UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

S1 02 CR 395 (JGK)

v.

AHMED ABDEL SATTAR, NOTICE OF MOTION
MOHAMMED YOUSRY
and LYNNE STEWART,
Defendants.
----------X

PLEASE TAKE NOTICE that upon the annexed Memorandum Of Law In Support Of Lynne Stewart's Second Omnibus Motion To Dismiss The Indictment And For Other Relief, the attached affirmations of Michael E. Tigar and Jill R. Shellow-Lavine, and all pleadings and proceedings herein, and in the superseded indictment proceedings, the undersigned will move this Court at the United States Courthouse, 500 Pearl Street, New York, New York 10007, at 9:00 a.m. on April 9, 2004, for orders:

1. Dismissing Counts Four and Five because 18 U.S.C. § 2339A, as applied to Lynne Stewart, is unconstitutionally vague and overbroad;
2. Dismissing Counts Four and Five because they impermissibly charge a double (or triple) inchoate crime, in violation of the Due Process clause;
3. Dismissing Counts Four and Five because they are impermissibly multiplicitous;
4. Dismissing Count Four because it violates the *ex post facto* clause of the constitution, or in the alternative, because it charges an offense that did not exist at the time of the alleged conduct;
5. Dismissing Count One because 18 U.S.C. § 371 fails to state an offense and is unconstitutionally vague as applied in this indictment;

6. Dismissing Counts One and Four because they are impermissibly multiplicitous;
7. Dismissing Counts Six and Seven for failure to state an offense against the United States;
8. Dismissing Counts Four, Five and Seven on the grounds that they are the result of the government's vindictive prosecution of Lynne Stewart or, in the alternative, granting Lynne Stewart's requests for discovery on the issue of vindictive prosecution or an evidentiary hearing on the matter;
9. In the alternative, as to any counts not dismissed, striking paragraphs 1 through 27 from the indictment and all parts of Paragraphs 28, 31, 33(a), 34, 36, 40, 42 and 44 that refer to them because their inclusion violates FED. R. CRIM. P. 7(c); striking all prejudicial, inflammatory, irrelevant, or vague wording in the indictment, including, but not limited to, all references to "terror," "terrorize," "terrorism," "jihad," "fatwah," and paragraphs 28, 30(j), 30(k), 30(p), 30(cc), 30(ee), 30(ff), and 30(gg) through 30(ii) from the indictment as prejudicial surplusage;
10. Disqualifying Assistant United States Attorneys Christopher J. Morvillo and Robin L. Baker from representing the United States in this case because their prior admissions bind the government and require them to be witnesses;
11. In the alternative, as to any counts not dismissed, ordering a severance and separate trial for Lynne Stewart, pursuant to FED. R. CRIM. P. 8(b) and 14, and *Bruton v. United States*, 391 U.S. 123 (1968), and in order to determine that motion, requiring the government to produce for inspection all statements of any defendant that it intends to use at trial;
12. In the alternative, as to any counts not dismissed, and as a means of assessing the legality of any count not dismissed as prayed above, ordering a bill of particulars, as set forth in the annexed Memorandum of Law;

and for such other relief as may be proper.

Dated: Annapolis, Maryland
January 22, 2004

Michael E. Tigar

Michael E. Tigar
Attorney for Lynne Stewart
626C Admiral Drive, #321
Annapolis, MD 21401
(888) 868-4427
Facsimile (866) 654-7245

Of Counsel:
Jill Shellow-Lavine
Jane B. Tigar
Steven P. Ragland

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

S1 02 CR 395 (JGK)

v.

AHMED ABDEL SATTAR, AFFIRMATION
MOHAMMED YOUSRY
and LYNNE STEWART,
Defendants.
----------X

AFFIRMATION OF MICHAEL E. TIGAR

Michael E. Tigar declares under penalty of perjury:

1. I am counsel to Lynne Stewart. I make this declaration in support of Lynne Stewart's Second Omnibus Motion to Dismiss The Indictment And For Other Relief.

2. I hereby certify that all statements in the Motion to Dismiss and its accompanying Memorandum of Law that are not otherwise supported by cited authority are true and correct within my personal knowledge and belief.

Dated: Annapolis, Maryland
January 22, 2004

Michael E. Tigar
Michael E. Tigar

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Notice of Motion, attached affirmations of counsel, and accompanying Memorandum Of Law In Support Of Lynne Stewart's Second Omnibus Motion To Dismiss The Indictment And For Other Relief to be delivered on January 23, 2004:

BY HAND DELIVERY to:

Robin L. Baker
Anthony S. Barkow
Andrew S. Dember
Christopher J. Morvillo
Assistant United States Attorneys
U.S. Department of Justice
U.S. Attorney Southern District of New York
The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007
Attorneys for the United States

Kenneth A. Paul
319 Broadway, Suite 500
New York, New York 10007
Attorney for Ahmed Abdel Sattar

David Stern
Rothman, Schneider, Soloway & Stern
70 Lafayette Street
New York, New York 10013
Attorney for Mohammed Yousry

BY FIRST CLASS MAIL, postage pre-paid, to:

Barry Fallick
Rochman Platzer Fallick & Sternheim, LLP
666 Third Avenue
New York, New York 10017
Attorney for Ahmed Abdel Sattar

David Ruhnke
Ruhnke & Barrett
47 Park Street
Montclair, New Jersey 07042
Attorney for Mohammed Yousry

Steven P. Ragland
STEVEN P. RAGLAND

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

S1 02 CR 395 (JGK)

v.

AHMED ABDEL SATTAR,
MOHAMMED YOUSRY
and LYNNE STEWART,
Defendants.
----------X

MEMORANDUM OF LAW IN SUPPORT OF LYNNE STEWART'S SECOND OMNIBUS MOTION TO DISMISS THE INDICTMENT AND FOR OTHER RELIEF

Michael E. Tigar
Attorney for Lynne Stewart
626C Admiral Drive, #321
Annapolis, MD 21401
(888) 868-4427
Facsimile (866) 654-7245

Of Counsel,
Jill R. Shellow-Lavine
Jane B. Tigar
Steven P. Ragland

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Legislative and Regulatory Materials

Constitutional Provisions

Books and Essays

Periodicals & Miscellaneous

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

S1 02 CR 395 (JGK)

v.

AHMED ABDEL SATTAR,
MOHAMMED YOUSRY
and LYNNE STEWART,
Defendants.
----------X

MEMORANDUM OF LAW IN SUPPORT OF LYNNE STEWART'S SECOND OMNIBUS MOTION TO DISMISS THE INDICTMENT AND FOR OTHER RELIEF

In its July 22, 2003, dismissal of the prior material support charges, this Court cautioned that "[t]he Grand Jury should not be asked to return a superseding indictment that includes charges that are in part unconstitutional." *United States v. Sattar*, 272 F. Supp. 2d 348, 361 n.5 (S.D.N.Y. 2003) (hereinafter *Sattar*). Despite this warning, just two months before the trial was to begin, these prosecutors have done just that. As a result, we find ourselves again analyzing a defective and unconstitutional indictment and showing why it must be dismissed. [1]

[1] In the interest of brevity, we will not repeat arguments made in the motions filed concerning the first indictment. Instead, we will refer to and incorporate specific discussions from those motions as necessary. We also incorporate the Memorandum of Law in support of our first Omnibus Motion to Dismiss and our Reply Memorandum by reference as alternative bases for relief. In referring to various papers from the course of this case, we use the following abbreviations:

- Indictment, 02 CR 395, April 9, 2002 ("Initial Ind.")
- Memorandum of Law In Support of Lynne Stewart's Omnibus Motion to Dismiss the Indictment and for Other Relief, Jan. 10, 2003 ("Stewart MTD")
- Government's Memorandum of Law in Opposition to Defendants' Pretrial Motions, Mar. 21, 2003 ("Gov't Opp.")
- Lynne Stewart's Reply Memorandum of Law, Apr. 25, 2003 ("Stewart Reply")
- Declaration of Michael E. Tigar in Support of Lynne Stewart's Reply Memoranda, Apr. 25, 2003 ("Reply Decl.")
- Transcript, June 13, 2003 Motions Argument ("Mtn. Tr.")
- Transcript, Sept. 29, 2003 Evidentiary Hearing ("Hrg. Tr.")

We first provide a necessary procedural history and context to the new indictment. Next, we explain why the charges against Lynne Stewart must be dismissed and why she is entitled to the relief sought in the accompanying Notice of Motion. The table of contents outlines our arguments.

PROCEDURAL HISTORY

Lynne Stewart is a distinguished lawyer.[2] For nearly thirty years she has represented the poor, despised and powerless who are under attack by the state. This case is a vindictive effort to chill courageous advocacy by all lawyers.[3]

The initial indictment was returned April 9, 2002. This Court heard pretrial motions argument June 13, 2003, and issued its opinion July 22, 2003, reported at *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). In that opinion, the Court held 18 U.S.C. § 2339B unconstitutional as applied to this case. The Court focused on the statutory terms "communications equipment" and "personnel." *Sattar*, 272 F. Supp. 2d at 356-61.

The government waited until August 19, 2003 to file a notice of appeal, and thereafter obtained an order expediting consideration of that appeal. Because the Court expressed concern at the September 29, 2003 hearing about our opposition to expedited consideration, and because

---

- Indictment, S1 02 Cr 395 (JGK), Nov. 19, 2003 ("Ind.")
- Transcript, Nov. 21, 2003 Arraignment, S1 02 CR 395 (JGK) ("Arr. Tr.")

In addition, we have attacked each of the counts in which Lynne Stewart is charged. Regardless of the Court's ruling on these motions, Ms. Stewart has by her plea of not guilty placed every material fact in issue. We are not in any motion asking the Court to decide any part of the "general issue."

[2] *See, e.g.,* S. Arena, *Bar None: New York's Ten Best Criminal Defense Attorneys*, N.Y. DAILY NEWS (Mar. 12, 1994).

[3] *See United States v. Reid*, 214 F. Supp. 2d 84, 94-95 (D. Mass. 2002); N. Hentoff, *High Noon for Ashcroft, Stewart, and the Defense Bar*, VILLAGE VOICE, Apr. 15, 2002, *available at* www.villagevoice.com/issues/0216/hentoff.php (quoting constitutional law Professor Jonathan Turley commenting that the indictment of Lynne Stewart will "create a huge, chilling effect—indeed a glacial effect—on attorneys approached by highly controversial clients to represent them.").

the course of events is relevant to motions filed this day, we set out the procedural history relating to the appeal.

Under a settled policy of the Department of Justice (DOJ), government lawyers are generally not permitted to appeal an adverse district court order or judgment[4] unless the Solicitor General of the United States gives his or her approval.[5] In a complex and high-profile case such as this one, that approval is not given without thorough and independent study by the Solicitor General's office. Lead counsel has many times conferred with a succession of Solicitors General when seeking to have a voice in the review process, beginning with the tenure of Acting Solicitor General Spritzer in the 1960s and continuing through the present tenure of Theodore Olson.

Therefore, soon after the notice of appeal was filed, lead counsel sent a letter to Solicitor General Olson and followed up with a telephone call to Michael Dreeben, the deputy Solicitor General who usually supervises the review process in criminal cases. Our letter supported the S*attar* opinion, made additional arguments, and asked for a conference with the Solicitor General or his designee.[6]

In a telephone conversation, Mr. Dreeben took note of our letter, and said that the review process would take some time. He said that because of the politically-sensitive nature of the case, the review decision might be taken out of the Solicitor General's hands and that the process

---

[4] The terms "order," "judgment" and "decision" may have different meanings depending on context. "Judgment" generally refers to a final disposition, "order" to an interlocutory ruling. *See generally* M. Tigar & J. Tigar, FEDERAL APPEALS: JURISDICTION & PRACTICE, §§ 2.02 – 2.16 (3d ed. 1999).

[5] This practice is codified to some extent with respect to appeals from criminal case suppression and exclusion orders in the second paragraph of 18 U.S.C. § 3731.

[6] We cited, among other things, Mr. Olson's 1965 California Law Review student comment, which dealt with First Amendment issues. *See* T. Olson & N. Oberstein, Comment, *Aspects of Pay Television: Regulation, Constitutional Law, Antitrust*, 53 CAL. L. REV. 1382 (1965).

would then be truncated.[7] We were therefore concerned about all efforts to speed up the appellate process, because we genuinely believed that the Solicitor General might see the unwisdom of an appeal.

On September 29, 2003, as lead counsel was driving back to Maryland from that day's hearing, Mr. Dreeben called and said that a conference would be granted, at the Main Justice Building, on September 30, 2003. In a later call, presumably after talking to the Southern District prosecutors, Mr. Dreeben confirmed an appointment for 2:00 p.m. in the conference room of the Assistant Attorney General of the Criminal Division. He said that our "side" would have 30 minutes to present a case, "as much as you get in the Supreme Court." Mr. Tigar and Mr. Ragland prepared for the meeting. September 30, 2003 was just six days before the government's Second Circuit brief was due under the expedited schedule the prosecutors had sought and obtained.

Mr. Dreeben chaired the conference and was accompanied by a DOJ lawyer who had helped him brief the case. Patty Merkamp Stemler, chief of the Appellate Section of the Criminal Division, attended, accompanied by an associate. Other DOJ lawyers were also present, and the Assistant Attorney General for the Criminal Division made a brief appearance. At about 2:10 p.m., Assistant United States Attorneys (AUSAs) Robin L. Baker and Christine Chung from the Southern District arrived, and we understood that they would be presenting their "case" after Mr. Ragland and Mr. Tigar left.

[7] This sort of thing happens seldom, but it does happen. For example, in *Gutknecht v. United States*, 396 U.S. 295 (1970), Solicitor General Griswold refused to sign the government's brief. The government then filed a two-part brief, one part signed by Attorney General Mitchell and a second part, taking an even more extreme position, on behalf of Selective Service Director Hershey. The government lost.

Mr. Tigar first argued that the *Sattar* opinion was right on its own terms as a matter of Second Circuit law. Mr. Tigar also discussed several aspects of the vagueness doctrine as it applies to the difficult decisions that lawyers must make.[8] The DOJ lawyers questioned Mr. Tigar intensely throughout the session. The Southern District prosecutors' discomfiture was evident.

Two days later, the prosecutors initiated a process to dismiss their appeal. A later telephone call confirmed that the Solicitor General's office had refused its approval to appeal.

After that decision, we repeatedly tried to engage the prosecutors in discussion to present our views about the future course of this case. Every one of those efforts was rebuffed, often rudely. We now have this indictment. The indictment alleges provision of "personnel."

United States Attorney James B. Comey told the press that the superseding indictment is built on a "different legal foundation."[9] Despite the prosecutors' bland assurance at arraignment that no new discovery is contemplated, this indictment in fact introduces new episodes and new theories that will inevitably expand the government's production obligations. Of its 89 paragraphs, compared to 68 in the former indictment, 44 are wholly new, only 9 are the same, and 36 are different though similar to varying degrees.

Like the initial indictment, however, this one fails to take account of the difficult decisions that a lawyer must make in representing a client accused of serious wrongdoing. It ignores the special position in which the law has placed attorneys engaged in representing clients. It threatens protected rights to an even greater extent than its predecessor. The

[8] He principally relied on *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).
[9] Department of Justice, *Superseding Indictment Adds New Charges Against Ahmed Abdel Sattar, Lynne Stewart, and Mohammed Yousry*, Nov. 19, 2003, *available at* http://www.usdoj.gov/opa/pr/2003/November/03_crm_631.htm.

government's new attack has required us (as we said at arraignment) to examine all aspects of this case afresh.

I. COUNTS FOUR AND FIVE MUST BE DISMISSED BECAUSE 18 U.S.C. § 2339A IS VOID FOR VAGUENESS AS APPLIED TO LYNNE STEWART

The initial indictment was premised on the theory that Ms. Stewart provided herself, as "personnel," to the Islamic Group, which was designated as a foreign terrorist organization. The new indictment reverses course entirely.[10] In brief, it appears to charge a conspiracy to provide Ms. Stewart's client, Sheikh Abdel Rahman, and the provision of Sheikh Abdel Rahman, knowing and intending[11] that such provision was to be used to prepare for and carry out a conspiracy to violate 18 U.S.C. § 956.

According to the indictment, the context of these charges is as follows:

- Sheikh Adbel Rahman supported struggle, Ind. ¶3, and advocated terrorism, Ind. ¶4, to achieve his goals.
- He "exercised leadership," "provided necessary guidance," "provided strategic advice," and "solicited . . . violent . . . actions." Ind. ¶5. All of this apparently took place between 1990 and 1993, if we assume that the indictment is chronological. *See* Ind. ¶6, which takes up the story in 1993.
- After his arrest, Sheikh Abdel Rahman continued to urge violence. Ind. ¶7.
- Ind. ¶8 alleges that "prior to and after his arrest, Abdel Rahman was a spiritual leader" of the Islamic Group and played a "key role."

[10] The government's inconsistent positions are addressed *infra* Section X.

[11] The conjunctive "and" means "or," so that the government is alleging that either she knew or she intended. Using "or" would render the indictment fatally flawed for uncertainty. *See generally United States v. Donovan*, 339 F.2d 404, 408 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965) ("[A]n indictment which charges the accused, in the disjunctive, with being guilty of one or of another of several offenses, is destitute of the necessary certainty, and is wholly insufficient. It does not give the accused definite notice of the offense charged, and thus enable him to defend himself").

Ms. Stewart became Sheikh Abdel Rahman's lawyer in 1994 and represented him in his trial. The issues in the trial are discussed in *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), *United States v. Rahman*, 1995 WL 739524 (S.D.N.Y. Dec. 14, 1995), and *United States v. Rahman*, 861 F. Supp. 247 (S.D.N.Y. 1994). The trial was the subject of intense media scrutiny, and Ms. Stewart often spoke to the press on behalf of her client. Although lawyers for codefendants were fined by Judge Mukasey for improper media contact, Ms. Stewart's actions never lead to any such reproach or condemnation.

The court of appeals affirmed Sheikh Abdel Rahman's conviction on August 16, 1999, and the Supreme Court denied certiorari on January 10, 2000.

Counts Four and Five both deal with the same time frame, September 1999 through April 2002.[12] Ms. Stewart is charged with having provided "material support and resources," defined as "personnel." Allegedly, Ms. Stewart:

- made her client available as a co-conspirator, presumably to the Count Two conspiracy;[13] and
- concealed the nature, location, source and ownership of her client by concealing and disguising that he was a co-conspirator. Ind. ¶38.

The allegation seems to be that Ms. Stewart accomplished these unlawful ends by making communications on her client's behalf, and by concealing communications to and from her client, made in her presence by herself and by the translator Mr. Yousry, whose translation assistance was doubtless necessary for the provision of professional legal services.[14]

---

[12] As discussed below, *infra* Section III, they are multiplicitous in at least two respects.
[13] This is by no means certain because Count Four is not clear and, as we note below, *infra* Section I.E.4, Sheikh Abdel Rahman appears to be alleged to be a co-conspirator in each of the three (or four) pleaded conspiracies.
[14] *See, e.g.,* FED. R. EVID. 503(b) (Proposed Official Draft 1973). The proposed rule states:

The *Sattar* opinion focused on necessary parts of a lawyer's role: providing communication facilities and providing her own professional legal services. The new indictment also directly attacks the lawyer's role. Therefore, this attempted application of § 2339A to legal representation is constitutionally impermissible.

A. Law of the Case Doctrine Informs This Analysis

As the procedural history indicates, this Memorandum is not written on a clean slate. They are built on almost two years of litigation. Some of the legal issues raised are, of necessity, the same as those raised and decided before, but they must be raised and decided anew.[15] Unlike the first indictment, the superseding indictment represents a wide ranging attack on all aspects of the professional legal services that Lynne Stewart provided during the course of representing

---

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative, and his lawyer and his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Although Proposed Rule 503 was not adopted as a Federal Rule of Evidence by Congress, courts frequently cite the standard as a restatement of the attorney-client privilege at common law. *See, e.g., In re Application of Horler*, 799 F. Supp. 1457, 1466 n.4 (S.D.N.Y 1992) (referring to proposed FED. R. EVID. 503, footnoting that "[c]ourts frequently look to the Proposed Rules of Evidence as a source of federal common law."); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) ("Although not enacted by Congress, courts have relied upon [Rule 503] as an accurate definition of the federal common law of attorney client privilege . . . . Consequently, despite the failure of Congress to enact a detailed article on privileges, [Rule] 503 should be referred to by the Court.") (internal citations and quotation marks omitted).

[15] *See* Arr. Tr. at 6-7. We note it is sometimes said that a motion to dismiss admits the facts in the indictment, at least for purposes of ruling on the motions. To the extent this is true, however, a motion to dismiss can only admit *well-pleaded* facts, not tendentious generalities. *See, e.g., United States v. Nippon Paper Indus., Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). Also, an indictment, such as this one, that implicates First Amendment freedoms must be closely scrutinized. *United States v. Lamont*, 236 F.2d 312, 314-16 (2d Cir. 1956).

Sheikh Abdel Rahman[16] and goes to the fundamental nature of the attorney-client relationship. In alleging that Ms. Stewart made her client available as a co-conspirator, the superseding indictment goes to the heart of both the attorney-client relationship and how that relationship impacts third parties who have a vital interest in the well-being and views of clients.

This Court's analysis of 18 U.S.C. § 2339B as applied to these defendants and its dismissal of Counts One and Two of the original indictment as unconstitutionally vague as applied was sound. The Department of Justice acknowledged as much when the Solicitor General refused to permit the United States Attorney to take an appeal. Accordingly, we build on that analysis in arguing that Counts Four and Five of the superseding indictment are fatally flawed for the same reasons. The principles of fairness and Due Process set forth in *Sattar*, 272 F. Supp. 2d at 358-61, apply here with equal force. However, because the new charges have a "different legal foundation,"[17] they cannot be resolved quite so quickly. The prosecutors' "different legal foundation" requires a new set of legal responses and theories. In these circumstances, the law of the case doctrine becomes attenuated.

B. The Teachings of the Supreme Court and Professor Amsterdam On the Fairness and Due Process Foundations of the Void for Vague Doctrine Demonstrate the Fatal Flaws in Counts Four and Five of the Indictment

We begin our analysis of § 2339A with the origins of void for vagueness doctrine in the Supreme Court. In his student note, 109 U. PA. L. REV. 67 (1960),[18] Anthony Amsterdam argued that "the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost

[16] From April 1999 through 2002.
[17] *See supra* note 9.
[18] Cited with approval in, *e.g.*, *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 685 n.11 (1968); *NAACP v. Button*, 371 U.S. 415, 433 n.14 (1963).

invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." *Id*. at 75.

In this case, the freedoms are found in the First, Fifth, and Sixth Amendments. We are dealing here with speech, Due Process, and right to counsel. One must ask whether a conscientious lawyer like Lynne Stewart could determine whether her conduct would violate the statute at issue, as she went about representing her client zealously as New York law and Due Process demand. It is also relevant now, as in the previous indictment, that prosecutors be able to explain why particular conduct violates the law; otherwise, a vague law licenses the police to make arrests and the prosecutors to file charge without definable standards and minimal guidelines to limit excess. As the Supreme Court cautioned in *Kolender v. Lawson*, "Where the legislature fails to provide . . . minimal guidelines [to govern law enforcement], a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Additionally, if the prosecuting authority cannot adequately define proscribed conduct, citizens have no way to ensure their behavior conforms to the law. *See Sattar*, 272 F. Supp. 2d at 360 (noting that prosecutor's response to question about distinguishing legal from illegal conduct that "You know it when you see it" . . . "is an inefficient guide by which a person can predict the legality of that person's conduct"). Moreover, a vague statute makes it impossible for jurors to render a fair and reviewable judgment. That is, the void for vagueness doctrine provides a necessary check to police and prosecutorial power, ensures fair notice, and protects important trial rights.[19]

[19] As we note below, these other functions of the void for vagueness doctrine are the reason why a scienter requirement will not usually save a vague criminal statute. Such a requirement may, though will not inevitably, ensure that a defendant knows what she is doing is unlawful.

An early void for vagueness case, discussed by Professor Amsterdam, 109 U. PA. L. REV. at 77-78, illustrates the issue. In *Smith v. Cahoon*, 283 U.S. 553 (1931), a trucker brought habeas corpus to test the application to him of a Florida statute that broadly regulated the trucking industry. The Supreme Court, under the substantive Due Process view of that era, held that application of such a broad scheme to truckers who were not common carriers[20] would violate the constitution. However, the Florida courts had recognized this potential infirmity and held that the statute was not intended to apply common carrier rules to truckers who were not in that status. This effort at "interpretation" looks something like the prosecutors' efforts to construe § 2339B in the June 2003 oral argument. *See, e.g.,* Mtn. Tr. at 54-62.

The Supreme Court found that the statute as construed by the state court left Mr. Smith guessing at his obligations, and was therefore void. It held:

> Either the statute imposed upon the appellant obligations to which the state had no constitutional authority to subject him, or it failed to define such obligations as the state had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers "no standard of conduct that it was possible to know." . . . The Legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulations as to which even courts are not yet in accord.

Cahoon, 283 U.S. at 564 (internal citations omitted).

However, the vagueness of the *act* element (as distinct from any scienter element) still gives the prosecutors a license to criminalize conduct at their discretion and leaves the jurors without guidance as to what act or acts will fall within a statute's prohibition.

[20] Common carriers and innkeepers, at common law, were lawfully subject to duties that did not apply to ordinary merchants. *See, e.g., Lombard v. Louisiana*, 373 U.S. 267, 275-76 at n.2 (1963) and accompanying text (Douglas, J., concurring).

A second important case, in Professor Amsterdam's view, is *Herndon v. Lowry*.[21] Here is his analysis:

> With *Smith v. Cahoon* it is profitable to compare the process of litigation in *Herndon v. Lowry*. Defendant was convicted under one provision of a Georgia insurrection statute making unlawful "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state." The Georgia courts had read into this "inducement" section the requirement contained in another provision of the statute that the actor must intend that "resistance" be manifested by acts of physical force, and the judge at Herndon's trial charged the jury that to convict they must find that defendant expected to inspire "immediate serious violence." Appealing on the ground, *inter alia*, that the evidence was insufficient to allow such a finding, the convicted defendant was met in the Georgia Supreme Court by a less stringent interpretation of the force requirement: the act made inducement punishable, that court held, if future violence might have been expected to ensue "at any time." Herndon was quick to petition for rehearing, arguing a violation of first amendment clear and present danger standards. Denying the petition, the Georgia court in a second opinion announced that "at any time" certainly did not mean "at any time":
>
> > [T]he phrase "at any time" was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection.
>
> Here again the Supreme Court of the United States reversed, talking the language of uncertainty:
>
> > The act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. . . .
> >
> > If, by the exercise of prophecy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophecy and abstain, under

[21] 301 U.S. 242 (1937).

> pain of punishment, possibly of execution. . . . The law, as thus construed, licenses the jury to create its own standard in each case. . . .
>
> No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

109 U. PA. L. REV. at 78-80 (footnotes omitted).

The Amsterdam thesis, that the vagueness doctrine protects important rights, was expressly stated in *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (footnote omitted):

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus v. Search Warrant*, 367 U.S. 717, 733 (1961). These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Cf. Smith v. California*, [361 U.S. 147] at 151-154 [(1959)]; *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

1. <u>The "Breathing Space" Concept Applies Not Only to First Amendment Freedoms but with Equal Force to Other Constitutionally Protected Rights</u>

There are three additional points to make with respect to vagueness. First, as the cases Professor Amsterdam discusses confirm, the concept of "breathing space" is not limited to protecting First Amendment rights. *Smith v. Cahoon* was an economic rights case. The earliest void for vagueness cases involved the exercise of the economic right to engage in commerce, and the concomitant requirement that government regulate such activity in terms that business people, prosecutors, jurors and judges could and would understand in consistent ways. In other

cases, the Supreme Court has invalidated statutes that simply gave police and prosecutors too much discretion to interfere with people who were going about their ordinary business.[22] *See*, *e.g., City of Chicago v. Morales*, 527 U.S. 41, 50-51 (1999) (loitering statute facially unconstitutional because the term "loitering" does not differentiate "between innocent conduct and conduct calculated to cause harm"); *M. Kraus & Bros. v. United States*, 327 U.S. 614 (1946) (whether chicken feet and chicken skin are parts of a "chicken"); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (terms "gang" and "gangster" have no fixed meaning); *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 242-43 (1932) ("general expressions . . . not known to the common law or shown to have any meaning in the oil industry"); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (offense definition unknown to common law); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1927) (first mention of persons "of common intelligence" in the vagueness context).

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), illustrates that vagueness rulings are often, if not usually, contextual. They are contextual in the sense that the court will inquire what degree of autonomy the legal system ought to give a particular kind of activity and then the court will honor that autonomy by insisting that legal rules impinging upon it be precise and narrow. For this reason, we show below, *infra* Section I.C.2, some of the myriad ways in which the law recognizes and honors lawyer discretion.

[22] There are also the licensing cases, invalidating schemes that give administrators unfettered discretion to grant or deny permission to conduct various activities. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *see also* Amsterdam, 109 U. PA. L. REV. 67, 82 n.78 (1960) (collecting cases were a "license requirement constituted a prior restraint on freedom of speech … and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid,") (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)). The logic of these licensing cases applies equally to attorney conduct.

2. The Dangers of Vagueness and Overbreadth are Linked and Must Be Analyzed in the Context of the Many Functions of a Criminal Defense Attorney Representing an Unpopular Client

Second, the concepts of vagueness and overbreadth are linked together. Indeed, at the motions hearing, the government took the position that vagueness and overbreadth "are interchangeable. . . . vagueness, to a certain extent is a subset of overbreadth." Mtn. Tr. at 51.

This linkage is most clearly seen in the First Amendment area, but is also inherent in other contexts. The defendant in *Herndon* was "inducing" people to rise up against the government. In today's world, he would be labeled a terrorist.[23] His "inducing" might be called "solicitation" in a jurisdiction that had such a statute. The Supreme Court's decision assumes that such inducing, even by a person who desired that the government be overthrown, is constitutionally protected unless and until the defendant's conduct raises a clear and present danger that he knew to exist and intended to foster. That is, *Herndon* must be read against the backdrop of cases requiring a threat of imminent lawless action, *e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Georgia statute was not unconstitutionally vague in the abstract; it was vague because it did not define with clarity the line between constitutionally-protected and unprotected expression that was also criminal.

This symbiosis between the proximity test now best expressed by *Brandenburg v. Ohio*,[24] and *Hess v. Indiana*,[25] on the one hand, and the vagueness teaching of cases like *Connally v. General Construction Co.*,[26] *Lanzetta v. New Jersey*,[27] and *NAACP v. Button*,[28] on the other, has

[23] *See* discussion below at Section IX.C.
[24] 395 U.S. 444 (1969).
[25] 414 U.S. 105 (1973).
[26] 269 U.S. 385 (1927) (first mention of persons of "common intelligence" in the vagueness context).
[27] 306 U.S. 451 (1939) (regarding fair notice of offending conduct).

been a consistent aspect of the Supreme Court's First Amendment jurisprudence. For example, in *Yates v. United States*, 354 U.S. 298 (1957), the Court stressed the distinction between advocacy directed at immediate unlawful ends and more generalized assertions about the desirability of such acts.

In *Gentile*, the petitioner, a prominent defense attorney, had a First Amendment right to issue statements about his client and the case in which the client was involved. He had the right to criticize the police and say that they were the real criminals. That right was limited by the standard set by five members of the Court who adopted a test for lawyer speech. *Gentile*, 501 U.S. at 1065-76. Then, with Justice O'Connor switching her vote, five members of the Court held that when there is a line between lawful and unlawful that is also the line between protected and unprotected, the line must be clearly drawn. *Id.* at 1081-82 (O'Connor, J., concurring). *Gentile* tells us that the vagueness of 18 U.S.C. § 2339A must also be judged in the context of a lawyer's many functions representing a client like Sheikh Abdel Rahman.

3. The Additional Problem of Inchoate Crimes

Third, the problem of vagueness is exacerbated when the crime charged is inchoate.[29] For example, few will doubt that Paul Castellano and the others who met in Apalachin, New

---

[28] 371 U.S. at 432-33 ("Standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *See also Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) (a statute must be sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited."); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (when a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply.")

