

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

v.

**AHMED ABDEL SATTAR,
MOHAMMED YOUSRY, and
LYNNE STEWART,**

Defendants.

02 CR 395 (JGK)

**AMICI CURIAE BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS,
THE NATIONAL LAWYERS GUILD, AND THE NATIONAL COALITION TO
PROTECT POLITICAL FREEDOM IN SUPPORT OF LYNNE STEWART'S
MOTION TO DISMISS THE CRIMINAL PROVISION OF MATERIAL
SUPPORT CHARGES IN COUNTS ONE AND TWO OF THE INDICTMENT**

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INTRODUCTION

The Center for Constitutional Rights, the National Lawyers Guild, and the National Coalition To Protect Political Freedom submit this amici curiae brief in support of attorney Lynne Stewart's motion to dismiss the charges in Counts One and Two of the Indictment against her. The government alleges that Ms. Stewart conspired to provide, and provided, "material support" – largely in the form of her "personnel" – to a designated foreign terrorist organization, the Islamic Group (IG) of Egypt, in violation of 18 U.S.C. § 2339B. Specifically, the government contends that Ms. Stewart made a statement at a June 2000 press conference in the course of her representation of imprisoned IG leader Sheikh Abdel Rahman that provided the IG with "material support."

The material support counts of the Indictment fail to meet constitutional muster for three critical reasons. First, the material support statute's blanket prohibition on the provision of "personnel" criminalizes a substantial amount of core political speech and is, as a result, both void for vagueness and facially overbroad. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

Second, the Indictment does not allege that Ms. Stewart issued the statement in question with the intent to further the IG's unlawful ends. The Supreme Court has established that the government must prove specific intent to further the unlawful objectives of an organization that has both lawful and unlawful ends because mere guilt by association is "alien to the traditions of a free society and the First Amendment itself." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982). Moreover, under the

Fifth Amendment's Due Process Clause, guilt cannot be imposed unless it "is personal." *Scales v. United States*, 367 U.S. 203, 224-26 (1961).

Third, the statute by which the Secretary of State designates foreign terrorist organizations, 8 U.S.C. § 1189, runs afoul of the First Amendment and Due Process Clause, initially by giving the Secretary of State virtually unfettered discretion to designate foreign terrorist organizations without adequate procedural safeguards, and then by precluding criminal defendants from arguing that their activities were protected by the First Amendment because the organization they supported was not a terrorist organization. *See United States v. Rahmani*, 209 F.Supp.2d 1045 (C.D.Ca. 2002).

STATEMENT OF INTEREST OF THE AMICI CURIAE

The government's decision to prosecute a prominent criminal defense attorney based on a public statement she is alleged to have made in the course of representing a controversial client has sent shock waves through the legal community. In commenting on "the importance of an independent bar to our system of democracy," Judge William Young of the District of Massachusetts astutely observed, "[w]hatever the merits of [the Indictment against Lynne Stewart], its chilling effect on those courageous attorneys who represent society's most despised outcasts cannot be gainsaid." *United States v. Reid*, 214 F.Supp.2d 84, 95 (D. Mass. 2002).

In a similar vein, a member of the criminal defense bar lamented that "[a]lthough ... it is far from clear what Stewart is alleged to have done or not done, it is certainly safe to conclude that her indictment will have a substantial and long-lasting chilling effect on criminal lawyers everywhere." Barry Tarlow, "Warning: Attorney-Client Jailhouse Conversations No Longer Privileged," *The Champion*, June 2002. Another member of

the bar warned, “the Stewart indictment shows, an attorney can be charged with aiding and abetting terrorism if she engages in many everyday acts of lawyering.” Elaine Cassel, “Bringing Down The Curtain On Defense Attorneys: The Lynne Stewart Case,” *Counterpunch*, Jan. 28, 2003”).

The Amici, too, are concerned that the government’s highly publicized prosecution of Ms. Stewart based on a statement made in the course of representing a controversial client will cause attorneys to shy away from representing persons charged with terrorism and to refrain from providing clients facing such charges with the zealous representation and effective assistance of counsel to which they are entitled.

Additionally, the Amici are concerned by the fact that the material support statute is so broadly drafted that it criminalizes pure speech. The Amici deplore the use of terrorism in all of its forms and recognize that our nation must take appropriate steps to protect against future terrorist attacks. But the Amici believe that the vigorous exercise of our First Amendment rights of freedom of expression and association is essential to the health of our democracy. The material support statute, which was introduced into the criminal code in the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132 (AEDPA), and amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, P.L. 107-56 (Patriot Act), provides an example of legislation that reflexively and inappropriately sacrifices our civil liberties in the name of national security.

