

Securing the Nation Post-9/11: The case against Steve Kurtz

Interview by Gita Hashemi and Janna Graham
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Since 1987, Critical Art Ensemble have written manifestos, conducted research and staged participatory performative events that explore the intersections of art, technology, radical politics and critical theory. Their recent investigations into bio-technology have included the creation of a process for testing food for genetically modified ingredients and research into the history of United States' biological warfare program. In 2004, a number of events triggered the detainment and prosecution of CAE's Steven Kurtz under the US Patriot Act.

In this interview with FUSE Magazine's Gita Hashemi and Janna Graham, Steve Kurtz, Lucia Sommer and Claire Pentecost, members of CAE and Members of the CAE Defense Fund (Steve cannot speak directly to issues in his legal case) discuss Steve's recent experiences in U.S. courts and the implications of the US Patriot Act on CAE's work on bio-technology, tactical media and the democratization of science.

Fuse: Steve, We'd like to start by expressing how sorry we are about the personal circumstances under which this fiasco with the FBI took place. Lucia, could you tell us how this case came about?

Lucia Sommer: On May 11, 2004, Steve Kurtz's wife of 20 years, Hope, died of heart failure in their home in Buffalo. Steve called 911. In what was apparently a symptom of the new "war on terror" political climate in the US, the Buffalo Police, who responded along with emergency workers, became alarmed by the presence of scientific equipment and petri dishes in Steve's home. The Petri dishes contained a harmless bacteria— *Serratia marcescens*. Most of this material had previously been used in CAE's exhibited work in galleries and museums throughout Europe and North America; the rest was for a new project that CAE was working on. On his way to the funeral home the next day, Steve was detained by agents from the FBI and Joint Terrorism Task Force, who informed him he was being investigated for "bioterrorism." At no point during the next 22 hours in which Steve was held and questioned did the agents fully Mirandize him or inform him he could leave. Meanwhile, agents from numerous federal law enforcement agencies – including five regional branches of the FBI, the Joint Terrorism Task Force, Homeland Security, the Department of Defense, and the Buffalo Police, Fire Department and state Marshall's office – descended on Steve's home in Hazmat suits. They cordoned off half a block around the house and seized his cat, car, computers, manuscripts, books and equipment. They seized Hope's body from the county coroner - who had already determined she had died of natural causes - for further analysis. The Erie County Health Department condemned Steve's house as a possible "health risk." A week later, only after the Commissioner of Public Health for New York State had tested samples from the home and announced there was no public safety threat, and the military coroner had also determined Hope had died of natural causes, was Steve allowed to return to his home and to recover her body and his cat, who had been locked in the attic without food or water. To this day, the FBI has not released most of the tens of thousands of dollars worth of impounded materials, including the research for a book Steve was working on.

Fuse: Our understanding is that Steve is no longer charged with “bio-terrorism”. What is the charge against him?

LS: On June 29, 2004, a federal Grand Jury appeared to reject any “terrorism” charges and instead handed down indictments of two counts each of “mail fraud” and “wire fraud” under Title 18, United States Code, sections 1341 and 1343. Also indicted was Robert Ferrell, former head of the Department of Genetics at the University of Pittsburgh’s School of Public Health. The charges concern technicalities of how Bob helped Steve obtain \$256 worth of harmless bacteria for one of CAE’s projects. Although they’re a far cry from the charges the District Attorney originally sought, these are still serious federal charges, and they carry the same potential sentence as the original bio-terrorism charge would have: up to 20 years in prison.

Charges of mail fraud and wire fraud, are designed to dismantle financial schemes that defraud people out of money through the mail, credit cards or the Internet. These laws are written very broadly, so they’re also used to convict figures in organized crime – and they’ve been used historically to put away social and political dissidents, from Marcus Garvey on. In this case, the prosecution is trying to make what could *at best* be a civil contract dispute into a federal crime. It’s important to note that even if the defendants did what is alleged in the indictment, at most this would be a petty contract dispute to be settled between the University of Pittsburgh and American Type Culture Collection (the suppliers of the bacteria). But, clearly, it’s not even *that*, because neither of these parties, nor the New York or Pennsylvania state authorities, have brought any complaint whatsoever against Steve or Bob! To our knowledge, this is the first time the U.S. Justice Department is intervening in the alleged breach of a Material Transfer Agreement (MTA) of non-hazardous materials in order to redefine it as a criminal offense – and they are going way outside of their own prosecutorial guidelines to do this. The Justice Department’s “Prosecution Policy Relating to Mail Fraud and Wire Fraud” states very clearly that prosecutions of fraud should not be undertaken unless a scheme is directed to defrauding “*a class of persons, or the general public, with a substantial pattern of conduct.*” Any actions by Steve and Bob in no way fit any of these guidelines.

