



1-1-2005

U.S. vs. Stewart: Two Opinions

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Recommended Citation

Bannerman '07, Allison and Kemper '05, Ryan A. (2005) "U.S. vs. Stewart: Two Opinions," *Res Publica - Journal of Undergraduate Research*: Vol. 10
Available at: <https://digitalcommons.iwu.edu/respublica/vol10/iss1/10>

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Abstract

Lynne Stewart was counsel for Sheikh Abdel Rahman during his 1995 trial when he was convicted of "seditious conspiracy to wage a war of urban terrorism against the United States" and of "soliciting crimes of violence against the United States military and Egyptian President Hosni Mubarak" (Stewart 4). Rahman was considered to be a leader of the Islamic Group (IG), which was designated as a foreign terrorist organization by the State

Department in 1997. Stewart continued to act as Rahman's counsel after his trial. In 1998, Special Administrative Measures (SAMs) were imposed on Rahman to halt his communication with IG. The SAMs included restrictions on Rahman's access to mail, the telephone, and visitors, and prohibited him from speaking with the media. Stewart was asked to abide by and sign these SAMs, which she did in May 1998. In doing so, she agreed "not to use 'meetings, correspondence, or phone calls with Abdel Rahman to pass messages between

third parties (including, but not limited to, the media) and Abdel Rahman" (Stewart 5). In April 2002, Ahmed Abdel Sattar, Yassir Al-Sirri, Mohammed Yousry and Lynne Stewart were charged with a five-count indictment. Stewart was charged on Counts One ("conspiring to provide material support and resources to a foreign terrorist organization (FTO)"), Two ("providing and attempting to provide material support and resources to an FTO"), Four ("conspiring to defraud the United States") and Five (Stewart alone was charged with "making false statements"). These charges held that the defendants had violated the SAMs as well as the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) which made it illegal to provide, or attempt to provide, "material support or resources to a foreign terrorist organization" (AEDPA).

Professor Simeone's assignment for his Constitutional Law II class was as follows: "Write a 650-800 word essay on the following topic: Lynne Stewart stands convicted in U.S. District Court of violating the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) by providing 'material support' to the Islamic Group, a State Department designated terrorist organization. You are an associate justice on the U.S. Supreme Court and have been given the task of writing the opinion of the court by the chief justice."

Keywords

legal opinions

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Professor Simeone’s assignment for his Constitutional Law II class was as follows: “Write a 650-800 word essay on the following topic: Lynne Stewart stands convicted in U.S. District Court of violating the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) by providing ‘material support’ to the Islamic Group, a State Department designated terrorist organization. You are an associate justice on the U.S. Supreme Court and have been given the task of writing the opinion of the court by the chief justice.”

MS. JUSTICE BANNERMAN delivered the opinion of the Court.

Lynne Stewart was convicted in the US District Court of violating the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹. Stewart aided her client, Sheikh Abdel Rahman, in communicating with the declared terrorist group, IG², while he was imprisoned and under “Special Administrative Measures (‘SAMs’)”³ (5). In doing so, Stewart violated the SAMs and the AEDPA. She made herself a tool to facilitate communication, as stated in the indictment, by, in May of 2000, hiring an interpreter, Mohammed Yousry, who was affiliated with IG and allowing him to read letters to Rahman concerning IG matters. She “took affirmative steps to conceal” (7) these discussions from the prison’s guards, and by doing this nullified any claim she could have made of being unaware of what was being done by her interpreter. She then later directly responded to some of the questions the interpreter had asked Rahman by, again in direct violation of the SAMs she had signed two years previously, making a statement to the media that Rahman no longer supported the cease-fire in Egypt. Through these actions she provided material support to IG, directly violating AEDPA 2339B and bringing bodily harm to other humans.

