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[Corporate](#)
[Criminal](#)
[Employment](#)
[Healthcare/Hosp.](#)
[Insurance](#)
[Judges/Judiciary](#)
[Law Practice](#)
[Litigation](#)
[Probate](#)
[Real Estate](#)

[Daily Opinions](#)
[Firm Watch](#)
[Transactions](#)
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[Editorial Staff](#)
[Columnists](#)
[Submissions](#)

Hobbled Justice

Case Against Sheik's Lawyer Tests Limits of Attorney-Client Privilege

Forum Column

By Susan B. Jordan

She refers to herself as "The Poster Child for the PATRIOT Act." Veteran New York criminal defense attorney Lynne Stewart is facing 40 years in prison in the Southern District of New York for providing material support to the Gama'a Islamiya, which is on the Bush administration's list of terrorist organizations. Stewart is counsel for Sheik Omar Abdel Rahman, the "blind Sheik." In 1995, Rahman was convicted of conspiracy to bomb New York City landmarks.

The indictment alleges that Stewart and three others (one of whom is her interpreter) facilitated communication between leaders of the Gama'a Islamiya and the imprisoned sheik. The conditions of Rahman's incarceration severely restrict his communication with the outside world, as well as with his lawyer. Violation of the regulations that restrict that communication, called the Special Administrative Measures, is the gravamen of the charged offenses.

"Whatever I did, I did as a lawyer. It's nothing different than I have done for 20 years," she told me. She believes that the indictment is fueled by the administration's desire to demonstrate to a nervous public that it is winning the war on terrorism more than by legitimate law enforcement considerations. Attorney General John Ashcroft himself gave a press conference following her arraignment and later appeared on late-night television to talk about the case.

The violation of the Special Administrative Measures occurred in 2000. Stewart says she got a call from a U.S. attorney reprimanding her for telling a reporter for the Reuters news agency that the sheik was withdrawing his support from a cease-fire that had been effect in Egypt since 1988. Following the reprimand, the government began electronically monitoring Stewart's prison visits with her client.

Because the case involves both First Amendment speech and the Sixth Amendment right to counsel, it raises the same specter of civil liberties retreat as does the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.

Stewart believes that her own radical politics and her representation of radical clients over the past 20 years make her a seemingly easy mark for indictment, especially when tied into the present preoccupation with terrorism. Her job, Stewart says, is "to give a voice to the voiceless." In a day and age when the administration is urging indefinite and incommunicado detention for even American citizens, her principles cannot be faulted by students of the Sixth Amendment.

The Department of Justice has had the attorney-client privilege in its rifle sights since the 1980s. In the early stages of the war on drugs (which preceded the current war on terrorism), the department went after attorney fees - saying that the fees were drug proceeds - pitting the right to retained counsel against the government's desire to seize these proceeds. The policy eliminated many of the nation's best lawyers from the largest and most difficult of these cases because the clients didn't want to risk examination of the source of their attorney fees, and many lawyers didn't want to get involved in the fight over assets while the funds were in their trust accounts.

The net effect was that many clients went without well-known and very good private counsel, and the government got no seized assets. Taxpayer money paid the bills when public defenders took up the slack.

In the late 1990s, assistant U.S. attorneys relied on the now-infamous

"Thornburgh Memo" to permit them to bypass ethical rules and talk to defendants and witnesses represented by counsel, in the absence of and unbeknownst to their lawyers. The government's purpose was to undermine the defense function and urge the defendant to work with the government.

Thornburgh argued that State Bar ethical rules prohibiting contact with defendants who had lawyers did not apply to attorneys employed by the Justice Department. It took an act of Congress to stop the Thornburgh practice (28 U.S.C. Section 530B).

Recent arrests of two U.S. citizens captured in the war on terrorism, "enemy combatants" Yaser Hamdi and Jose Padilla, make clear that the Bush administration is trying to establish precedent for the indefinite and incommunicado detentions of United States citizens. Hamdi's case is currently before the 4th U.S. Circuit Court of Appeals.

