

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NY 10036-6689

COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS

H. R. 4239 “Animal Enterprise Terrorism Act” (“AETA”)

An Act to amend the Animal Enterprise Protection Act, as amended in 2002 (18 U.S.C. 43) “to provide the Department of Justice the necessary authority to apprehend, prosecute, and convict individuals committing animal enterprise terror.” **S. 3880 as passed.**

This Bill is Disapproved.

This bill proposes an amendment to 18 U.S.C. 43 which already specifies substantial criminal penalties for causing physical disruption to an animal enterprise. Ostensibly, the bill’s purpose is to provide additional protection to those who sell or use animals or animal byproducts and those with whom they transact business from property damage and against bodily injury or reasonable fear of serious bodily injury. Instead, the bill appears to (a) add penalties even where there is no property damage, bodily injury or reasonable fear of serious bodily injury, (b) expand greatly the types of otherwise arguably protected activity that would be punishable under the Act, (c) attempt to misapply anti-terrorism laws that are designed to prevent massive attacks on civilians to protect commercial enterprises, and (d) expand the breadth of the Act to include clearly constitutionally-protected activities.

The bill raises a number of concerns, namely:

- (a) It is not clear that AETA would address terrorism;
- (b) AETA would likely have a chilling effect on the lawful exercise of First Amendment rights;
- (c) AETA appears overly broad and vague;
- (d) AETA appears to punish conduct that causes no economic damage or injury;
- (e) AETA appears to lack a rational basis for the conduct it purports to criminalize and may violate equal protection rights;
- (f) AETA expands the definition of an “animal enterprise” to include virtually every U.S. retail business;
- (g) AETA’s penalty provisions appear disproportionately harsh;
- (h) AETA would likely expand the basis upon which the federal government may conduct wiretapping; and
- (i) The Senate bill as passed does not sufficiently address the concerns in the House bill.

(a) It is not clear that AETA would address terrorism.

It is not clear that the additional offenses that AETA seeks to curtail relate to terrorism. Domestic terrorism usually refers to intimidation of a civilian population, mass destruction, assassination or kidnapping.¹ AETA’s prohibition against any intent to “interfere with an animal enterprise” could comprise virtually any conduct, cover virtually every U.S. retail business (further explained below), and include protected First Amendment activity. Many activities that are now protected might not be if AETA passes, e.g., sending emails interstate to persuade family and friends to stop purchasing from a chain supermarket that does not sell cage-free eggs. Since AETA’s prohibition also relates to any conspiracy or attempts to interfere with an animal enterprise, otherwise protected speech may easily become suspect.

¹ 18 USC 2331. Domestic terrorism means activities that

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

AETA expands the law in three general ways: (1) expands offenses from “physical disruption to ... an animal enterprise” to “damaging or interfering with ... an animal enterprise.” (2) provides stepped up penalties for economic damage and (3) creates penalties for having committed no economic damage, bodily harm or reasonable fear of serious bodily harm. It is not clear how these address terrorism.

Since AETA would likely leave reasonable people to differ as to what is a violation, AETA may overly burden our court system with honest citizens trying to clear their names, and would divert valuable taxpayer money and resources from terrorism. Current state and federal laws appear to be more than sufficient to handle the disruption of an animal enterprise. Successful convictions have already been gained under 18 U.S.C. 43. Remedies for economic damage seem to be amply addressed in the current law.

(b) AETA Would Likely Have a Chilling Effect on the Lawful Exercise of First Amendment Rights.

AETA seems to cast a wide net that would likely capture a substantial amount of protected free speech and assembly, even with the bill's exemptions (further explained below). The probability of singling out any group for harsher penalties that advocates for animals simply because of political ideology is increased by this bill. AETA, therefore, appears to regulate content-based speech based on political ideology (e.g., ensuring the protection and enforcement of animal welfare laws).

“Content-based laws are presumptively invalid.”² They are subject to the strict scrutiny test that require that the law serve a compelling governmental interest, and be narrowly tailored to achieve the law's end.³ It is not clear that AETA would withstand this test. AETA would appear to prohibit otherwise lawful, peaceful conduct if the purpose of that conduct is to interfere with an animal enterprise. The penalties section underscores that point by specifying that no bodily injury, reasonable fear of serious bodily injury or economic damage need occur.

Not everyone engaging in free speech and assembly who is politically motivated engages in terrorism. Politically motivated activity is at the core of the fundamental freedoms guaranteed by the First Amendment. It is necessary to the successful functioning of a democracy. AETA would also be an unsettling precedent by which to target other content based speech as terrorism or target the disfavored group of the month.