It has been argued by opponents to Stewart’s conviction that she was within her First Amendment rights to speak to the media and that the SAMs themselves, along with AEDPA, were unconstitutional because they imposed on her First Amendment rights as well as on Rahman’s by limiting their ability to pure speech. However, under the clear and present danger test established in *Schenck v United States*⁴, Congress has a right to limit speech, even pure speech, to protect against imminent danger and “the ban does not restrict an organization’s or an individual’s ability to freely express a particular ideology or political philosophy. Those inside the United States will continue to be free to advocate, think and profess the attitudes and philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups, or their subsidiary groups over seas” (14). Stewart was free to express her own beliefs on the cease-fire, if her announcement to the press had been that she no longer supported the cease-fire in Egypt that would have been fine, but it was Rahman’s opinion she was expressing and not her own. She therefore was providing a resource to IG, not merely exercising her right to free speech. Rahman was convicted in October of 1995 for “engaging in a seditious conspiracy to wage a war of urban terrorism against the United States, including the 1993 World Trade Center bombing and a plot against New York City landmarks. He was also found guilty of soliciting crimes or violence against the United States military and Egyptian President Hosni Mubarak.” (4) It is within the interest of avoiding clear and present dangers that the SAMs were imposed to effectively sever Rahman’s ability to serve as a leader of the IG and

¹ Which declares: “Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both” (2339B)

² Also known as “Gama’at al-Islamiyya’ a/k/a ‘IG’ a/k/a ‘al-Gama’at’ a/k/a ‘Islamic Gama’at’ a/k/a ‘Egyptian al-Gama’at al-Islamiyya’... [which] existed as an international terrorist group dedicated to opposing nations, governments, institutions, and individuals who did not share IG’s radical interpretation of Islamic law...” (2)

³ “The SAMs limited certain privileges in order to protect ‘persons against risk of death or serious bodily injury’ that might otherwise result. The limitations included restrictions on Sheikh Abdel Rahman’s access to the mail, the telephone, and visitors, and prohibited him from speaking with the media. All counsel for Sheikh Abdel Rahman were obligated to sign an affirmation acknowledging that they and their staff would abide fully to the SAMs before being allowed access to their client. In affirmation, counsel agreed to ‘only be accompanied by translators for the purpose of communicating with the inmate Abdel Rahman concerning legal matters.’ Since at least in or about May 1998, counsel agreed not to use meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman.” (6)

⁴ “The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” (*Schenck* 25)

therefore reducing their threat. Through her actions, Stewart bypassed these protections to the state and in doing so reactivated this clear and present danger. "The First Amendment does not protect violence" (*NAACP v. Claiborne Hardware Co.*, 916). Stewart's statement was directly instigating acts of violence in Egypt, where, under the direction of Rahman, IG would end the cease-fire. Though opponents argue that this does not constitute clear and present danger because it is not within the United States, this is not a correct statement. Egypt and the US are close allies and are tied closely economically as well. If the violence were to escalate any harm caused to Egypt would also affect the US and if violence were to escalate to the point where intervention was needed, it would be likely that the US would be entered into the conflict. Not only is there a clear and present danger in Egypt that would involve US interests, but if Rahman is able to actively communicate to IG from prison then there is direct danger to the US. Rahman was charged, as previously stated, for directly threatening violence in the US. If he is able to communicate plans and orders to IG the effectiveness of imprisoning Rahman is undermined and the IG could easily bring violence to the US. Stewart went much farther than an attorney has a right to when representing a client that clearly is a threat to US security. Five years after Rahman's conviction Stewart made a statement to the press that had nothing to do with getting him released from prison, and in all actuality would probably do more to keep him there. She went beyond her First Amendment protections and directly broke AEPDA and the SAMs, both of which were in place to protect the United States from imminent dangers and were therefore constitutional. The judgment of the lower courts is

Reversed.

MR. JUSTICE KEMPER delivered the opinion of the Court.