Fuse: But how did this alleged contract dispute end up in criminal courts?

LS: According to affidavits and search warrants obtained by Steve’s lawyer, Paul Cambria, the FBI and federal prosecuting attorney William Hochul obtained the search warrants to Steve’s home and office by intentionally misleading a judge. That judge was never told of Steve’s explanation of what the harmless bacterial substances were being used for, nor that Steve was a professor and artist (instead he was referred to as a “political advocate”) who had exhibited the materials at museums and galleries internationally, nor of the fact that Steve tasted the bacteria in one of the petri dishes in front of an officer to prove it was harmless. Also, in a blatant (and illegal) use of racial profiling, the judge was told of Steve’s possession of a photograph with Arabic writing beside it, but not of the photograph’s context: an invitation to an art exhibition at the Massachusetts Museum of Contemporary Art! The photograph, by artists The Atlas Group, was one of several exhibited pieces pictured on the invitation.

Fuse: When you were in Toronto last spring, the case was about to go to pre-trial. What happened at court?

LS: The evidentiary hearing finally happened in April, and at the moment, Steve is still waiting for a judge to rule on the pre-trial motions. The hearing did seem to go very well for us, with the judge appearing genuinely incredulous at several points during William Hochul's presentation – but that's not necessarily a good indication of what a judge will do. Judges generally don't like to overturn Grand Jury indictments. We're hoping for a dismissal, but realize that's not very likely. While most observers assumed the FBI would realize its initial investigation was a terrible mistake, the Department of Justice seems determined to press its "case" against Steve and Bob. Despite the Public Health Commissioner's conclusion as to the safety of the materials Steve was using, and despite the fact that the FBI's own field and laboratory tests showed they were not used for any illegal purpose, the U.S. District Attorney continues to waste millions of dollars of taxpayer money on what is now clearly a politically motivated prosecution.

Fuse: The obvious question about what is happening to Steve is how it relates to other arrests being made under the US Patriot Act/war on terror. Claire, you've written an excellent article categorizing the different types of arrests made under the Act and the Act's use in current prosecutorial strategies (available at www.caedefensefund.org). How does Steve and Bob's case fit into the overall strategies used by the U.S. legal system?

Claire Pentecost: As I mention in the essay, it's hard to know just how much the US Patriot Act is being used in investigations because part of the power of "sneak and peek" is that the law never has to disclose the wiretaps, searches, surveillances, DNA swabs they may have deemed necessary to determine suspicion. But at the level of the courts we are seeing an earlier, less publicized law become a handy prosecutor's hammer. Among other provisions, "The Antiterrorism and Effective Death Penalty Act of 1996," signed by Bill Clinton after the Oklahoma City bombing, renders it a crime for U.S. citizens to provide material support to the lawful political or humanitarian activities of any foreign group designated by the Secretary of State as "terrorist."

A somewhat ambiguous and tragic case delivering convictions in 2003 on the basis of the material support argument is that of six young Yemeni Americans from the defunct steel town of Lackawanna, New York. These low-income, working, first- and second-generation Americans were recruited by a religious fundamentalist to an al-Qaeda training camp in Afghanistan in the spring of 2001 where some of them actually met Osama bin Laden. Confronted with the reality of a jihadi organization, they returned home, and ceased all ties with the man who recruited them (who was later killed by a U.S. Predator drone in Yemen). By all accounts they got on with their lives and never knew about, planned or in any other way supported terrorists or terrorist actions. The travesty in this case was the severity of the punishment and the way it was won. The axe over the defense was the constant threat of being declared enemy combatants, which would deliver them to a military prison without access to lawyers, courts or their families – possibly a life sentence by executive fiat. The prosecutors never offered evidence that the Lackawanna defendants intended to commit an act of terrorism, but under the pressure of loosing all legal

rights, they pleaded guilty and received sentences ranging from 6-1/2 to 10 years. A condition of the plea was a waiver by each defendant of the right to appeal, even if the Supreme Court were later to find the law unconstitutional.