The Center for Constitutional Rights is a non-profit legal and educational organization that was founded in 1966 to provide support to the Civil Rights Movement. The Center is dedicated to protecting and advancing the rights guaranteed by the United

States Constitution and the Universal Declaration of Human Rights. It has long advocated for the protection of political freedoms, including the First Amendment rights of freedom of expression and association. Currently, it represents the plaintiffs in *Humanitarian Law Project v. Ashcroft*, which has established that the criminal prohibition on providing “material support” to designated foreign terrorist organizations in the form of “personnel” – which is at issue in the prosecution of Ms. Stewart – is unconstitutional.

The National Lawyers Guild is a national non-profit legal and political organization of lawyers, law students, legal workers and jailhouse lawyers dedicated to using the law as an instrument for social amelioration. Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has taken an integral role in representing political movements. As a result, it has long been a target of government efforts to discredit and disrupt its work, including the FBI’s COINTELPRO program. It views the right of association as key to the continued life of these movements and to peaceful political change.

The National Coalition to Protect Political Freedom is an umbrella organization composed of national civil rights and civil liberties organizations, national ethnic rights groups, national legal organizations and nationally recognized legal experts, local and regional coalitions, and local support committees. The NCPPF was formed to protect civil liberties in the wake of the Anti-Terrorism and Effective Death Penalty Act of 1996 and is committed to protecting both liberty and security. It believes that political freedoms like the right of association and fundamental due process principles can and must be maintained in the fight against terrorism.

ARGUMENT

THE MATERIAL SUPPORT CHARGES SET OUT IN COUNTS ONE AND TWO OF THE INDICTMENT AGAINST LYNNE STEWART CANNOT BE SQUARED WITH THE FIRST AND FIFTH AMENDMENTS AND SHOULD BE DISMISSED

The first two counts of the Indictment against Ms. Stewart arise under 18 U.S.C. § 2339B, which makes it a crime to “knowingly provide[] material support or resources to [a group designated by the Secretary of State pursuant to 8 U.S.C. § 1189 as] a foreign terrorist organization or to attempt[] or conspire[] to do so.” 18 U.S.C. § 2339B(a)(1). The term “material support” is broadly defined to include “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” 18 U.S.C. § 2339A(b). A violation of the material support statute is punishable by a fine or a prison sentence of not more than 15 years or, if the death of any person results, any term of years or for life. 18 U.S.C. § 2339B(a)(1).

Count One charges Ms. Stewart with conspiring to provide “material support” in violation of 18 U.S.C. § 2339B to the IG, an Egyptian group that was designated by the Secretary of State as a foreign terrorist organization on October 8, 1997. Count Two charges her with the provision of such support. The “material support” Ms. Stewart stands accused of providing to the IG principally takes the form of her own “personnel.” She is alleged to have reported at a June 2000 press conference that her client, Sheikh Rahman, an IG leader who was convicted in 1995 of conspiring to commit terrorist acts

in New York City, was withdrawing his support for a ceasefire between the IG and the Egyptian government.¹

The government's charge that Ms. Stewart violated the material support statute fails constitutional scrutiny on three grounds:

First, as the Ninth Circuit Court of Appeals ruled in *Humanitarian Law Project*, the material support statute's blanket prohibition on providing one's own "personnel" to a designated foreign terrorist organization criminalizes a substantial amount of core political speech that enjoys the full protection of the First Amendment.² For this reason, the statute is both void for vagueness and facially overbroad. 205 F.3d 1130, 1137-38.

The vagueness doctrine protects us against statutes that "trap the innocent by not providing fair warning" and that encourage "arbitrary and discriminatory application" because they lack "explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnotes and internal citations omitted). In the case of statutes like 18 U.S.C. § 2339B, which impose criminal sanctions and threaten to chill speech and associational rights, the vagueness doctrine demands the most

¹ Specifically, the Indictment states that "[o]n or about June 14, 2000, STEWART released Sheikh Abdel Rahman's statement to the press and quoted the Sheikh as stating that he is 'withdrawing his support for the cease-fire that currently exists.'" Indictment ¶ 21(k). Counts One and Two of the Indictment allege that Ms. Stewart played a role in several other overt acts in furtherance of a conspiracy to provide material support. The Amici's first argument addresses only the allegations that charge Ms. Stewart with the unlawful provision of "personnel." The Amici's next two arguments, if accepted by the Court, would require the invalidation of all of the "material support" charges against Ms. Stewart.