In challenging the AEDPA of 1996, Stewart relies on three primary arguments. First, she contends that the authority of the Secretary of State to designate terrorist groups cannot be reviewed and, therefore, violates due process. I believe that the heart of this case lies elsewhere and I am satisfied that the review of the U.S. Circuit Court of Appeals for the District of Columbia is sufficient to uphold due process (*Humanitarian* 2369).

Stewart's other arguments, however, go to the essence of the 1996 Act. Stewart claims that provisions outlawing "material support," especially in the form of "personnel" infringe on her constitutional rights of speech and association, and are unconstitutionally vague. In considering these closely related claims it is essential to determine if the law was aimed at a content expressive component of conduct and, therefore, strict scrutiny should be applied. In fact, several logical considerations suggest that mere advocacy and association were made illegal under this legislation. This Court has found financial support of "legitimate" speech equal to speech under the First Amendment in other contexts (see *Buckley v. Valeo*). Since money is accepted as a proxy for speech, prohibiting "material support" to designated groups is no different than saying, "thou shall not advocate designated political goals." This logic leads into the realm of association as well. This Court said in *Claiborne*: "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected (908)." As the Center for Constitutional Rights correctly contends in its *amicus* brief: "[AEDPA] makes it a crime to provide any "material support" to a designated group, even when that support is intended — and is in fact used — exclusively for lawful purposes, simply because others in the recipient group engaged in some unlawful activities (9)." Finally, the vagueness of the "personnel" provision suggests that one cannot appoint oneself as a spokesperson for the causes of designated groups. The ability to support a chosen cause goes to the very nature of advocacy. If considered under strict scrutiny, the AEDPA must be found unconstitutional, because it is not narrowly tailored.

The government makes a strong argument, however, that the AEDPA is aimed solely at conduct and should be considered under intermediate scrutiny. This legislation does not limit any particular type of speech or association, but is aimed at keeping resources out of the hands of terrorists. The government correctly contends that the federal government has the power to restrict U.S. citizens in dealing with foreign entities, the government has a legitimate interest in preventing the spread of terrorism and this interest is unrelated to suppressing First Amendment rights (*Humanitarian* 2366). Against the Appellate Court's ruling, the government also contends that the terms used in the AEDPA are specific enough in dealing with terrorism. Simply put, all resources that aid terrorist groups naturally lead to an imminent threat. As the Appellate Court correctly found in *Humanitarian Law Project*: "...organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization aids their unlawful goals (2358)."

Even if one accepts the intermediate scrutiny standard for evaluating the AEDPA, however, the law fails to meet this standard. The vagueness of the terms "material support" and, specifically, "personnel" leaves the incidental First Amendment restrictions of the AEDPA far greater than necessary to achieve the government's purpose. Precedent for evaluating individual action under a given statute emerges from the stream of thought that originated with Justices Holmes and Brandeis in cases from *Scheck to Abrams*. As Justice Vinson echoed in *Dennis*: "...where an offense is specified by a statute in [nonspeech terms], a conviction relying upon [speech] as evidence of violation may be sustained only when the [speech] created a "clear and present danger" of attempting or accomplishing the prohibited crime (505)." This concept was clarified in *Brandenburg* to only include cases where speech, "...is directed to inciting or producing imminent lawless action and is likely

to produce such action (447).” As applied to other rights in *Claiborne*, the government may criminalize association alone only when, “...the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims (920).”

For a law restricting First Amendment rights to be constitutional, it must draw a clear distinction between legal and illegal conduct when considered under these precedents. As this Court stated in *Dennis*: “...it serves well to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go...(516).” In *Dennis*, this Court upheld a vague statute because the defendant’s intent was clearly within the scope of conduct that the government has the authority to prohibit. In this case, it is unclear whether lawless action was imminent based on Stewart’s communication of messages to IG. Moreover, it is unclear whether Stewart intended to further the legal or illegal aims of this group. The facts of this case clearly indicate that AEDPA is unconstitutionally vague and I must uphold the ruling of the Appellate Court. The judgment of the lower courts is

Affirmed.