[29] Under the Model Penal Code's influence, the *locus poenitentiae* for attempt and conspiracy has been moved back. *Compare United States v. Stallworth*, 543 F.2d 1038, 1041 (2d Cir. 1976) *with United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (Hand, J.) (quoting *Commonwealth v. Peaslee*, 177 Mass. 267, 272 (1901) (Holmes, J.)), *cert. denied*, 342 U.S. 920 (1952); s*ee generally* M. Tigar, *"Willfulness" and "Ignorance" in Federal Criminal Law*, 37 CLEV. ST. L. REV. 525 (1989).

York[30] were not all law-abiding citizens. But the vague and sprawling indictment impermissibly "permit[ted] the jury to substitute a feeling of collective culpability for a finding of individual guilt." *United States v. Bufalino*, 285 F.2d 408, 417 (2d Cir. 1960).

Paragraph 1 of the superseding indictment in this case is a lens through which one can see the government's constitutional errors in clear perspective. It alleges that Sheikh Omar Abdel Rahman was "an influential and high-ranking member of terrorist organizations based in Egypt and elsewhere," from "at least the early 1990s until in or about April 2002." The indictment does not name the organizations. It does not plead facts that show that his "membership" is related in any specific way to the charged offenses. The term "member" is meaningless, indeed unconstitutionally vague, unless a statute gives the term a particular meaning and context. For example, what does it mean to be a "member" of the Catholic Church, or of a Buddhist temple?[31]

There are degrees of involvement and volition. One may be a "member" of a religious group simply in order to send one's children to the group's day care center. One may be a "member" of a labor organization against one's will, or at least be required to pay union dues. *See, e.g., Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n.16 (1985) (citing *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 41 (1954)) (holding that the payment of dues is the only aspect of union membership that can be required as a condition of employment pursuant to 29 U.S.C. § 8(a)(3) union security provision); *NLRB v. Revere Metal Art Co.*, 280 F.2d 96, 103 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960) (noting same requirement).

---

[30] And were subsequently prosecuted for conspiracy to commit perjury for their testimony about the gathering.

[31] To become a member of Islam, one merely has to be witnessed reciting in Arabic, "I bear witness that there is no object of adoration besides Allah, Who is One and has no associate and I bear witness that Muhammad is His servant and His Messenger." One can apparently become a member of Islam online at http://aaiil.org/text/join/pledge/islamicpledgeform.shtml.

Because involvement may take many forms, the ideas of vagueness and overbreadth intersect in the loyalty oath cases, such as *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). As a matter of criminal law, ascribing guilt to "membership" requires specific and detailed proof of (a) the character of the organization, and (b) the quality of the alleged member's participation. *See generally Noto v. United States*, 367 U.S. 290 (1961) and *Scales v. United States*, 367 U.S. 203 (1961) (noting a distinction between "active" and "nominal" membership); *see also United States v. Spock*, 416 F.2d 165, 172-73 (1st Cir. 1961) (discussing bifarious organizations and culpable intent). As the Second Circuit has explained:

> Even if it were shown . . . that some of the [North American Man/Boy Love Association's] members engage in illegality, or that the organization's aims are in fact illegal, [a member] could not be punished absent clear proof . . . that he knew of such illegal aims and specifically intended to accomplish them.

Melzer v. Board of Educ. of City of New York, 336 F.3d 185, 198 (2d Cir. 2003).

The problem is compounded by the allegations in Counts Four and Five, where Sheikh Abdel Rahman becomes "personnel." How does being an "influential and high ranking member" differ from being "personnel," and how do those designations differ from being a "co-conspirator"? The government can move these three shells around on a board, but there is no solid kernel of meaning under any of them.

Paragraph 1 then turns to a discussion of Sheikh Abdel Rahman's personal views, with no stated reference to any particular group within which, or any time or place where, he expressed them. None of these allegations are relevant to any charge in the indictment. We deal with the surplusage issues *infra* Section IX.

C. *An Attorney's Conduct is Presumptively Regulated by State Law and Fulfilling Her Professional Obligations Makes Her the Primary Protector of Her Clients' Constitutionally Protected Rights*

In a colloquy at the June 13, 2003, motions hearing, the Court observed that the question of "what the role of the lawyer is, and . . . whether they are violating the law by what they are doing" is a "very difficult" one. Mtn. Tr. at 58.

The issue of lawyer obligation and lawyer autonomy runs through every part of this case and applies equally to our challenges to Counts Six and Seven and our constitutional challenges of Counts Four and Five. For convenience, we brief the issue here. Three clear points emerge from the cases and analysis that follows. First, one of the cornerstones of our federalism is that lawyers' licenses and the duties and rights of their profession are presumptively creatures of state law, not lightly to be overridden by the federal executive branch. Second, as a matter of separation of powers, the executive branch requires congressional approval before it can invade the state's province to regulate lawyers' rights and obligations.[32] Third, lawyer autonomy to represent clients in the way the lawyer determines best is a vital link in the chain of democratic rights. Without lawyers to guide, assist, represent, defend, and counsel people in need, all of the other important rights are in danger.

1. <u>The New York Rules of Professional Responsibility Establish Lynne Stewart's Obligations as a Lawyer, and Those Obligations Cannot be Modified at the Whim of the United States Department of Justice</u>

New York law is the source of Lynne Stewart's rights and obligations as a lawyer, and the disciplinary committee of the First Department has authority over her professional conduct.

---

[32] We discuss this issue in more detail below under Section VII.B. *See also Ex parte Garland*, 71 U.S. 333, 379 (1867) ("The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor.").

See generally 22 NYCRR § 1200.1 *et seq.* The prosecutors, even with the blessing of the Attorney General, cannot legislate or otherwise impose attorney conduct rules that undercut state bar disciplinary rules. This issue has been litigated.

On June 8, 1989, then-Attorney General Richard Thornburgh issued guidance ("Thornburgh Memo") to all Justice Department litigators permitting contact with represented persons and taking the position that such conduct did not violate DR 7-104(A)(1), which relates to contact with represented persons or parties.[33] Subsequently, an AUSA used the Thornburgh Memo as justification for violating Rule 2-100 of the Rules of Professional Conduct of the State Bar of California [American Bar Association Disciplinary Rule ("DR") 7-104(A)(1)]. The District Court for the Northern District of California flatly rejected the Memo's assertions. *United States v. Lopez*, 765 F. Supp. 1433, 1446 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993). It found no authority for the proposition that DR 7-104 did not apply to federal prosecutors who attempt to contact defendants post-indictment. *Id.* at 1447.

The Department of Justice went on, however, boldly to claim that the constitutional doctrine of separation of powers barred the federal courts from enforcing their own local no-contact rules against federal prosecutors. *Id.* at 1453. The Department argued that if the federal court enforced the ethical rule against federal prosecutors, the court would be interfering with the inherent power of the executive branch to carry out and enforce the law. *Id.* at 1453. The court rejected this insinuation by stating:

> The government's suggestion that this court may not enforce its Local Rules against DOJ attorneys because of some perceived conflict with

[33] R. Thornburgh, *Memorandum to All Justice Department Litigators Re Communications with Persons Represented by Counsel* (unpublished office memorandum, Jun. 8, 1989), cited in *In re Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992).

> those attorneys' statutory responsibility to investigate criminal investigations is, to put it bluntly, preposterous. DOJ attorneys may not be exempted from the court rules which every other attorney must obey. Like every attorney, an attorney for the United States appears before the court in a dual role. "He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, i.e., his demeanor, deportment and ethical conduct . . . ."

Id. at 1453-54 (quoting *United States v. Chanen*, 549 F.2d 1306, 1313 n.5 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)).

On appeal, the Ninth Circuit vacated the lower court's order dismissing the indictment in the absence of prejudice, *Lopez*, 4 F.3d at 1464, but recognized that the AUSA had violated his ethical duty, and condemned the Thornburgh Memo. *Id.* at 1458.

Undeterred by case law, Attorney General Janet Reno attempted to reissue the Thornburgh Memo's provisions on August 4, 1994. *See* 28 C.F.R. § 77 *et seq.* (1999) (commonly referred to as the "Reno Rules"). The Justice Department sought to allow federal prosecutors to communicate with persons who are represented by opposing counsel, without the consent of that counsel, if the prosecutor determined there was a likely conflict of interest between client and attorney, or if it was not possible to get a judicial order challenging the representation. Thus, the Reno Rules exempted federal prosecutors from ABA Model Rule of Professional Conduct 4.2 (Communication with Person Represented by Counsel).

The policy again was challenged in court. In *United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1252, 1257 (8th Cir. 1998), the Eighth Circuit declared the Justice Department policy expressed in the Reno Rules invalid. The *McDonnell* court held the statute relied upon by the Justice Department insufficient because it only provided for the establishment of procedural, not substantive regulations. Following the Eighth Circuit's decision, a meeting of

state supreme court chief justices affirmed the federal court's decision and agreed that the Justice Department policy was invalid.[34] Congress then codified the *McDonnell* holding.[35]

In New York, a lawyer has the duty of zealous representation,[36] a duty that some states have watered down. *See, e.g.,* Louisiana State Bar Assn., Art. XVI, Rules of Professional Conduct Rule 1.1 (2003) ("A lawyer shall provide competent representation to a client"); Maine Bar Rule 3.6 (2003) ("A lawyer must employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services"). A lawyer in New York, thus, is required by her oath to look at all times to her client's welfare, even at some risk to herself. Indeed, there are times when a lawyer may stand between the client and the State, and advise the client to resist the State's demands. A lawyer who behaves in this way may not be punished, for punishment would erode the client's right, which the lawyer is seeking to defend. *Maness v. Meyers*, 419 U.S. 449, 468 (1975).

2. Examples of How the Rules of Professional Responsibility Protect the Lawyer Autonomy in the Everyday Practice of a Criminal Defense Lawyer

The issues become most complex for lawyers who represent people accused of crime.[37] Many of those accused have actually committed crimes and may even want to commit more crimes if the opportunity presents itself. Prosecutors do not share the vision held by defense attorneys that lawyers are essential to the protection of human rights. In the name of "anti-

---

[34] *See* S. Khatiwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 GEO. J. LEGAL ETHICS 111, 121 (1999).
[35] *See* McDade Amendment in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998), *codified at* 28 U.S.C. § 530B.
[36] 22 NYCRR § 1200.32 [DR 7-101] (Representing a Client Zealously).
[37] We are speaking here of lawyers who take their jobs seriously, not the deal-makers who don't pay attention to their cases. J. Fritsch & D. Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, Sec. 1, p.1 (Apr. 8, 2001).

terrorism" and "national security," the Justice Department has conducted a systematic campaign to marginalize lawyers and deprive people of a right to counsel. Fortunately, the tide has begun to turn.[38] Examples of lawyers' roles, even in everyday law practice, illustrate the point:

- A lawyer is hired to represent a company that sells fuel to the United States military in a foreign country. The company has been accused of overcharging. The company takes the position that its practices are legal. Everyone recognizes that a case like this could lead to corporate and individual criminal charges under 18 U.S.C. §§ 371, 1001,[39] and to civil litigation under the False Claims Act, which is historically linked to § 1001.[40] The lawyer must meet with officials and employees of the company, carry communications back and forth, zealously advocate the company's position, and always strive to conceal all lawyer-client connected activity from outsiders. All this happens while the company is continuing to sell fuel, even though its entire course of conduct may later be found unlawful. The lawyer knows that the company and its officials are at risk, but the lawyer is entitled to large measure of unreviewable discretion in doing her job.

---

[38] *See, e.g., Padilla v. Rumsfeld*, ___ F.3d ___, 2003 WL 22965085 at *23 (2d Cir. Dec. 18, 2003) (absent Congressional approval, President lacks authority to detain U.S. citizen on American soil outside the zone of combat); *Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382, 403 (9th Cir. 2003) (holding that the terms "personnel" and "training" as used in 18 U.S.C. § 2339B are void for vagueness).

[39] Criminal conduct by an agent within the scope of employment and with intent to benefit the entity will usually suffice to make the corporation liable under federal law, as distinct from the Model Penal Code. *Compare United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990) ("It is settled law that a corporation may be held criminally responsible for antitrust violations committed by its employees or agents acting within the scope of their authority.") (citing *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981)), *with* Model Penal Code 2.07(1)(c) (1962) (imputing only the intent of corporate agents highly placed in the corporate hierarchy). *See generally*, M. Tigar, *It Does the Crime But Not the Time*, 17 AM. J. CRIM. L. 211 (1990).

[40] The far reaching applicability of 18 U.S.C. § 1001 is surprising given its earliest predecessor, the original false claims statute, Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863 Act), was significantly narrower in scope, criminalizing only *false claims* submitted "for the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim." *Id.* at 705 (quoting 12 Stat. 696). The metamorphosis of this provision, from its inception to its modern version, is the culmination of periodic congressional amendments that incrementally expanded the statute's scope over more than a century. The statutory language of § 1001 has been criticized as overbroad. *See, e.g.*, *United States v. Yermian*, 468 U.S. 63, 76 (1984) (Rehnquist, J., dissenting).

- A lawyer and client confer. The lawyer makes a memorandum that contains damaging information about the client and about the client's potential plans. The lawyer believes that the client is not seeking the lawyer's assistance for the purpose of furthering a crime or fraud, although there is always the risk that a tribunal might later decide otherwise. What are the lawyer's obligations? Her first job is to conceal the information the client has provided. If the memorandum is on her desk, and someone comes in to the office, she may turn it over so it cannot be read, or hide it in some other way. New York Code of Professional Responsibility, 22 NYCRR § 1200.19 [DR 4-101]. In the ordinary course, the lawyer's decision to conceal or not to conceal "requires consideration of a wide range of factors and should not be subject to reexamination." New York Code of Professional Responsibility, 22 NYCRR EC 4-7 (2002).

- An incarcerated client is subject to a legal constraint imposed by an agency or tribunal. The lawyer believes that the constraint is unlawful because it violates the client's right to counsel and his free speech and Due Process rights, and that it violates the free press guarantee as well.[41] She makes a good faith judgment that a test through litigation is impossible.[42] She therefore assists the client to make a statement that arguably violates the constraint. She does so only after considering legal alternatives. She does so openly, using her name and his name, and in a very public way. She is later overheard acknowledging that her public act cannot be hidden from the government. The client may well be subject to prison discipline if his First Amendment position is held to be incorrect. But the lawyer has the right to exercise her discretion as she did. Lawyers make these kinds of calls all the time, counseling clients about what they may and may not do with respect to laws,

[41] On the undisputed facts in the case, the Special Administrative Measures ("SAM") applicable to Sheikh Abdel Rahman had already, by the time of Ms. Stewart's alleged conduct, been tested at least once by Mr. Ramsey Clark. He issued a statement from Sheikh Abdel Rahman that the government believed, though Mr. Clark did not, violated the SAM imposed on Abdel Rahman. All understood that the government had not made any complaint about this conduct.

[42] In fact, such a challenge would have been at best impractical. The client was virtually indigent. He was incarcerated in Minnesota. There were no lawyers available to serve as local counsel, and the case was beyond the point where CJA funding was available. Moreover, a lawsuit would have spawned procedural delays. Suits against government officers are notoriously subject to delays occasioned by the government's style of litigation, or at least a lawyer could reasonably conclude that this is so. Even venue for such a suit would be elusive, and possibly challenged by the government whether brought in Minnesota (where he was incarcerated), the Southern District of New York (where he was convicted), or elsewhere (such as the District of Columbia).

rules, and orders. *See generally Maness v. Meyers*, 419 U.S. 449 (1975) (lawyer advises client to disobey court order and invoke the privilege against self-incrimination; lawyer cannot be punished).[43]

- A client receives a grand jury subpoena drafted and issued by the United States Attorney's office. Must the lawyer go to court to challenge the prosecutors' demand, or may she simply advise noncompliance and await an order to show cause? Clearly, she will take the latter course. *See, e.g., In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003). Not only that, nobody could reasonably suggest that the lawyer should be punished even if the subpoena is upheld.

- A lawyer knows where the bodies of a client's victims are buried. The lawyer does not reveal this information. The lawyer may not be punished. *People v. Belge*, 50 A.D.2d 1088 (N.Y. App. Div. 1975), *aff'd*, 359 N.E.2d 377 (1976).

- A classified document is leaked. Only a few people had access to it, and all are under suspicion. One suspect consults an attorney. After he leaves the office, the lawyer's secretary asks who that person was. The lawyer not only refuses to tell her the client's identity, but takes affirmative steps to prevent her from learning who he is. *See, e.g., Vignelli v. United States*, 992 F.2d 449, 452-53 (2d Cir. 1993) (discussing "confidential communication exception" which permits withholding of client identity and fee arrangements); *In re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423, 1431 (5th Cir.), *cert. denied*, 499 U.S. 959 (1991) (recognizing that client identity can be privileged "when revealing the identity of the client . . . would itself reveal a confidential communication") (cited with approval by the Second Circuit in *Vignelli*).

- A lawyer wants to influence public opinion in ways that will benefit her client. She wants advice on media strategy. She goes so far as to hire a public relations consultant for this purpose. The consultant meets with the client, without the lawyer present. That is, the non-lawyer and the consultant are talking without the lawyer's participation. All of this is part of the lawyer's lawful role, and most of this activity is shielded by the lawyer-client privilege. The lawyer's refusal to produce information about the

[43] This scenario is not very different from what lawyers do in civil discovery. They instruct witnesses not to answer questions at depositions; they decline to answer interrogatories. That is, the system justifiably gives lawyers more leeway than non-lawyers to take defiant positions in order to obtain a test.

media consultant unless ordered to do so by a court is not considered unlawful concealing and disguising. *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 331.

- A lawyer's client is allegedly an agent of a notorious political group, or some hostile foreign power. The client is in an American jail. The lawyer and client discuss the political issues that might affect the client's release. The lawyer may contact individuals and entities in foreign countries, or representing foreign interests, in furtherance of the representation. The lawyer may visit foreign countries in pursuit of the client's interests.[44] Instances of prisoners being exchanged or released to foreign countries as a result of politically-motivated deals are well documented.[45] Some of the more well-known instances are cited in the footnotes.[46] One prominent New York law firm represented a number of socialist countries during the 1960s, 1970s and 1980s, and negotiated many prisoner releases.

- A lawyer may facilitate communication among co-conspirators and associates of a client by entering into joint defense agreements. Such agreements may validly include lawyers for fugitives. *See, e.g., In re Grand Jury Subpoena (Vesco)*, 406 F. Supp. 381 (S.D.N.Y. 1975) (Vesco was at that time outside the United

---

[44] As at least one of Sheikh Abdel Rahman's lawyers did.

[45] Even in the midst of the Cold War, prisoners were exchanged to achieve political goals. More recently, one well-known instance is the United States' October 1986 release of accused Soviet Spy Gennadi Zakharov in exchange for Nicholas Daniloff, a U.S. NEWS & WORLD REPORT correspondent who the Soviet Union held on charges of spying. *See, e.g.,* J. Demott, *Dealing for Daniloff*, TIME, Oct. 6 1986 (discussing the two prisoners prior to the exchange); G. Byrne, *Why Scientists Don't Spy*, The Scientist, Nov. 17, 1986, *available at* http://www.the-scientist.com/yr1986/nov/byrne_p2_861117.html (discussing the exchange of Zakharov for Daniloff).

[46] For example, prisoner releases have been used to assist in peace processes. The issue of releases was a primary concern in the Northern Ireland peace process. *See* K. McEvoy, *Academic Viewpoint: Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict*, 22 FORDHAM INT'L L.J. 1539, 1550-51 (1999). The Egyptian government recently released 1,000 members of the Islamic Group. *See* C. Levinson, *In Two New Books, The Gamaa Islamiya Continues To Distance Itself From Violence*, CAIRO TIMES, Oct. 9-15, 2003, vol. 7, Issue 37, *available at* http://www. cairotimes.com/news/Pamphlets0731.html. The Israeli government has often released members of the Palestinian Liberation Organization during negotiations. For a chronological list of these prisoner releases, see http://www.nad-plo.org/interim/prischro.html. *See generally*, M. A. Sherman, *Transfer of Prisoners Under International Instruments and Domestic Legislation: A Comparative Study, by Michal Plachta*, 28 GEO. WASH. J. INT'L L. & ECON. 495, 506-507 (1995) (book review) (summarizing history of prisoner transfers).

States). On the application of the privilege to joint interests, *see generally United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989) (communications in the course of ongoing common enterprise).

- During the anti-apartheid struggle in South Africa, American lawyers went to South Africa to work with the African National Congress and the Pan-African Union. The lawyer-leaders of these groups knew about the armed struggle against the apartheid regime, and even that some of those lawyers intended that the armed struggle continue and be successful. Some of these lawyers also believed, then as now, that the armed struggle was just, even though it inevitably meant that some people would die. Counsel nonetheless trained lawyers who would represent people charged with violent crimes, and helped devise strategies that might gain acquittal for people so charged, even though such defendants might well have committed the acts attributed to them. The point is that lawyers may well share some of their client's goals and intentions, and should not be punished for doing so, provided they do not commit "act" elements of offenses that are defined narrowly and specifically.

- Consider also the work of lawyers who represented the Communist Party and its leadership from about 1946 onwards. Those lawyers, who included such figures as John Abt, represented the Party itself in many proceedings, counseled party members, represented those accused of crimes allegedly involving the Party. *See, e.g., United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Noto v. United States*, 367 U.S. 290 (1961); *Communist Party of the United States of America v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956). These lawyers visited foreign countries. The Party itself was part of an international movement, the "Third International." It was alleged to be engaged in an international conspiracy to topple capitalist institutions. Mr. Abt also recruited other lawyers to represent Party members. For example, he was active in selecting counsel to represent Professor Angela Davis. *See generally* J. Abt & M. Meyerson, ADVOCATE & ACTIVIST, MEMOIRS OF AN AMERICAN COMMUNIST LAWYER (1993).

- A lawyer for any jailed client knows that the guards may be listening. Every lawyer we know takes active steps to conceal what is being said in jailhouse meetings. Sometimes lawyers will direct the client to write out messages rather than speak them. Sometimes we try to place one person with a back to the door, so that the guards peering in cannot see who is speaking. We play radios, we engage in irrelevant chatter, and do all manner of things

to keep our business from being understood by the law enforcement. It is our right, and perhaps our duty to do these things. Indeed, a lawyer must take active steps, or risk waiving the attorney-client privilege. *See United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003) (presence of a prison recording device, of which lawyers were aware, "was the functional equivalent of the presence of a third party" and thus waived privilege).

- A lawyer is a client's principal link to the outside world. Solitary confinement is a prison punishment because it takes a psychological and physical toll. There is for that reason a great deal of prison litigation over contact visits with friends and family. *See generally Boudin v. Thomas*, 554 F. Supp. 703 (S.D.N.Y. 1982), *appeal dismissed*, 697 F.2d 288 (2d Cir. 1982).[47] In order to make good decisions, a client needs to know what is going on in the outside world. This is particularly true when the prisoner is old, blind, and evidently having mental problems, as was true of Ms. Stewart's client.

- More than a decade ago, the Office of Thrift Supervision attacked the Kaye Scholer law firm for alleged improprieties in connection with the Lincoln Savings scandal. The case sparked a debate about the role of lawyers, even in administrative proceedings, where arguably the lawyer's unqualified loyalty to the client may be somewhat attenuated. One commentator has persuasively argued that lawyer autonomy must exist even in that realm. N. Combs, Comment, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CALIF. L. REV. 663 (1994).

The lawyer can and must contact potential fact witnesses, family members, officers of the entity, and others. This is implicit in the lawyer's role.

Of course, the lawyer must exercise independent judgment about which client statements should be shared with counsel for others, and which statements should be shared with the media. In this case, the government challenges decisions it alleges Lynne Stewart made in this

[47] The *Boudin* case also illustrates the difficulty of bringing a civil suit to deal with prison conditions. The first phase of the case took about a year, and then litigation over attorney fees continued for another two years. Ms. Boudin was not, in the end, able to obtain attorney fees even though she prevailed in the litigation.

connection. The language of the statute it has chosen is, as we show below, ill-adapted to that purpose.

In addition, a lawyer must provide information to her client. A business executive with many years experience, a political leader, a Mafia chieftain – almost any defendant – has insights into events that the lawyer would not have. The criminal defense lawyer almost by definition lacks significant shared experiences with her clients. To portray the client's condition, mental state, aspirations, and experiences, the lawyer – particularly for the imprisoned client – must provide information about what is going on in the outside world.

There are limits on this kind of sharing, but again these limits must honor the command against vagueness and respect the lawyer's exercise of independent judgment.

D. The Lawyer – Servant of the State or Client's Champion?

The prosecutors in this case continue to misunderstand the role of defense lawyers. Perhaps they have not read of the tradition that has informed modern ethics rules on this subject. Andrew Hamilton, who represented John Peter Zenger, is more honored than Judge Delancey, whose orders Hamilton ignored in talking directly to the jury and gaining an acquittal.[48] Erskine is most remembered for defying Judge Buller's admonition to keep quiet.[49] And Lord Brougham, defending a criminal charge that threatened to destabilize the British monarchy, is remembered for saying:

> I begin by assuring your lordships that the cause of the Queen as it appears in evidence does not require recrimination at present against the heir apparent to the crown. The evidence against her majesty does not, I feel, now call upon me to utter one whisper against the conduct of her

[48] *See* J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, *Printer of the New York Weekly Journal* (Stanley Katz ed., Harvard University Press, 1972) (1736); V. Buranelli, Ed., NOTES ON THE TRIAL OF PETER Zenger (1957); L. Rutherfurd, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL (1904); M. Tigar, THE TRIAL OF JOHN PETER ZENGER (1986).
[49] Quoted in M. Tigar, *Litigators' Ethics*, 67 TENN. L. REV. 409, 411 (2000).

> illustrious consort. And I solemnly assure your lordships that but for that conviction, my lips would not at this time be closed. In this discretionary exercise of my duty, I postpone the case which I possess. Your lordships must know that I am waiving a right which belongs to me and abstaining from the use of materials that are unquestionably my own.
>
> If however I should hereafter think it advisable to exercise this right, let it not be vainly supposed that I or even the youngest member in the profession would hesitate to resort to such a course and fearlessly perform his duty.
>
> I once again remind your lordships, though there are some who do not need reminding, that an advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means, and at all hazards and costs to all others, and among all others to himself, is his first and only duty. And in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Nay, separating the duty of patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 8 (1821).

Advocates such as Lord Brougham play a pivotal role in defending people against government overreaching and advancing claims for justice. We addressed this issue in our prior motions and incorporate that discussion by reference here. Stewart MTD at 82-88 (section VI, The Role of Lawyers). As an attorney, Lynne Stewart has both the right and the duty to act independently in representing her client. *See, e.g.,* N.Y. Code of Professional Responsibility, 22 NYCRR §§ 1200.17 [DR 3-102], 1200.18 [DR 3-103], 1200.26(b) [DR 5-107(B)], 1200.26(c) [DR 5-107(C)] (barring certain practices that would interfere with an attorney's professional independence). If the government can interfere with this duty and mandate what action an attorney may or may not pursue as a part of her representation of her client, notions of lawyer autonomy would be meaningless. Indeed, if the government could dictate the bounds of lawyer advocacy, no attorney could litigate against the government or its interests.

The courts have consistently recognized the importance of lawyer autonomy. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court struck down congressionally-imposed restrictions on attorney advocacy. In the case, a congressional mandate that Legal Services Corporation funds not be distributed to groups that represent clients challenging the welfare laws was held an unconstitutional violation of the First Amendment. *Id.* at 548-49. In holding that "[t]he Constitution does not permit the Government to confine litigants and their attorneys in this manner," the Court emphasized that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Id*. at 548. The Court underscored that state action "cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 549.

The Supreme Court's decision striking down the funding restrictions on lawyer-autonomy was premised on a specific understanding the function of lawyers. These restrictions, the Court observed, were:

> [I]nconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of judicial power.

Id. at 545. Thus, by preventing lawyers from being free to make independent decisions on the representation of clients, Congress interfered with not only the lawyers, but the courts as well.

Polk County v. Dodson, 454 U.S. 312 (1981), further illustrates this point. In *Dodson*, the Supreme Court held that a public defender, "in exercising her independent professional judgment in a criminal proceeding," is not a state actor for the purpose of a section 1983 suit. *Id.* at 324. The case arose when Dodson's attorney, a public defender, withdrew from appellate proceedings because she believed the client's claims were frivolous. Dodson then alleged that her withdrawal

deprived him of his right to counsel, subjected him to cruel and unusual punishment, and denied him Due Process of law. *See id.* at 314-15 (summarizing facts).

The Supreme Court's analysis focused on the professional independence of lawyers:

> [A] public defender is not amenable to administrative direction in the same sense as other employees of the State. . . . State decisions may determine the quality of his law library or the size of his caseload. But, a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal advice."

Id. at 321 (internal citations omitted) (quoting the earlier version of ABA Model Rule 5.4).[50]

Relying on the Court's earlier decision in *Gideon v. Wainwright*,[51] which "established the right of state criminal defendants to the 'guiding hand of counsel at every step of the proceedings against [them],'" the Court emphasized:

> Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.

Dodson, 454 U.S. at 322.

Taken together, these decisions underscore that the government does not have the right to impair the professional independence of lawyers. Although each of these cases involved an attorney working in the courtroom as part of an ongoing court proceeding, a lawyer may also advise on matters outside of any specific court proceeding. *See* 22 NYCRR E.C. 7.8 ("In rendering advice, a lawyer may refer not only to law but to other considerations"). The rules of

[50] The language of the earlier version of ABA Model Rule 5.4 relied upon by the Supreme Court in *Dodson* has been adopted by 22 NYCRR § 1200.26 [DR 5-107].
[51] 372 U.S. 335 (1963).

professional conduct contemplate that a lawyer may even speak with the press on behalf of a client. *See* 22 NYCRR § 1200.38 [DR 7-107]; ABA MODEL RULE PROF'L CONDUCT R. 3.6 (governing the handling of pre-trial publicity); *see generally Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). There is no ethical canon or rule of law that removes the duty of professional independence from an attorney who conveys her client's message in the press or steps outside the courtroom while representing a client.

Dodson also demonstrates that lawyers are "different," even from other professionals who enjoy a substantial degree of independence. The *Dodson* Court distinguished the case of the public defender from "two cases in which this Court assumed that physicians, whose relationships with their patients have not traditionally depended on state authority, could be held liable under § 1983." *Dodson*, 454 U.S. at 319 (discussing *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Estelle v. Gamble*, 429 U.S. 97 (1976)). Physicians, the Court noted, do not necessarily owe their patients a duty of undivided loyalty, as do lawyers, and may be held to serve both the interests of patients and of the State. *Dodson*, 454 U.S. at 320. "With the public defender it is different," said the Court. *Id.*

With this context, we turn to the indictment of Lynne Stewart.

E. 18 U.S.C. § 2339A In This Indictment

Title 18, Section 2339A (Jan. 2, 2001), stated as follows:

> § 2339A. Providing material support to terrorists
>
> (a) Offense.—Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49, or in preparation for, or in carrying out, the concealment or an

> escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) Definition.--In this section, the term "material support or resources" means currency or other financial securities, financial services, lodging, training, 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 (Jan. 2001).

The indictment, which applies the statute, is a mixture of this vagueness with both solecism and meaninglessness. There is no way a conscientious lawyer could know whether her acts were within the statutory words.

The solecism is the allegation that Ms. Stewart concealed and disguised the ownership of personnel. All personnel are people, though not all people are personnel. As the court observed in *United States v. Lindh*:

> One who is merely present with other members of the organization, but is not under the organization's direction and control, is not part of the organization's "personnel." This distinction is sound; one can become a member of a political party without also becoming part of its "personnel;" one can visit an organization's training center, or actively espouse its cause, without thereby becoming "personnel." Simply put, the term "personnel" does not extend to independent actors. Rather, it describes employees or employee-like operatives who serve the designated group and work at its command or . . . who provide themselves to serve the organization.

212 F. Supp. 2d 541, 572 (E.D. Va. 2002) (footnote omitted).

It is, of course, against the law to own people. U.S. Const., amend. XIII. Despite this, the indictment claims that "LYNNE STEWART . . . would and did conceal and disguise the . . . ownership of personnel . . . ." Ind. ¶38.

