

## Lynne Stewart: Casualty of the 'War on Terror'

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In a decision that reflects the post-911 terrorism hysteria, a three-judge panel of the Second Circuit Court of Appeals has affirmed prominent civil rights attorney Lynne Stewart's convictions and remanded her case to district court Judge John G. Koeltl to reconsider her sentence. The appellate panel directed Koeltl to remand Stewart to custody and the 70-year-old woman is now in prison.

Stewart was convicted of conspiracy to provide and conceal material support to the conspiracy to murder persons in a foreign country (18 U.S.C. sec. 2339A and 18 U.S.C. sec. 2), conspiring to provide and conceal such support (18 U.S.C. sec. 371), and knowingly and willfully making false statements (18 U.S.C. sec. 1001). The majority opinion states that Stewart was convicted "principally with respect to [her] violations of those measures by which [she] had agreed to abide," namely, Special Administrative Measures (SAMs).

The SAMs were placed on Stewart's client, Sheikh Omar Ahmad Ali Abdel Rahman, who is serving a life sentence for terrorism-related crimes. They restrict his ability to communicate with persons outside of the prison. Stewart and Abdel Rahman's other attorneys, Ramsey Clark and Abdeen Jabara, signed statements saying they wouldn't forward mail from Abdel Rahman to a third person or use their communications with Abdel Rahman to pass messages between him and third persons, including the media. Stewart violated her agreement to abide by the SAMs. Clark and Jabara allegedly did as well. Lawyers who violate SAMs expect to suffer administrative consequences, such as being denied visiting privileges. Yet Stewart was indicted for federal crimes. Clark and Jabara were not.

Judge Koeltl presided over the nine-month trial. Stewart was precluded from arguing that a prosecution for conspiring to commit a conspiracy (an inchoate offense) raises serious dangers. Koeltl sentenced Stewart to 28 months. The maximum sentence under the federal sentencing Guidelines is 30 years but the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005) that the guidelines are advisory, not mandatory.

Koeltl concluded that the terrorism enhancement, "while correct under the guidelines, would result in an unreasonable result." He cited "the somewhat atypical nature of Stewart's case" and "the lack of evidence that any victim was harmed as a result of the charged offense." The result of the terrorism enhancement, according to Koeltl, was "dramatically unreasonable in [her] case" because it "overstate[d] the seriousness of [her] past conduct and the likelihood that [she would] repeat the offense."

Stewart, Koeltl concluded, "has no criminal history and yet is placed in the highest criminal history category [under the terrorism enhancement] equal to that of repeat felony offenders for the most serious offenses including murder and drug trafficking." Koeltl found that Stewart's opportunity to repeat "the crimes to which she had been convicted will be nil"

because she “will lose her license to practice law” [“itself a punishment”] and “will be forever separated from any contact with Sheikh Omar Abdel Rahman.”

Koeltl viewed Stewart’s personal characteristics as “extraordinary” and determined that they “argue[d] strongly in favor of a substantial downward variance” from the guidelines. He described her as a dedicated public servant who had, throughout her career, “represented the poor, the disadvantaged and the unpopular, often as a Court-appointed attorney,” thereby providing a “service not only to her clients but to the nation.”

Koeltl also considered that Stewart had suffered from cancer – undergoing surgery and radiation therapy – and found a significant chance of recurrence. At age 67, Koeltl observed, prison would be “particularly difficult” for Stewart.

Although the appellate majority stated that the district court judge is “in the best position to make an individual determination about the ‘history and characteristics’ of a particular defendant, and to adjust the individualized sentence accordingly,” the panel second-guessed Koeltl by ordering that he reconsider Stewart’s sentence. Specifically, the panel directed Koeltl to consider whether Stewart committed perjury at trial by testifying “that she understood that there was a bubble built into the SAMs whereby the attorneys could issue press releases containing Abdel Rahman’s statements as part of their representation of him.” The panel also directed Koeltl to consider Stewart’s possibly perjured testimony about “her purported lack of knowledge” of Taha, a leader of the Islamic Group, who had solicited a statement from Abdel Rahman opposing the continuation of a ceasefire between the Islamic Group and Egyptian President Hosni Mubarak’s government.

In fact, Koeltl noted there was “evidence to indicate that [Stewart’s] statements were false statements.” But he concluded it was “unnecessary to reach [the question] whether the defendant knowingly gave false testimony with the intent to obstruct the proceedings” because (1) the Guidelines calculation already provided for the statutory maximum, and (2) a non-Guidelines sentence was, in Koeltl’s estimation, “reasonable and most consistent with the factors set forth in Section 3553(a).” Thus, Koeltl did consider whether Stewart committed perjury in his initial sentencing decision. Michael Tigar, Stewart’s trial counsel, told me he is “convinced that there is ample independent corroboration for Lynne’s version of events.”

Judge Calabresi, who joined the majority panel decision, noted in his separate opinion that Koeltl was “a judge of extraordinary ability [with] a well-earned reputation for exceptional judgment.” Calabresi wrote that “for us – who have not been involved in the case and do not know all the backs and forths, . . . to second guess the district court’s judgment seems to me be precisely what both the Supreme Court and our court sitting *en banc* . . . have said we should not do.”

According to Tigar, Koeltl’s sentence decision was “well-argued.” Tigar said, “For any court of appeals judge to write in a hostile vein about [Koeltl’s] decision is an arrogation to the appellate court of a power that the rules of procedure and long legal tradition vest in trial judges. In addition,” he added, “the sentence reflected the reality of this case, a reality that seems to have escaped the court of appeals panel.”

Calabresi thought it “not . . . entirely irrelevant” that Stewart was the only lawyer criminally charged even though two others also violated the SAMs. Noting that “while prosecutorial

discretion may be salutary in a wide variety of cases,” Calabresi wrote, “when left entirely without any controls it will concentrate too much power in a single set of government actors, and they, moreover, may on occasion be subject to political pressure.” Calabresi observed that the district court’s exercise of its sentencing discretion “may provide the only effective way to control and diminish unjustified disparities.”

Judge Walker, concurring and dissenting, wrote separately that Stewart’s sentence was “breathtakingly low” and “extraordinarily lenient.” He would go further than the majority and vacate Stewart’s sentence as “substantively unreasonable.”

Both Calabresi and the majority thought it significant that all of the acts for which Stewart was convicted occurred before the September 11, 2001 attacks. Calabresi would “take judicial notice of their timing,” and “recognize that our attitudes about her conduct have inevitably been influenced by the tragedy of that day.” Notably, he added: “We must be careful then in judging Stewart based on lessons that we learned only after her – very serious – crimes were committed.” Stewart was indicted in 2002 and convicted in 2005.

“Lynne’s representation of the sheik was in the best traditions of advocacy,” Tigar said. “She was brought into the case by Ramsey Clark, and her actions on behalf of her client never went farther than Ramsey had already gone. The government’s conduct towards her when the SAMs issue first erupted validated that belief.”

The clear message of the 125-page majority appellate panel opinion is that attorneys who zealously represent their clients in the post-9/11 era beware. This result will undoubtedly chill the willingness of criminal defense attorneys to handle terrorism cases. Moreover, the Court of Appeals fortuitously released its opinion just as Attorney General Eric Holder announced his intent to try Khalid Sheikh Mohammed in federal court for his alleged role in the 9/11 attacks.

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