As the 9/11 report attests, in the spring of 2001 Ashcroft had taken terrorism off the list of funding priorities and Condoleezza Rice didn't have the time of day for the state department terrorism experts. Although people at the top level of government have not been held to account for being unable or unwilling to heed mounting evidence that al-Qaeda would become the number one U.S. threat, six young men from Lackawanna should have known that they risked 25-year prison sentences by exploring the promises of radical forms of their religion.

With particular regard to the domestic sweeps and persecutions, many ask, why have we so violently alienated the community whose cooperation might actually help us in the war on terrorism? Clearly, cooperation is not a priority. "Catching terrorists" may be the advertised objective, but what these policies demonstrate is that there is a broader goal, a more urgent necessity for a larger vision. What the terrorist attacks of 9/11 represented to their target, Multinational Capital, embodied in the World Trade Center, and its ally, the U.S. military, embodied in the Pentagon, is that the pan-Islamic independence movement is out of control and must be eliminated. For global capital to continue to integrate one "nonintegrated" region after another, especially those with valuable resources, the notion of Islamic independence, like any vigorous third world independence movement, is *in the way* and must be crushed. And this means that any *potential* sympathizers with such a movement must be set straight. In this case, people of Islamic identification everywhere must be disciplined, must be shown that the privileges of the first world, including democracy and basic human rights, are only theirs by the discretion of first world superpowers, the US and the EU.

Of the Lackawanna Six, Bush boasted that we had broken up a terrorist sleeper cell. In 2003 John Ashcroft gave the Justice Department's highest award, "The Attorney General's Award for Exceptional Service" to the members of the Buffalo Joint Terrorism Task Force for the dismantlement of the Lackawanna terrorist cell. Many of the award recipients were part of the team that conducted the investigation of Kurtz. The award-winning prosecutor who presented the case against the Yemeni Americans, William J. Hochul, Jr., is now prosecuting Steve Kurtz and Robert Ferrell. Besides heading the anti-terrorism unit in the Western District of New York State, his specialty is the use of fraud and racketeering charges in criminal cases against white collar, violent and organized crime.

Fuse: Beyond this connection to Hochul, what are the ideological grounds or pragmatic considerations that allow the state to pull a white man of an elite class into this whirlpool? Surely he doesn't fit the racial profile driven by xenophobia...

CP: Referring to the Lackawanna case, Deputy Attorney General Larry D. Thompson said, "Terrorism and support of terrorists is not confined to large cities. It lurks in small towns and rural areas." An advantage of the Kurtz-Ferrell case is that it illustrates that U.S. Justice does not

only prosecute the dark and the poor, but that it will also hunt the white and the professionally salaried. The enemy is not confined to those we easily recognize as other, but comes disguised as college professors in the arts and sciences. Justice is fair; the enemy is everywhere.

In this way, even as the architects of a privileged society wage war on a population they have deemed a threat or obstacle, they consolidate the loyalty of the included. This requires disciplining any serious criticism of the system being defended. Even in the best of times, the law is multifarious and discretionary, meaning that laws are generally enforced in an unequal manner, so the more enfranchised, “valued” citizenry are less likely to encounter the law for the same actions that will trip the less enfranchised, generally suspected, disposable people. And this is always put to political ends, sometimes urgently when a “present danger” can be broadcast and other times more routinely. When the reigning defence moves from routine mechanisms of ideology and enforcement to broader operations of brutality, the tactics must be justified by vilifying more than just the outsiders, but by showing any class of detractor to be deviant and punishable.

It’s easy to believe this ambitious prosecutor and his team find the content of Critical Art Ensemble’s work, especially their writings, so radically deviant from their own plan for America that they consider it criminal. Everything about the art group’s activity has always been completely legal and their ideas are protected by the First Amendment. As little respect as the Bush administration shows for the U.S. Constitution or any other inconvenient law, national or international, they have not yet been able to openly trump the First Amendment. But the judicial trance induced by the mantra of terrorism currently gives the prosecution supraconstitutional powers, specifically end-runs around First Amendment rights. Unfortunately, the Kurtz-Ferrell case may follow the formula of the neutral infraction + leftist politics = inflation to terrorist proportions.

Fuse: How has your case impacted on the scientific community and how much support have you had from the field of science?