In earlier argument before the District Court, Judge Robert G. Doumar commented, "I tried valiantly to find a case of any kind, in any court, where a lawyer couldn't meet with a client This case sets the most interesting precedent in relation to that which has ever existed in Anglo-American jurisprudence since the days of the Star Chamber."

What led to Stewart's indictment was that she disobeyed the Special Administrative Measures. These regulations permit the Bureau of Prisons to restrict conversation between lawyers and their clients to topics only within the scope of legal representation. 28 C.F.R. Section 501.3. Stewart is alleged to have permitted the interpreter to discuss the Gama'a Islamiya's position on a cease-fire in effect in Egypt with Rahman, and to have made comments to mask the conversation. Violation of the Special Administrative Measures alone does not carry a criminal penalty.

One wonders who determines what is or isn't within the scope of legal representation, especially in light of Rule 1.2 of the American Bar Association's Model Rules of Professional Conduct, which directs that lawyers have a duty to render "candid" advice not only about the law but also about "economic, social and political factors that may be relevant to the client's situation."

The regulations, amended after Stewart's indictment, now permit the Bureau of Prisons to monitor communications between inmates and attorneys without court order or supervision in order to deter future acts of terrorism. 28 C.F.R. Section 501.3(d).

The government has said it has been monitoring conversations between Stewart and her client from as far back as May 2000. Though the legal basis of the wiretaps has not been revealed, they are almost certainly Foreign Intelligence Surveillance Act wiretaps, which cannot be used to target Americans except in the "national interest" or to protect against acts of terrorism.

The legal basis for those wiretaps is questionable, as is the question of whether any legally authorized wiretap would permit the monitoring of an attorney-client conversation. The regulation cited above permitting wiretapping without court order was not enacted until October.

Wiretapping is an ongoing issue in the case as the government has refused to reveal whether Stewart continues to be the object of wiretapping, either with her own clients or in consultations with her own defense counsel.

Stewart continues to represent her clients and to cross the country speaking about her case and the lessons to be gleaned from it. She is courageous in the face of a daunting fight with the government. She is clear about her role in the sheik's case, which she does not differentiate from her other difficult cases: "I see my role as giving a voice to the voiceless, for those who cannot articulate for themselves. For defendants who are political people, my job is keeping alive their persona, their dreams, something that perhaps an average American [juror] can at least look at without recoiling in horror."

Stewart's New York colleague, Ron Kuby, says of her in a New York Times Magazine article: "Her great talent as a lawyer is to see something redemptive in everyone and to make jurors see it also."

But now she finds herself on the other side of the lawyer-client divide, relying for counsel on Michael Tigar, one of the country's most erudite and convincing lawyers, who is credited with keeping Oklahoma bombing defendant Terry Nichols

from the death penalty.

"Even if every word in this indictment is true," Tigar says, "Lynne Stewart is not guilty. It is outrageous that the indictment alleges as criminal what is clearly protected conduct under the First and the Sixth Amendments to the United States Constitution."

Stewart's case tests the parameters of the Sixth Amendment. But the chilling effect of the indictment for those lawyers who would represent such clients is enormous. As for me, a criminal defense lawyer for more than 30 years, if the federal defender indigent defense panel calls asking me to represent a client charged with being a terrorist, in today's world, I would think twice about it. The war on terrorism is changing the turf on the battlefield. I probably would take the case but would go in with my eyes wide open to the risks. The job of representing such a client will be hard enough, but if the government deems the way that I am representing my client "outside the scope" of the attorney-client relationship, then I will be waging my own high-stakes battle.

In a recent submission to the court in Stewart's case, Tigar wrote: "A defendant's Sixth Amendment rights can never under any circumstances yield to alleged national security concerns. To hold otherwise would be to resurrect the idea of sovereign power rejected by the Constitution itself."

Watching the prosecution of Stewart, one cannot help but ask whether the Sixth Amendment could fall victim to the war on terrorism.

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