, even if it is irrelevant to the actual charges, because it prejudices the jury. They argue that any connection with terrorists, however remote, bears on the defendant's character and thus the intentions with which the defendant did an act that would otherwise be innocent. The government reinforces this by frequently calling one particular (so called) "expert" on terrorism, Evan Kohlman, to testify that the defendant's "associations" are related somehow to terrorists, and Osama Bin Laden. Mr. Kohlman, barely out of law school, has not been to the Middle East, speaks no foreign languages, and has no academic post. He does all of his research on line (presumably including web sites of the government), and he makes a good living parroting the government's position to the jury as an expert.

Finally the government is good at generating an atmosphere of fear and hysteria surrounding preemptively prosecuted individuals. Massive law enforcement, snipers on buildings, anonymous witness, all contribute to a picture that the government wants to paint for the media and jury pool – a picture that they have caught a real terrorist. With all of these advantages for the government, it is very hard for the defendant to get a fair trial. The truth about "preemptive prosecution" needs to be better understood before this epidemic of injustice will have run its course.

The Government should appoint a special prosecutor to review all preemptive prosecution cases in order to separate and dismiss the fake cases (in which the defendants were framed or overcharged), similar to what occurred in the Stevens case⁶, and similar to what the Justice Department's own inspector general has recommended in his July 10, 2009 report. For more information, go to our web site at www.projectsalam.org.

didn't have the evidence of that but he had the ideology...Our investigation was concerned with what he was going to do here, and in order to **preempt** anything else we decided to take the steps that we did take".

⁶ After Senator Theodore Stevens was convicted of Bribery, the Justice Department independently reviewed his conviction and dismissed it for prosecutorial misconduct