Steve Kurtz: The case is reasonably well known. Enough for a minor crackdown to begin, especially within academia. A lot of warnings regarding MTAs are being memoed about. Scientists are being told they need to run a tighter ship. The days of free exchanges without worry are over. Also, there has been more talk about cutting off support to amateurs, or anyone outside one’s own lab. Lab supply distributors have been warned as well and have complied to the extent they will not sell wetware to amateurs.

Support for the case has been OK. There was a lot of positive editorializing in the beginning in science journals. And enough scientists have come forward to mount a defense with highly qualified expert witnesses. It’s not as good as it could be though. There are two problems: One, Bob is too ill to put a lot of effort into the campaign; and two, there are many scientists who are scared they will lose funding if they stand up against the government.

Fuse: CAE has extensively addressed this climate of fear and control within the scientific community in theorizing the notion of “amateur” critical inquiry into “life science knowledge systems.” What is your definition of “amateur” and how has CAE used “amateur” practices in its work?

SK: An amateur is someone who has not been formally trained as an expert within a given specialized discourse, but still has an interest in exploring the discipline, and does so. When the amateur comes to this discourse armed with critical capabilities, a good imagination, or both, s/he can do things that specialists cannot. S/he can challenge paradigms, and if the challenge is a lost cause there is no problem because nothing is riding on the results. S/he does not have to answer to investors, granting agencies, the government, bosses, the military, peers, etc. For CAE, we can take a critical position within the life sciences that would be unwise if we were trying to build a career. We can imagine how to use the knowledge, materials and procedures of the life sciences in ways in which the powers that direct or pressure research initiatives would not approve. Obviously, the limitations are many. We can’t do Big Science, but we can make our presence felt.

Fuse: How does this work challenge both governments and multi-national companies like Monsanto in the increasing regulation and control over all aspects of knowledge production in bio-science?

SK: First, CAE does not recognize these institutions’ self-proclaimed right of ownership of the life sciences. We attempt to remind them and the public that this knowledge system is part of the commonwealth and everyone has a right to access the knowledge, processes, and the unregulated materials. Second, we take direct cultural action to stop exploitive corporate practices, or, at the very least, expose the practices and undermine the rhetoric used to mislead the public.

Fuse: And what are your demands?

SK: In concrete terms, here are what we struggle for in regard to the Life Sciences and biotechnology.

- 1) A halt to corporate initiatives to consolidate and control the world’s food supply. Food supplies should be decentralized and diversified so that they cannot be used as a means to reinforce hegemony and colonial dependency.
- 2) All biotech initiatives and policies that are going to have a profound effect on the environment and/or humans should be in the democratic control of the public, as opposed to the current status of corporate/bureaucratic control.
- 3) Biotechnologies that could have profound effects on the environment over time must be the subject of long-term study before they can be commercially licensed. We do not want to stop GMO research, only proceed with a caution that indicates a belief that environmental and public safety is of greater importance than profit.

4) The Life Sciences (in its many cultural forms) should remain a part of the cultural commons, and should not be considered the private property of corporations and the military.

5) All ecological commons should be maintained and defended and corporate eco-pirates prosecuted.

Those have been our primary concerns of late.

Fuse: Does CAE align and/or affiliate itself with GMO-free and anti-corporate activism, much of which must, by necessity, engage in activities rendered illegal by existing institutions and systems?

SK: Again, I have to emphasize that we are not anti-GMO. Genetic modification is a revolutionary field of research that must go forward. We are anti-capitalist, and resist the ways capitalism abuses knowledge by framing it so it serves the few and harms the many. We view ourselves as a radical research wing for a generalized anti-capitalist resistance. Hopefully, we can produce models, methods and tools for those who have chosen resistance whether they are individuals, groups or popular fronts. We are not formally allied with anyone. We do function within a larger network of cultural researchers with whom we have an informal mutual aid agreement including RTMark, the Institute for Applied Autonomy, the Carbon Defense League, subRosa, World Intelligence Organization, Mongrel, and so on. It's really best to stay independent. To ally with a specific movement will suck you in like a black hole. In the 80s, we got overly involved in the AIDS movement. The next thing we knew, we were just making agitprop and organizing protests and actions. We weren't doing what we are best at and like to do. After that, no more direct alliances.

Fuse: Given the neo-colonial political economy of First World-Third World relations and the urgency and scope of devastation in the Third World countries resulting from the forced or coerced adoption of GMOs and other industrial agricultural practices, how does your radicalism contribute, tactically or strategically, to the broader activist efforts that are articulated outside the walls of cultural institutions?