Other allegations make no sense. Given the allegation in paragraph six of the indictment that Sheikh Abdel Rahman was in various federal penal institutions, it is impossible to

understand what is meant by the allegation that Ms. Stewart "did conceal and disguise the . . . location" of her client. Ind. ¶38. Similarly, the meanings of "nature" and "source" are obscure in this context.

We have sought by bill of particulars to find out who was allegedly a conspirator and when the conduct is alleged to have occurred with respect to the three charged conspiracies. The government responded saying Ms. Stewart is "not entitled to the particulars sought."[52]

Like the previous indictment, Counts Four and Five allege provision of "material resources, to wit, . . . personnel." The "personnel" in this instance is in fact one person, Ms. Stewart's client Sheikh Abdel Rahman. Based on other allegations in the present indictment, Sheikh Abdel Rahman has been a leading figure in the Islamic Group since at least 1990. *See, e.g.*, Ind. ¶¶ 1, 5, 8, 10. Thus, he was already a member of a conspiracy that resembles the one charged in the various counts.

The root question is how a conscientious lawyer, in the context provided by the examples above, can avoid making her client "available" through consultations, communications, joint defense agreements, and all the other services that a lawyer regularly and lawfully performs. The term "making . . . available" does not appear in 18 U.S.C. § 2339A. Thus, the statute's vagueness as applied is compounded by the prosecution's use of a non-statutory term.[53] The term "making available" might include many lawful legal services, and outside the context of lawyer-client relations, many other services as well. An answering service makes its subscribers

[52] Letter from AUSA Baker to Shellow-Lavine, Jan. 12, 2004. *See* discussion *infra* Section XII.
[53] Early vagueness cases were indeed premised on the notion that a vague statute violated separation of powers because it called on the judiciary to fill in the gaps, which is a legislative function. An indictment founded upon a vague statute also fails to give the accused notice, which is a Sixth Amendment violation. *See* W. LaFave, CRIMINAL LAW § 2.3 at 103 nn. 1-3 (4th ed. 2003).

"available" to callers, as does voice mail on a telephone. A taxicab makes passengers available by transporting them.

The term "personnel" is defined by the SHORTER OXFORD ENGLISH DICTIONARY 1561 (1973) as "[t]he body of persons engaged in any service or employment, esp. in a public institution, as an army, navy, hospital, etc." The term comes from the French, and the dictionary notes that it is to be "contrasted with matériel." This ordinary meaning is borne out by a search of federal statutes. A Westlaw search of the U.S.C.A. database with the search terms "defin! +4 personnel" in December 2003 yielded 49 entries, each of which refers to people working in an institutional setting. Thus, the government is using "personnel" in a previously unknown way, while redefining the statutory term "provide" to suit its purposes.

When we put together the statutory term "personnel" and the prosecutors' invented term "making . . . available," we have a statute which, as applied, gives no guidance. Like "gang" and "gangster" in *Lanzetta*, 306 U.S. at 455, or "chicken" in *Kraus & Brothers,* 327 U.S. at 625, a person seeking to obey the law must necessarily guess at what is meant.

"Personnel" connotes an employment relationship. To make personnel available implies a degree of control over people and those people's entry into an employment relationship with an employer. This entire field is beset with difficulty, as was apparent by AUSA Christopher J. Morvillo's repeated attempts at the motions hearing to define the term "personnel" in such a way to alleviate the Court's unease. Mtn. Tr. at 60-65. For decades, employers have claimed that those who work in their facilities are not employees but independent contractors. This distinction is crucial for overtime, taxation, ERISA, and many other issues. Indeed, an article on this subject evokes this Court's earlier concern about the term "personnel." R. Carlson, *Why The Law Still Can't Tell An Employee When It Sees One And How It Ought To Stop Trying*, 22

BERKELEY J. EMP. & LAB. L. 295 (2001). *See also* Judge Learned Hand's discussion of the issue, quoted in *id.* at 311-12; L. Barton, Comment, *Reconciling The Independent Contractor Versus Employee Dilemma: A Discussion Of Current Developments As They Relate To Employee Benefit Plans*, 29 CAP. U. L. REV. 1079 (2002).

Thus, Counts Four and Five make the same error as in the superseded indictment. An analysis of the authorities on which the Court relied in its earlier opinion will make the point.

1. The Court's Prior Analysis of "Personnel" Applies To Counts Four and Five

The *Sattar* opinion explained that "[i]t is not clear from § 2339B what behavior constitutes an impermissible provision of personnel to an FTO." *Sattar*, 272 F. Supp. 2d at 359. The Court noted that the government's "evolving definition of 'personnel'" failed to resolve this infirmity. *Id.* at 359-60. With the new indictment, the government's definition of "personnel" continues to evolve. The fact that "material support" is now charged under § 2339A does not invalidate the Court's analysis of the statutory term "personnel," which is central to the old and new allegations. Regardless of whether § 2339A or § 2339B "material support" is charged, the exact same statutory definitions, found at 18 U.S.C. § 2339A(b), apply.

The government previously charged that Ms. Stewart conspired to provide, and provided material support to a foreign terrorist organization. *See* Initial Ind. (Counts One and Two). It now alleges that Ms. Stewart conspired to provide (and conceal), and provided (and concealed) material support to terrorist activity. *See* Ind. (Counts Four and Five). Regardless of whether the charges claim she directed it to a "foreign terrorist organization" or to "terrorist activity," the core allegation is the same, that Ms. Stewart provided "personnel." Therefore, the Court's prior analysis of the providing personnel charges applies with equal force here. *See Sattar*, 272 F.

Supp. 2d. at 358-61. Indeed, the Seventh Circuit's analysis in *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002), supports this point. As *Boim* explained:

> In 1994, Congress passed 18 U.S.C. § 2339A, which criminalizes the provision of material support to terrorists. . . . Two years later, Congress extended criminal liability to those providing material support to foreign terrorist organizations. . . . Section 2339B adopts the definition of "material support or resources" provided in section 2339A. . .

Id. at 1012-13.

Because § 2339B is merely an extension of § 2339A, applying it to support of an FTO, this and other courts' analysis of statutory terms such as "personnel" apply to prosecutions under both provisions.

This Court previously explained "[i]t is not clear from § 2339B what behavior constitutes an impermissible provision of personnel to an FTO." *Sattar*, 272 F. Supp. 2d at 359. Likewise, § 2339A fails to clarify what behavior constitutes an impermissible provision of personnel, or concealment of personnel, to terrorist activity. *Accord Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382, 493 (9th Cir. 2003) (reaffirming holding in *Humanitarian Law Project II* and analyzing constitutional infirmity of statutory term "personnel").

2. The Current Charges of Providing Personnel Are Vague and Overbroad[54]

Given that Sheikh Abdel Rahman was in prison, he could not be "provided" in any meaningful sense of the word. The government's addition of the term "making available" does not explain the word "provided" but rather seeks to extend the statute's reach.[55]

[54] We analyzed the unconstitutional vagueness and overbreadth of "personnel" as applied to Lynne Stewart in our initial pleadings, Stewart MTD at 56-58, and fully incorporate that discussion by reference here.

[55] We are not saying that the statute will always flunk a vagueness test. There may be acts of providing personnel, within some accepted meaning of that term, that could be punishable.

As Sheikh Abdel Rahman's lawyer, Ms. Stewart is required to conceal many things about her client, including (if it be true) that he is a co-conspirator. We have discussed that obligation, noting that even if Ms. Stewart believed that her client might commit offenses in the future, she would have only the right to consider making disclosure and not a duty to disclose. *See supra* Sections I.C.2 & I.D.

The government's recasting of the material support allegations makes it a sort of misprision statute. The offense of concealing knowledge of a felony has been the subject of extensive judicial and scholarly commentary. Lord Denning's formulation has been cited as authoritative, as discussed in G. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L. J. 697, 708 (2003). Lord Denning made clear that misprision would always be trumped by recognized privileges such as the attorney-client and doctor-patient privilege, although not (as he argued) by friendship or family ties. Again, the indictment's construction of the statute provides no guidance, and its vagueness fails to give lawyer autonomy the proper breathing space.[56]

Nor does scienter save this statute as applied. The "act" element of the statute does not have any mental element at all. Thus, there is the same defect as with § 2339B. *See Humanitarian Law Project*, 352 F.3d at 399-403 (Despite reading a *mens rea* requirement into

[56] An analogous situation is presented when a lawyer learns that a client is about to perpetrate a fraud upon a person or tribunal. The lawyer must take steps to rectify the situation, but only if doing so will not reveal a privileged communication. Thus, the privilege trumps the obligation to rectify, at least as interpreted in New York, where Ms. Stewart is licensed to practice. *See* New York State Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 454 (1976); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975). Moreover, even in the exceedingly rare instances when the information is not gained through a privileged communication, the information must "clearly establish" that the client's conduct is fraudulent before the lawyer is obliged to disclose it.

DR 7-102(B)(1) as originally promulgated did not include the exception for privileged communications; the ABA added the exception in 1974. *See* G. Hazard & S. Koniak, THE LAW AND ETHICS OF LAWYERING 283-84 (1990). Many states have not adopted the amendment, *see id.* at 284, but New York did. 22 NYCRR § 1200.33 [DR 7- 102(B)(1)].

18 U.S.C. § 2339B, the Ninth Circuit held terms "personnel" and "training" void for vagueness under the First and Fifth Amendments because they brought within their ambit constitutionally protected speech and advocacy.). Because the definitions of "personnel," "providing," and (in the government's rewriting of the statute) "making available" are in the statute without any *mens rea* qualifier, a lawyer cannot know when she is crossing the line from lawful to unlawful conduct.[57]

The mental element in § 2339A does not modify or explain the act elements. That is, one need not know what "personnel," "providing" or "making available" mean, or that one's acts constitute the doing of these things.[58] One need only act in a general way with certain knowledge or intent. In the context of a lawyer-client relationship, these mental elements make the vagueness problem worse and not better. The lawyer's knowledge of the client's plans and desires does not generally authorize her, much less require her, to violate the client's privilege. The lawyer's knowledge does not prevent her from taking all necessary steps on the client's

---

[57] *United States v. Handakas*, 286 F.3d 92 (2d Cir.), *cert. denied*, 537 U.S. 894 (2002), *overruled in part, United States v. Rybicki*, __ F.3d __, 2003 WL 23018917, at *13 (2d Cir. Dec. 29, 2003), on which this Court relied in part in finding § 2339B void for vagueness, involved the "honest services" portion of 18 U.S.C. § 1346, which adds a gloss to 18 U.S.C. § 1341, the mail fraud statute. The mail fraud statute has a mental element that includes what is generally called "specific intent." *Handakas*, 286 F.3d at 100. Thus, the presence of an intent element does not save an otherwise impermissibly vague enactment. The *Handakas* constitutional holding has been overruled in *Rybicki* on grounds that do not negate the Court's analysis. However, the *en banc* court also noted that Handakas' conduct did not violate the mail fraud statute, thus it was unnecessary for the panel to reach the constitutional question. *Rybicki*, 2003 WL 23018917, at *53. The *en banc* panel did not criticize the constitutional analysis in *Handakas*, choosing instead to overrule the holding "without reviewing it on its merits." *Id*. We note it has been held that good faith alone will negate mail fraud liability. *United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981).

[58] In parsing a criminal statute, there is no such thing as scienter in the abstract. Rather, each mental element (purpose, knowledge, recklessness or negligence) modifies one or more "act" or "circumstance" element. For example, a carnal knowledge statute may require "knowing" behavior, but knowing will usually be held not to modify the "circumstance" element that the accuser was under the age of consent. *See generally* M. Tigar, *"Willfulness" and "Ignorance" in Federal Criminal Law*, 37 CLEV. ST. L. REV. 525 (1989).

behalf, including all the meetings, communications and actions discussed in the examples *supra* Section I.C.2. To repeat in summary fashion, lawyers representing criminal defendants often know that some of their clients are committing crimes and will do so again in the future. The lawyer's job as advocate is to see that the client's rights are respected and protected regardless of the client's agenda.

It is of no consequence that a lawyer may desire some of the same things as the client. That is, if a lawyer is advising Nelson Mandela while he is in jail, he may share Mandela's desire that armed struggle continue. The lawyer may know that some of his actions in defending Mr. Mandela may have undesirable consequences. That is a problem inherent in every case where the lawyer shares some of the client's aspirations. If one's client is accused of establishing a monopoly, and the lawyer wants the client to succeed in that endeavor, he can still defend the client to the utmost of his ability. He can take a flood of depositions, issue press statements, lobby the government, and do all manner of things that may well head off or terminate litigation directed at exposing and punishing the client's effort to monopolize. So long as the lawyer's acts are within the law, his intention does not matter. Every lawyer in this case knows that is how lawyers behave, and with the law's blessing.

3. Specific Intent Requirement Does Not Save the Statute

Thus, the need remains for the lines to be drawn with clarity and for prohibited acts to be defined with precision. The law does not say that an intent requirement saves a statute that is so vague it cannot be understood. *See, e.g., United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001) (an intent requirement "cannot eliminate vagueness . . . if it is satisfied by an intent to do something that is otherwise ambiguous") (internal quotations and citation omitted); *Nova Records, Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983) ("scienter requirement cannot

eliminate vagueness . . . if it is satisfied by an 'intent' to do something that is itself ambiguous"); *Sewell v. Georgia*, 435 U.S. 982, 987 (1978) (Brennan, J., *dissenting*) (scienter requirement cannot save an otherwise vague statute where requirement "provides no reasonable assurance that persons will know or ought to know when they are likely to violate" the statute). Even assuming that such a statute gives an accused fair warning, it would still give prosecutors, judges and jurors unfettered discretion to charge or convict. *See Kolender*, 461 U.S. at 358 (warning of statutes that "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections'") (quoting *Goguen*, 415 U.S. at 575).

One may be convinced, that is, of a defendant's wrongful intent, but there will remain the need to determine if the defendant's acts fell within the prohibited zone. *See Kolender*, 461 U.S. at 358 (warning of the danger of a "standardless sweep" created by vague statutes).

This has been the teaching of the cases. Even where *mens rea* is deployed, the act elements must also pass muster. Thus, in *Hill v. Colorado*, 530 U.S. 703, 706 (2000), the "zones" that protesters could not enter were clearly defined. In *United States v. National Dairy Prod., Corp.*, 372 U.S. 29, 33-38 (1963), the Robinson-Patman definitions were clear through long and consistent usage. In *Screws v. United States*, 325 U.S. 91, 108-110 (1945), the "right" violated had to be proven to have been clearly established.

4. Section 2339A is Unconstitutional As Applied to Ms. Stewart

Even if this Court disagrees with our analysis, the statute is still vague as applied in this case.[59] Counts Four and Five refer to Count Two, which charges a conspiracy to murder and kidnap under 18 U.S.C. § 956. *See* Ind. ¶¶38, 41. Count Two is an example of baroque

[59] The vagueness of this linkage between § 2339A and § 956 is further discussed in Section II.A, *infra*, and that discussion also bears on vagueness of the statute as applied.

pleading. It incorporates many paragraphs by reference, and does so twice. *Compare, e.g.*, Ind. ¶31, *with* Ind. ¶33(a) (duplicative incorporations by reference); *compare* Ind. ¶36, *with* Ind. ¶39(a) (same). The statute punishes conspiracies whose object is "outside the United States." The indictment says "in a foreign country." However, the indictment does not specify which foreign country. The incorporated paragraphs refer to Israel, Egypt and the Philippines. As we show below, these incorporated paragraphs fall short of alleging any act by Sheikh Abdel Rahman within the limitations period directed at kidnapping or killing any identified person or persons in any specific place or places.

Count Two consists of general allegations imported from other parts of the indictment, and a series of cryptic snippets of conversations. All of these conversations were presumably in Arabic, and Ms. Stewart is not alleged to have been a party to any of them. Thus, the citation of Count Two in Counts Four and Five makes the situation murkier rather than clearer.

Count Two is also defective because it fails to state an offense, and because Counts Four and Five reference Count Two, Ms. Stewart has standing to make this challenge.

Briefly, Count Two does not satisfy the requirements of *Russell v. United States*, 369 U.S. 749, 763-64 (1962) that an indictment apprise the defendant of the conduct of which she stands accused and allege each element of the offense charged, and protect her against double jeopardy. Count Two alleges a conspiracy "to murder and kidnap persons in a foreign country." Neither the persons nor the countries are further identified even in a general way, and the government has refused to provide this information. *See* request for bill of particulars, discussed at Section XII, *infra*. Ms. Stewart is entitled to know where the alleged kidnappings and killings were to take place, who was to be kidnapped or killed, and who was to do these acts. Otherwise the indictment simply alleges the same sort of abstract "feeling" as in *Bufalino*, 285 F.2d at 417.

The incomplete notice of this count is particularly significant for Ms. Stewart because of her role as criminal defense counsel to alleged co-conspirator Sheikh Abdel Rahman.

Surprisingly, Sheikh Abdel Rahman is alleged to be a co-conspirator in both Count Two and Count Four, while in Count Four, Ms. Stewart is alleged to have made him available. Count Four does not say to which conspiracy or conspiracies he was to be made available, whether to that in Count Four, or that in Count Two or some other conspiracy – perhaps that in Count One – to violate the SAMs. If the plan was to make him available to the Count Two conspiracy, the indictment alleges he was already in it.

To be a conspirator does not require going anywhere or doing anything in particular. It requires only that one agree, intend to agree, and intend to further the conspiracy's object. The agreement can be expressed tacitly. No form of words is required. The *locus poenitentiae* of conspiracy is elusive. *See generally* W. LaFave, CRIMINAL LAW § 12.2(b) (4th ed. 2003) (discussing the overt act requirement). The indictment's convoluted structure adds to the difficulty of knowing when and where Ms. Stewart allegedly crossed the line into wrongdoing.

Without any guidance as to where, who, how and when some unlawful action might take place, the lawyer is without a clue as to what acts of hers will trigger criminal liability. Even if the indictment is held to satisfy the bare-bones criminal pleading rules, it nonetheless fails to illuminate the meaning of § 2339A.

Finally, Lynne Stewart could very well share the view, held by many,[60] that the government of Egypt is repressive and should be replaced with one more attuned to the Egyptian

[60] *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, *Egypt: Country Reports on Human Rights Practices – 1999* (Feb. 23, 2000), *available at* http://www.state.gov/g/drl/rls/hrrpt/1999/408pf.htm (Reply Decl. Exh. A); Human Rights Watch, *Egypt: Trials of Civilians in Military Courts Violate International Law; Executions Continue, No*

people's will, even if the majority of Egyptians want a government based on Islamic principles.[61] Wanting to overthrow the government of Egypt is a desire that has been shared at various times by the English, French, Israelis, and maybe the Americans. As we pointed out at the June 13, 2003 hearing, the United States Department of State has concluded that governmental change in Egypt cannot occur by democratic means.[62] Lynne Stewart might also share the view, again held by many, that the process of change in Egypt will inevitably involve bloodshed, not because those seeking change want it but because the Egyptian security services have proven to be so irresponsibly violent. *See* Human Rights Watch, *Egypt: Hostage-Taking and Intimidation by Security Forces (Summary)*, Vol. 7, No. 1 (Jan. 1995) *available at* http://www.hrw.org/reports/1995/Egypt.htm (Reply Decl. Exh. D). Ms. Stewart might even believe that if Sheikh Abdel Rahman were released from confinement he would become a spiritual leader of positive social change in Egypt. These protected and permissible beliefs are within the literal reach of the statute as applied in this indictment.

5. The Vagueness of the Statute and the Indictment is Graphically Illustrated by a Linguistic Analysis

In the preceding sections, we have focused primarily on the term "personnel," and the various ways in which that term is used in Counts Four and Five. The statute as pleaded, however, in Counts Four and Five sweeps much more broadly. These counts deploy, in the conjunctive, many statutory terms that appear in § 2339A in the disjunctive. Thus, as applied in this indictment, the jury would be presented with thousands of possible combinations of bases of

---

Appeal of Death Sentences to Higher Court, vol. 5, issue 3 (Jul. 1993), *available at* http://www.hrw.org/reports/1993/egypt (Reply Decl. Exh. C).

[61] Secretary of State Colin Powell recently met with Egypt's intelligence chief Omar Suleiman to discuss concerns over human rights in Egypt. U.S. Department of State, State Department Noon Briefing, (Dec. 11, 2003), *available at* http://usinfo.state.gov/topical/pol/terror/texts/03121102.htm.

[62] Mtn. Tr. At 14-15.

liability. This is constitutionally defective notice. *Russell*, 369 U.S. at 763-64. There is simply no way that we can prepare a defense to so vague a charge.

As an illustration of vagueness in this statute, we turn to Count Four. Paragraph 38, the charging portion of this Count (as distinct from the portions enumerating the co-conspirators) contains the word "and" at least 13 times. Each of these uses is a substitute for the statutory term "or." Several uses of the word "and" are meant to cover multiple instances, such as "nature, location, source, and ownership of material support and resources." This assertion, when we substitute the word "or" for "and," charges eight separate possible violations. For example, the charge could be that Ms. Stewart "concealed" the "nature" of "support," or that she "concealed" the "ownership" of "personnel." If we add the conjunctive between "conceal" and "disguise," the number multiplies accordingly. A statute or regulation subject to two or more government interpretations is too vague to impose criminal liability. *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (cited with approval by *United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000)).

In short, § 2339A(a)'s vagueness problems stem in part from a scatter-shot use of terms, each of which is subject to a vagueness analysis.[63] We are consulting with a legal and linguistic scholar who is preparing a detailed analysis of this statute using a methodology long-employed to interpret legal writing. He was unable to complete his analysis at the time of this filing. Therefore, we may seek leave from the Court at a later date to supplement this Memorandum with his report.

[63] As we have noted above, the vagueness of these statutory terms is increased by the government's inventing terms such as "making available," presumably to rewrite the statute to fit its theory.

6. Even If §2339A Is Not Unconstitutionally Vague, It Cannot Be Applied to Lynne Stewart On the Facts As Alleged In This Indictment

The allegation that Lynne Stewart provided "material support" by "making available"[64] a co-conspirator is a contradiction in terms. The term "material support" is defined in § 2339A(b) to include several things, "and other physical assets." Under the principle of *ejusdem generis*, therefore, there must be some element of physical reality to anything that is provided in the name of material support. The common sense meaning of the term comports with this understanding.

In sharp contrast, this indictment alleges that Ms. Stewart's provision of material support consisted of "making available" a prisoner in federal custody in such manner that he became a co-conspirator. The prisoner was always in government hands. The only way he could be "provided" would be in some intangible, evanescent sense. He could not be a "physical asset."

Someone who is part of an army unit might, without too much violence to the term, be "material support" in the sense of being listed in a military unit and available to the command structure to be ordered about at will. Classical economists also spoke of "labor power" as an asset of the worker, that would be hired out to the employer. In this sense also one could speak of personnel as a physical asset.[65] As used in this indictment, however, the statutory term does not cover the alleged conduct and therefore the indictment fails to state an offense.

In addition, Lynne Stewart's status as counsel for Sheikh Abdel Rahman should preclude application of this statute to her provision of legal services to him. Protected and significant activities are often held to be beyond the reach of literal statutory commands. For example, labor violence cannot be prosecuted under the Hobbs Act, 18 U.S.C. § 1951. *United States v. Enmons*,

[64] Again, "making available" is a term invented by the government. *See supra* Section I.E.
[65] Hence the contract *locatio conductio operarum*, the hiring of labor, in civil law.

410 U.S. 396 (1973). And baseball is still exempt from the antitrust laws.[66] *See Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club, Inc. v. National League of Prof'l Baseball*, 259 U.S. 200 (1922).

Therefore, this Court can avoid deciding the constitutional issues by holding that the statute does not apply to the charged conduct. This approach to decision has been endorsed by the Second Circuit in *United States v. Rybicki*, __ F.3d __, 2003 WL 23018917, at *13 (2d Cir. Dec. 29, 2003) (holding that the constitutional analysis in *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), was unnecessary because the defendant's conduct did not fall within the behavior proscribed by the statute.).

II. COUNTS FOUR AND FIVE IMPERMISSIBLY CHARGE A DOUBLE (OR TRIPLE) INCHOATE OFFENSE, ADDING TO THE IMPERMISSIBLE VAGUENESS OF § 2339A AND MAKING THE INDICTMENT DEFICIENT

A. Count Four's Inchoate Allegations are Unconstitutionally Vague

Count Four charges a conspiracy under 18 U.S.C. § 371 to make a conspirator available to the Count Four charged conspiracy, and to conceal and disguise various things knowing and intending that all of this conspiring would be "used" in preparation for and carrying out a second conspiracy, which is alleged to arise under 18 U.S.C. § 956. *See supra* Section I.E.4. The inchoate character of the alleged offense is then compounded by the words "in preparation for, and in carrying out, the concealment of such violation." Ind. ¶ 38.

Ignoring the various uses of the term "preparation" [67] the count alleges a conspiracy to (1) provide material support, knowing and intending that the material support was to be used to

[66] Organized baseball may not be a constitutionally protected activity, but has acquired iconic status.

[67] "Preparation" is in the language of the statute and is alleged in this count only in the conjunctive with "carrying out." While "preparation" makes the charged offense yet more

carry out a second conspiracy; and (2) provide material support, knowing and intending that the material support was to be used to carry out the concealment of the second conspiracy.

What is alleged, then, is a conspiracy with the aim not of actually carrying out the second conspiracy, but with the lesser and more remote aims of assisting and disguising (i.e. facilitating) that second conspiracy.[68] Ms. Stewart is not charged in the second conspiracy. We are not dealing with the bizarre formulation of an agreement to agree to do X ("X" being the ultimate substantive crime), but with the yet more bizarre formulation of an agreement to facilitate to agree to do X. This construction is unprecedented.

There is a long-standing objection to charges that pile inchoate offenses upon inchoate offenses. The leading discussion is Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989). Professor Robbins divides the historical objections into two categories: logical absurdity and Due Process notice considerations. The absurdity is that the state of mind alleged is not of agreeing to do X, but of agreeing to try to do X or, worse still, of agreeing to agree to do X; that is, that the state of mind is so far removed from any act as not to correspond with what we know of human mental processes.[69] The Due Process notice objection is that the very difficulty of setting out a meaningful understanding of what it is to agree to agree (or any further regression such as we encounter here) makes impossible the necessary inquiry into whether the criminality of the alleged actions were known or should have been known to the actors. We have briefed the vagueness/notice issue above, *supra* Sections I, I.B – I.B.3, I.E, I.E.5, and need not repeat that analysis here.

---

remote from any substantive crime, the charged offense stands or falls regardless of whether that term is considered.

[68] Knowing facilitation falls short of the state of mind required for a conviction for conspiracy. *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

[69] The origin of this line of discussion is *Wilson v. State*, 53 Ga. 205 (1874).

The federal courts have dealt with the problem by looking to legislative intent. "Conspiracies to attempt" have generally, but not always,[70] been found set out with sufficient clarity and evidence of legislative intent, so as to satisfy Due Process notice as to the specific statute and charges in question. Professor Robbins summarizes this body of law:

> Although conspiracy statutes reach back further in the continuum of preparatory acts to impose liability than do attempt statutes, the federal courts' use of the conspiracy-to-attempt construction has not resulted in an extension of liability to more remote acts. Instead, the courts have applied it in instances in which the conspiracy failed to realize an object offense for which the statutory definition of the crime prohibited both the attempt and the substantive crime.

Robbins, at 59-60 (footnotes omitted).

That is to say, there is no body of case law authorizing the use of a § 371 conspiracy with the offense against the United States being a second conspiracy – "a conspiracy to conspire" – let alone, as here, a conspiracy to facilitate to conspire.

Even where Congress has explicitly placed a conspiracy provision within comprehensive statutory provisions that include predicate offenses that are themselves conspiracies, as in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, the courts have made clear that the result is not the creation of the bizarre offense of conspiring to conspire:

> A RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a "conspiracy to conspire" as alleged by appellants, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *See United States v. Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir.1980), *cert. denied*, 450 U.S. 916 (1981). The trial judge

[70] *E.g.*, *United States v. Meacham*, 626 F.2d 503, 507 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982) (cited with approval and distinguished by *United States v. Mowad*, 641 F.2d 1067, 1074 n.14 (2d Cir.), *cert. denied*, 454 U.S. 817 (1981)).

> clearly instructed the jurors that to find a particular defendant guilty of the RICO conspiracy they would have to find beyond a reasonable doubt that he wilfully participated in at least two of the conspiracies alleged as predicate offenses, that the predicate offenses constituted a pattern of racketeering activity, and that, in addition, the defendant under consideration conspired to participate in the affairs of the Bonanno crime family by engaging in the predicate offenses. The instruction was proper, and the evidence was sufficient to support the defendants' convictions.

United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), *cert. denied,* 469 U.S. 831 (1984).

As for the legislative intent regarding 18 U.S.C. § 2339A, the October 26, 2001 amendment (the "Patriot Act") did add to § 2339A a provision setting forth the offenses of conspiring or attempting to provide "material support." Given the summary consideration accorded that piece of legislation, it is not easy to make any claims as to the legislature's intent to create the novel offense of conspiring to facilitate to conspire.[71] But that is not the issue here, because the conspiracy provision was added after all overt acts alleged in this indictment had occurred (albeit the charged conspiracy is alleged to have been in existence after October 26, 2001).[72] However, the creation of such an offense, if indeed such was intended, is decidedly not an argument for a legislative intention to have *already* created the offense before the legislation was enacted.

---

[71] *See* Statement of Senator Russell Feingold regarding the USA Patriot Act, 147 CONG. REC. S11020-21 (daily ed. Oct. 25, 2001) ("It is one thing to shortcut the legislative process in order to get Federal financial aid to the cities hit by terrorism. We did that, and no one complained that we moved too quickly. It is quite another to press for enactment of sweeping new powers for law enforcement that directly affect the civil liberties of the American people without due deliberation by the peoples' elected representatives."); E. A. Palmer, *Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities*, CQ WEEKLY, Oct. 27, 2001, at 2533-34 (noting that just 36 days after the legislation's introduction, Congress "rubber-stamped" it after making only minor alterations and reporting that on the day the House held its final debate on the law, members complained that they did not have a chance to read the final version).

[72] As the Court has explained, "[t]he parties agree that the modified definition of 'material support or resources' does not apply retroactively to the conduct charged in the Indictment." *Sattar*, 272 F. Supp. 2d at 356 n.4.

At issue, then, is the creation of new offenses by prosecutors out of the provisions of hastily drafted statutes ever further removed from substantive offenses. The endless regression feared by those courts that looked askance even at far more comprehensible combinations of conspiracies and attempts has now in fact arrived. It presents the inane scenario feared by the Fifth Circuit in *United States v. Meacham*:

> It would be even more inane to commit the other crime the government would have us recognize – attempt to conspire. A scenario leading to a prosecution for that offense might read something like this: A suggests to B that they get together to discuss the possibility of violating the criminal code and to select the provisions they will violate. B agrees to meet and talk. While ascending the staircase leading into the room in which they will meet, both slip and fall down the stairs. A dies of his injuries. B, who survives, is prosecuted for an attempt to conspire.

626 F.2d at 509 n.7.

"Conspiracies to conspire" or, as here, the yet more remote conspiracy to facilitate to conspire are without precedent in the history of the common law, and violate Due Process.

Moreover, the conspiracy or facilitation, or whatever it may be called, deals with political activity assertedly directed at overthrowing a government and establishing a theocracy in Egypt. A conspiracy to conspire to facilitate is so removed from imminent lawless action as to raise serious First Amendment concerns. In this context, the membership cases under the Smith Act are instructive, particularly *Noto*, 367 U.S. at 299-300 (warning that membership crimes must be judged *strictissimi juris* so as to avoid punishing a sympathizer to an organization for adhering to "lawful and constitutionally protected purposes."). Also relevant is *Yates v. United States*, 354 U.S. 298 (1957), the "second-string" Communist Party leadership case. *See also Brandenburg*, 395 U.S. at 447 ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or

produce such action"); *Hess*, 414 U.S. at 109 (same); *Virginia v. Black*, 535 U.S. 1094, 123 S. Ct. 1536, 1547 (2003).