Law-abiding citizens might feel intimidated from exercising their free speech rights for fear that they would be wrongfully charged and tainted as terrorists. Even if they are vindicated in court, their reputation would likely be damaged with no reciprocal right of economic restitution for having exercised their First Amendment rights.

AETA purportedly exempts the exercise of First Amendment rights; however, it is questionable what an honest citizen gains by AETA's exemptions when AETA appears to restrict the very First Amendment rights it is exempting. The bill does not define “interfere with” and can therefore mean virtually anything. The bill could then be interpreted to mean that virtually any interference with an animal enterprise could be illegal, unless it can be proven to be legal. This would seem to turn the First Amendment on its head and would not truly preserve First Amendment rights.

AETA's exemptions would neither immunize nor provide an adequate defense for a wrongful arrest. The exemptions provide a conundrum – so long as your speech has no intent to interfere with an animal enterprise, then your rights are protected. This places honest citizens in the untenable position of not knowing if their activity is lawful. AETA could effectively silence dissent or criticism of any animal enterprise whether it relates to animal welfare, child labor or pornography, to name a few.

In practice, the law may have the opposite of its intended deterrent effect. On the one hand, the harsher penalties could silence law-abiding citizens from lawful animal advocacy even if calling attention to animal enterprises' violation of animal cruelty statutes. On the other hand, silencing even lawful animal advocacy may fuel the perception by those the law intends to deter that the legal system does not work. This could not possibly be AETA's intended result.

² *R.A.V. v. City of St. Paul*, 505 U.S. 337, 382 (1992); see also *Regan v. Time, Inc.*, 468 U.S. 641 (1984).

³ *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). “Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *NAACP V. Button*, 371 U.S. 415, 434 (1963).

Under equal protection analysis, if a fundamental right such as a First Amendment right is implicated, the law impinging upon that right is subject to strict scrutiny.⁴ Virtually all advocacy attempts to interfere with some activity, such as through education, persuasion or legislative change, and may cause a loss of profits. Indeed, this bill might even characterize this Committee as engaging in terrorism. Any animal protection organization intends to interfere with an animal enterprise. For example, the anti-horse slaughter bill recently passed will not only interfere with horse slaughter enterprises that slaughter and process horses for human consumption, but also substantially close down their businesses.

AETA appears to mislabel economic damage such as profit loss as terrorism. Civil disobedience, the hallmark of major changes in our society, likely resulted in lost profits for the targeted businesses. Under AETA, the activities of civil rights pioneers Harriet Tubman, Rosa Parks and Martin Luther King, would likely have been terrorism.

(c) AETA Appears Overly Broad and Vague.

Due process requires that any statute penalizing conduct as criminal clearly define that conduct, and not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning.⁵ First, an offense based on any activity “interfering with” an animal enterprise even if there is no reasonable fear of serious bodily injury, bodily injury, or economic damage, could mean virtually anything and is therefore vague. Second, “animal enterprise” includes virtually every U.S. retail business (as further discussed below), and therefore exponentially multiplies the vagueness of the Act. Third, the expanded definition of bodily injury from the original definition of serious bodily injury⁶ includes “illness,” and “short-term loss or impairment of the ... mental faculty ...” That could mean that any mental anxiety arising from even legal protest may fall under the law if the protest is found to “interfere with” an animal enterprise. People who are the subject of protests are often intimidated by the disapproval of their fellow citizens and people who are informed that there is opposition to their positions may be fearful of the ramifications; yet, those protests would likely be protected speech.⁷

Due process also requires that laws may not be enforced in an arbitrary and discriminatory manner by giving government officials unbridled discretion.⁸ Since AETA is vague, it is susceptible to arbitrary and selective enforcement. In addition, it would appear from a literal reading of AETA that it would not require that an animal enterprise be lawful to be protected.

For example, it would not be clear whether any of the following would fall under the bill:

1. An email to alert friends across state lines that they should not patronize a big-box store because it sponsors a rodeo.
2. An otherwise peaceful picketing of a fur fashion show where pamphlets are distributed depicting trapped wild animals, which may discourage attendance and thereby affect profits not only of the fashion show promoters but also of the furriers with whom they are transacting business.
3. A shareholder resolution calling for certain animal welfare reforms in a corporation.