² The definition of "material support" was amended by the Patriot Act on October 26, 2001, to add "expert advice and assistance." See Patriot Act, § 805(a)(2). The press conference at which Ms. Stewart is alleged to have provided material support to the IG took place on June 14, 2000, more than a year before the definition was amended. For this reason, the Indictment charges Ms. Stewart with the provision of "personnel," and not with the provision of "expert advice or assistance."

stringent scrutiny because uncertain meanings inevitably lead people to “‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); see also *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

As the Ninth Circuit correctly observed, the material support statute’s ban on the provision of “personnel” is void for vagueness: it is “not ‘sufficiently clear so as to allow persons of “ordinary intelligence a reasonable opportunity to know what is prohibited”’” because “[s]omeone who advocates the cause of [a proscribed group] could be seen as supplying them with personnel; . . . [b]ut advocacy is pure speech protected by the First Amendment.”³ 205 F.3d at 1137 (citations omitted). In addition, the ban is unconstitutionally overbroad because it sweeps within its ambit a substantial amount of political speech, advocacy, and association. See *City of Houston v. Hill*, 482 U.S. 451 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The term “personnel” covers virtually the entire range of human activity, much of which is indisputably protected by the First Amendment.

Second, the material support charges against Ms. Stewart must fail under the First and Fifth Amendments because the Indictment seeks to impose guilt by association. Nowhere does the Indictment allege that Ms. Stewart provided “material support” with

³ The Ninth Circuit in *Humanitarian Law Project* rejected the government’s argument that the vagueness of the term “personnel” in the definition of material support is cured by the statute’s scienter requirement. As the court explained, “the term ‘knowingly’ modifies the verb ‘provides,’ meaning that the only scienter requirement . . . is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support.” 205 F.3d at 1138, n. 5.

the specific intent to further the IG's unlawful ends. Merely "representing a client does not constitute approval of the client's view or activities," *see Model Rules of Professional Conduct*, R. 1.2 cmt. (2002), and the government does not claim that Ms. Stewart had any association with the IG outside of her role as counsel to one of its leaders.

The Supreme Court has established, in an unbroken line of cases with its roots in the McCarthy era that the First and Fifth Amendments protect freedom of association against the imposition of guilt by association.⁴ As the Supreme Court explained in *Scales*, "if there were a [] blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired." 367 U.S. at 229.

The First Amendment's protection of freedom of political association is reinforced by the Due Process Clause of the Fifth Amendment, which mandates that guilt be personal and not rest on association alone. The *Scales* Court explained:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

⁴ See, e.g., *United States v. Robel*, 389 U.S. 258, 262 (1967) (government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

group's noble struggle to end apartheid in South Africa might have found themselves staring at long prison sentences.

Furthermore, the designation statute violates the First Amendment and the Due Process Clause insofar as it allows a "terrorist" designation to act as an unreviewable predicate to a prosecution under the material support statute by precluding criminal defendants from arguing that their activities were protected by the First Amendment because the organization they supported was not terrorist. As Judge Takasugi of the Central District of Los Angeles recently concluded in granting a motion to dismiss an indictment under the material support statute, "Section 1189 violates the defendants' due process rights because defendants, upon a successful Section 2339(B) prosecution, are deprived of their liberty based on an unconstitutional designation they could never challenge." *United States v. Rahmani*, 209 F.Supp.2d at 1054-55. Similarly, in *McKinney v. Alabama*, 424 U.S. 669, 675-76 (1976), the Supreme Court unanimously overturned on First Amendment grounds a conviction for the crime of selling materials that had been designated as obscene in a judicial proceeding to which the defendant was not a party. The Court concluded that defendant's rights were not adequately protected simply because other individuals had been given notice and the opportunity to challenge the obscenity designation where the interests of those individuals were not "sufficiently identical" to those of the defendant. *Id.*

CONCLUSION

For the foregoing reasons, the Amici respectfully submit that Counts One and Two of the Indictment should be dismissed.

Respectfully submitted,



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The Center for Constitutional Rights wishes to thank Sabita Krishnan of the New York University School of Law for her assistance on this brief.

CERTIFICATE OF SERVICE

I, Nancy Chang, hereby affirm that on this 3rd day of March, 2003, I sent by pre-paid first-class mail a true copy of the attached Amici Curiae Brief of the Center for Constitutional Rights, the National Lawyers Guild, and the National Coalition to Protect Political Freedom in Support of Lynne Stewart's Motion to Dismiss the Criminal Provision of Material Support Charges in Counts One and Two of the Indictment in *U.S. v. Sattar, Yousry, and Stewart* (02 CR 395 (JGK)) to counsel for the parties listed below at the addresses that are listed:

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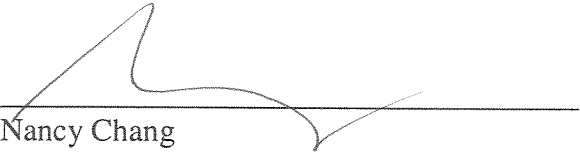
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Also on this 3rd day of March, 2003, I e-mailed a copy of the attached brief to the Assistant U.S. Attorney Christopher Morvillo to the address he provided at his request.

Dated: New York, New York
March 3, 2003



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