Again, one may desire overthrow, political violence, and/or religious domination of the secular state, and teach it as doctrine. No revolutionary change would occur or has occurred in recorded human history without some writing, preaching, and teaching. Marx and Engels no doubt intended that revolution occur. Mr. Noto probably did too. Their work may have facilitated social change in some sense, but their conduct was, as the Supreme Court has taught, too remote to be punishable.

B. Count Five's Inchoate Charges Are Unconstitutionally Vague

Count Five is a substantive charge under § 2339A. It removes one layer of inchoateness from the offense charged in Count Four. However, it suffers from the same infirmities as Count Four. It has to do with preparation to conspire and with preparing to conceal a conspiracy. The remoteness of this alleged conduct from social harm compounds the difficulty of knowing what acts are sought to be punished.

Therefore, Counts Four and Five must be dismissed.

III. COUNTS FOUR AND FIVE ARE IMPERMISSIBLY MULTIPLICITOUS

Counts Four and Five are multiplicitous in violation of FED. R. CRIM. P. 8(a) and U.S. CONST. amend. V (double jeopardy clause). Multiplicity is the mistake of splitting a single offense into two or more separate counts. *See United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999), *aff'g United States v. Chacko*, 1997 WL 481862 (S.D.N.Y. Aug. 21, 1997) ("An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed"); *United States v. Holmes*, 44 F.3d 1150, 1153-54 (2d Cir. 1985) (same). It contravenes the express wording of the

double jeopardy clause, and also suggests unfairly to the jury that the defendant has done more wrong than he truly has. *See generally United States v. Dixon*, 509 U.S. 688, 696 (1993) ("In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies."); *United States v. Marquardt,* 786 F.2d 771, 778 (7th Cir. 1986); *United States v. Lilly,* 983 F.2d 300, 304-05 (1st Cir. 1992).

Count Four charges that "it was a part and an object of said conspiracy that LYNNE STEWART and MOHAMMED YOUSRY, the defendants, and others known and unknown, within the United States, would and did provide material support and resources . . . ." Ind. ¶38. Count Five charges that these defendants "provided material support and resources." Ind. ¶41. If the provision of resources were only an object of the conspiracy, the word "would" describes anticipated conduct, which is the hallmark of inchoate offenses. However, Count Four continues to allege that it was a "part of" the conspiracy that the defendants "did" provide, which is in the past tense.

The government has chosen to make the "unit of crime" in both counts the same. *See Handakas*, 286 F.3d at 98 ("The drawing of each check cannot constitute an 'allowable unit of prosecution' because 'the structuring itself, and not the individual deposit, is the unit of crime.'") (quoting *United States v. Davenport*, 929 F.2d 1169, 1172 (7th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992)). Accordingly, these two counts duplicate each other, in violation of the principles stated above, and they must be dismissed.

IV. COUNT FOUR EITHER VIOLATES THE *EX POST FACTO* CLAUSE OR CHARGES AN OFFENSE THAT DID NOT EXIST AT THE TIME OF THE ALLEGED CONDUCT

Section 2339A, during time relevant to the charged conduct, provided:

> (a) Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49, or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 2339A (Jan. 2001).

The statute was amended by § 811(f) of Pub. L. 107-56, October 26, 2001, to insert the words "or attempts or conspires to do such an act," following "any such violation." Thus, the statute acquired a conspiracy provision as part of the Patriot Act.

The first question is why Congress chose to insert a conspiracy provision if it was already possible to prosecute conspiracies to violate § 2339A under 18 U.S.C. § 371. If we assume that Congress and the executive branch meant to change the law by legislating, as they surely did with the Patriot Act,[73] then it follows logically that prosecuting under § 371 is not an option for conduct prior to October 26, 2001.

---

[73] *See* Testimony of Attorney General John Ashcroft Before the House Committee on the Judiciary, Sept. 24, 2001, *available at* http://www.usdoj.gov/ag/testimony/2001/agcrisisremarks9_24.htm (Attorney General John Ashcroft stating that the Administration's draft proposal of the USA Patriot Act was designed to: (1) strengthen and streamline intelligence gathering activities to eliminate terrorism; (2) make fighting terrorism a national priority; (3) enhance the authority of the INS to detain or remove suspected alien terrorists from within our borders; (4) increase the ability to track the flow of terrorist money; and (5) increase the ability of the President and Department of Justice to provide swift emergency relief to the victims of terrorism and their families). Ashcroft concluded his remarks with, "Today I urge the Congress, I call upon the Congress to act, to strengthen our ability to fight this evil wherever it exists. . . ."

This reading of the plain text makes sense because (discussed *infra* Sections II – II.B) § 2339A is already an inchoate offense in many respects, speaking as it does of "preparation" for the commission of an offense.[74]

If Congress intended a change in the law, creating conspiracy liability where none existed before, Count Four must fail because the *ex post facto* clause, U.S. CONST. art. 1, § 9, forbids it. *See generally Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798) (setting out the often-quoted four part test for an *ex post facto* law).[75]

Alternatively, if Congress intended to substitute one form of conspiracy liability for another, then § 371 ceases to be applicable to the charged conduct on October 26, 2001, and Count Four fails because the charged conspiracy is said to have continued until April 2002.

---

[74] "Preparation" is a word of art in the law of attempt, as in "mere preparation." *Stallworth*, 543 F.2d at 1039-41. *See United States v. Plotitsa*, 2001 WL 1478806 (S.D.N.Y. Nov. 19, 2001) (despite defendant meeting twice with an undercover FBI agent to plan out the murder of two of defendant's associates, negotiating the price of the murders with the agent, and threatening to take the job to the "Russian community" because the agent's price was too high, the court found that defendant's actions did not constitute a "substantial step" toward the commission of the crime); *see also United States v. Rosa*, 11 F.3d 315, 337-40 (2d. Cir 1993), *cert. denied*, 511 U.S. 1042 (1994) (court found no "substantial step" in defendant Rosa's actions to support a conviction of attempt); *Coplon*, 185 F.2d at 633 (Judge Learned Hand discussing preparation as opposed to attempt).

[75] According to the *Calder* test, an *ex post facto* law is:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder, 3 U.S. at 390-91.

The meaning of the statutory change must next be considered in the context of abatement. Congress did not repeal § 371 in the Patriot Act. It simply passed a statute that shifted the statutory basis for imposing liability. When it did that on October 26, 2001, what happened to the liability under § 371 that might have existed before that date? At common law, outright repeal of a criminal statute abated all prosecutions under it, whether commenced or not, provided that a final judgment had not been entered. As Justice Field explained in *United States* v. *Tynen*, 78 U.S. 88, 95 (1870):

> By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed.

This common law rule was consistently recognized by the Supreme Court. *See generally United States v. Chambers*, 291 U.S. 217, 223 (1934) (discussing views of Marshall and Taney). Congress has, however, provided in 1 U.S.C. § 109 that an outright repeal shall not abate criminal prosecutions absent language expressly doing so.

A problem remains with cases like this one, where a change in the law is not an outright repeal. We recognize that lower courts have been reluctant to recognize abatements. *See, e.g., United States v. Ross*, 464 F.2d 376, 379 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973) (rejecting the rationale of *United States v. Stephens*, 449 F.2d 103 (9th Cir. 1971); *United States v. Uni Oil, Inc.*, 710 F.2d 1078 (5th Cir. 1983) (reversing district judge holding that President Reagan's decontrol of oil abated "daisy chain" prosecutions under former regulations). *Cf. United States v. $125,882 in U.S. Currency*, 286 F. Supp. 643, 645 (S.D.N.Y. 1968) (giving claimants back their gambling money after Supreme Court decisions invalidated the underlying revenue statute).

Nonetheless, *United States v. Chambers* is still the law.[76] In *Chambers*, the 21st amendment repealed the 18th amendment. This event impliedly repealed the statutes under which the bootleggers in *Chambers* were being prosecuted. The Court held that the savings statute did not apply and the prosecutions were abated.

So it is here. If Congress did intend to change the law, and to shift conspiracy prosecutions from the general § 371 provision to an internal one in § 2339A itself, then this implied repeal abates Count Four.[77]

V. COUNT ONE MUST BE DISMISSED BECAUSE 18 U.S.C. § 371 FAILS TO STATE AN OFFENSE AND IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE

A. Count One Fails to State an Offense

Count One purports to state a conspiracy to defraud the United States by impeding and obstructing the function of its Bureau of Prisons in the administration and enforcement of the Special Administrative Measures ("SAMs") for Sheikh Abdel Rahman. It relies on Ms. Stewart's conduct in connection with the signing of certain attorney affirmations. It fails to state an offense, because there is no provision in the regulatory scheme for such affirmations. They are completely a creature of the prosecuting authority and thus are an improper abrogation of power on behalf of the executive branch. We discuss the regulatory scheme and separation of powers concerns *infra* Section VII.B, and incorporate that analysis here.

---

[76] As the Eleventh Circuit has held, although there may be "ample ground for argument that the Supreme Court has doubts about [its] vitality, a requiem may be premature and, in any event, should not be sung by this choir." *United States v. Adkinson*, 135 F.3d 1363, 1365 (11th Cir. 1998).

[77] Congress could well have taken this step in order to capitalize on the rule in *Albernaz v. United States*, 450 U.S. 333 (1981), and obtain consecutive sentences for multiple conspiracies.

B. Count One is Unconstitutionally Vague

Title 18 U.S.C., Section 371 criminalizes conspiracies "to defraud the United States, or any agency thereof, in any manner or for any purpose." The statute does not list the things or rights of which one must not defraud an agency. The courts have recognized that the list of such frauds may be long and its meaning is broad. *See Dennis v. United States*, 384 U.S. 855, 861 (1966) (defrauding government "is not confined to fraud as that term has been defined in the common law," and it "reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government") (internal quotation omitted). *See, e.g., Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (interpreting a predecessor statute to 18 U.S.C. § 371); *Haas v. Henkel*, 216 U.S. 462, 479 (1910) (same).

Prosecutorial discretion is not, however, unlimited. Prosecutors cannot invent rights or things to which an agency has no legal right, and cannot frame their accusation in terms that are unduly vague. *See Dennis*, 384 U.S. at 860, ("indictments under the broad language of the general conspiracy statute [18 U.S.C. § 371] must be scrutinized carefully … because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable"); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963) (prosecution for false representation cannot be grounded upon omission of an explanation where the omission only implies of a false state of facts); *Haas*, 167 F. at 216 (United States not defrauded because defendants cannot be found guilty of merely "dishonorable" conduct; the conduct must be criminally punishable). *See also United States v. Cohn*, 270 U.S. 339, 346-47 (1926) (withholding material facts need not constitute defrauding the government); *United States v. Britton*, 108 U.S. 199, 206-07 (1883) (conspiracy between bank directors to misapply funds does not constitute defrauding the government); *United States v. Campbell*, 64 F.3d 967, 976-77 (5th

Cir. 1995) (defendant's legal actions were insufficient to support conspiracy conviction; absent scheme of deceit or misrepresentation, defendant was entitled to pursue available legal remedies to regain control of property); *United States v. Caldwell*, 989 F.2d 1056, 1058-60 (9th Cir. 1993) (defrauding government under § 371 requires use of deceptive or dishonest means); *United States v. Murphy,* 809 F.2d 1427, 1431-32 (9th Cir. 1987) (failure to disclose something that one has no independent duty to disclose is not conspiracy to defraud, even if it impedes the IRS); *United States v. Heinze*, 361 F. Supp. 46, 50 (D. Del. 1973) (dismissing conspiracy to defraud for failing "to adequately apprise the defendants of the nature of the accusation against them with reasonable certainty"). *Accord Haas v. Henkel*, 166 F. 621, 626 (C.C.S.D.N.Y. 1909), *aff'd*, 216 U.S. 462 (1910) (in deciding whether an act constitutes a fraud against the United States, courts "should not be induced, by our contempt for or indignation for such conduct as set forth in the indictments, to turn it into a crime if it is not one.").

Ms. Stewart is entitled to dismissal of Count One because it is impermissibly vague and thus violates her Fifth Amendment right to be tried only on charges returned by a grand jury and not on charges later determined by the government to be used as grounds for trial and conviction. *Russell*, 369 U.S. at 770-771; *United States v. Silverman*, 430 F.2d 106, 110 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971) (noting that the function of specificity in an indictment is to prevent the "prosecutor from modifying the theory and the evidence upon which the indictment is based"); *see also United States v. Piccolo*, 696 F.2d 1162, 1172 (6th Cir. 1983), *cert. denied*, 466 U.S. 970 (1984) (reversing a conspiracy conviction and discussing the dangers of proceeding on an indictment that lacks "a specific theory of conspiracy" when it comes to such issues as the admission of co-conspirator's testimony and jury instructions).

In this case, the United States charges it has been defrauded of its right "in the administration and enforcement of Special Administrative Measures." SAMs are authorized by 28 C.F.R. § 501.3. This regulation says nothing about regulating the practices of attorneys, and there is no mention of subjecting attorneys to the SAMs' regime. SAMs are a form of administrative adjudication against inmates who are uniquely named as those entitled to seek administrative relief from them. 28 C.F.R. § 501.3(e). We discussed this issue in our initial papers, Stewart MTD at 71-75 and Stewart Reply at 37-40, and incorporate those points and authorities by reference here. They take on new meaning in light of the novel approach taken by the government in the superseding indictment.

This case revolves around affirmations drafted by prosecutors who are not subject to any of the administrative process that applies to SAMs. These prosecutors, as the evidence before the Court has shown, were the very ones involved in prosecuting Sheikh Abdel Rahman. They were Ms. Stewart's adversaries. Their dictates are not entitled to the dignity that may attach to Congressional enactments, administrative rules fairly arrived at, regulatory adjudications, or judicial orders.[78]

[78] A close analogy is the warrant requirement of the Fourth Amendment, which Justice Jackson classically spoke of in these terms:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be

The President and his minions in the Executive Branch have no power to regulate the practice of law,[79] or to arrange the system of confinement and attorney access to meet their needs and without judicial supervision or Congressional authorization.[80] Justice Powell addressed this

---

> decided by a judicial officer, not by a policeman or Government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14 (1948) (quoted in *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971)).

[79] *See supra* Section I.C – I.C.1.

[80] *See infra* Section VII.B. This is the case even in a time of war and as applied to an alleged enemy combatant. *See Padilla v. Rumsfeld*, ___ F.3d ___, 2003 WL 22965085 at *21-23. Of course, no state of war existed at the time of the conduct alleged against Ms. Stewart and she is not accused of being an enemy combatant. The *Padilla* court provided this analysis of Executive power even in extreme circumstances:

> Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). . . . when the Executive acts, even in the conduct of war, in the face of apparent congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts. *See Youngstown* [*Sheet & Tube Co. v. Sawyer*], 343 U.S. [579] at 638 [(1952)] (Jackson, J., concurring).
>
> These separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere. The Supreme Court has long counseled that while the Executive should be "indulged the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society," he enjoys "no such indulgence" when "it is turned inward." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring). This is because "the federal power over external affairs [is] in origin and essential character different from that over internal affairs," and "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." [*United States v.*] *Curtiss-Wright* [*Export Corp.*], 299 U.S. [304] at 319, 320 [(1936)].

Id. at *21-22.

issue in *United States v. United States District Court*, 407 U.S. 297, 313-14 (1972) (internal citation omitted):

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'

The facts that (1) SAMs are not addressed to lawyers, (2) affirmations are not part of the SAMs process, (3) there is no statutory authorization for prosecutors to draft documents purporting to regulate lawyer behavior ramify into several consequences. Certain of these consequences are discussed at Section VII.B, *supra*, and *infra* Section V.A (showing that the SAMs affirmations violate separation of powers principles, and are otherwise invalid, and that Count One fails to state an offense.). For the present, it suffices to note that the alleged object of the fraud is not defined in any statute, administrative order or rule, or judicial order. There is no tort of disobeying a United States Attorney.[81]

VI. COUNTS ONE AND FOUR ARE IMPERMISSIBLY MULTIPLICITOUS

Counts One and Four charge conspiracies under 18 U.S.C. § 371 that are upon examination the same conspiracy (or one conspiracy wholly included within another) and are

---

The Thornburgh Memo/Reno Rules cases also add to this analysis, *see, e.g., United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998) (U.S. Attorney General lacks authority to supersede Missouri Supreme Court rule regarding attorney's contact with parties represented by another attorney). This point is discussed more fully *infra* Section VII.B.

[81] *See also* the discussion I.C.1, *supra*, of the now well-settled law that prosecutors do not have the power to compel evidence without participation of the grand jury.

therefore multiplicitous in violation of FED. R. CRIM. P. 8(a) and the double jeopardy clause. *See authorities cited supra* section III.

The introductory material, the overt acts, the paragraphs incorporated by reference, and the conduct alleged to have constituted and furthered each of these two conspiracies are substantially the same.[82] Sheikh Abdel Rahman is alleged in each to be a co-conspirator, although in Count Four it is difficult to know which conspiracy he is said to be a member of : the Count Four § 2339A conspiracy, or the Count Two § 956 conspiracy, or the conspiracy in Count One.

An indictment is multiplicitous when it "charges in separate counts two or more crimes, when in law and fact, only one crime has been committed." *Holmes*, 44 F.3d at 1153-54. In the instance, as here, of separate counts each drawn under the same statute, charging the same conspiracy, but with the counts alleging different illegitimate conspiratorial goals, the governing rule is set out in *Braverman v. United States*, 317 U.S. 49, 53-54 (1942):

> [W]hen a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy that the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one… The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, s 37 of the Criminal Code. For such a violation only the single penalty prescribed by the statute can be imposed.

[82] Count One (¶¶28-30(ii)) incorporates ¶¶1-27 for a total of 65 paragraphs. Count Four (¶¶36-39(a)) incorporates ¶¶1-27, 30(a)-30(ii), and 33(b)-33(h) for a total of 74 paragraphs. Count one is almost completely realleged in Count Four. Paragraphs 28-30, exclusive to Count One, are made up of a referencing paragraph, a charging paragraph, and an introductory paragraph to the Overt Acts section, respectively. Paragraphs 33(b)-33(h) in Count Four are substantive and also included in Count Two.

In the Second Circuit, to determine whether two charged conspiracies amount to the "same offence" for double jeopardy purposes, a variety of factors are to be considered. These were reviewed and catalogued in *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir.1985):

> (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

See also United States v. Macchia, 35 F.3d 662 (2d Cir. 1994) (collecting cases and reviewing factors).

Although these considerations have most generally been applied to successive prosecutions, "[i]t would seem apparent that if the state cannot constitutionally obtain two convictions for the same act at two separate trials, it cannot do so at the same trial." *Grimes v. United States*, 607 F.2d 6, 17-18 (2d Cir. 1979) (quoting *O'Clair v. United States*, 470 F.2d 1199, 1203-04 (1st Cir. 1972), *cert. denied*, 412 U.S. 921 (1973)).

Applying the *Korfant* factors to Counts One and Four demonstrates that the two conspiracies charged amount to the same offense. Participants, time, scope and interdependence all speak to a single result – one offense. The Count Four conspiracy, although adding the aim of facilitating (providing "material support" for) a violation of 18 U.S.C. § 956, completely overlaps Count One.

Albernaz v. United States created an exception to the *Braverman* rule:

> If the offenses charged are set forth in different statutes or in distinct sections of a statute, and each section unambiguously authorizes punishment for a violation of its terms, it is ordinarily to be inferred that Congress intended to authorize punishment under each provision.

United States v. Marrale, 695 F.2d 658, 662 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983) (citing *Albernaz*, 450 U.S. at 336).

The *Albernaz* exception, however, does not apply here. Title 18 U.S.C. § 371 can in no sense be said to "unambiguously" authorize separate punishment for a single conspiracy that violates both the "defraud the United States" and "commit any offense against the United States" provisions. *See United States v. Rosenblatt*, 554 F.2d 36, 40-42 (2d Cir. 1977).

A review of the pertinent legislative history leads to the same result. As the Ninth Circuit explained in discussing this exact point: "[a]lthough there is no helpful legislative history, the two clauses [of § 371] should be interpreted to establish alternate means of commission, not separate offenses." *United States v. Smith*, 891 F.2d 703, 712 (9th Cir. 1989), *amended as to form of opinion only*, 906 F.2d 385 (9th Cir. 1990), *cert. denied*, 498 U.S. 811 (1990). The court emphasized, "[i]t would be strange to infer that Congress intended to punish twice a conspiracy that violates both clauses. Where a single criminal statute prohibits alternative acts, courts should not infer the legislature's intent to impose multiple punishment." *Id*.

In the Second Circuit, although the government may simultaneously prosecute the same conduct under both clauses, "the government may not obtain two convictions or punish the defendant twice for the same conduct by alleging violations of both the defraud and offense clauses of the conspiracy statute." *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir. 1991). In *Bilzerian*, the court allowed a § 371 prosecution under separate counts where multiple and different schemes and conspiracies were alleged.

The ultimate consideration is as set out by the Second Circuit in a case raising double jeopardy considerations fundamentally similar to those here: "doubt will be resolved against turning a single transaction into multiple offenses." *Grimes*, 607 F.2d at 24 n.6 (quoting

Simpson v. United States, 435 U.S. 6, 15 (1978)[83] (quoting *Bell v. United States*, 349 U.S. 81, 84 (1955)).

Here, the indictment seeks to charge a single conspiracy under multiple counts. Counts One and Four are, therefore, multiplicitous and must be dismissed.

VII. COUNTS SIX AND SEVEN MUST BE DISMISSED BECAUSE THEY FAIL TO STATE AN OFFENSE

Lynne Stewart has moved this Court for an Order dismissing Counts Six and Seven of the indictment because they fail to state an offense and, accordingly, this Court lacks subject matter jurisdiction over their prosecution.

Count Six of the superseding indictment does not materially differ from Count Five of the indictment as returned originally. Count Six alleges that Lynne Stewart violated 18 U.S.C. § 1001 in connection with the statements she made in an "affirmation" dated "in or about May 2000." Ind. ¶43. Count Seven is, however, new. It states the same offense but with respect to an "affirmation" dated "in or about May 2001." Ind. ¶45. The affirmations were drafted and proffered to Ms. Stewart by the United States Attorney's Office to regulate her communications with her client, Sheikh Abdel Rahman. In fact, these are not the only affirmations that Ms. Stewart signed. She executed five attorney affirmations. The first one is dated May 7, 1998. The second one is dated May 16, 2000, and is the subject of Count Six of the indictment. The third one is dated May 7, 2001, and is the subject of Count Seven of the pending indictment. The fourth one is dated October 8, 2001 and the final one is dated January 9, 2002. The indictment makes no allegations about any purported violations other than regarding the May 2000 and May 2001 affirmations.

[83] While not affecting the jeopardy analysis here, *Simpson* was superseded by statute as stated in: *Payne v. United States*, 1997 WL 164298, at *3 (S.D.N.Y., Apr. 8, 1997).

In our initial moving papers directed to the now superseded indictment we argued that the prosecution of the allegations directed to the 2000 affirmation could not be maintained because: (1) there exists no basis in statute, regulation or other authority for the imposition of an affirmation on Sheikh Abdel Rahman's counsel, much less any authority to punish criminally any purported violation by legal counsel of such an affirmation, Stewart MTD at 67; (2) the affirmations at issue violated Ms. Stewart's *constitutional* rights to represent her client and practice her profession on pain of relinquishing her personal rights to freedom of speech and expression as guaranteed by the First Amendment; that the affirmation's purported attempt to limit Ms. Stewart's ability to provide zealous representation to her client constituted an unconstitutional violation of the client's right to counsel as guaranteed by the Sixth Amendment, Stewart MTD at 68; and (3) the affirmation's limitation of Ms. Stewart's ability zealously to represent Sheikh Abdel Rahman constituted a Due Process violation of her protected liberty and property interests in practicing her profession as a lawyer. Stewart MTD at 69. These arguments apply with equal force to Counts Six and Seven of the pending indictment and we incorporate them in this motion as if fully re-stated here.[84]

Counts Six and Seven constitute a blunderbuss attack on a lawyer for the tactical decisions she made during the course of a legal representation. As a result of the September 29, 2003 evidentiary hearing, we now know that the affirmations that form the basis for these counts were moves in a complex game of chess being played out by the government. They were not presented to Ms. Stewart for the purposes of "protect[ing] persons against the risk of death or serious bodily injury." 28 C.F.R. § 501.3(a) (1997). Rather, they were presented to Ms. Stewart for the purposes of prosecuting her with their violation. Thus, with hindsight we know that there

[84] We also adopt the arguments presented previously by amicus curiae National Association of Criminal Defense Lawyers.

was no colorable authority for their issuance. *See United States v. Barra*, 149 F.2d 489, 490 (2d Cir. 1945). We also note that Mr. Fitzgerald's testimony establishes, (a) the government had overlooked alleged SAMs affirmation violations when it wished to, and (b) the government issued affirmations precisely so they could be violated as part of an intelligence operation.

In light of these facts, we are compelled to raise again a constitutional challenge to affirmations. We recognize that this Court has held that Ms. Stewart's constitutional challenges to the SAMs are not a defense to any of the counts in the initial indictment and that the teaching of *United States v. Dennis*, 384 U.S. 855 (1966), and its progeny foreclosed her from signing the document and then attempting to attack the government's authority to require it in the first instance. *Sattar*, 272 F. Supp. 2d at 372-73. Nonetheless, the superseding indictment's new attack on all aspects of Ms. Stewart's representation of Sheikh Abdel Rahman dictates that we argue why the requirements of *Dennis* and its progeny are not applicable.

We first note that the law of the case doctrine does not state an absolute.[85] "[W]hile it informs the court's discretion, [it] does not limit the tribunal's power." *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (quoting *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991); *see also United States v. Lo Russo*, 695 F.2d 45, 53 (2d Cir. 1982), *cert. denied*, 460 U.S. 1070 ("whether the case *sub judice* be civil or criminal[,] so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so") (internal quotation marks and citation omitted); *Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980) ("we have many times said that the doctrine of the law of the case is not an inexorable demand but a rule of practice"). Additional authority for this proposition includes: *Slotkin v. Citizens Casualty Co.*,

[85] We also address Law of the Case *supra* Section I.A.

614 F.2d 301, 312 (2d Cir. 1979), *cert. denied*, 449 U.S. 981 (1980); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 274 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 135 (2d Cir.), *cert. dismissed*, 352 U.S. 883 (1956); *Doe v. New York City Dep't of Social Services*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983); *United States v. Cirami*, 563 F.2d 26, 33 n.6 (2d Cir.1977).

Dennis, *Bryson v. United States*, 396 U.S. 64 (1969) and their progeny do not apply to an attorney acting pursuant to the requirements of Rules of Professional Responsibility that require zealous advocacy in connection with a legal representation. None of these cases involve such facts, and lawyers' special status has long been recognized. As we discussed *supra* Sections I.C – I.C.1, lawyers' conduct is governed by the Courts using the Rules of Professional Responsibility (or Model Rules) adopted by the highest court of the jurisdiction(s) in which an attorney is licensed.

Ms. Stewart was presented with a choice: (1) obey her duty to the disciplinary rules and thus her client, or (2) obey whatever duty she may have had to the government as a result of signing the affirmations. Such a choice is necessarily informed by the fact that there was an articulable basis in the law for believing that the affirmations wer not enforceable or, if enforceable, were sanctionable only on pain of losing access to one's client (who, it is alleged, wanted his views to be known). As such, she cannot as a matter of law be found to have willfully violated the false statement statute with respect to the attorney affirmations. We make this argument explicitly without asking the court to rule on the general issue of fact, which we reserve the right to present to the jury.

Additionally, this attempt by the executive to impose upon an attorney an affirmation that limits the scope of professional representation violates the separation of powers doctrine. This is

particularly so where the purported authority to proscribe attorney conduct is nothing more than the general regulatory authority of the Attorney General to issue SAMs. Attorneys are officers of the court and, as such, their conduct is not subject to *sua sponte* limitation by the executive branch. In a similar vein, the issuance of the attorney affirmations directed to Ms. Stewart is flawed because there was no adversarial procedure. The affirmation was drafted by her adversary without any neutral or detached review.

A. Lawyers Constitute A Special Class of Litigant

1. The Requirements of *Dennis* and Its Progeny Do Not Apply to Lawyers; Lawyers Can Violate a Rule and Subsequently Challenge the Rule's Constitutionality

In its July 22, 2003 ruling, this Court held that Ms. Stewart "cannot challenge the legitimacy of the SAMs or the Government's action requiring the May Affirmation in which she agreed to abide by them as a defense to conspiring to defraud the Government or to make a false statement in violation of 18 U.S.C. § 1001." *Sattar*, 272 F. Supp. 2d at 372 (footnote omitted). In reaching this conclusion the court relied on *Dennis*, 384 U.S. 855, *Bryson*, 396 U.S. at 68, and *United States v. Knox*, 396 U.S. 77, 79 (1969). None of these cases involved conduct by a lawyer, much less a lawyer whose alleged criminal conduct arises during the course of and for the purposes of furthering her professional representation of a client. In *Dennis*, four of the six defendants were union officers. The other two were union members, but not officers. *Dennis*, 384 U.S. at 858. In *Bryson*, the defendant was also a union officer. *Bryson*, 396 US at 67. And in *Knox*, the defendant was in the gambling business and the false statements at issue involved the number of employees he had working for him who accepted bets on his behalf. *Knox*, 396 U.S. at 78.

We have been able to find no other reported criminal prosecutions where the rules established by *Dennis*, *Bryson* and *Knox* were applied to lawyers prosecuted for criminal conduct when acting within the context of a legal representation and in furtherance of that representation. In the only reported decisions where these principles are espoused as the basis for an action against an attorney, the facts are significantly different and readily distinguishable from the present indictment.

By contrast, in facts remarkably similar to the attorney affirmations at issue in Counts Six and Seven, the Seventh Circuit held that an attorney can contest the constitutionality of a court rule in disciplinary proceedings addressing his violation of that rule. In *United States v. Oliver*, 452 F.2d 111 (7th Cir. 1971), a criminal defense attorney was charged with violating a "policy statement" promulgated by the United States District Court for the Northern District of Illinois and one of the ABA Canons of Professional Ethics, both of which related to extra-judicial comments by attorneys regarding pending litigation. *Id.* at 112. The district court found that Oliver violated both the policy statement and the Canon and warned him that "any future misconduct similar to that here reprimanded shall subject him to disbarment." *Id.* (internal quotations omitted). Oliver conceded in the trial court "that he had knowledge of the policy statement at the time of the conduct charged and that he knowingly violated it." *Id.* The Seventh Circuit said that "the threshold issue [was] whether Oliver may challenge the validity of the rule he violated." *Id.*

The government, relying on *Walker v. City of Birmingham*, 388 U.S. 308 (1967) and *United States v. United Mine Workers*, 330 U.S. 258 (1947), argued that the court's rules must be obeyed until abrogated by some non-violative action that contested their validity. *Oliver*, 452 F.2d at 113. The Seventh Circuit disagreed, holding that "this case is not governed by the

injunction cases and . . . Oliver may properly challenge the validity of the district court's policy statement." *Id*. at 114. Finding that the policy statement violated the First Amendment, the Seventh Circuit reversed the district court's discipline of Oliver. *Id.* at 115.

Both the Third and Fourth Circuits have ruled in accord with *Oliver*, allowing attorneys to test the constitutionality of rules they violated. *See Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.) (*en banc*), *cert. denied*, 371 U.S. 888 (1962) (allowing attorney to challenge validity of rule-making of policy he allegedly violated), *overruled on other grounds*, *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985); *In re Morrissey*, 996 F. Supp. 530, 536 (E.D. Va. 1998), *aff'd*, 168 F.3d 134 (4th Cir. 1999), *cert. denied*, 527 U.S. 1036 (1999) ("it is settled that a lawyer may challenge the constitutionality of a rule in a proceeding to determine whether he has violated it").

Ms. Stewart stands in the same position as Oliver. She is charged with having knowingly violated an agreement with the United States Attorney's Office that purported to regulate her conduct as a lawyer. That is akin to a court-made rule of general applicability governing the practice of lawyers in its courts.[86] She should be permitted to contest its validity and constitutionality as a defense.