SK: CAE hopes that some of the tools, tactics and models we create can be used by anyone. For example, inverting Monsanto's model of agricultural sabotage so it could work for traditional and organic farmers as a means of environmental defense. We also hope to show through our amateur practices that the only thing keeping us from making the master's tools are own, is believing what we are told—tools are dangerous in the wrong hands and we are not trained to properly use them.

Fuse: This question of where one's work is positioned seems extremely critical at this juncture. CAE has always distributed its work in the art world. Is this for protection, to engage with mainstream audiences, to create a framework from which you can be a witness or necessary outsider to the collusion between science, government and multi-nationals?

SK: The first thing to remember is that the art world is not a monolith. It can appear that way sometimes, but there are many different art worlds with wildly different agendas and goals. The second thing is that CAE does not consider itself a group of art specialists. We are interdisciplinarians who explore intersections. We try not to place ourselves in a particular position; rather, we aim for a dynamic flow that moves through specializations for both exploratory and practical reasons. The key logistical issues here are communication, access, and sponsorship (protection has never really been on the table, because, as you mentioned, you can't be protected. CAE's general project is one that assumes risk). We use the language that we believe the people we want to dialogue with understand best and are most comfortable using. When we need access to an institution, we choose the role (artist, academic, colleague, activist, researcher, whatever) that will give us the best chance for access. If we need production costs covered, we go to where it's most likely to happen. The segments of the "art world" that are interested in experimental and political art have been very good to us in this regard. Like everything that we do, we engage in series of tactical choices in an effort to accomplish what is generally not allowed to happen or is at least strongly discouraged. When we do actions, in the grand majority of cases, our audience does not view what we do as art. Even in a museum. For participants outside of the specialization of art, we are just something out of place that they have discovered. There are too many discourses crossing one another for our actions to be easily categorized unless someone arrives with a preconceived set of assumptions. This is why we discourage publicity for our actions and performances. We want them to be discovered, not attended.

Fuse: For you does CAE's work operate on a representational or symbolic level or do you employ the art structures as a way to infiltrate certain audiences? Who are the audiences?

SK: The answer is both, although we are not trying to infiltrate anything. We leave that to the "community artists." We are simply trying to engage certain audiences. The audiences are those we believe have a stake in the issues that we are exploring. If the issue is GM food, the people at the grocery store, or at a farmers market are the audience. If its reproductive technology, the audience is middle class white people between the ages of 25 and 45. If the project is tourism in Halifax, the tourists in Halifax are the audience. The formula is quite simple.

Fuse: To wrap this up and perhaps open the door for a future follow up, in your reflections you've suggested that your research-in-progress on bio-defense policy has been a factor prompting the prosecution's zeal to pursue the case. Could you tell us about the manuscript that was confiscated when you were arrested? What was your analysis of the United States role and increasing state and corporate interests in bio-terrorism?

SK: We are at the center of a reinvention of McCarthyism, and a new type of enforcement of the privatization of knowledge. In the greater sense, it's not something unique to CAE that is being targeted. There are many other candidates that could serve the same purpose. Our guess is that it was the combination of the FBI stumbling upon us, seeing the content of our work, and then deciding with the Justice Department that this was a good case to make an example of. What

makes us an even better candidate is the work we were doing at the time on germ warfare. We think the feds believed that they could throw the term bio-terrorism around, that it would stick to CAE and then they could get a slam-dunk court win on whatever bogus charge they could come up with.

The project CAE was, and is still working on is called “Marching Plague.” We were looking to show how the history of bio-warfare programs reveals that they usually emerged out of false military fear in conjunction with segments of the military seeing a means to generate funds by planting these fears. The technology consistently tested out to be useless even within the logic of the military. We then wanted to go on to show the current germ warfare program generated by the Bush administration is not only a waste of taxpayer dollars, but also competes for funds better used for public and global health initiatives (again, even when placed within the strategic logic of the military). The payoff for the Bush administration in engaging this economy of waste is to maintain the spectacles of fear and commitment to national defense. Of course, this comes at the cost (quite literally) of millions of lives each year.

For more information about the case against Steve Kurtz and Bob Ferrell or to contribute to the CAE Legal Defense Fund, please contact www.caedefensefund.org.