⁴ “No person shall be ... deprived of life, liberty or property without due process of law ...” U.S. Const. amend. V, § 1
“... No State shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Equal protection applies to the federal government through the Fifth Amendment (See *Bolling v. Sharpe* 347 U.S. 497 (1954))

⁵ *Schad v. Arizona*, 501 U.S. 624 (1991) reh den 501 U.S. 1277 (1991), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁶ 18 USC 1365 “...(3) the term “serious bodily injury” means bodily injury which involves—

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty ...”

⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972), quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 at 509, 89 S.Ct. 733 at 738 (1969), “...particular expressive activity could not be prohibited because of a ‘mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint ...”

⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

One would think that these activities are protected speech, but this bill would call them into question. The bill would appear to give the federal government unfettered discretion to determine what is legal.

**(d) AETA Appears to Punish Conduct That Causes
No Economic Damage or Injury.**

The vagueness and overbreadth of AETA is exacerbated by the inclusion of a provision under which anyone who conspires or attempts to commit an offense under this Act would now be subject to penalties as would someone who actually commits an offense. Such penalties could be imposed even if there is no economic damage or bodily injury, or even fear of serious bodily injury. What is unusual here is that any otherwise constitutionally protected communication that could be perceived as "interfering" with an animal enterprise could be interpreted under AETA as an attempt to interfere with an animal enterprise.

For example, any animal protection organization which posts on its website a boycott against an entity (e.g. a rodeo) engaging in animal abuse would be attempting to interfere with an animal enterprise. Anyone donating to that organization or a member of that organization could be charged with conspiracy under AETA.⁹ If that organization then sends out more than one interstate email on the boycott, it might be liable for repeated terrorist acts, i.e., sending the email, and might be charged with a course of terrorist conduct.¹⁰ Since the website and emails and donations would be done for the "purpose of ... interfering with ... an animal enterprise," all of the above activities might be terrorism under AETA.

**(e) AETA Appears to Lack a Rational Basis For the Conduct
It Purports to Criminalize and May Violate Equal Protection Rights.**

Although the House hearing on AETA discussed the need to protect the medical research community from economic damage and the businesses with whom they transact business,¹¹ the expanded definition of "animal enterprise" includes virtually every retail business in the United States, and the House hearing did not substantiate the need for that expansion.¹² A rational basis would need to exist for finding that conduct has a substantial effect on interstate commerce before federal involvement is appropriate under the Commerce Clause.¹³ Although a hearing was held, albeit briefly, there appears no basis upon which to add an offense for which there was no bodily harm, or even reasonable fear of serious bodily harm, or economic damage, or even non-violent physical obstruction which is sufficiently covered by current state and federal laws. The undefined prohibition against "interfering with" an animal enterprise when coupled with the offense of no harm or damage does not seem to be substantiated.

It is important to note that, in certain instances, AETA sets the bar for the burden of proof even lower than in civil matters, such as defamation. Entering an animal or research facility to take pictures to expose violations of animal cruelty might be sufficient to show intent to interfere with an animal enterprise because it may influence the public's willingness to transact business with that enterprise.

When AETA is compared to the bill upon which it was originally modeled, the Freedom of Access to Clinic Entrances ("FACE") Act, AETA's "rational basis" appears to crumble.

1. A number of hearings were held before FACE was enacted compared to the one brief hearing on AETA. Congress had found that anti-abortionists committed more than 6,000 blockades, and numerous and substantial acts of violence had occurred over 16 years.¹⁴

⁹ "Sec 43(a) OFFENSE. Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce [e.g., the Internet or electronic mail] (1) for the purpose of ... interfering with the operations of an animal enterprise ... (C) conspires or attempts to do so; shall be punished as provided for in subsection (b)."

¹⁰ Sec 43(d) DEFINITIONS. "... 'course of conduct' means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose ..." (e.g. having a website or sending electronic mail).

¹¹ Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the community of the Judiciary, House of Representatives, One Hundred Ninth Congress, Second Session on H.R. 4239, May 23, 2006, Serial No. 109-125.

¹³ United States v. Wilson, 73 F.3d 675, 678 (7th Cir. 1995) quoting H.R. Rep. No. 306, 103 Cong., 2d Sess 6 (1993) reprinted in 1994 U.S.C.C.A.N. 699, 703-704.

¹⁴ 1,000 acts of violence against health care providers, "at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 347 clinic 'invasions' and one murder" had occurred between 1977 to April 1993. U.S. v. Wilson, 73 F.3d 675 (7th Circuit, 1995) referencing H.R. Rep. No. 306, 103d Cong., 2d Sess. 6 (1993) at 6-7, reprinted in 1994 U.S.C.C.A.N. at 703-704.