2. <u>As the Prosecutors Now Admit, Lynne Stewart's Violation of the Attorney Affirmation Constituted An Act of Open Defiance as a Predicate to Testing Its Validity</u>

Ms. Stewart's conduct demonstrated "open defiance," which was an issue not before the Court in the last round of motions. Now the record is enhanced. Count One of the indictment alleges a conspiracy to defraud. It also alleges that Ms. Stewart "released a statement to the

[86] The situation presented when a court issues a gag order or similar case-specific directive to a lawyer, or lawyers practicing before it is different. We discuss this distinction below. *See generally, United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995).

press" (Ind. ¶ 30(r)) and that in a telephone conversation she said that she would not be able to "hide" the fact that she issued a press release (Ind. ¶ 30(s)).

Ms. Stewart, according to the government's own version of events at the September 29, 2003, hearing did not scheme in secret to violate her agreement with the prosecutors. Rather, she acted publicly and in her own name, in a public forum, and then acknowledged to others that she would not be able to hide her conduct. Because she knows how the press works, she must therefore have understood that she was not hiding her conduct. Her alleged act was one of open defiance, just as if she marched in a parade after being denied a permit, or refused to honor a subpoena. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (petitioner's conviction cannot stand where petitioner violated an unconstitutional statute prohibiting him from marching); *United States v. Ryan*, 402 U.S. 530, 532 (1971) (respondent may refuse to comply with subpoena in order to test its burdensomeness or unlawfulness via contempt litigation). She is entitled, therefore, to test the validity of the affirmations. *See also United States v. Eichman*, 496 U.S. 310, 319 (1990) (invalidating convictions for burning the flag on the steps of the U.S. Capitol to protest the government's domestic and foreign policies and in Washington State to protest passage of the Flag Protection Act of 1989.)

In essence, what the government has done is criminalize a lawyer's failure to keep a bargain with a prosecutor – a bargain that the prosecutor in fact never had authority to enforce.[87] Counts Six and Seven are alleged false promises to keep bargains made with the prosecutors that

[87] *See supra* note 100.

the prosecutors were never entitled to make. These counts perhaps state a violation in contract, but they do not state a criminal offense. [88]

B. The Attorney General's Requirement That Stewart Sign an Attorney Affirmation Before Allowing Her To Communicate with Her Client Constitutes an Unconstitutional Violation of the Separation of Powers

Ms. Stewart was at all times relevant to this indictment legal counsel to Sheikh Abdel Rahman. Although his conviction was final and the Supreme Court had denied his petition for certiorari, Ms. Stewart continued to provide valuable counsel to him on such matters as conditions of confinement and possible means to secure an early release, transfer or other change in his incarceration. Therefore, she assumed "a dual role as a zealous advocate and as an officer of the court." *United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003) (quoting *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977)).

Her conduct is subject to regulation by the Supreme Court of the State of New York, Appellate Division, First Department and the Rules of Professional Conduct that have been adopted by that court. *See* 22 NYCRR § 1200.1, *et seq*. Her conduct would also be subject to regulation by the order of any court in which she might appear or where she is otherwise properly subject to such court's jurisdiction.

She is not subject to regulation by her adversaries. It is not the province of the executive branch in the voice of a prosecutors' office to circumscribe how she performs her professional duties including how she relates to or communicates with her clients, even in the context of a SAM imposed on her client pursuant to regulation. It is the Court, and not the Attorney General,

[88] If the Court adheres to its view that the § 1001 counts state an offense, then of course we must try all issues to a jury. Even if the Court takes that view, however, the § 371 allegations cannot stand.

to whom Ms. Stewart must be answerable. *See*, discussion of the Thornburgh Memo and Reno Rules in which DOJ unsuccessfully attempted to exempt its prosecutors from local Rules of Professional Responsibility, *supra* Section I.C.1; *McDonnell*, 132 F.3d 1252; *Lopez*, 765 F. Supp. at 1446.

The Constitution circumscribes and defines the respective functions of each branch of government. *INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II and III exemplifies the concept of separation of powers. . . ."). It "entrusts the ability to define and punish offenses against the law of nations to the Congress, not the Executive." *Padilla*, 2003 WL 22965085, at *14 (citing *United States v. Arjona*, 120 U.S. 479, 483 (1887)). The Attorney General does not have the power to establish a scheme for punishing attorney conduct. That power is reserved to the Congress in its legislative capacity and to the Courts in their supervisory capacity.

The New York Rules of Professional Conduct provide that

> (a) A lawyer shall not intentionally:
>
> > (1) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules, except as provided by subdivision (b) of this section. A lawyer does not violate this disciplinary rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
> >
> > (2) Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under sections 1200.15, 1200.21 and 1200.24 of this Part.
> >
> > (3) Prejudice or damage the client during the course of the professional relationship, except as required under section 1200.33(b) or as authorized by section 1200.15 of this Part.

> (b) In the representation of a client, a lawyer may:
>
> (1) Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.
>
> (2) Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

22 NYCRR § 1200.32 [DR 7-101].

The Rules further provide that a lawyer shall not "violate a disciplinary rule." 22 NYCRR § 1200.3(a)(1). Violations are subject to sanction by the Court. N.Y. Judiciary Law § 90(2) (McKinney's 2003) ("[t]he supreme court shall have power and control over attorneys and counsellors-at-law . . . and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct. . . .").

There is no allowance in this regulatory scheme for regulation by the Executive Branch. Thus, for example, when defense counsel for a suspected terrorist held in pretrial detention objected to executing an attorney affirmation that purported to regulate his conduct and that of the investigators and paralegals on his staff with respect to the client, the court not only modified many of the government's proposed restrictions but moved them all out of the SAM, refused to require the attorney to execute an affirmation, and instead made defense counsel subject to a protective order of the Court. *United States v. Ujaama*, No. CR02-0283R (W.D. Wash., Dec. 2, 2002) (protective order entered by Hon. Barbara Jacobs Rothstein).[89] *See also Reid*, 214 F.

[89] Unlike Ms. Stewart, the defense attorneys representing Ujaama were on notice that the Justice Department would prosecute criminally violations of attorneys affirmations executed in connection with SAMs. Thus, they approached the court and asked her to rule in advance that there was no basis for their imposition.

Supp. 2d at 92-96, (refusing to require defense counsel to sign an affirmation before communicating with a client also held in pretrial detention).

In sum, there is no federal or state statute, regulation or judicial decision that permits prosecutors to regulate the professional duties of their adversaries. There is no provision in the statute or regulations that authorizes issuance of an attorney affirmation in connection with a SAM, and there is no authority for criminal sanction for any violation of such an affirmation.

SAMs are directed at inmates. The very issuance of the SAMs themselves is flawed in the context of applying them to persons not in the custody of the Bureau of Prisons. The decisional process is dominated by the prosecutors, FBI and other law enforcement agents, and correctional personnel from the Bureau of Prisons. There is no adversary procedure, and the SAMs themselves rely on prosecutors and FBI agents as the principal sources of information and power. As Professor John Coffee said in an analogous context – involving the Office of Thrift Supervision's attack on the Kaye Scholer law firm – in the "traditional administrative law model . . . a supposedly disinterested party (the ALJ) is interposed between the enforcement agency and the remedy it desires." Quoted in Combs, 82 CALIF. L. REV. at 703 n.279 and accompanying text. Here, the SAMs were issued and placed into a system devoid of any legitimate checks and balances. *See* Stewart MTD at 65-78.

Attorney affirmations or acknowledgements are, as the indictment alleges, demanded by prosecutors in connection with SAMs. This indictment has now presented an absurdity never before seen in federal criminal law. The decision to impose SAMs, made unilaterally by one's adversaries, purports to provide the authority for the decision to impose an attorney affirmation on the mouthpiece.

When Bruce Cutler violated a gag order in connection with a prosecution of John Gotti in the Eastern District of New York, he was convicted of misdemeanor criminal contempt and placed on probation. The United States District Court for the Eastern District of New York suspended him from practice for 180 days. The court of appeals invoked the collateral bar doctrine to foreclose judicial review of the gag order he violated. Nonetheless, because his offense consisted of speech, and despite the collateral bar doctrine, the court of appeals reviewed the propriety of enforcing the gag order under the First Amendment. *Cutler*, 58 F.3d at 832-34. That was, of course, a judicial order, and the collateral bar rule applies to such orders, subject to exceptions.

One such exception is *Maness*, where the issue was "whether a lawyer may be held in contempt for advising his client, during the trial of a civil case, to refuse to produce material demanded by a subpoena *duces tecum* when the lawyer believes in good faith the material may tend to incriminate his client." *Maness,* 419 U.S. at 458. The Court held that a lawyer as "an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony." *Id.* at 468. The conclusion of *Maness* evolved from *In re Watts*, 190 U.S. 1, 29 (1903), which held that "if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment." Justice Marshall addressed this issue in a dissent from the Court's denial of a certiorari petition involving a lawyer's advice to his client that he had a privilege not to submit to a breathalyzer test. Justice Marshall believed the conviction should have been reviewed because the lower court "made no finding that the advice was given in bad faith." *Davis v. Goodson*, 459 U.S. 1154, 1154-55 (1983) (Marshall, J., dissenting).

In *In re Mann*, 311 F.3d 788 (7th Cir. 2002), *cert. denied*, ___ U.S. ___, 124 S. Ct. 68 (2003), the court relied on *Maness* for the proposition that "[a] lawyer may advise a client to disobey a judicial order when that step is essential to secure appellate review." *Id.* at 790. It failed to excuse a lawyer who refused to obey a court-ordered monetary sanction, but recognized that had she proffered some "extenuating circumstance" such as financial hardship, her non-compliance might have been excusable. *Id.* Thus, lawyers are a special breed even with respect to judicial orders.[90]

There are other established exceptions to the collateral bar rule. The violator of a judicial order can challenge its validity if the issuing court had no jurisdiction. *See, e.g., In re Green*, 369 U.S. 689, 692-693 (1962) (labor injunction by state court pre-empted); *Ex parte Fisk*, 113 U.S. 713, 718 (1885) (when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void"); *In re Providence Journal Co.*, 820 F.2d 1342, 1347 n.29 (1st Cir. 1986) (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)). Some courts have also carved out an exception for court orders that are "transparently invalid." *In re Providence Journal Co.*, 820 F.2d at 1346-1347 & nn.18, 30 (citing *Walker*, 388 U.S. at 320-321). *See Martin v. Wilkes*, 490 U.S. 755, 790 n.28 (1989) (Stevens, J., dissenting) (collateral bar rule does not apply if the order violated was transparently invalid); *United States v. Dickinson*, 465 F.2d 496, 509-10 (5th Cir.1972) (recognizing exception to collateral bar rule for transparently invalid orders); 3A Wright, King & Klein, FEDERAL PRACTICE & PROCEDURE § 702 at 435 n.17 (2004) (same).

[90] Arguments have also been made that the *Maness* exception should be available in the First and Fourth Amendment contexts as well. *See* R. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 AM. U.L. REV. 323, 355-56 (1988); Rendleman, *More on Void Orders*, 7 GA. L. REV. 246 (1973).

The current prosecution of Ms. Stewart stands in sharp contrast to these authorities. Lynne Stewart has allegedly violated a letter agreement with prosecutors. The agreement was drafted by her adversaries. For this alleged act, she faces more than a decade in prison. Something is wrong with a picture that gives prosecutors the unregulated power to issue orders that are punishable in this way.

As Judge John R. Brown explained in *Dickinson*, 465 F.2d at 510 (citations omitted), judicial orders are different:

> Admittedly, the inviolability of court orders, typified by the *Walker* rule, is unique among governmental commands. When legislators or executive agencies-State or Federal-have transgressed constitutional or statutory bounds, their mandates need not be obeyed. Violators, or course, risk criminal sanctions if their prediction of illegality should fail, but if the directive is invalid, it may be disregarded with impunity. . . . In fact, in certain situations, intentional disobedience to the statute may be the only means of obtaining a judicial determination of its constitutionality. . . . Similarly, "one cannot be punished for failing to obey the command of a [police] officer if that command is violative of the Constitution." . . . .
>
> Likewise, disobedience to a Congressional demand for information cannot be punished as contempt of Congress if the demand was constitutionally infirm[91]. . . . And obviously, refusal to submit to an order of induction into the armed forces is not punishable where the order issued in violation of the inductee's constitutional or statutory rights.

In *Dickinson*, which involved a judge's order, the court of appeals nonetheless vacated the contempt judgments and remanded the case so that the district judge could reflect on whether he was wrong in issuing an order that flatly violated the First Amendment. *Id.* at 514.

To continue the analogy, suppose in Bruce Cutler's case that the defense lawyers had received a letter from the prosecutors asking them to agree not to hold press conferences that

[91] Judge Brown cites *Watkins v. United States*, 354 U.S. 178 (1957). *Watkins* also holds that one may resist a congressional subpoena and not be punished under 2 U.S.C. § 192 (contempt of Congress) if the congressional committee is exceeding its authority. This was indeed a powerful and consistent basis for reversing contempt of Congress convictions.

might prejudice the fair administration of justice. Suppose further that the defense lawyers agreed, but then later some outrageous government conduct spurred them to make press statements. Can the prosecutors get a grand jury indictment, claiming that they have been defrauded of some right they possess? Where would they find such a right? It is not in any statute, regulation, or rule. This stretches the already lamentable "quasi-judicial function" that some prosecutors have assumed for themselves to unprecedented lengths. *See also*, G. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2128 (1998).

For the reasons discussed in *Coolidge*, 403 U.S. at 450 and *United States District Court*, 407 U.S. at 315-16, prosecutors as adversaries are unsuitable receptacles for such a power over defense lawyers. If the President and the Attorney General cannot be trusted to take over the magistrate's job under the Fourth Amendment, why should Assistant United States Attorneys think they should have that job? Even when foreign intelligence is at issue, a special court at least reviews the warrant applications.

Put simply, United States Attorneys do not have colorable jurisdiction to issue orders that regulate law practice by defense counsel. They lack that power because they are not the legislative branch, and also because even their boss, the Attorney General, cannot devise and apply rules that override lawyer's obligations as defined by state law.[92] A generation of lawyers ago, it was common practice for a prosecutor to issue "office subpoenas" to compel a witness to appear in the prosecutor's office for what was essentially an interview. When finally challenged, courts roundly rejected this prosecutorial abuse of the judicially supervised grand jury process.

---

[92] *See* the discussion *supra* Section I.C.1, of the Thornburgh Memo and Reno Rules. It is also worth noting that the orders or agreements issued here are not statutes or regulations, but are rather what the leading legal positivist John Austin would call individually-addressed commands. Analogies to invalid orders are thus more apt than to cases involving statutory or regulatory duties. *See* Tigar and Tigar, *supra* n.4.

See, e.g., United States v. Elliott, 849 F.2d 554, 557 (11th Cir. 1988) (it is alright for a prosecutor to interview a witness before his grand jury appearance; "[t]he court's subpoena power may not, however, be used by the United States Attorney's office as part of its own investigative process"); *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1976) (the United States Attorney "may not use his subpoena powers under Rule 17 to gather evidence without the participation of the grand jury"); *United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir.), *cert. denied*, 429 U.S. 1038 (1976) (characterizing the government's issuance of a "forthwith" grand jury subpoena for the purpose of facilitating questioning in the United States Attorney's office a "misuse" of the grand jury subpoena and pointing out that Rule 17 of the Federal Rules of Criminal Procedure does not authorize the use of grand jury subpoenas as a ploy for an office interview); *United States v. Miller*, 500 F.2d 751, 757-758 (5th Cir. 1974), *rev'd on other grounds,* 425 U.S. 435 (1976) (reversing a conviction for failure to suppress evidence by use of a "purported grand jury subpoena, issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of [the defendant's] financial records to the government"); *United States v. Standard Oil Co.,* 316 F.2d 884, 897 (7th Cir. 1963) (trial subpoena must not command witness to appear in United States Attorney's office, or at time when court not in session).[93] *See also*, MOORE'S FEDERAL PRACTICE, § 617.02 n.9 (3d ed. 2003) (prosecutors cannot subpoena people to their office for personal interviews) (citing *United States v. Villa-Chaparro*, 115 F.3d 797, 804 (10th Cir.

[93] A leading case – one that many other courts cite – is *Durbin v. United States,* 221 F.2d 520, 522 (D.C. Cir. 1954). The discussion in *Durbin* is eloquent and blunt: "It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition." Strictly speaking, however, it also is dictum, as the court ordered the indictment dismissed on other grounds and did not make clear that it would have done the same on subpoena misuse issue alone. It is also unclear whether *Durbin* relied on a federal court's supervisory power, on the Fourth Amendment, or on the Fifth Amendment.

1997)); Holderman, *Preindictment Prosecutorial Conduct in the Federal System,* 71 J. CRIM. L. & CRIMINOLOGY 1, 7 & nn.58-61 (1980). The ABA standards for prosecutors also formally observe that the use of subpoenas to facilitate office interviews without legal authority is unprofessional conduct. ABA STANDARDS FOR CRIMINAL JUSTICE, *Prosecution Function and Defense Function*, § 3-3.1(e) (3rd ed. 1993).

When Congress wants to criminalize the investigative process and give prosecutors the power to trigger criminal liability, it knows how. For example, civil investigative demands are authorized by statute under certain limited circumstances, and obstruction of them is a crime. 18 U.S.C. § 1505. Even in that realm, there are certain circumstances in which Congress has forbidden the issuance of civil investigative demands. *See, e.g.*, 15 U.S.C. § 4014(b)(3) (no demands to targets in export investigations). In the back-and-forth negotiations that often accompany civil investigative demands, there is no statutory authority for prosecutors to issue letters demanding that lawyers promise to abide by the civil investigative demand, much less authorization for prosecuting a lawyer who changes her mind about compliance and decides to force the matter into litigation through an act of open defiance.

In the tax arena, Congress has given the IRS the authority to summons information from taxpayers and others. *See* 26 U.S.C. § 7602(a)(2). Nonetheless, Congress also provided that the IRS's summons authority would not be self-executing. In the event a person to whom a summons is directed chooses not to comply, the Commissioner of Internal Revenue must petition a court to enforce the summons. *See* 26 U.S.C. §§ 7402(b), 7604(a). Even then, the IRS must demonstrate that the summons was issued in "good faith" before enforcement will be ordered. *United States v. Powell*, 379 U.S. 48, 57-58 (1964) ("good faith" requires the IRS to demonstrate that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may

be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the [Internal Revenue] Code have been followed – in particular, that the 'Secretary or his delegate,' after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect") (internal quotations omitted).

When personal liberty is at stake, the Supreme Court requires clear congressional authorization before it will conclude that Congress intended to authorize an administrative agency action that may invade protected rights. *See, e.g., Gutknecht*, 396 U.S. at 306 (invalidating the practice of designating draft registrants as delinquent because that power, "exercised entirely at the discretion of the local board … [was] a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions"); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) ("[w]here the liberties of the citizen are involved … we will construe narrowly all delegated powers that curtail or dilute them," which in this case dealt with administrative decisions to issue or withhold passports to United States citizens), *overruled on other grounds as stated in, Regan v. Wald*, 468 U.S. 222 (1984). In *Greene v. McElroy*, 360 US 474, 506 (1959), the Court held that

> Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Such decisions cannot be assumed by acquiescence or nonaction. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to

> administrators who, under our system of government, are not endowed with authority to decide them.

Id. at 507 (citations omitted). The teaching of these cases is particularly important here, where the prosecutors seek to interfere with the conduct of their adversaries.

An analogous situation arose in *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C. Cir. 1984). There, the Treasury Department prevented a corporation that was designated as a Cuban national under the Trading with the Enemy Act ("TWEA") from enlisting its chosen attorney to act on its behalf without prior approval by Treasury. The district court held that the corporation had no capacity to retain counsel in its own name due to its TWEA designation. *Id.* at 869. The D.C. Circuit reversed, finding that "requiring a government license prior to obtaining counsel, would trench on a right of constitutional dimension." *Id.* at 867. Judge Ginsburg emphasized:

> The nature and purpose of the attorney-client relationship . . . impel us to review with special care any initiative by an administrative officer to expose to licensing the very creation of that relationship. We stress particularly that, in our complex, highly adversarial legal system, an individual or entity may in fact be denied the most fundamental elements of justice without prompt access to counsel.

Id. at 872-73.

Referring to the exemption appearing in the Foreign Agent's Registration Act for lawyers, the Court explained:

> This Congressional action, when only registration was at stake, adds to our grave doubts that Congress ever entertained the notion that an executive officer might extract from highly general statutory language authority to initiate a prior license requirement governing an attorney's response to a client's request for representation.

Id. at 873.

Of course, intercepting threats that are sufficiently immediate and dangerous that they may be punished consistently with the First Amendment is a permissible object of governmental attention. *See Watts v. United States*, 394 U.S. 705, 707-08 (1969) (*per curiam*) (statute criminalizing threats against the President is valid, but "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind"). Saying this does not, however, answer the basic question that pervades our motions. Does the agency that possesses the power to intercept such threats also have the authority to make the rules and seek punishment of offenders? The answer ramifies into the issues of federalism and separation of powers discussed above.

In this case, an executive officer, then-Assistant United States Attorney Patrick Fitzgerald, exceeded his constitutional authority when he extracted from general regulatory language the purported authority to (1) regulate, limit, and punish attorney conduct and (2) define and narrow the scope of legal representation to which Ms. Stewart's client was entitled.

C. The Government's Use of Attorney Affirmations Limiting Ms. Stewart's Ability to Communicate With Her Client for the Purpose of Piling on Criminal Charges Is Constitutionally Offensive and Outrageous to a Degree That it Constitutes a Denial of Due Process[94]

The executive branch's outrageous overreaching is demonstrated by the totality of the circumstances that prevailed when the affirmations at issue were presented to Ms. Stewart. The government makes no complaint in this indictment about Ms. Stewart's conduct under the first attorney affirmation that she signed in 1998.[95] As early as February 2000 – months before the conduct complained of in the indictment – then-AUSA Patrick Fitzgerald, in consultation with

[94] We further address the implications of a due process violation *infra* Sections VIII – VIII.C.
[95] Despite repeated requests, the government has to date not disclosed its intention to present any evidence pursuant to FED. R. EVID. 404(b) that Ms. Stewart violated any of the three other attorney affirmations that she signed.

various other law enforcement officers, determined that he wanted Ms. Stewart to continue consulting with Sheikh Abdel Rahman so the government could eavesdrop on and record those conversations. *See, e.g.,* Hrg. Tr. at 74-75. The government had already obtained a FISA warrant to overhear those conversations and wanted to continue wiretapping rather than to confront Ms. Stewart with her alleged violation. *Id.* at 79. Mr. Fitzgerald presented Ms. Stewart with the attorney affirmation that forms the basis for Count Six purportedly to implement the SAM. In reliance on Mr. Fitzgerald's representations as to the proper purpose of the attorney affirmations – like others she had signed – she executed the documents, and according to the government shortly thereafter violated its terms by making a public statement.

There was nothing clandestine about Ms. Stewart's violation of the 2000 attorney affirmation. It was open and notorious, and she well-expected it was known to the Southern District prosecutors. Nonetheless, rather than confronting Ms. Stewart specifically with the specter of criminal sanction for her conduct, the prosecutors presented Ms. Stewart and her lawyer, Stanley Cohen, with another affirmation – which after three or four negotiation sessions resulted in the May 2001 affirmation that forms the basis for Count Seven.

Such conduct is nothing short of a premeditated design to pile on additional criminal charges after the government already had what it believed was the factual basis to seek an indictment. *See* Hrg. Tr. at 70-73 (Mr. Fitzgerald discussing charges under consideration). Such outrageous conduct in and of itself is a basis for dismissing count seven as a Due Process violation. *See, e.g., United States v. Russell*, 411 U.S. 423, 431-32 (1973) (outrageous government conduct may invoke constitutional principles of Due Process); *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (government conduct rising to a "demonstrable level of outrageousness" may compel acquittal on constitutional grounds). In

sum, such law enforcement conduct violates that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella v. United States*, 361 U.S. 234, 246 (1960).

The government's conduct in relation to Count Seven brings to mind the excesses feared by courts when confronted with defendants' allegations that they have been victimized by prosecutors determined to lay a "perjury trap." A perjury trap is created "when the government calls a witness . . . . for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury." *Wheel v. Robinson*, 34 F.3d 60, 67 (2d Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995) (quoting *United States v. Chen*, 933 F.2d 793, 796-97 (9th Cir. 1991)). *See United States v. Simone*, 627 F. Supp. 1264, 1268 (D.N.J. 1986) (perjury trap involves "the deliberate use of a judicial proceeding to secure perjured testimony, a concept in itself abhorrent"); *see also United States v. Catalano*, 1993 WL 183694, at *4 (S.D.N.Y. May 25, 1993); *United States v. Crisconi*, 520 F. Supp. 915, 920 (D. Del. 1981). Such governmental excesses raise the specter of a violation of the defendant's Fifth Amendment right to Due Process. *Simone*, 627 F. Supp. at 1267-1272. Alternatively, they may constitute an abuse of grand jury proceedings. *Bursey v. United States*, 466 F.2d 1059, 1080 n.10 (9th Cir. 1972) ("[i]f a court divines that the purpose of repetitious questioning is to coax a witness into the commission of perjury . . . such conduct would be an abuse of the grand jury process"); *Crisconi*, 520 F. Supp. at 920; *see generally* A. Dunlap & D. Herzog, *Perjury*, 38 AM. CRIM. L. REV. 1121, 1147 (2001) ("when a grand jury calls a defendant in order to create an opportunity for perjury and not for the purpose of assisting in an investigation, the defendant finds herself in a 'perjury trap'"); B. Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624, 683 (1981) ("[i]f, under the guise of an otherwise legitimate investigation, a prosecutor solicits testimony with the

premeditated design of indicting the witness for perjury, the grand jury is put to an unintended and inappropriate use").

The Second Circuit has discussed the "perjury trap" rationale, but has yet to be presented with an occasion in which it has been necessary to adopt or reject it as a defense. *Wheel*, 34 F.3d at 68; *United States v. Regan*, 103 F.3d 1072, 1078 (2d Cir. 1997). As in the perjury trap cases, the appropriate inquiry here is "whether the government had a legitimate basis" for presenting Ms. Stewart with the May 2001 affirmation. *See United States v. Awadallah*, 202 F. Supp. 2d 17, 43 (S.D.N.Y. 2002), *rev'd on other grounds* 349 F.3d 42 (2d Cir. 2003). At the time that Mr. Fitzgerald presented the May 2001 affirmation to Ms. Stewart, the government was fully aware of her purported violations one year earlier. They not only knew about them, but by supplying Ms. Stewart with the affirmation, they provided the only avenue by which she could have committed the alleged offense. Just as the perjury trap defense "arises out of the Due Process Clause and the principles governing grand jury proceedings" so too do the defenses Ms. Stewart presents in response to the government's outrageous conduct. *United States v. Weissman*, 1996 WL 742844, at *7 n.8 (S.D.N.Y. Dec. 20, 1996). *Cf. United States v. Moon*, 532 F. Supp. 1360, 1374 & n.17 (S.D.N.Y. 1982).

D. The Attorney General's Authority To Issue SAMs Does not Extend to Attorney Affirmations

In earlier motions, we addressed the Attorney General's improper efforts to use the SAMs and the attorney affirmations to regulate Ms. Stewart's right to represent her client and right to free speech. Stewart MTD at 65-78; Stewart Reply at 37-40. A more basic issue is the Attorney General's authority to issue the attorney affirmations in the first instance. In its ruling on the earlier motions in this case, this Court expressed the opinion – in the context of discussing whether the exception to the principles of *Dennis* and *Bryson* enunciated in *Barra*, 149 F.2d at

490, applied here – that the Attorney General's issuance of the attorney affirmations was "reasonably within the jurisdiction of the Department of Justice as a measure for effectuating the SAMs relating to Sheikh Abdel Rahman" based on two cases, *United States v. Davis*, 8 F.3d 923, 929 (2d Cir. 1993) and *United States v. Salman*, 189 F. Supp. 2d 360, 364-366 (E.D. Va. 2002). *Sattar*, 272 F. Supp. 2d at 372. The issue addressed by the courts in both *Davis* and *Salman* was whether statements by the inmate provided jurisdiction for the purposes of prosecuting a false statement charge under 18 U.S.C. § 1001. Neither discussed the inmate's right to attorney-client communications unregulated by the federal government.

The government has argued that the Attorney General's authority to issue the attorney affirmation derives from 28 C.F.R. § 501.3(a). Gov't. Opp. at 103-105. The government concedes that there is no explicit mention of the attorney-affirmation process in the regulation and argues instead that if the regulations that permit SAMs were to exclude attorneys, the SAMs' purposes could be evaded entirely. *Id.* Nowhere has the government actually addressed the lack of authority for regulating the attorney-client relationship in this context.[96] In order to understand why there is no basis for extending the regulation to attorneys, one must start with the text of the regulation itself.

Section 501.3(a) allows the Bureau of Prisons (BOP) to place "special administrative measures" upon a prisoner when a prisoner's communications or contacts pose a substantial risk of death or serious injury. The regulation at issue is the one promulgated in 1997. *See* 62 FED. REG. 33730 (Jun. 20, 1997).[97] It provides as follows:

---

[96] The government contends that "[n]o court has held that it is unlawful for SAMs to affect the conduct of noninmates," Gov't Opp. at 104, but does not directly address the lack of authority allowing the SAMs' intrusion into the attorney-client relationship.

[97] An interim rule amending the regulation was promulgated on October 31, 2001. *See* 66 FED. REG. 55062.

§ 501.3 Prevention of acts of violence and terrorism.

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury. These procedures may be implemented upon written notification to the Director, Bureau of Prisons, by the Attorney General or, at the Attorney General's direction, by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism. The inmate shall sign for and receive a copy of the notification.

(c) Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in 120-day increments upon receipt by the Director of additional written notification from the Attorney General, or, at the Attorney General's direction, from the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that the circumstances identified in the original notification continue to exist. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

62 FED. REG. at 33732.

The relationship between a criminal defendant and his lawyer is not a privilege, but a right. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Gideon*, 372 U.S. at 339-40. It lies on a different plane from normal opportunities available to a well-behaved inmate to correspond, to have visits and use the telephone. Even assuming that the subject SAMs were imposed by appropriate officials upon proper written direction, the attorney affirmations that are the subject of Counts Six and Seven are invalid at the most elemental level. Nothing in § 501.3(a) suggests it could be used to regulate any part of how a lawyer represents an incarcerated client.

In addition, the process by which § 501.3(a) was issued makes it clear that it was not intended to affect attorney-client communications. It was promulgated by the BOP on June 20, 1997 following an interim rule published on May 17, 1996. *See* 61 FED. REG. 25125 (May 17, 1996), 62 FED. REG. 33730-732 (June 20, 1997). In promulgating § 501.3, the Director was acting "pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. § 552(a) and delegated to the Director, Bureau of Prisons, in 28 C.F.R. §0.96(p)." At the time, the delegation of authority appearing in 28 C.F.R. § 0.96 read as follows:

> The Director of the Bureau of Prisons is authorized to exercise or perform any of the authority, functions, or duties conferred or imposed upon the Attorney General by any law relating to the commitment, control, or treatment of persons (including insane prisoners and juvenile delinquents) charged with or convicted of offenses against the United States, including the taking of final action in the following-described matters:
>
> (a) …
>
> (p) Promulgating rules governing the control and management of Federal penal and correctional institutions and providing for the classification, government, discipline, treatment, care, rehabilitation, and reformation of inmates confined therein (18 U.S.C. 4001, 4041, and 4042).

A rule restricting how a lawyer represents an incarcerated defendant can in no way be said either to "govern[] the control and management" of a penal institution or to provide for the

"classification, government, discipline, treatment, care, rehabilitation, and reformation" of the defendant.

The issuance of the attorney affirmations is not saved by the statutory references to 18 U.S.C. §§ 4001, 4041 and 4042. Section 4001 vests control and management of federal prisons with the Attorney General. Section 4041 merely provides that the BOP shall be under the direction of a Director appointed by the Attorney General, and 4042 authorized BOP, under the Attorney General's direction, to manage and regulate federal prisons and the inmates within.[98]

---

[98] During the years at issue the statutes read in pertinent part as follows:

18 U.S.C. § 4001:

> (a) …
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil- service laws, the Classification Act, as amended and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. § 4041:

> The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

18 U.S.C. § 4042:

> (a) In general.--The Bureau of Prisons, under the direction of the Attorney General, shall--

A delegation of administrative authority is not an expansion of authority beyond the boundaries defined by statute. There is no statutory authority for restricting the attorney-client relationship, much less for regulating how defense counsel might represent her client. Put simply: constitutionally protected attorney-client communications are not matters of prison management or administration. Because the constitutional right to counsel is at issue, BOP's power to regulate it will not be readily inferred. "[W]e will construe narrowly all delegated powers that curtail or dilute [fundamental constitutional rights]." *Kent*, 357 U.S. at 129. *See* discussion, *supra* at Section VII.B.