There is no similar documentation of extreme behavior by a tiny minority of animal activists that has a history of criminal activity even comparable to that of the anti-abortion movement that would justify replacing the current version of AEPA, as amended in 2002. Although hearings are not required, the courts will review hearings to help determine if there was a rational basis for regulating conduct; otherwise, the law may be invalidated.¹⁵ The AETA hearing did not include the very parties whose even lawful activities AETA would likely affect. Absent more extensive hearings, there is no reason to believe existing state and federal laws do not adequately protect against criminal activity aimed at an animal enterprise. Indeed, successful convictions have already been made under AEPA.

2. FACE had been enacted to protect a woman's constitutional reproductive rights. Although the government would have a compelling interest to protect a woman's constitutional reproductive rights, on balance, one would think that the government would have less of a compelling interest to protect the profits of an animal enterprise. Yet under AETA, the government appears to protect an entity's profits even more rigorously than a woman's constitutional reproductive rights under FACE.
3. FACE ties the intent to injure, intimidate or interfere with doing so "by force or threat of force or by physical obstruction." Under AETA it would be sufficient to simply intend to interfere with an animal enterprise since under the penalties section no economic damage, bodily injury or reasonable fear of serious bodily injury would be required.
4. Relief under FACE is capped at \$25,000 for any suit brought by the Attorney General. AETA has no such cap.
5. FACE defines "interfere with" as ".... [restricting] a person's freedom of movement." AETA has no such definition leaving the term vague and open to wide interpretation and uneven enforcement.
6. AETA's penalty for bodily injury is up to 20 years, twice that of the similar penalty under FACE.
7. FACE is not an anti-terrorism statute despite the prolific documentation of violence for almost two decades.
8. AETA greatly expands the basis for wiretapping, whereas FACE is not subject to wiretapping.

It is interesting to note that, historically prior to FACE being enacted, protests that went beyond peaceable protest were virtually all prosecuted as minor misdemeanors under state law if there was no significant property damage or physical harm. Most cases that involved defendants who obstructed a railway outside a nuclear power plant or blocked entrances to abortion clinics were treated in this more lenient manner.¹⁶ For example, anti-abortionists who blocked an operating room were convicted of the petty disorderly persons offense of defiant trespass.¹⁷ It was only after a number of hearings and extensive findings of violence that anti-abortionists' actions were criminalized under FACE because they affected women's reproductive health on a national basis. A similarly extensive investigation has not been made through congressional hearings on AETA to justify penalties that are harsher than those under FACE.

(f) AETA Expands the Definition of an "Animal Enterprise" to Include Virtually Every U.S. Retail Business.

AETA substantially expands existing law as to what constitutes an animal enterprise.¹⁸ Most retail businesses in the United States is an "animal enterprise" under the new definition, because virtually every retail business "sells

¹⁵ See, e.g., U.S. v. Wilson, 73 F.3d 675, citing U.S. v. Lopez, 514 U.S. 549 for the proposition that unless there is a showing that activities to be regulated substantially affect interstate commerce, there is no rational basis upon which to regulate those activities.

¹⁶ 3 ALR 521 (1992) James O. Pearson, Jr. J.D.

¹⁷ State v. Loce, 630 A2d 792 (Sup. Ct. N.J. App. Div. 1993)

¹⁸ AETA as proposed in H.4239 and S.3880 defines an "animal enterprise" as:

. . . animal products for profit.” The expanded definition includes the sale of “animal products for profit, . . . [and] education,” and includes animal shelter, pet store, breeder, [and] furrier.” Every grocery store or supermarket (sells meat and dairy products), shoe store (sells leather shoes or boots), department store (sells wool sweaters), and restaurant (also sells meat and dairy products), just to name a few, would fall under the law.

Thus, labor protestors who block access to a non-union big box store are disrupting an “animal enterprise” if that enterprise sells, for example, leather wallets. Anti-pornography activists who target an adult bookstore that sells leather attire also risk running afoul of AETA. This would be an unintended effect.

(g) AETA’s Penalty Provisions Appear Disproportionately Harsh.

The penalties provided by AETA are not only much higher than under AEPA as amended, but also out of proportion with the penalties imposed for other federal offenses. AETA penalties far exceed those for FACE, again a potential violation of equal protection rights (discussed below).

AETA was ostensibly introduced to stiffen penalties for violence and economic damage, yet AEPA, as amended in 2002, had already substantially stiffened penalties. AEPA, as amended in 2002:

- a. created a new penalty for economic damage of less than \$10,000 resulting in a fine or a maximum of 6 months in prison, or both;
- b. doubled the maximum penalties for serious bodily injury from 10 years to 20 years in prison and
- c. tripled the maximum penalties for economic damage in excess of \$10,000 from 1 year to 3 years in prison.