E. The Attorney Affirmations At Issue in Counts Six and Seven are Too Vague to Constitute a Legal Basis for Imposing Criminal Liability

Assuming, *arguendo*, that the attorney affirmations are a valid exercise of governmental power, they cannot be the basis of a criminal prosecution. Paragraph 26 of the indictment states that the affirmations provided that the attorney would "only be accompanied by translators for

---

> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
>
> (4) provide technical assistance to State and local government in the improvement of their correctional systems; and
>
> (5) provide notice of release of prisoners in accordance with subsection (b).

the purpose of communicating with inmate Abdel Rahman concerning legal matters." Paragraph 26 then recites the prohibition on "pass[ing] messages between third parties (including, but not limited to, the media) and Abdel Rahman." The issue of media communications may be set aside for separate consideration. Count One charges broadly a conspiracy to defraud the United States in the administration of the SAMs and attorney affirmations. There are two problems with the affirmation in this context. The first is one of federal executive power, and the second is one of vagueness.

The definition of "legal matters" and of legal services generally is broad, and is defined by each lawyer licensing jurisdiction. There is no room in this scenario for FBI agents and AUSAs to redefine the lawyer-client relationship, determining in their unfettered discretion which communications between lawyer and client relate to "legal matters" and which do not. For example, the indictment at paragraphs 30(j) and 30(k) alleges in part that Ms. Stewart told her client that she believed he could be released from prison if the government in Egypt were changed and that – with Ms. Stewart's alleged approval – Mr. Yousry read the client an "inflammatory" media statement by the client's alleged political ally, again presumably relating to change in the Egyptian government. Paragraph ¶30(l) of the indictment is to a similar effect, relating to a letter discussing potential political action in Egypt.

These are alleged as acts in furtherance of a conspiracy, presumably because some prosecutors have decided they do not relate to "legal matters." But prosecutors do not have the legal power to define what constitutes legal services.[99] If the lawyer concludes that reading this information to the client is necessary, that is the lawyer's decision, within the ambit of state bar rules.

[99] In addition to the discussion here, see Stewart Reply at 35-37.

For example, lawyers have represented political prisoners in various contexts. In many of these cases, it was clear that a regime change, or a change in a regime's policies, would result in people being liberated. Providing the client with information about potential regime changes, including plans that might involve illegal activity, can fall within the ambit of professional legal services. Examples where American lawyers have provided such services include their representation of political prisoners in South Africa, the former Soviet Union, France, and the United States. In South Africa, lawyers working with groups seeking release of political prisoners inevitably communicated with incarcerated people about political matters. American lawyers also visited the U.S.S.R. and worked on emigration issues for Soviet Jews, and their representation included writing articles on this subject for United States media. In France, the presidential politics of the 1970s presented a good opportunity for amnesty for some prisoners.

Of course, there are dangers in recognizing lawyer discretion in this area. But the point is that the lines, which admittedly must be drawn, are not for prosecutors to draw.[100]

Assume that prosecutors could make rules and then indict lawyers for breaking them. Assume further that in such a prosecution, the defendant could not have judicial review of the prosecutor's power to issue and enforce the rules, what we have called the "collateral bar" rule elsewhere in this Memorandum. Even then, the affirmations are so vague that they cannot be the basis for punishment. The lawyer can only talk about "legal matters" and yet cannot "pass messages." Inevitably, a lawyer is involved with many people in providing legal services. These

[100] Allowing prosecutors to draw the lines and enforce every "agreement" with defense counsel quickly leads to absurdity. Suppose a prosecutor asks defense counsel at a trial recess how much longer a cross-examination will take and the attorney responds "I just have a couple more questions." The prosecutor makes an afternoon appointment relying on that representation. When court reconvenes, defense counsel continues the cross-examination for another three hours. Should the law allow the prosecutor to enforce the "agreement"? Or bring charges against defense counsel for fraud or lying? Such outcome would be absurd.

people are "third persons." Thus, the lawyer inevitably passes messages between the client and third persons, if the terms "message" and "third persons" are interpreted according to their plain meaning. Yet the lawyer is authorized to communicate about "legal matters." There is an inherent tension here.

Taking the most difficult case we would face, it is generally held that someone subject to a judicial order must obey the order until it is set aside; that is the collateral bar rule, although as we have seen from such cases as *Maness*, 419 U.S. at 460, it does not apply to lawyers in this situation.

Even if it did, the injunctive order must be sufficiently precise. One cannot be punished for violating a vague injunction. One illustrative case is *United States v. O'Quinn*, 913 F.2d 221 (5th Cir. 1990). In *O'Quinn* a lawyer was convicted of criminal contempt for sleeping in an unused jury room during a break in a civil trial. During a heated bench conference, the judge presiding over the civil trial entered the following oral order: "[Y]ou need to stay out of the facilities up here on this floor unless you get prior permission. That's the jury room, also." The Court of Appeals reversed the contempt conviction, holding the order was too "vague and overbroad" because "there was too much doubt as to what was intended . . . to support a judgment of criminal contempt." *Id.* at 222. *See United States v. Giovanelli*, 897 F.2d 1227, 1231 (2d Cir.), *cert. denied*, 498 US 822 (1990) ("[t]o sustain a finding of contempt, the order allegedly violated must have been reasonable clear"); *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988) (explaining that "[n]o one may be held in contempt for violating a court order unless the order is clear and specific and leaves no uncertainty in the minds of those to whom it is addressed" and concluding that the phrase "bona fide offer of settlement" is vague and imprecise and therefore will not support a conviction of

contempt); *NBA Properties v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (a contempt citation must be based on a clear and unambiguous order and any ambiguities must be resolved in favor of the accused); *United States v. Joyce*, 498 F.2d 592, 595-597 (7th Cir. 1974) (holding order requiring the defendant to use his "best offices" is too vague and ambiguous to uphold a conviction of criminal contempt); *see also Critzer*, 498 F.2d at 1162.

Any attempt to interpret the attorney affirmations leads to confusing, contradictory and just plain nonsensical conclusions. In paragraph one of both the May 2000 and May 2001 affirmations, for example, while the affirmations state Ms. Stewart understood that she could not allow third persons other than cleared translators present in her office with her "to participate" in conversations with Sheikh Abdel Rahman, there is no bar on permitting such persons to sit silently and overhear such conversations on a speaker phone. And, while Ms. Stewart agreed she would "not record any conversations" with her client, "record" is not defined. Any notes she took could constitute recordation of her conversations. Further, the limitation on using calls with Sheikh Abdel Rahman only for "legal discussion," as that phrase appears in the last sentence of paragraph 1 of the May 2001 affirmation, is vague; the boundaries of the meaning of the phrase are uncertain.

In paragraph two of both affirmations, Ms. Stewart agreed that she could "employ only cleared translators/interpreters"; the paragraph does not address translators/interpreters who might volunteer their services. The phrase "legal matters" is totally without meaning. Does it mean that she was limited to using the translator to discuss matters as to which there could be no challenge to their legal nature? Her client was a convicted criminal. Did this mean she could not discuss his "illegal" conduct? The problem is elucidated when considered in the context of taxes: does the purported limitation on Ms. Stewart's communication with Sheikh Abdel

Rahman mean that she could only discuss tax avoidance problems with him, not tax evasion? Read literally, restricting Ms. Stewart's communications through the translator to "legal matters" barred her from asking the precleared translator/interpreter to communicate with Sheikh Abdel Rahman about the weather, travel arrangements, her health, or even her vacation plans. Again, the vague phrase "legal discussion" is used in the May 2001 affirmation without a corresponding definition.

Paragraph three of the May 2000 and May 2001 affirmations is no less infirm. While it states that Ms. Stewart understands that neither she nor any member of her office "shall forward any mail" received from Sheikh Abdel Rahman – it makes no reference to his notes made during meetings. Similarly, Ms. Stewart agreed not to use "meetings, correspondence or telephone calls with Abdel Rahman" to pass messages between third parties and her client. No such limitation is suggested with respect to memoranda.

Literally read, the attorney affirmations at issue in this prosecution prohibited Ms. Stewart from talking to Sheikh Abdel Rahman's wife – a "third party" – about his health status and medical needs. This would be unconscionable for an attorney representing a defendant of his age and infirm physical condition, incarcerated in a country foreign to him.

Indeed, the vagueness of the affirmations is further demonstrated by the government's revisions of them between May 2000 and May 2001. Mr. Fitzgerald in fact acknowledged the possibility that Lynne Stewart did not "get" exactly what the "attorney affirmations" purported to prohibit and why. In detailing his reasons for inserting new language into the affirmation in the Summer and Fall of 2000, Mr. Fitzgerald explained in the September 29, 2003 hearing, "I thought, you know, if she doesn't get it she ought to understand…." Hrg. Tr. at 91. While he stated he thought "the special administrative measures were clear beforehand," *id.,* his testimony

and the altered language demonstrate an acknowledgement that they may not in fact have been "clear" to Ms. Stewart.[101] If they were in fact not vague, the government could simply have required Ms. Stewart to re-execute the same affirmation rather than insert new language in an effort to clarify the conduct they purported to prohibit.[102]

In sum, permitting a criminal prosecution for a violation of these attorney affirmations would "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Sattar*, 272 F. Supp. 2d at 358 (quoting *Kolender*, 461 U.S. at 358). For these reasons, the prosecution of Counts Six and Seven should be dismissed as void for vagueness as applied. As has already been said once by this Court:

> When analyzing a vagueness challenge, a court must first determine whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited and then consider whether the law provides explicit standards for those who apply it. A "void for vagueness" challenge does not necessarily mean that the statute could not be applied in some cases but rather that, as applied to the conduct at issue in the criminal case, a reasonable person would not have notice that the conduct was unlawful and there are no explicit standards to determine that the specific conduct was unlawful.

Sattar, 272 F. Supp. 2d at 357 (citations omitted). *See Rybicki*, 2003 WL 23018917, at *7 ("Vagueness may invalidate a criminal law for either of two independent reasons. . . . it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; [or] it may authorize and even encourage arbitrary and discriminatory enforcement.") (quoting *City of Chicago*, 527 U.S. at 56 (plurality opinion)); *Chatin v. Coombe*, 186 F.3d 82, 87 (2d Cir. 1999); *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir. 1993).

[101] Indeed, language can often be clear to the author because he knows what he is trying to say. The reader, on the other hand, is left only to interpret the words on the page.
[102] We do not acknowledge that the May 2001 affirmation was in fact sufficiently clear.

F. The SAMs Regulations Are Unconstitutionally Overbroad

In certain situations, a defendant has standing to assert the rights of persons not before the court. *See generally*, Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.5.4 (2d. ed. 2002) (discussing exceptions to the general rule against third party standing). In the area of First Amendment rights, the Supreme Court has recognized that:

> [A]n individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

In this case, Lynne Stewart may assert the rights of her client, the media, and the public. We recognize that the Court has previously held that Ms. Stewart lacks standing to assert her client's rights in the attorney-client privilege context, *see, e.g., United States v. Sattar*, 2003 WL 22137012, at *18 (S.D.N.Y. Sept. 15, 2003) and that the SAMs did not violate Ms. Stewart's First Amendment rights. *Sattar*, 272 F. Supp. 2d at 368-70. We are not re-raising those claims here.

The SAMs imposed upon Sheikh Abdel Rahman during the relevant timeframe purported to forbid him from any and all contact with any member or representative of the news media by any means whatsoever.[103] This is a substantial, overbroad prohibition of First Amendment activity. *See generally Virginia v. Hicks*, __ U.S. __, 123 S. Ct. 2191, 2196-97 (2003) (discussing overbreadth requirements and noting that the remedy arose "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally-protected speech

[103] Out of an abundance of caution, in light of the protective order in this case, we refrain from quoting directly from the SAMs notifications themselves.

– especially when the overbroad statute imposes criminal sanctions"). It cannot be that an administrative agency, here the Bureau of Prisons, has the unchecked authority to so limit core constitutionally-protected activity. Read literally, Sheikh Abdel Rahman would have violated the SAMs by telling a reporter that he liked chocolate, or renounced violence, or agreed with the State Department's assessment that the Egyptian government restricts its citizens' right to freedom of religion.[104] A reporter investigating U.S. prison conditions for religious minorities could not interview Sheikh Abdel Rahman about his treatment, whether that treatment had been good or bad. And the public would be completely foreclosed from knowing anything about him at all except whatever the Bureau of Prisons alone may decide to convey.

Historically, one object of imprisoning and silencing people has been to make sure that their views do not emerge from behind the bars. We discussed this issue in our initial papers, providing examples, and incorporate that discussion by reference here. Stewart MTD at 71-73.

The import of this is that the SAMs at issue allowed unchecked prosecutorial discretion. The Fitzgerald memoranda in fact demonstrate that the government has already enforced the SAMs selectively, choosing not to prosecute certain violations by an attorney for Sheikh Abdel Rahman, yet bringing this case against Lynne Stewart.

While *Sattar*, 272 F. Supp. 2d at 371, held that Ms. Stewart can not raise her own First Amendment rights to challenge the SAMs restrictions in the face of an allegation that she surreptitiously circumvented them, *Dennis* and its progeny cannot foreclose the First Amendment rights of third parties in the overbreadth context.[105]

---

[104] Regarding Egypt's abridgement of religious freedom, *see* Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, *Egypt: Country Reports on Human Rights Practices – 1999*, Feb. 23, 2000 (Reply Decl. Exh. A).

[105] Nor does *Dennis* foreclose our present challenge to the SAMs-related counts in that Ms. Stewart openly violated the measures. *See infra* Section VII – VII.A.2.

VIII. COUNTS FOUR, FIVE AND SEVEN MUST BE DISMISSED AS VINDICTIVE

As we stated at the outset, the Court admonished the United States Attorney's Office not to ask the grand jury "to return a superseding indictment that includes charges that are in part unconstitutional." *Sattar*, 272 F. Supp.2d at 361 n.5. Faced with this Court's dismissal of the material support charges and the Solicitor General's refusal to authorize an appeal they clearly desired,[106] these prosecutors improperly chose to contort their case theory to add new material support charges and a new 18 U.S.C. § 1001 count. They did so even though, as AUSA Andrew S. Dember admitted, "there is no new discovery arising out of these new charges." Arr. Tr. at 12. In so doing, the government has increased the number and severity of charges Ms. Stewart now faces in violation of her Due Process rights.[107] Such conduct amounts to vindictive prosecution. Accordingly, Counts Four, Five, and Seven of the superseding indictment must be dismissed.

As *United States v. White*, 972 F.2d 16, 19 (2d Cir.), *cert. denied*, 506 U.S. 1026 (1992), explained, "the decision to prosecute violates due process when the prosecution is brought in retaliation for the defendant's exercise of his legal rights." *See also Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (same); *United States v. Khan*, 787 F.2d 28, 31 (2d Cir. 1986) (same). The United States Supreme Court has repeatedly emphasized:

> To punish a person because he has done what the law plainly allows him to do is a Due Process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

---

[106] S*ee*, *e.g.*, Hrg. Tr. At 101 (AUSA Baker noting that the government had filed a motion with the Second Circuit to expedite the appeal). *See also* Motion for Expedited Briefing and Argument Schedule, Docket Nos. 03-1507(L), 03-1508, 03-1509, filed Sept. 19, 2003.

[107] As we discuss below and *supra* Section VII.C.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (internal citations omitted); *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982); *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 n. 20 (1973); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

A. The Superseding Indictment Is Presumptively Vindictive

In this Circuit, "a rebuttable presumption of a vindictive motive may arise under certain circumstances." *White*, 972 F.2d at 19. The United States Court of Appeals for the Fifth Circuit has explained such circumstances as when:

> [T]here exists a substantial and realistic likelihood of such motive, as, for example, where, after the defendant's prior exercise of a procedural or substantive legal right . . . the prosecution acts arguably to punish the exercise of such rights, by increasing the measure of jeopardy by bringing additional or more severe charges. . . .

United States v. Ward, 757 F.2d 616, 619-20 (5th Cir. 1985). *See also Blackledge*, 417 U.S. at 27; *Pearce*, 395 U.S. 711.

While there exists no "inflexible presumption of prosecutorial vindictiveness in a pretrial setting," *Goodwin*, 457 U.S. at 381, such a presumption is appropriate here as "the circumstances of [this] case pose a 'realistic likelihood' of such vindictiveness." *United States v. King*, 126 F.3d 394, 397 (2d Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (quoting *Blackledge*, 417 U.S. at 27).

We acknowledge that in *White*, 972 F.2d at 19, a panel of the Second Circuit, quoting *United States v. Hinton*, 703 F.2d 672 (2d Cir.), *cert. denied,* 462 U.S. 1121 (1983), stated "[w]e have held that a 'presumption of vindictiveness does not exist in a pretrial setting.'" We believe the *White* Court's conclusion is too broad. A careful reading of *Hinton* reveals that the case did not go so far as to foreclose all possible pretrial application of such a presumption.

In *Hinton*, the defendant claimed that a superseding indictment was improperly returned after his attorney disclosed a possible defect in the charging document to the prosecutor during plea negotiations. Following Hinton's refusal to plead guilty and after Hinton fired his assigned lawyer, a superseding indictment was returned that corrected the purported defect by adding a new count. Relying on *Goodwin*, and *Bordenkircher*, the Second Circuit declined to apply a presumption of vindictiveness and denied Hinton's claim. First it commented on the presumption of vindictiveness "where the government attempts to bring more serious charges against a defendant *after the completion of a full trial*." *Hinton*, 703 F.2d at 678 (emphasis in original). Then, again relying on *Goodwin* and *Bordenkircher* it observed that "such a presumption of prosecutorial vindictiveness does not exist in a pre-trial setting." *Id.* (The source of the quotation in *White*.) This was not, however, the last word in *Hinton.* The court's discussion of vindictiveness concludes as follows:

> We find that even assuming counsel's disclosure prompted the government to seek a superseding indictment, these circumstances, occurring prior to trial, *without more*, do not warrant a presumption of prosecutorial vindictiveness. We therefore hold that *the circumstances herein* do not indicate a due process violation.

Hinton, 703 F.2d at 679 (emphasis added).

Subsequent Second Circuit decisions are squarely in accord with this analysis. *See, e.g., United States v. Sanders*, 211 F.3d 711, 717 (2d Cir.), *cert. denied*, 531 U.S. 1015 (2000) ("A presumption of vindictiveness *generally* does not arise in a pretrial setting.") (emphasis added); *United States v. Koh*, 199 F.3d 632, 639 (2d Cir. 1999), *cert. denied*, 530 U.S. 1222 (2000) ("We have previously held that the presumption of prosecutorial vindictiveness *generally* does not arise in the pretrial setting") (emphasis added). *See also United States v. Andrews*, 633 F.2d 449,

456-57 (6th Cir. 1980) (*en banc*), *cert. denied*, 450 U.S. 927 (1981) (declining to foreclose the possibility of a pre-trial presumption of vindictiveness).[108]

Blackledge is particularly on point. In *Blackledge*, the defendant exercised his statutory right to a trial *de novo* following his misdemeanor conviction. *Blackledge*, 417 U.S. at 22. The prosecutor sought and obtained a superseding felony indictment encompassing the same conduct that formed the basis of the earlier charge. *Id.* at 23. The Court held that the prosecutor had a stake in discouraging appeals, and thus a presumption of vindictiveness arose without the defendant demonstrating actual vindictiveness. *Id.* at 27. The prosecutor's conduct in *Blackledge* was held to violate the defendant's Due Process rights.

Similarly here, these prosecutors have a stake in discouraging Ms. Stewart from pursuing a vigorous defense. The reputation of the Office is on the line following this Court's dismissal of the material support charges originally brought and the Solicitor General's refusal to permit an appeal. Thus, the superseding indictment punishes Ms. Stewart for seeking dismissal of the material support charges and retaliates against her for prevailing in part after the last round of pretrial motions and following an arduous oral argument. A presumption of vindictiveness is further warranted because the Solicitor General refused to let the United States Attorney appeal the *Sattar* decision to the Second Circuit. The prosecution has chosen to up the ante, despite the Court's admonition. *See Sattar*, 272 F. Supp. 2d at 361. n.5.

This case presents precisely the "more" referred to in *Hinton.* The prosecutors upped the ante following the Solicitor General's refusal to permit an appeal.[109] The potential pre-trial

---

[108] In any event, if the Court declines to apply a presumption of vindictiveness, we further demonstrate that the prosecutors' objective conduct demonstrates a vindictive motive here, enough at least sufficient to require an evidentiary hearing.

[109] The concerns expressed in *Goodwin*, 457 U.S. at 379-80 and *Hinton*, 703 F.2d at 678-79 about the effect on plea negotiations of a presumption of vindictiveness in the pretrial context are

presumption of vindictiveness left open by *Goodwin* and *Hinton*, as well as *Pearce* and *Blackledge*, presents itself now, where the increased charges are not the result of any failure of Ms. Stewart to cooperate in negotiations, but rather are the result of the prosecution's failure to maintain the material support charges and failure to obtain approval to appeal this Court's July 22, 2003 ruling.

Here, as the Fitzgerald Materials demonstrate,[110] Ms. Stewart was first targeted for possible prosecution in the Summer of 2000. She was not indicted until nearly two years later. An additional 15 months passed until the *Sattar* opinion. For more than another two months, the prosecutors were intent on pursuing an appeal of that decision and proceeding with their initial case theory. After being foreclosed from appealing the *Sattar* decision on or about October 2, 2003, the prosecutors apparently spent the next 45 days weaving this new, convoluted case theory that ups the ante and adds counts nearly identical to those found unconstitutional by this Court. The idea that the proper extent of prosecution only "crystallized" in the last month and a half, as opposed to in the preceding nearly three years is nothing short of ludicrous.

There is no reason why the government could not have proceeded on the second § 1001 count and the § 2339A-related charges from the outset. *See Blackledge*, 417 U.S. at 29 n.7 (finding prosecutorial conduct presumptively vindictive and in violation of defendant's Due Process rights and observing that "[t]his would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz v. United*

---

inapplicable to this case. In this matter there have been no plea negotiations, therefore the concern of the courts that a pre-trial vindictiveness presumption will harm the plea negotiation process is not an issue. *Andrews*, 633 F.2d 449, makes this very point, confining *Bordenkircher* (and thus its progeny) "to the plea bargaining context in which it arose." *Andrews*, 633 F.2d at 456-57.

[110] We refrain from quoting directly from these materials, as they remain under seal. Any details about their contents discussed herein have already been stated in open court.

States, 223 U.S. 442 [(1912)]."[111]). In fact, Mr. Fitzgerald admitted that he and his office considered charging Ms. Stewart with § 2339A counts in its initial assessment in the Summer of 2000, nearly two years before the superseded indictment was brought. Hrg. Tr. at 71. Mr. Fitzgerald even memorialized this legal theory in July 2000. *Id*. at 73.

The prosecutors' new theory in this high-profile case arose only after their first stab at Ms. Stewart was held in part unconstitutional and their superiors refused to let them appeal that loss. This is exactly the sort of special circumstance where a pretrial presumption of vindictiveness is appropriate.

B. In The Alternative, Even Absent Presumption, Objective Evidence Demonstrates Vindictiveness

To demonstrate actual vindictiveness, a defendant must show that:

> (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a "stalking horse," and (2) [the defendant] would not have been prosecuted except for the animus.

Koh, 199 F.3d at 640. The actions of the prosecutors lay bare their motives and provide direct evidence of vindictiveness.

This case began with a high-profile press conference and an appearance by Attorney General John Ashcroft on a late-night talk show. *See* Stewart Reply at 37. It proceeded with a vigorous motions cycle. The prosecutors were unable to convince the Court in their papers, or at the motions argument, that the material support charges were constitutional.

---

[111] In *Diaz*, the defendant was first tried and convicted for assault and battery and then the assault victim died from the injuries and the defendant was tried and convicted of homicide. As the *Blackledge* Court observed, "[o]bviously, it would not have been possible for the authorities in *Diaz* to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death." *Blackledge*, 417 U.S. at 29 n.7.

The prosecutors filed a notice of appeal, requested and received an expedited briefing schedule, and obtained a limited mandate from the Second Circuit so they could press forward with prosecuting Ms. Stewart while an appeal was pending. Order, Granting Expedited Briefing and Argument Schedule, Raggi, J., Sept. 30, 2003; Order, Granting Issuance of Limited Mandate, Parker, Jr., J., Sept. 23, 2003. They repeatedly emphasized their desire to appeal this Court's dismissal of the material support charges. As we explained above, our attempts to engage the prosecutors in discussion about the pending superseding indictment and the future of the case were rebuffed, often rudely. Following the Solicitor General's refusal to approve an appeal, the prosecutors asked the Grand Jury to return the pending indictment that (1) increases the measure of jeopardy for Ms. Stewart; (2) recharges material aid counts, albeit under a different part of § 2339; (3) adds an additional 18 U.S.C. § 1001 count; (4) omits the prior indictment's admission that the lawyers "want to deal with [Sheikh Abdel Rahman's] case legally," (original Ind. ¶11); and (5) claims that Ms. Stewart was involved in a conspiracy to murder and kidnap, an extreme leap in both allegation and rhetoric from the picture painted by the initial indictment which was that of a lawyer acting improperly, but without any allegation of intent to commit violent crimes. Especially when viewed in light of AUSA Dember's admission at the November 21, 2003 arraignment that "there is no new discovery arising out of these new charges," Arr. Tr. At 13, a finding of actual vindictiveness is warranted.

Therefore, because of the vindictive nature of this prosecution, Counts Four, Five, and Seven must be dismissed.

C. Should the Court Decline to Dismiss On These Grounds, Ms. Stewart Requests Discovery on the Issue of Vindictive Prosecution Or, in the Alternative, an Evidentiary Hearing

In the event that the Court does not find presumptive or actual vindictiveness, we respectfully request discovery on the issue of vindictive prosecution. In *Sanders*, 211 F.3d at 717, the Second Circuit applied the same standard to discovery of vindictive prosecution as was applied to discovery of selective prosecution in *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). According to *Sanders*, "a defendant must provide some evidence tending to show the existence of the essential elements of the defense." 211 F.3d at 717 (internal quotations omitted). The court further explained, "[t]o warrant discovery, the defendant must show 'some evidence' of 'genuine animus,' not the mere possibility that animus might exist under the circumstances." *Id.* at 718.

A lesser burden is required for a hearing to be granted. "To obtain a hearing, the defendant must 'raise a reasonable doubt that the government acted properly in seeking the indictment.'" *United States v. Aviv*, 923 F. Supp. 35, 37 (S.D.N.Y. 1996) (quoting *United States v. Benson*, 941 F.2d 598, 611 (7th Cir. 1991).

In this case, as discussed above, there is ample evidence to warrant discovery on the vindictive prosecution issue. The Fitzgerald memoranda, the "new" material support charges, the refusal by the Solicitor General to approve the appeal these prosecutors desired, the additional § 1001 charge, and the absence of plea negotiations evidence animus on the part of these prosecutors. Were it not for the animus harbored by these prosecutors, the grand jury would not have been asked to return additional charges, and trial on the charges remaining after the *Sattar* opinion would have already begun. At the very least, "some" evidence supporting

both elements of the vindictive prosecution claim is offered, and in the absence of dismissal, discovery of the matter is merited. *See Aviv*, 923 F. Supp. at 37.

Finally, in the alternative to a dismissal or grant of discovery, Ms. Stewart respectfully requests that this Court conduct an evidentiary hearing on Ms. Stewart's vindictive prosecution claim.

IX. PREJUDICIAL, INFLAMMATORY, VAGUE, IRRELEVANT SURPLUSAGE SHOULD BE STRICKEN FROM THE INDICTMENT

As an alternative to dismissal, we respectfully request that the Court order that the surplusage outlined below be stricken from the indictment. The principal legal standard on which we rely is this Court's opinion in *United States v. Rittweger*, 259 F. Supp. 2d 275 (S.D.N.Y. 2003), which analyzed the relevant legal issues. As in that case, any surplusage not stricken should be redacted from the indictment as read to the jurors. *Id*. at 293. We also rely on FED. R. CRIM. P. 7(c)(1), which requires that an indictment be "plain" and "concise." This sprawling, vague and tendentious pleading flunks that test.[112]

A. This Court's Surplusage Decisions Support Striking Language Here

This Court has addressed surplusage contentions in at least four reported cases. In *Rittweger*, 259 F. Supp. 2d 275, the defendant moved to strike aliases from the indictment. This Court denied the motion to strike, but did so without prejudice, holding that "the parties should refrain from referring to the allegations in the Indictment concerning aliases until there has been such evidence at trial." *Id* at 293. Here, as in *Rittweger*, defense counsel make the good faith claim that much of the prejudicial material is irrelevant to the main themes of the alleged

[112] It is quixotic and unfair for the government to insist – as it already has in this case – that its pleading need not provide more details, and to resist calls for a bill of particulars, while at the same time presenting an indictment full of purple though non-informative prose.

offenses. In addition, the prejudicial material will be subject to serious admissibility challenge at trial.

In *United States v. Gallo*, 1999 WL 9848 (S.D.N.Y. Jan. 11, 1999), the defendants moved to strike from the indictment an alias and references to "the Gambino Organized Crime Family" and "the Genovese Organized Crime Family." This Court's denial of the motion was based on a consideration not applicable here. The Court observed that "[c]ourts have consistently refused to strike from an indictment language that identifies the name of a criminal enterprise." *Id.* at *6 (citing *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir.), *cert. denied*, 498 U.S. 816 (1990); *United States v. Napolitano*, 552 F. Supp. 465, 480 (S.D.N.Y. 1982)). In *Gallo*, the language at issue was relevant to whether the defendants "wrongfully exploited the fear of [their] association with organized crime families in order to extort money." *Id.* That challenged language, therefore, is far different from the surplusage here. The superseding indictment does not allege that Lynne Stewart shared the religious and/or political beliefs of her client, nor used his name and/or status in order to accomplish some forbidden end for herself.

United States v. Elson, 968 F. Supp. 900, 909 (S.D.N.Y. 1997) involved an alias and the name of a criminal enterprise. In a RICO case, the "enterprise" is an element of the offense. Not so here. Most of Ms. Stewart's surplusage motion is addressed to language that lies outside the elements of the charged offenses.

Finally, *United States v. Washington*, 947 F. Supp. 87 (S.D.N.Y. 1996), addressed the assertedly surplus words "by various means, including, among other things." Although these words were surplus, they were not, in the court's view, inflammatory and prejudicial. This Court explained:

> When a charging paragraph of an indictment . . . contains surplusage that "adds nothing to the charges, gives the defendant no further information

> with respect to them, and creates the danger that the prosecutor at trial may impermissibly enlarge the charges contained in the Indictment returned by the grand jury," the language must be stricken. *United States v. DePalma*, 461 F. Supp. 778, 798-99 (S.D.N.Y. 1978); *cf.*[*United States v. DeFabritus*, 605 F. Supp. 1538, 1547 (S.D.N.Y. 1985) (striking the words "among other things" from the indictment "where they serve no useful purpose and allow the jury to draw the inference that the defendant is accused of crimes not charged in the indictment"). But when a means paragraph, which refers to the matter of proof to sustain the charges, contains surplusage, a court should not strike the language. *See DePalma*, 461 F. Supp. at 799 ("Accordingly, the phrase 'and other activities' or 'among the means' when contained [in the means paragraph] can be equated to allegations of overt acts in a conspiracy charge where the Government is not required to set forth all the acts relied upon to effectuate the conspiracy.").

Id. at 90 (citations expanded). The Court emphasized that the surplus terms in the means section of the *Washington* indictment "do not infer that the defendant is accused of crimes not charged in the Indictment." *Id.*

These four opinions embody the legal standard that we contend supports striking this indictment's surplusage as inflammatory and prejudicial. The indictment makes allegations foreign to the elements of the charged offenses. It oversteps constitutional bounds.

We begin, however, with a surplusage issue that the Court has not previously addressed.

B. The "Introduction" Set Forth in Paragraphs 1 Through 27, and All Parts of Paragraphs 28, 31, 33(a), 34, 36, 40, 42 and 44 That Refer To Them Must Be Stricken Pursuant to FED. R. CRIM. P. 7(c)

The indictment begins with "INTRODUCTION," which appears even before the ritual language "The Grand Jury charges." The "introduction" consists of 27 numbered paragraphs, with various subheadings. These 27 paragraphs are then incorporated by reference in each of Counts One through Seven.

This method of pleading is contrary to the express limits set out in FED. R. CRIM. P. 7(c)(1), which provides in relevant part:

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count.

Under Rule 7(c)(1), therefore, only parts of a "count" may be incorporated by reference in another "count." Indictments with more than one charge are to be pleaded in "separate counts," FED. R. CRIM. P. 8(a). Incorporation by reference must be done expressly. *Davis v. United States*, 357 F.2d 438, 440, n.2 (5th Cir.), *cert. denied*, 385 U.S. 927 (1966).

Paragraphs 1 through 27 are not part of any "count." Therefore, have no place in an indictment and cannot be incorporated by reference in any count. The Federal Rules of Criminal Procedure are not advisory; they are mandatory, binding on litigants and judges.[113] The Federal Rules of Criminal Procedure may not be "construed to mean something other than what they plainly say." *Carlisle v. United States*, 517 U.S. 416, 424 (1996) (rejecting effort to expand FED. R. CRIM. P. 29's plain language).

Moreover, as a matter of sensible policy, prosecutorial exuberance should not carry us back to days of old when long, rambling indictments were not only in fashion but often required. This Court has already held that an indictment "need do little more than track the language of the statute charged." *Sattar*, 272 F. Supp. 2d at 373. As this Memorandum reveals, we do not concede that this indictment informs Ms. Stewart of what she must meet at trial. Rather, our point is that logorrhea defeats rather than advances clarity.

[113] The practice of long "introductions," loaded with prejudicial detail, may have gained some currency in this District. No informal usage can justify a practice that violates the plain language of the rules.

C. Terror, Terrorist, Terrorism[114]

The original indictment used the word "terrorist" or "terrorists" 13 times and word "terror" three times, for a total of 16 references. In that indictment, the 18 U.S.C. § 2339B charge included an element referring to a terrorist organization. *Sattar*, 272 F. Supp. 2d at 352.

In the superseding indictment "terrorist" or "terrorists" appear 29 times, "terrorism" appears five times, "terrorize" appears twice, and "terror" appears once; a total of 37 references. Yet, none of the offenses charged contains an element that includes any of those words.[115]

None of the indictment's references is tied to a statutory definition,[116] or to the administrative definitions in the provisions at issue under the earlier indictment. The references are thus entirely gratuitous, inflammatory and irrelevant.

Moreover, the terms "terrorism" and "terrorist," divorced from any specific definition, are so vague as to invite speculation as to what they mean. They are mere epithets. *See, e.g., Curtis Publ'g Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) (the phrase "those bastards," when directed at members of the Mississippi Highway Patrol, were "mere epithets" and had "no real meaning"). *See also* BLACK'S LAW DICTIONARY 1484 (7th ed. 1999) (defining "terrorism" as: "The use or threat of violence to intimidate or cause panic, esp. as a means of affecting

---

[114] Our request to strike references to "terror" and "terrorism" is made with a reservation of rights. If there is a conviction in the case, we reserve the right to challenge the application, validity and procedural setting of any proposed reliance on "terrorism" as a sentencing enhancer, including without limitation arguments on separation of powers, vagueness and the right to jury trial as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

[115] The title of 18 U.S.C. 2339A does include the word "terrorists," but the term is not carried into the statute's text.

[116] *See, e.g.*, 18 U.S.C. § 2331(1) and (5). Note that the definition of "domestic terrorism" was not added until the Patriot Act. *See generally* J. W. Whitehead and S. H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1092-1093 (2002) (*citing* USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, 376 (2001)).

political conduct.") This adds nothing to any standard offense definition, nor to any offense here charged.

Of course, "terror" was an element of a common law crime that still survives in at least several American jurisdictions, but that offense has nothing to do with politics unless you are a member of the National Rifle Association. In its common law form, "terror" simply meant scaring people, and is a limit on the right to bear arms.[117]

---

[117] The common law crime of affray (from the French word "*effrayer*," meaning "to affright" - *See State v. Huntly*, 25 N.C. 418 (1843)) is defined as "the fighting of two or more persons in some public place, to the terror of his majesty's subjects." 4 W. Blackstone, COMMENTARIES 145 (1769) (cited in E. Dale, *A Different Sort of Justice: The Informal Courts of Public Opinion in Antebellum South Carolina*, 54 S.C. L. REV. 627, 628 n.2 (2003).

Affray has also been defined as "a public offense to the terror of the people, and is an English word, and so called, because it affrighteth and maketh men affraid." Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 284 n.132 (2002) (citing CONDUCTOR GENERALIS (J. Parker ed., printed by J. Patterson for R. Hodge in N.Y., 1788) (available in EARLY AMERICAN IMPRINTS, FIRST SERIES, no. 10935) (citing 2 Sir Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND 158 (in four parts; originally published during the 1640s)).

The phrase "terror of the people" has also been used in legal parlance to identify traditional common law boundaries on the right to bear arms: "A Justice of the Peace may require surety from persons who "go about with unusual Weapons or Attendants, to the Terror of the People." D. B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 174 n.313 (1999) (citing W. Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 126 (1716) (Garland Publ. 1978)).

Some United States cases have used affray (or its criminal elements) to carve out an exception to the Second Amendment. *State v. Huntly*, 25 N.C. 418 (1843), recognized a crime that amounts to affray, quoting Blackstone: "the offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is *particularly* prohibited by the Statute of Northampton, 2 Edward 3d, Ch. 3d, upon pain of forfeiture of the arms, and imprisonment during the King's pleasure." *Huntly*, 25 N.C. at 420-421 (citing 4 W. Blackstone, COMMENTARIES 149 (1769) (emphasis in original)). In upholding Huntly's indictment, the North Carolina Supreme Court held: "It is the wicked purpose – and the mischievous result – which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people." *Huntly*, 25 N.C. at 423.

Oxford University Professor Sir Adam Roberts notes that the word "terrorism" entered into European languages in the wake of the French Revolution in 1789, as the National Assembly sought to impose its views the citizenry. This was what came to be called "The Reign of Terror." *See* A. Roberts, *The Changing Faces of Terrorism*, http://www.bbc.co.uk/history/war/sept_11/changing_faces_07.shtml. Thus, the first meaning of the word "terrorism" was "system or rule of terror," as recorded by the Académie Française in 1798.[118]

In the nineteenth century, terrorism began to be associated with non-governmental persons or groups assassinating political leaders. *See id*. This association was symbolized by the assassination of Archduke Ferdinand by a Bosnian Serb student, and continued through the Second World War. *See id*.

Of the French "reign of terror," Mark Twain had a very different view than, say, Edmund Burke.[119]

Subsequent North Carolina Supreme Court decisions followed *Huntly*. *State v. Dawson* decided the issue of whether a citizen "has a right to bear arms to the terror of the people." 159 S.E.2d 1, 11 (N.C. 1968). In holding that he has no such right, the Court held that "[t]he right to keep and bear arms no more gives an individual the right to arm himself in order to prowl the highways or other public places to the terror of the people than the constitutional guaranty of free speech gives him the right to yell "fire" in a crowded theater." *Id*. at 11.

Just a few months ago, the same court outlined the three essential elements of the crime of affray: "(1) that there was a fight between two or more persons; (2) that the fight occurred in a "public place"; and (3) that the fight caused terror to persons who qualify as members of the public." *In re May*, 584 S.E.2d 271, 274 (N.C. 2003).

North Carolina is not the only state to acknowledge the crime of affray. Kentucky, Florida, Illinois, and Alabama have all have defined affray as to include the phrase "terror of the people." *See, e.g., Wallace v. Commonwealth*, 268 S.W. 809, 813 (Ky. 1925); *Carnley v. State*, 102 So. 333, 334 (Fla. 1924); *Thomas v. Riley*, 114 Ill. App. 520, 522 (Ill. App. Ct. 1904); *Thompson v. State*, 70 Ala. 26, 28 (1881).

[118] This terror was what is now known as state-sponsored terrorism, arbitrary governmental action such as practiced at least since 1981 by the government of Egypt.

[119] Twain wrote:

Throughout American history, "terror" and "terrorist" have been chameleon words. From the earliest days of the American labor movement, they were epithets hurled at labor organizers and strikers. The historical parallel to this case is striking. Doubtless some labor leaders were involved in violent acts against property and people. *See, e.g.*, ATTORNEY FOR THE DAMNED (Weinberg ed. 1957) (containing many of Clarence Darrow's arguments in labor cases); M. Tigar, HAYMARKET: WHOSE NAME THE FEW STILL SAY WITH TEARS (1987). But judges, prosecutors and employers have used the terrorism epithet to brand all organized workers. *See, e.g., United States v. Railway Employees' Dep't of American Federation of Labor*, 283 F. 79 (N.D. Ill. 1922) (a holding that required the Norris-LaGuardia Act to undo); *Lake Erie & Western Ry. v. Bailey*, 61 Fed 494, 495-97 (C.C.D. Ind. 1893) (a judicial harangue on whether labor unions should exist); *United States v. Gregg*, 5 F. Supp. 848 (S.D. Tex. 1934) (unions as terrorists); *see also* the prosecutor's references to terrorism quoted in *Bridges v. California*, 314 U.S. 252, 275 n.19 (1941) ("union terrorism"). The criminal syndicalism statutes that were

---

> There were two "Reigns of Terror," if we would but remember it and consider it; the one wrought murder in hot passion, the other in heartless cold blood; the one lasted mere months, the other had lasted a thousand years; the one inflicted death upon ten thousand persons, the other upon a hundred millions; but our shudders are all for the "horrors" of the minor Terror, the momentary Terror, so to speak; whereas, what is the horror of swift death by the ax, compared with lifelong death from hunger, cold, insult, cruelty, and heartbreak? What is swift death by lightning compared with death by slow fire at the stake? A city cemetery could contain the coffins filled by that brief Terror which we have all been so diligently taught to shiver at and mourn over; but all France could hardly contain the coffins filled by that older and real Terror - that unspeakably bitter and awful Terror which none of us has been taught to see in its vastness or pity as it deserves.

M. Twain, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT, ch. 13.

finally invalidated by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), also contained references to terrorism.

Among other perpetrators of terror recognized in Supreme Court opinions are: monoplies and trusts, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944); the Ku Klux Klan, *Virginia v. Black*, 535 U.S. 1094, 123 S. Ct. at 1544; federal tax collectors, *Warden v. Hayden*, 387 U.S. 294, 316 (1967); police who conduct unlawful searches, *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting); mob action to influence a jury, *Frank v. Mangum*, 237 U.S. 309, 347 (1915); courts of justice who should be a "terror to evil doers," *United States v. Castillero*, 67 U.S. 17 (1862); patent holders, *Hogg v. Emerson*, 47 U.S. 437, 473 (1848); and attacks by Native Americans, *Sim's Lessee v. Irvine*, 3 U.S. 425, 440 (1799).

In sum, these words have no generally accepted meaning. They are simply appeals to passion and prejudice. These words have no place in this indictment and all references to them should be stricken from Paragraphs 1, 4, 5, 6, 8, 11, 17, 20, 21, 22, 24, 25, 30(j), 30(p), 30(ee), 33(b), and 35.

D. Paragraph 1[120]

> *From at least the early 1990's until in or about April 2002, Omar Ahmad Ali Abdel Rahman, a/k/a "the Sheikh," a/k/a "Sheikh Omar" (hereinafter, "Abdel Rahman"), who is a co-conspirator not named as a defendant herein, was an influential and high-ranking member of terrorist organizations based in Egypt and elsewhere. Abdel Rahman considered nations, governments, institutions, and individuals that did not share his radical interpretation of Islamic law to be "infidels" and interpreted the concept of "jihad" ("struggle") to compel the waging of opposition against such infidels by whatever means necessary, including force and violence.*

[120] For the ease of the reader, before each argument we have set forth the entire language from each paragraph of the indictment that we move to strike.

Paragraph 1 should be stricken because it pleads actions and views beginning nine years before any alleged criminal act in this case. Moreover, the terms "infidel," "jihad," and "radical" are unduly vague. They are pejorative loaded words.

Also, the paragraph violates the First Amendment, by alleging political and theological views as wrongful and by making a blatant appeal to anti-Muslim prejudice. The term "infidel," which is in quotations, is not an Arabic word. Adherents of Islam regard the original Arabic texts as the sole authentic expressions of doctrine. To say that a religious leader regards all those who disagree with his "radical" views as faithless to his religion's basic precepts is not surprising.[121]

---

[121] Examples of this view abound, and the following are just a few. Former Presidential-candidate Reverend Pat Robertson told NEW YORK MAGAZINE:

> It is interesting that termites don't build things, and the great builders of our nation almost to a man have been Christians, because Christians have the desire to build something. . . . The people who have come into (our) institutions (today) are primarily termites, They are into destroying institutions that have been built by Christians . . . The termites are in charge now, and that is not the way it ought to be, and the time has come for a godly fumigation.

Pat Robertson, NEW YORK MAGAZINE, Aug. 18, 1986.

Another well-known Christian reverend, Jerry Falwell, preached in a 1993 sermon: "[W]e must fight against those radical minorities who are trying to remove God from our textbooks, Christ from our nation. We must never allow our children to forget that this is a Christian nation. We must take back what is rightfully ours." J. Falwell, CHURCH & STATE (May 1993) at 14.

A view of religious supremacy is shared by at least some government officials. Last Fall, Army Lieutenant General William G. Boykin was criticized for, as one news report summarized, "[saying] that the enemy in the war on terrorism was Satan, that God had put George W. Bush in the White House and [calling] one Muslim Somali warlord an idol-worshipper." CBS News, *General Seeks 'Satan' Speech Probe*, Oct. 21, 2003, *available at* http://www.cbsnews.com/ stories /2003/10/16/attack/main578471.shtml.

And, noted conservative commentator and author Ann Coulter, speaking in the broadest term of the Islamic world, declared, "We should invade their countries, kill their leaders and convert

Reading this paragraph to the jury invites (and perhaps requires) the defense to defend by putting this allegation into context. The term "infidel" has a Latin root, which is understandable given that the Western Roman Emperor Constantine converted to Christianity in 313 C.E. The term is widely used in Latin-based languages to describe those with beliefs different than the speaker's own.

With the rise of Islam, the term infidel[122] was used by Christians to describe Muslims. Beginning in 1095 C.E., when Pope Urban began to preach the First Crusade. As an epithet, it was hurled at Muslims at least until 1291 C.E., when the last Christian outpost at Acre fell to Sultan Qualawun.[123] That sense of "infidel" was first used, so far as we are aware, by Roman Catholics during the Crusades, as they turned their hostile actions towards Byzantine Christians in addition to Muslims.[124]

Paragraph 1 says that Sheikh Abdel Rahman used the word to describe any person or institution that did not share his "radical" view of Islam. Presumably that would include at least other adherents to Islam.

Nor, as this capsule history suggests, is it strange that somebody should call for "force" and "violence" against those with whom they had religious disagreements. The First

---

them to Christianity." A. Coulter, *This Is War; We should invade their countries*, NATIONAL REVIEW, Sept. 13, 2001, *available at* http://www.nationalreview.com/coulter/coulter091301.shtml.

[122] If one accepts, as do most textual critics, that a word that evokes a quality necessarily implies the existence of that quality's opposite, then the motto *Semper Fidelis* would imply that the Marine Corps believes there are infidels as well.

[123] *See generally* M. Tigar, LAW AND THE RISE OF CAPITALISM ch. 4 (2d ed. 2000).

[124] The economic motivation of the Crusades is fairly easy to see. Ironically, the Christian traders wound up learning a great deal about commercial law and accounting from the "infidels," including Muslims and Byzantine Christians. This is the most plausible explanation for what we see in the documents dating to the 11th and 12th centuries. *See generally* M. L. Carlin, *La Pénétration du droit romain dans les actes de la pratique provençale* (1967) (discussing the earliest evidence of Eastern Roman law principles based on Justinian's codification to appear in the Western Mediterranean); M. Tigar, LAW & THE RISE OF CAPITALISM, ch. 4.

Amendment protects such a belief, and advocacy of it, no matter how disagreeable. This country was founded by people who were the victims of force and violence directed at them because they did not share the radical views of a state church. Distressingly, many of those who sought refuge here began to persecute those who disagreed with them. *See, e.g.,* P. Irons, A PEOPLE'S HISTORY OF THE SUPREME COURT 9-11 (1999) (discussing religious persecution in colonial America and observing, "[t]here is a powerful irony in the disparity between the myth of colonial America as a haven for religious dissenters . . . and the reality of intolerance toward those who challenged the new orthodoxy of the colonists").

Beziers, Les Baux, the Huguenots, Joan of Arc, all of these names conjure images of violence. Paragraph 1, with its irrelevant and dated quotation, continues the cycle of religion-based intolerance.[125]

The word jihad is also inflammatory and prejudicial. The term has no settled sinister meaning. Muslims and non-Muslims alike argue over its accurate definition. Allegations based on a snippet from a non-defendant's 14-year old statement should be stricken. Jihad is "perhaps the most loaded word in the lexicon of Islam's relations with the West."[126] Commonly (mis)translated as "holy war,"[127] jihad is a verbal noun that literally means to strive, to exert oneself, to struggle, or to take extraordinary pains;[128] it can mean a form of moral self-

---

[125] As to Beziers, see M. Tigar, LAW & THE RISE OF CAPITALISM 121-22. On religious intolerance, see Justice Black's dissenting words in *American Communications Ass'n C.I.O. v. Douds*, 339 U.S. 382, 447 (1950).

[126] M. Kramer, *Jihad 101*, THE MIDDLE EAST QUARTERLY 9.2 (Spring 2000), *available at* http://www.meforum.org/article/160.

[127] Strictly speaking, there is no term in classical Arabic which means "holy war." The word for *holy*, "muqadessa" and *war*, "harb," must be placed together to create the phrase.

[128] *See* D. E. Streusand, *What Does Jihad Mean?*, THE MIDDLE EAST QUARTERLY 4.3 (Sept. 1997), *available at* http://www.meforum.org/pf.php?id=357.

improvement as well as a war on behalf of the Islamic faith. It is to be done "with the heart, with the hand, and with the tongue."[129]

Scholars make a distinction between the so-called "lesser jihad" of religiously-grounded warfare and the "greater jihad" against evil, a distinction that originated with the Prophet Mohammad who told his followers after a battle that "We return from the lesser jihad to the greater jihad," a more difficult and important struggle for one's soul.[130] The Washington-based Council on American-Islamic Relations follows the interpretation that "[j]ihad does not mean holy war." Instead, it "is a central and broad Islamic concept that includes struggle against evil inclinations within oneself, struggle to improve the quality of life in society, struggle in the battlefield for self-defense (e.g., having a standing army for national defense), or fighting against tyranny or oppression."[131]

As scholar Hilmi Zawati explains:

> [I]n the course of discussing the theory of jihad, a considerable number of contemporary scholars have confused the types and modes of jihad. Nevertheless, while Ibn Qayyim al-Jawziyya distinguished four types of jihad: the struggle against the self; the struggle against evil; the struggle against non-believers; and the struggle against hypocrites, al Mawardi, for his part, divided jihad into two general categories: wars of public interest, and wars against polytheists and apostates. In a similar vein, other Muslim jurists spelled out two types of jihad: the greater jihad and the lesser jihad. The first type deals with the struggle against the self and evil, and may be performed by heart; and the second type deals with the strife against apostates and non-believers, which can be accomplished by tongue, wealth and self. Based on the above categorization, and taking into consideration the current adaptation of the Shari'a in contemporary

[129] Sheikh Abdullah bin Muhammad bin Humaid (ex-Chief Justice of Saudi Arabia), *Jihad in the Qur'an and Sunnah*, *available at* http://www.islamworld.net/jihad.html.
[130] J. M. B. Porter, *Osama Bin-Laden, Jihad, and the Sources of International Terrorism*, 13 IND. INT'L & COMP. L. REV. 871, 873 (2003) (citing J. L. Esposito, UNHOLY WAR: TERROR IN THE NAME OF ISLAM at 28 (2002)). *See also* R. L. Euben, *Jihad and Political Violence*, CURRENT HISTORY, Nov. 2002, at 368.
[131] *See* About Islam and American Muslims, Council on American-Islamic Relations home page, *at* http://www.cair-net.org/asp/aboutislam.asp.

> vein, types of jihad can be subsumed under two categories: the moral struggle (greater jihad) and the armed struggle (lesser jihad). The first type is directed against the self and evil, while the second type deals with Muslims (highway robbers, rebels, apostates and unjust rulers), and with non-Muslims (polytheists and scripturaries).

H. Zawati, IS JIHAD A JUST WAR? 29-30 (Edwin Mellen Press) (2001) (footnotes omitted).

Because jihad is a loaded word, the clarity and authority that one author uses to define it is quickly derided by a second and third. One approach to understanding the concept of jihad is to examine its development in Muslim history. During Islam's formative period when its survival was at stake, jihad took on a more militant meaning. As more peaceful times came upon Islam, "new doctrinal limitations were imposed on the resort to jihad."[132] Today, even though scholars are divided over the interpretation of jihad, commentators have written that currently the more militant idea of jihad is prevailing.[133]

The issue is that the meaning of the word jihad lacks specificity and conjures up images of Muslim fundamentalist suicide bombers who strap explosives to their chests and run into crowded shopping areas and cafés. In protest of Zayed Yasin's Harvard Commencement speech entitled, "American Jihad," a fellow student said she thought of planes crashing into buildings when the word "jihad" was used.[134] Even Noam Chomsky promotes a violent image of jihad by simply titling his August 16, 2003 article "America's Past 11 Months Jihad Unspun," referring to

---

[132] M. C. Bassiouni, *Hilmi M. Zawati's IS JIHAD A JUST WAR? War, Peace and Human Rights Under Islamic and Public International Law*, 96 AM. J. INT'L L. 1000, 1001 (2002) (book review).

[133] F. Symon, *Analysis: The Roots of Jihad* (Oct. 16, 2001) (analyzing the concept of *jihad* under al-Banna, Maududi, Qutb, Bin Laden, and Zawahiri) *available at* http://news.bbc.co.uk/1/hi/world/middle_east/1603178.stm. *See also* http://www.yahoodi.com/peace/jihad.html, a Jewish website with a long list of Islamic sources supporting the idea that *jihad* equals *war*.

[134] B. Keim, *The Jihad against 'Jihad'*, Common Dreams News Center, (Jul. 7, 2002), *available at* http://www.commondreams.org/views02/0607-07.htm.

the war in Iraq.[135] Hypothetically, if a law were passed "forbidding jihad," no one would know what that would mean. For some it would clearly mean no fighting in the name of Allah against non-Muslims; to others (if not most Muslims) it would mean stop fasting, praying and giving alms.

Here are some final interesting uses of the word jihad:

- Jihad to Destroy Barney the Dinosaur.[136]
- "Queer Jihad" which is "the queer Muslim struggle for acceptance: first, the struggle to accept ourselves as being exactly the way Allah has created us to be; and secondly, the struggle for understanding among Muslims in general."[137]
- Jihad against Smokers.[138]
- Ashcroft's Jihad.[139]
- "Texas Yeehad." This is the slogan emblazoned on T-shirts sold by a cousin of General Tommy Franks, commander of the United States' Iraqi Central Command. The slogan and shirts "are meant to support the team of President Bush and General Franks."[140]

The Muslim faith is not unique in preaching struggle against those who do not share its precepts. As noted above, a great deal of Christian doctrine is in the same vein. Some Christian faiths even believe that there will be a war involving the armies of Christ. The precise meaning of these calls to warfare has been debated in cases where it is relevant. *See, e.g., Sicurella v. United States*, 348 U.S. 385, 387 (1955) (Jehovah's Witness who believed in a final conflict; government argued that Jehovah's Witnesses would use "carnal weapons").

---

[135] *Available at* http://www.veteransforpeace.org/Noam_Chomsky_081603.htm.
[136] http://www.jihad.net/main.html.
[137] http://www.well.com/user/queerjhd/aboutqj.htm.
[138] http://www.w3taxi.com/emancipation/jihad.shtml.
[139] http://www.counterpunch.org/murphy1.html.
[140] E. Quinn, *Patriotism soars at RiverStage*, SAN ANGELO STANDARD TIMES, Apr. 26, 2003, *available at* http://web.gosanangelo.com/archive/03/april/26/20030426021.html.

It is always dangerous for prosecutors to criminalize religious teachings, as distinct from focusing on elements of offenses. This is the warning sounded in *United States v. Ballard*, 322 U.S. 78 (1944). The statutes here are of general application; the prosecution invites trouble by applying them to one kind of "radical" and outspoken religious belief, in a country where all sorts of apocalyptic rhetoric is the hallmark of many monotheistic religions regularly practiced by large numbers of people. *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (animal sacrifice by religious group cannot be punished by statute that is limited to sacrifice by religious groups), which contains helpful thoughts on this subject.

To introduce the term "jihad" into this prosecution is to invite anti-Muslim prejudice, which could only be battled with a long excursus into history and theology, and away from the charges in the indictment. A religious motivation, courts often tell jurors, is not necessarily a defense to crime. If such a motivation is irrelevant when tendered by the defense, it is irrelevant when the prosecution seeks to capitalize on it.

E. Paragraph 2

> *According to Abdel Rahman's public remarks in 1990, "jihad is jihad . . . there is no such thing as commerce, industry and science in jihad. This is calling things . . . other than by its own names. If God . . .. says do jihad, it means do jihad with the sword, with the cannon, with the grenades and with the missile; this is jihad.. Jihad against God's enemies for God's cause and His word."*

Paragraph 2 is more of the same. The speech is old. It relates to events already tried, appealed and sentenced. The quoted material is also constitutionally-protected, as being hardly as inflammatory as the utterances in *Brandenburg*, 395 U.S. at 446 ("[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."), and *Hess*, 414 U.S. at 107.

Moreover, this paragraph and most others in the "Introduction" go back to a time before and during Lynne Stewart's representation of Sheikh Abdel Rahman. Not only are these paragraphs stale, but their inclusion risks confusing the role of a lawyer who defends against past misconduct with that of an active conspirator in that same conduct. No doubt the government intends to blur this distinction, but it is an important one.

If any of the declarants were to be witnesses, and were these events to have resulted in criminal convictions, there would be a presumptive 10-year bar against their use. FED. R. EVID. 609(b).

F. Paragraph 3

> *Abdel Rahman supported and advocated jihad to, among other things: (1) overthrow the Egyptian government and replace it with an Islamic state; (2) destroy the nation of Israel and give the land to the Palestinians; and (3) oppose those governments, nations, institutions, and individuals, including the United States and its citizens, whom he perceived as enemies of Islam and supporters of Egypt and Israel.*

Paragraph 3 is objectionable for the reasons given above. In addition, the paragraph reaches back into a time well before the indictment period.

Moreover, support and advocacy to achieve Sheikh Abdel Rahman's professed goals may or may not be constitutionally-protected, depending on context. *See, e.g., Yates v. United States*, 354 U.S. 298, *passim* (1957); *Brandenburg*, 395 U.S. at 447-48; *Hess*, 414 U.S. at 108-09. What we have, therefore, is a snippet from a 1990 speech in a foreign language, hitched to political views that are not identified as to the time of their formation and expression and packaged into an inflammatory paragraph.

G. Paragraph 4

> *Abdel Rahman endorsed terrorism to accomplish his goals. In a speech he gave prior to May 2, 1994, Abdel Rahman said: "Why do we fear the word 'terrorist'? If the terrorist is the person who defends his right; so we are terrorists. And if the terrorist is the one who struggles for the sake of God, then we are terrorists. We . . . have been ordered with terrorism because we must prepare what power we can to terrorize the enemy of God and yours. The Quran [the Islamic holy book] mentioned the word 'to strike terror,' therefore we don't fear to be described with 'terrorism'. . . . They may say 'he is a terrorist, he uses violence, he uses force.' Let them say that. We are ordered to prepare whatever we can of power to terrorize the enemies of Islam."*

This paragraph consists entirely of protected speech. Indeed, it shows the various meanings that "terrorist" may have. Again, this is a translation from another language, but the speaker might well be referring to the careless use of "terrorist" as a mere epithet. The term "terror" appears 29 times in the King James Version of the Bible, according to counsel's *Bible Study for Windows* program.

In addition, the reference to the Quran, with its parenthetical is again an irrelevant appeal to religious prejudice. Christians, Jews and Muslims share a great deal of text that they all regard as holy in one way or another.

Finally, since terrorism is not an element of any offense in this case, one co-conspirator's alleged views, dating from a time well before the indictment period, cannot fairly be attributed to any other conspirator. Permitting use of these out of court declarations can only confuse the jurors about what they may and may not consider as applying to other persons than the speaker. *See also Spock*, 416 F.2d at 179; FED. R. EVID. 404(b).

H. Paragraph 5

> *Abdel Rahman exercised leadership while subordinates carried out the details of specific terrorist operations. Abdel Rahman, who was viewed by his followers and associates as a religious scholar,*

> *provided necessary guidance regarding whether particular terrorist activities were permissible or forbidden under his extremist interpretation of Islamic law, and at times provided strategic advice concerning whether such activities would be an effective means of achieving their goals. Abdel Rahman also solicited persons to commit violent terrorist actions. Additionally, Abdel Rahman served as a mediator of disputes among his followers and associates.*

This paragraph is silent as to the time period to which it refers. If Sheikh Abdel Rahman "exercised leadership" between 1999 and 2002, then it is difficult to see how Ms. Stewart and Mr. Yousry could have engaged in the conduct described in Counts Four and Five. That confusion is the subject of other motions presented in these papers.

There are no "specific terrorist operations" charged in this indictment.

This case should not be a forum for a debate about whether Sheikh Abdel Rahman's views of Islamic law were "extremist" or not, although as Senator Barry Goldwater said while accepting the Republican nomination for President in 1964, extremism is not necessarily bad.[141] We cannot conceive of any relevant testimony that would explain the different variations on Islamic law to a jury in this case.

The solicitation charge is vague, foreign to this indictment, and irrelevant. There is no federal crime of soliciting violent "terrorist" actions, so this is another gratuitous use of the term. The mediation allegation, while exculpatory in some measure, is meaningless.

The entire paragraph is as consistent with protected speech as with punishable action. *See generally Noto*, 367 U.S. 290; *Yates*, 354 U.S. 298.

I. Paragraph 6

> *On or about July 2, 1993, Abdel Rahman was arrested in the United States. In October 1995, a jury sitting in the United States District Court for the Southern District of New York convicted*

[141] PBS Online, American Experience, *People & Events: The 1964 Republican Campaign*, *available at* http://www.pbs.org/wgbh/amex/Rockefellers/peopleevents/e_1964.html.

> *Abdel Rahman of engaging in a seditious conspiracy to wage a war of urban terrorism against the United States, which included the 1993 bombing of the World Trade Center and a plot to bomb New York City landmarks, including the United Nations, the FBI building in New York, and the Lincoln and Holland tunnels. The jury also found Abdel Rahman guilty of soliciting crimes of violence against the United States military and Egyptian President Hosni Mubarak. In January 1996, Abdel Rahman was sentenced to life imprisonment. On August 16, 1999, Abdel Rahman's conviction was upheld by the United States Court of Appeals for the Second Circuit and, on January 10, 2000, the United States Supreme Court refused to hear his case and his conviction thus became final. Since in or about 1997, Abdel Rahman has been incarcerated in various facilities operated by the United States Bureau of Prisons, including the Federal Medical Center in Rochester, Minnesota.*

This paragraph is a tendentious version of Sheikh Abdel Rahman's Southern District case. The paragraph's detailed recitation of what the jury allegedly found is improper. The jurors need not have found that every object of every inchoate offense was proved. The judgment has no preclusive effect against any defendant in this case, for none of them was a party. Further, details of his case may or may not be admissible at trial depending on the charges that are actually brought to trial and discussions and agreements between the parties. *Old Chief v. United States*, 519 U.S. 172, 181-83 (1997).