AETA would replace those penalties with penalties that are harsher still. First, AETA adds offenses that are non-violent and vague. Adding these offenses are contrary to the intended purpose of the Act. AETA would criminalize and penalize:

- a. Non-violent physical obstruction (civil disobedience) up to:
 - i. \$10,000 or up to 6 months in prison, or both, for the first offense and
 - ii. \$25,000 or up to 18 months in prison or both, for the second offense and
- b. A nondescript “offense” of no economic damage, no bodily injury and no reasonable fear of serious bodily injury or death, up to:
 - i. One year in prison or
 - ii. A fine or
 - iii. Both.

Second, AETA heaps on even stiffer penalties in the absence of any bodily injury so long as there is economic damage (e.g. profit loss). For example, the maximum punishment for those who cause no bodily injury and less than \$10,000 in profit loss is doubled from 6 months to one year. In addition, based alone on economic damage, such as profit loss, it would increase almost seven times the current maximum of 3 years in prison to:

- a. 5 years for economic damage in excess of \$10,000 not exceeding \$100,000
- b. 10 years for economic damage in excess of \$100,000 not exceeding \$1 million and

-
- (A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;
(B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event;
or
(C) any fair or similar event intended to advance agricultural arts and sciences.

The underscored terms show the changes in AETA’s proposed definition compared to the definition under current law, 18 U.S.C. § 43(d), which reads as follows:

- (A) a commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing;
(B) a zoo, aquarium, circus, rodeo, or lawful competitive animal event; or
(C) any fair or similar event intended to advance agricultural arts and sciences.

- c. 20 years for economic damage in excess of \$1 million.

Of course, all of these penalties are in addition to those available under general criminal laws that prohibit, for example, trespassing, larceny, burglary, destruction of property and assaults.

By way of perspective, the United States Sentencing Commission states that in 2005, the median sentence in the federal courts for larceny was 4 months; for embezzlement, 4 months; for sexual abuse, 4.5 years; and for manslaughter, 3 years. By contrast, AETA's penalties far exceed any of the foregoing and are heavily weighted towards economic damage. In addition, AETA's penalties for death do not differentiate lesser terms for manslaughter or self defense, so that, if one is convicted of manslaughter, one could potentially receive life imprisonment.

**(h) AETA Would Significantly Expand the Basis Upon Which
the Federal Government May Conduct Wiretapping.¹⁹**

The basis upon which a court is likely to find probable cause is greatly expanded under AETA's overly broad and vague language. Virtually anything could form the basis for wiretapping. It would appear to be sufficient on the basis of any activity "interfering with" an animal enterprise even if there is no reasonable fear of serious bodily injury, bodily injury, or economic damage. For example, an email to alert friends across state lines that they should not patronize a big-box store because it sponsors a rodeo may be sufficient probable cause for wiretapping. Similarly, an email alert to friends across state lines not to patronize a big-box store that otherwise falls under the broad definition of "animal enterprise" because it uses child labor in Indonesia may also be sufficient probable cause for wiretapping.

This is susceptible to arbitrary and discriminatory enforcement, with honest citizens not knowing whether their activities rise to the level of having their communications subject to wiretapping. Before any wiretapping statute has such an expansive reach, extensive hearings should be held.

**(i) The Senate Bill As Passed Does Not Sufficiently Address
The Concerns In The House Bill.**

The Senate bill removed the explicit prohibition against non-violent civil disobedience, but the prohibition seems to have remained in principle in the Penalties section. The law still spells out penalties for activity that does not "instill in another the reasonable fear of serious bodily injury" and "results in no economic damage" or bodily injury. No reasonable person would consider that activity to be terrorism -- or even a crime.

The reference to "damage" in the Offenses section only mentions "real or personal property"; however, the Penalties section greatly expands damages to "economic damage" including "profit loss" which does not relate back to the stated purpose of AETA to protect against physical damage or bodily injury or reasonable fear of serious bodily injury.

¹⁹ See 18 USC Sec. 2516(1)(c). Authorization for interception of wire, oral or electronic communications.

"(1) The Attorney General ... may authorize an application to a Federal judge ... and such judge may grant ... an order authorizing or approving the interception of wire or oral communications ... when such interception may provide or has provided evidence of - ...

"(c) any offense which is punishable under the following sections of this title: ... Section 43 (relating to animal enterprise terrorism)..."

Enacted March 9, 2006.