The statement that the Supreme Court "refused" to hear his case is puffery. A denial of certiorari means nothing. *See, e.g., United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times."); *Darr v. Burford*, 339 U.S. 226 (1950) (Frankfurter, J., dissenting) ("This Court has said again and again and again that such a denial [of certiorari] has no legal significance whatever bearing on the merits of the claim."). The language chosen in the indictment, however, suggests that it does.

The last paragraph indicates that the prosecutors know where Sheikh Abdel Rahman was at all relevant times. *Cf.* the allegations in Counts Four and Five concerning concealment of his "location."

J. Paragraph 7

> *Following his arrest, Abdel Rahman urged his followers to wage jihad to obtain his release from custody. For instance, in a message to his followers recorded while he was in prison, Abdel Rahman stated that it was the duty of all Muslims to set free any imprisoned fellow Muslims, and that "[t]he Sheikh is calling on you, morning and evening. Oh Muslims! Oh Muslims! And he finds no respondents. It is a duty upon all the Muslims around the world to come to free the Sheikh, and to rescue him from his jail." Referring to the United States, Abdel Rahman implored, "Muslims everywhere, dismember their nation, tear them apart, ruin their economy, provoke their corporations, destroy their embassies, attack their interests, sink their ships, and shoot down their planes, kill them on land, at sea, and in the air. Kill them wherever you find them."*

The paragraph gives no date for the alleged utterance, nor provides its context. Every word of this is protected speech. There are no specific addressees. Sheikh Abdel Rahman was, taking the indictment at face value, giving a political-religious address to all people and especially "Muslims." His advocacy of violence was not under circumstances indicating a clear and present danger of imminent lawless action. *Brandenburg*, 395 U.S. at 448-49; *Hess*, 414 U.S. at 108. So far as appears, no governmental action was taken against him as a result of this speech. The statute of limitations has long expired with respect to it, and it is not within the indictment period.

A great deal of very disturbing speech occurs every day in America, and we have only the First Amendment to thank. In addition to the cases cited above, and with specific reference to speech arising from religious conviction, *see Terminiello v. City of Chicago*, 337 U.S. 1

(1949). Justice Jackson's dissent contains some of the choicer passages from that tumultuous assembly. 337 U.S. at 13-37.

K. Paragraph 8

> *Both prior to and after his arrest and imprisonment, Abdel Rahman was a spiritual leader of an international terrorist group based in Egypt and known as the Islamic Group, a/k/a "Gama'a al-Islamiyya," a/k/a "IG," a/k/a "al-Gama'at," a/k/a "Islamic Gam'at," a/k/a "Egyptian al-Gam''at al-Islamiyya" (hereinafter, the "Islamic Group"). Abdel Rahman played a key role in defining and articulating the goals, policies, and tactics of the Islamic Group.*

This paragraph is not only old news, its presence also supports the vagueness arguments that made elsewhere in this Memorandum. The previous indictment, in the 18 U.S.C. § 2339B counts, focused on the Islamic Group and its formal designation by the Secretary of State as a foreign terrorist organization. This indictment contains no element that involves that designation. We note, however, that the government is identifying Sheikh Abdel Rahman as a spiritual leader of IG long before the time when the defendants are alleged to have provided him to that group or its members.

Moreover, the term "spiritual leader" shows the vagueness and overbreadth of the allegations. Almost every religion-based movement that engages in violence has its chaplains and preachers. South Africa's Afrikaaners had (and still have) their pastors who preach the inherent superiority of whites and the duty to claim the Afrikaaner land by any means. Since St. Augustine's time, priests, bishops, cardinals and Popes have preached of just wars.

This paragraph speaks of teaching and not punishable advocacy. *See Yates,* 354 U.S. 298; *Noto,* 367 U.S. 290.

L. Paragraph 9

> *According to Abdel Rahman's public remarks in 1990, Egyptian youths in the 1970's "established what is called A1 Gam''a al-Islamiy[y]a . . . , reviving jihad for the sake of Allah . . . . The Islamic group . . . started simple, few, little, then it spread and now has mosques and has presence in the governorates of Egypt . . . . [M]any of them were killed for the cause of God as they had sacrificed their own souls; they carried out many jihad operations against those tyrants. The most famous and the most successful operation was fighting the atheist; the oppressor and the profligate by killing him, Anwar A1-Sadat [the Egyptian president who was assassinated in 1981] . . . and now, it is hoping for another operation, God willing."*

The 1990 remarks are old news. As we have shown before,[142] that the repressive Egyptian government killed, tortured and imprisoned many Islamists. Much of this activity, which has been condemned by the United States and is still of concern to American policymakers,[143] took place after the Egyptian declaration of emergency in 1981.

Sheikh Abdel Rahman's alleged approval of the assassination of Anwar Sadat, and his hope that a repressive human rights abuser such as Hosni Mubarak would also be killed (taking this vague allegation for all it might conceivably be worth) are well within the confines of protected speech.

The Sadat assassination led to a mass trial of 300 defendants, hardly a proceeding that ensured the full rights of the accused. Yet Sheikh Abdel Rahman was acquitted in that trial. The government has gone beyond guilt by association and is now practicing guilt by innocence. In any case, now is not the time to retry his views on the subject.[144]

---

[142] *See, e.g.*, Reply Decl. Exh. A-F, *supra* at n.60.
[143] *See supra* n.61.
[144] *See* L. Wright, *The Man Behind Bin Laden*, THE NEW YORKER, Sept. 16, 2002 *available at* http://www.lawrencewright.com/art-zawahiri.html.

M. Paragraph 10

> *Abdel Rahman's followers, including those associated with the Islamic Group, shared his views about the reasons for jihad, including the goal of obtaining Abdel Rahman's release from United States custody.*

This paragraph is meaningless. It describes beliefs, not actions. Its vagueness is another attempt to "substitute a feeling of collective culpability for a finding of individual guilt." *Bufalino*, 285 F.2d at 417. Its allegations adumbrate the later paragraphs that ascribe all manner of conduct to "followers" and "supporters" without alleging that Sheikh Abdel Rahman had any role in the conduct those people are alleged to have done.

N. Paragraph 11

> *After Abdel Rahman's arrest, a coalition of terrorists, supporters, and followers, including leaders and associates of the Islamic Group, al Qaeda, the Egyptian Islamic Jihad, and the Abu Sayyaf terrorist group in the Philippines threatened and committed acts of terrorism directed at obtaining the release of Abdel Rahman from prison.*

This paragraph is particularly prejudicial in a case involving the lawyer who was representing Sheikh Abdel Rahman, and who was to that extent a "supporter," and necessarily in contact with his "followers."

The paragraph is also incomprehensible, except as a prejudicial set of epithets directed at everybody in sight. The prosecutors begin with a "coalition," a term that has no settled meaning in the law. Then, there are "terrorists, supporters and followers," three different groups, none of which is defined with precision. Among these are "leaders and associates," words that again find no settled meaning in the law. Finally, there are three named entities or collections of individuals.

Finally, it is alleged that people having the described characteristics "threatened and committed acts of terrorism." The terrorism word is subject to the same objection as above.

The allegation that these vaguely defined individuals wanted Sheikh Abdel Rahman released from prison does not signify that any defendant in this case had any culpable role in that activity. This is spillover prejudice, achieved by allegations against others. If this paragraph remains in the indictment, the government's discovery obligations will greatly increase, for we have seen little if any direct evidence about these allegations.

If this paragraph and others in the same vein are to be read to the jury, we will need to develop a detailed defense to these allegations. We are informed and believe, for example, that Messrs. Taha and al-Sirri, who are named in later paragraphs, ceased to be authorized spokespersons for the Islamic Group as early as 1996. The Islamist movement in Egypt has a long and complex history, and for a time attracted the support of Western powers as a "middle way" between Nasser nationalism and Soviet-style communism. The government's grandstanding revisionist version of recent Egyptian history can only lead everybody down a detour away from the issues framed in the body of the indictment.

O. Paragraph 12

> *On or about July 4, 1993, the defendant, AHMED ABDEL SATTAR, a/k/a "Abu Omar," a/k/a "Dr. Ahmed," spoke to the media regarding Abdel Rahman's arrest and stated that "we haven't decided the time or place, but our Muslim community will definitely demonstrate its outrage at the arrest of the Sheikh," and that, "if anything happens to the Sheikh, we will hold the American administration responsible . . . . Something very bad could happen."*

Like many of those discussed above, this paragraph relates only to protected speech. Further, the alleged statement so remote in time that it refers to a date before Lynne Stewart started representing Sheikh Abdel Rahman.

P. Paragraph 13

> *On or about January 21, 1996, a statement, issued in the name of the Islamic Group, responded to the sentence of life imprisonment imposed on Abdel Rahman by threatening, "All American interests will be legitimate targets for our struggle until the release of Sheikh Omar Abdel Rahman and his brothers. As the American Government has opted for open confrontation with the Islamic movement and the Islamic symbols of struggle, al-Gama[']a al-Islamiy[y]a swears by God to its irreversible vow to take an eye for an eye."*

This 1996 alleged statement is outside the indictment period, and does not relate to any of the offenses charged. Moreover, the literal allegation does not even charge complicity of any defendant or co-conspirator. The statement was issued "in the name of" the Islamic Group; the author is not identified.

Q. Paragraph 14

> *On or about April 21, 1996, an Islamic Group leader, who is a co-conspirator not named as a defendant herein ("CC-1"), stated during an interview that "the question of kidnapping Americans as a ransom for [Abdel Rahman] is in the cards, not ruled out, and under consideration."*

This paragraph is prejudicial in that the time of the statement is 1996, while the alleged conspiracy begins in late 1997. Thus, this ambiguous statement might be taken as proof of the indictment charges, although it logically does not support them at all. This is the sort of statement that should be excluded unless and until the government demonstrates it can prove it at trial.

R. Paragraph 15

> *On or about February 12, 1997, a statement issued in the name of the Islamic Group threatened, "The Islamic Group declares all American interests legitimate targets to its legitimate jihad until the release of all prisoners, on top of whom" is Abdel Rahman.*

The allegation is outside the indictment period. The acts alleged are not attributed to any particular person, as the statement was "in the name of" an amorphous group. Once again this is the impermissible false logic at work: Sheikh Abdel Rahman is a leader and advisor to the Islamic Group. Other people are also affiliated with the Islamic Group. Some people claiming such an association issue a statement, thousands of miles from New York City. The allegation implies that Sheikh Abdel Rahman must be responsible in some way for that statement, and Lynne Stewart is to be prejudiced by it.

S. Paragraph 16

> *On or about May 5, 1997, a statement issued in the name of the Islamic Group threatened, "If any harm comes to the [S]heik[h] . . . al-Gama[']a al-Islamiy[y]a will target . . . all of those Americans who participated in subjecting his life to danger." The statement also said that "A1-Gama[']a al-Islamiy[y]a considers every American official, starting with the American president to the despicable jailer . . . partners in endangering the [S]heik[h]'s life," and that the Islamic Group would do "everything in its power" to free Abdel Rahman. This statement by the Islamic Group followed a statement released to the media on May 2, 1997, by one of Abdel Rahman's attorneys that "[i]t sounds like the [S]heik[h]'s condition is deteriorating and obviously could be life-threatening."*

This paragraph is a gratuitous attack on the lawyers who served honorably in Sheikh Abdel Rahman's defense. It is a prejudicial smear attack, designed to link the right to counsel with the conduct of clients being defended. The paragraph begins with another unattributed allegation "in the name of" a group. Then, in flat violation of the *post hoc ergo propter hoc* canon, we are told that "this statement . . . followed" a statement by attorneys on Sheikh Abdel Rahman's physical condition. It is not even alleged that the attorney was Ms. Stewart.

T. Paragraph 17

> *On or about November 17, 1997, six assassins shot and stabbed a group of tourists visiting an archeological site in Luxor, Egypt. Fifty-eight foreign tourists were killed along with four Egyptians, some of whom were police officers. Before making their exit, the terrorists scattered leaflets espousing their support for the Islamic Group and calling for release of Abdel Rahman. Also, the torso of one victim was slit by the terrorists and a leaflet calling for Abdel Rahman's release was inserted.*

This allegation is remote in time and highly prejudicial. It is not relevant to any charge in the indictment.

U. Paragraph 18

> *On or about November 18, 1997, a statement issued in the name of the Islamic Group said, "A Gama'a unit tried to take prisoner the largest number of foreign tourists possible. . . with the aim of securing the release of the general emir (commander) of the Gama'a al-Islamiy[y]a, Dr. Abdel-Rahman." The statement continued, "But the rash behavior and irresponsibility of government security forces with regard to tourist and civilian lives led to the high number of fatalities." The statement also warned that the Islamic Group "will continue its military operations as long as the regime does not respond to our demands." The statement listed the most important demands as "the establishment of God's law, cutting relations with the Zionist entity (Israel) . . . and the return of our sheik[h] and emir to his land."*

The alleged "statement," not attributed to any defendant or co-conspirator is irrelevant. As with most of the other snippets contained in this "Introduction," the portions quoted are woefully incomplete and out of context. The context is the horrific repression of Islamists by the Mubarak government. Again, this does not seem to be an issue that deserves to be front and center in this trial. We are now at paragraph 18 of this indictment, and there is no allegation that any defendant did more than issue one press statement, and no allegation of conduct within the period of any charged offense.

V. Paragraph 19

> *On or about October 13, 1999, a statement in the name of Islamic Group leader Rif'i Ahmad Taha Musa, a/k/a "Abu Yasir" (hereinafter, "Taha"), who is a co-conspirator not named as a defendant herein, vowed to rescue Abdel Rahman and said that the United States, "hostile strategy to the Islamic movement" would drive it to "unify its efforts to confront America's piracy."*

While the allegations of this paragraph might be relevant to a charged offense, the paragraph lacks information showing that this statement is anything more than protected expression.

W. Paragraph 20

> *In or about March 2000, individuals claiming association with the Abu Sayyaf terrorist group kidnapped approximately 29 hostages in the Philippines, demanded the release from prison of Abdel Rahman and two other convicted terrorists in exchange for the release of those hostages, and threatened to behead hostages if their demands were not met. Philippine authorities later found two decomposed, beheaded bodies in an area where the hostages had been held, and four hostages were unaccounted for.*

The alleged actions are at three removes from any defendant. The responsible individuals claim association with a group that is said to be in a coalition, Ind. ¶11, that includes supporters and followers. The conduct is too far from the indictment charges. Moreover, the paragraph does not even allege that the decomposed bodies were those of hostages. The "*corpus delicti*" requirement is the most basic element of any homicide allegation.

Anticipating what the government may say about this allegation, we also note that Ind. ¶30(j), referring to a statement Ms. Stewart allegedly made contains a government misstatement of the remark to which Ms. Stewart was responding.

X. Paragraph 21

> *On or about September 21, 2000, an Arabic television station, A1 Jazeera, televised a meeting of Usama Bin Laden (leader of the al Qaeda terrorist organization), Ayman Al-Zawahiri (former leader of the Egyptian Islamic Jihad organization and one of Bin Laden's top lieutenants), and Taha. Sitting under a banner which read, "Convention to Support Honorable Omar Abdel Rahman," the three terrorist leaders pledged jihad to free Abdel Rahman from incarceration in the United States. During the meeting, Mohammed Abdel Rahman, a/k/a "Asadallah," who is a son of Abdel Rahman, was heard encouraging others to "avenge your Sheikh" and "go to the spilling of blood."*

This paragraph is a classic example of guilt by irrelevant association. The government begins by invoking Bin Laden and Al-Zawahiri. Al-Zawahiri and Sheikh Abdel Rahman do not even like each other, according to reliable sources. Certainly, their political paths have diverged, and the Islamic Group is not Al Qaeda, nor is it Islamic Jihad. Taha has been on the outs with the Islamic Group since 1996.

Then, there is an alleged statement from one of the Sheikh's sons. What the government leaves out is that Montassir Al-Zayyat, a prominent member of the Egyptian bar and an attorney for Sheikh Abdel Rahman, was also present at this gathering, and opposed violence as a means of obtaining the Sheikh's release.

So what we have here is an allegation about a meeting, based on a translated transcript. If the government tries to introduce the transcript at trial, we would be entitled under FED. R. EVID. 106 to demand that the entire document be shown to the jury. This paragraph is an effort to use "primacy" to establish in jurors' minds an impression of the meeting before they hear the facts.

Including this and the other "speaking" paragraphs is thus a device to have something in the jury room that is not evidence but simply distorts evidence in the most argumentative way.

Y. Paragraph 22

> *At various times starting in or about July 1997, certain Islamic Group leaders and factions called for an "initiative" (or cease-fire) in which the Islamic Group would suspend terrorist operations in Egypt in a tactical effort to persuade the Egyptian government to release Islamic Group leaders, members, and associates who were in prison in Egypt.*

This paragraph merely references protected political speech by unidentified persons (leaders and factions) with the government's interpretation of the meaning of the "initiative" but also the government's gloss on the intention, purpose and effect of the "initiative." The "initiative" is not attributed to any defendant or co-conspirator, and at least in part, by the government's own admission, is outside the indictment period.

Z. Paragraph 23

> *In or about February 1998, Usama Bin Laden and Taha, among others, issued a fatwah (a legal ruling issued by an Islamic scholar) that stated, among other things, "We, in the name of God, call on every Muslim who believes in God and desires to be rewarded, to follow God's order to kill Americans and plunder their wealth wherever and whenever they find it."*

This paragraph is prejudicial and misleading. A "fatwah" is not a "legal ruling." Linguistically, "fatwah" means "an answer to a question," and the answer is merely the opinion of the one who provides the answer. Within Islamic jurisprudence, a "fatwah" is the opinion of an Islamic scholar who answers according to his "understanding and interpretation of the intent of the sources of Islam."[145]

[145] *See* M. Hathout, *Demystifying the Fatwa*, Institute of Islamic Information and Education Website, *available at* http://www.iiie.net/Articles/DemystifyFatwa.html; Wikipedia, *Fatwa*, Online Encyclopedia, *available at* http://en.wikipedia.org/wiki/Fatwa; A. Iqbal, *Why Do Muslims Issue Fatwas*, MIDDLE EAST TIMES, issue 48 (Nov. 29, 2002), *available at* http://www.metimes.com/2K2/issue2002-48/opin/why_do_muslims.htm.

A "fatwah" is non-binding. Moreover, because there is no system of hierarchy within the Islamic faith, the acceptance of the "fatwah" is usually based on the integrity of the person declaring the "fatwah."[146] A "fatwah" delivered by one may be contradicted by a competing "fatwah" delivered by another. In such a case, people will often follow the "fatwah" from the person of their same religious tradition.[147] The binding nature of a "fatwah" is also subject to the country one lives in. A Muslim living in the United States is not subject to the influence of a "fatwah" to the same extent as someone living in a Muslim-ruled country.[148] "Fatwahs" deal with many subjects, including, for example, reproduction, worship, marriage, property, banking, and masturbation.[149]

When a search of the word "fatwah" is done using the Google search engine[150], the first result is "Osama bin Ladin's Fatwah." A similar search of "fatwa" or "fatwah" in the Westlaw Allfeds database produces 12 cases all of which use the term in the context of "fatwahs" to kill or to bomb and most of which relate to Bin Laden's "fatwah" for jihad against the United States and Jews. What is ironic is that Bin Laden does not even have the authority within Islam to issue a "fatwah."[151] Thus, all these references to "fatwah" are misinformed.

---

[146] *See* Hathout, *supra* note 145 ; Wikipedia, *supra* note 145.
[147] For example a Sunni Muslim will follow a "fatwah" originating in the Sunni tradition.
[148] *See* Wikipedia, *supra* note 145.
[149] *See* Fatwa-Online.com, *available at* http://www.fatwa-online.com/fataawa/miscellaneous/masterbation/0020309_1.htm.
[150] www.google.com.
[151] Porter, 13 IND. INT'L & COMP. L. REV. at 885 (Bin-Laden "does not bear the mantle of succession to the Prophet.")

The extent to which the word "fatwah" is misunderstood is evidenced by its misuse.[152] Moreover, it conjures up prejudicial images of Muslims issuing "fatwahs" to kill all non-Muslims, and is highly prejudicial.[153]

AA. Paragraph 24

> *On or about October 12, 2000, in Aden Harbor, Yemen, two terrorists piloted a bomb-laden boat alongside the United States Navy vessel the U.S.S. Cole and detonated a bomb that ripped a hole in the side of the U.S.S. Cole approximately 40 feet in diameter, murdering seventeen crew members, and wounding at least forty other crew members.*

This allegation does not even contain any word that signals how it might be relevant to the indictment charges.

BB. Paragraph 25

> *Beginning in or about April 1997, United States authorities, in order to protect the national security, limited certain of Abdel Rahman's privileges in prison, including his access to the mail, the media, the telephone, and visitors. At that time, the Bureau of Prisons (at the direction of the Attorney General) imposed Special Administrative Measures ("SAMs") upon Abdel Rahman, pursuant to a federal regulation (28 C.F.R. § 501.3). The stated purpose of the SAMs was to protect "persons against the risk of death or serious bodily injury" that could result if Abdel Rahman were free "to communicate (send or receive) terrorist information." Under the SAMs, Abdel Rahman could only call his wife or his attorneys and their translator, could only be visited by his immediate family members or his attorneys and their translator, and could only receive mail after it was screened by federal authorities. In addition, the SAMs prohibited communication with any member or representative of the news media. More specifically, as of April 7, 1999, the SAMs provided that "[t]he inmate will not be permitted to talk with, meet with, correspond with, or otherwise communicate with any member, or representative, of the news media, in person,*

[152] *See* H. Wasserman, *Pat Robertson's Supreme Fatwah*, Counterpunch (Jul. 24, 2003), *available at* http://www.counterpunch.org/wasserman07252003.html.
[153] *See, e.g.*, *Smith v. Islamic Emirate of Afganistan*, 262 F. Supp. 2d 217, 222 (S.D.N.Y. 2003) ("Fatwah" is described by apposition as "a holy war" which is clearly wrong.)

> *by telephone, by furnishing a recorded message, through the mails, through his attorney(s), or otherwise."*

During the period April 1997 until the return of the indictment, the Bureau of Prisons notified Sheikh Abdel Rahman and his counsel on several occasions that different SAMs had been put into effect regulating the conditions of his confinement. The reference in this paragraph to the SAMs in effect prior to the indictment period is confusing, as the content of the SAMs changed significantly during this time. Moreover, the government mischaracterizes the content of and regulatory authority for the SAMs. For example, nowhere do the applicable regulations refer to "national security." Similarly, the four corners of the SAMs contain no such reference. Finally, the implication that the Attorney General of the United States imposed the SAM is prejudicial and misleading because authority to implement a SAM has been delegated from the Attorney General to Bureau of Prisons personnel.

CC. Paragraph 26

> *The SAMs specifically provided that attorneys for Abdel Rahman were obliged to sign an affirmation, acknowledging that they and their staff would abide fully by the SAMs, before being allowed access to Abdel Rahman. The attorneys agreed in these affirmations, among other things, to "only be accompanied by translators for the purpose of communicating with inmate Abdel Rahman concerning legal matters." Moreover, since at least in or about May 1998, the attorneys also agreed not to "use [their] meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman."*

The reasons stated above apply to this paragraph. *See supra* Section IX.CC. The SAMs and attorney affirmations speak for themselves. If and when they are offered in evidence, we can invoke FED. R. EVID. 106 to correct any misimpression caused by the government's choice of provisions to place before the jury.

DD. Paragraph 27

> *Defendant AHMED ABDEL SATTAR, a/k/a "Abu Omar," a/k/a "Dr. Ahmed," is a longtime associate of and surrogate for Abdel Rahman. SATTAR negotiated Abdel Rahman's surrender and was present at Abdel Rahman's arrest on July 2, 1993. Upon Abdel Rahman's arrest, and continuing through his conviction, sentencing, and the imposition of the SAMs, SATTAR coordinated efforts to keep Abdel Rahman in contact with his co-conspirators and followers. Defendant LYNNE STEWART was one of Abdel Rahman's attorneys during his 1995 criminal trial in New York and, following his conviction, continued to act as one of his attorneys. Notwithstanding the SAMs and her agreement to abide by their provisions, STEWART, through her continued access to Abdel Rahman, enabled him to remain in contact with his co-conspirators and followers. Defendant MOHAMMED YOUSRY testified as a defense witness at Abdel Rahman's 1995 criminal trial and, starting in or about 1997, acted as an Arabic interpreter for communications between Abdel Rahman and his attorneys. Notwithstanding the SAMs and YOUSRY's knowledge of their provisions, YOUSRY, through his continued access to Abdel Rahman and facilitated by STEWART, enabled Abdel Rahman to remain in contact with his co-conspirators and followers.*

This paragraph contains the allegation that "Notwithstanding the SAMs and her agreement to abide by their provisions, STEWART, through her continued access to Abdel Rahman, enabled him to remain in contact with his co-conspirators and followers." This sentence wrongly implies that SAMs forbade a lawyer from facilitating communication between her client and his associates, and is also barred by this Court's prior opinion.

As the examples cited in Section I.C.2, *supra*, demonstrate, a lawyer must be free to maintain contacts between and among people associated with the client's activity. Such contacts help to provide essential information about the case, and help the lawyer to decide upon legal steps to take on the client's behalf. The SAMs contained no express prohibition that, in so many words, forbade such activity. Nor could the SAMs validly have contained any such provision.

In addition, this Court's prior opinion focused upon the vagueness inherent in alleging that a lawyer unlawfully provided communication facilities and herself (as personnel). This sentence is simply an artful (or perhaps artless) restatement of that invalid charge. The sentence acquires its prejudicial surplusage status because it is placed next to allegations about a non-lawyer.

EE. Paragraph 28

> *The allegations in paragraphs 1 through 27 of this Indictment are realleged and incorporated by reference as though fully set forth herein.*

This paragraph violates FED. R. CRIM. P. 7(c) and 8(a), as stated above. *See* Section IX-IX.B, *supra*.

FF. Paragraph 30(j)

> *On or about May 19, 2000, during a prison visit to Abdel Rahman by STEWART and YOUSRY, YOUSRY told Abdel Rahman and STEWART about the kidnappings by the Abu Sayyaf terrorist group in the Philippines and Abu Sayyaf's demand to free Abdel Rahman, to which STEWART replied, "Good for them." STEWART then told Abdel Rahman that she believed he could be released from prison if the government in Egypt were changed. STEWART also told Abdel Rahman that events like the Abu Sayyaf kidnappings in the Philippines are important, although they "may be futile," because it is "very, very crucial" that Abdel Rahman not be forgotten as a hero of the "Mujahadeen" (jihad warriors).*

This paragraph contains a misstatement of the actual conversation. Regardless, it is prejudicial surplusage because it is not in furtherance of any alleged conspiracy of which Ms. Stewart was an alleged member. She is entitled to her views about what world events might lead to amelioration of her client's prison conditions or his eventual release. *See* Section I.B-I.B.2, *supra.*

GG. Paragraphs 30(k)[154]

> *On or about May 19, 2000, during a prison visit to Abdel Rahman by STEWART and YOUSRY, YOUSRY read Abdel Rahman an inflammatory statement by Taha that had recently been published in an Egyptian newspaper.*

For the same reasons as given above, this act is not in furtherance of the charged conspiracy, and is constitutionally-protected activity in any case.

HH. Paragraph 30(p)

> *In or about late May 2000, after STEWART and YOUSRY's visit to Abdel Rahman on May 19 and 20, 2000, SATTAR had telephone conversations with Islamic Group leaders in which he stated that Abdel Rahman: (1) did not object to a return to "work" (terrorist operations); (2) agreed that the Islamic Group should escalate the issues in the media; (3) advised the Islamic Group to avoid division in the Islamic Group's leadership; and (4) instructed the Islamic Group to hint at a military operation even if the Islamic Group was not ready for military actions.*

The characterization "terrorist operations" is a prosecutorial interlineation, and should be stricken.

II. Paragraph 30(cc)

> *On or about October 25, 2000, SATTAR spoke by telephone to Taha, and Taha told SATTAR that "an Egyptian male" was involved in the bombing of the U.S.S. Cole and that SATTAR should assist in delivering a message to the United States government suggesting that similar attacks would occur unless Abdel Rahman were freed from prison.*

Whatever else this paragraph may be, it is not conceivably in furtherance of a conspiracy to violate the SAMs, which is the gravamen of Count One.

---

[154] We are not moving to strike paragraphs 30(l) – 30(o), but their content is the subject of other motions. *See* Section VII.E, *supra*, and Sections XI and XII, *infra*.

JJ. Paragraph 30(ee)

> *On or about July 13, 2001, during a prison visit to Abdel Rahman in Minnesota by STEWART and YOUSRY, YOUSRY told Abdel Rahman that SATTAR had been informed that the U.S.S. Cole was bombed on Abdel Rahman's behalf and that SATTAR was asked to convey to the United States government that more terrorist acts would follow if the United States government did not free Abdel Rahman. While YOUSRY was informing Abdel Rahman about this scheme, STEWART actively concealed the conversation between YOUSRY and Abdel Rahman from the prison guards by, among other things, shaking a water jar and tapping on the table while stating that she was "just doing covering noise."*

This paragraph does not allege that Sheikh Abdel Rahman responded in any way to the news he was being given, let alone that he responded in any culpable way. When somebody on the outside is doing acts that might affect the prisoner's situation, the prisoner should know about those acts. And when the communication must take place in a non-English language, the English-speaking lawyer is not a participant. Thus, this conduct is not in furtherance of any conspiracy.

KK. Paragraph 30(ff)

> *On or about July 14, 2001, during the second day of a prison visit to Abdel Rahman in Minnesota by STEWART and YOUSRY, YOUSRY read Abdel Rahman letters and Abdel Rahman dictated responsive letters to YOUSRY.*

Unless there is an allegation that the letters were sinister, this paragraph is prejudical surplusage.

LL. Paragraphs 30(gg) through 30(ii)

> *gg. On or about January 8, 2001, SATTAR spoke by telephone with STEWART. During this call, SATTAR informed STEWART that the prison administrator where Abdel Rahman was incarcerated had pleaded with Abdel Rahman's wife to tell Abdel Rahman to take insulin for his diabetes. Although SATTAR and STEWART knew that Abdel Rahman was voluntarily refusing to take insulin for his diabetes, they agreed that SATTAR should issue*

a public statement falsely claiming that the Bureau of Prisons was denying medical treatment to Abdel Rahman. STEWART expressed the opinion that this misrepresentation was "safe" because no one on the "outside" would know the truth.

hh. On or about January 8, 2001, SATTAR spoke by telephone with A1-Sirri and together they wrote a statement regarding Abdel Rahman's prison conditions, which included, among other things, a false claim that Abdel Rahman was being denied insulin by the United States government. A1-Sirri instructed SATTAR to send the statement to Reuters and any other news agencies he could contact.

ii. Between on or about January 8, 2001, and on or about January 10, 2001, SATTAR and Al-Sirri disseminated to several news organizations and on a website the false claim that United States authorities were withholding insulin from Abdel Rahman.

Dissemination of false information about a prisoner is not a crime, nor is it prohibited by the SAMs. These paragraphs are prejudicial surplusage. Whether this evidence might be admissible under FED. R. EVID. 404(b) will not be known until trial.

X. BECAUSE THEY OUGHT TO BE WITNESSES, CHRISTOPHER J. MORVILLO AND ROBIN L. BAKER SHOULD BE DISQUALIFIED FROM REPRESENTING THE GOVERNMENT IN THIS CASE

When asked by the Court at the motions hearing if the government's allegations then and in its briefs were to be taken as binding, "the same as a bill of particulars," Mr. Morvillo responded "yes." Mtn. Tr. at 50; *see also Sattar*, 272 F. Supp. 2d at 361 (noting the government's concession that its briefs and arguments in court "can be taken as a bill of particulars"). Indeed, the Second Circuit "has recognized that the government's attorneys can bind the government with their in-court statements." *United States v. Yildiz*, __ F.3d __, 2004 WL 35555, at *2 (2d Cir. Jan. 8, 2004) (citing *United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992)); *United States v. GAF Corp.*, 928 F.2d 1253, 1259-60 (2d Cir. 1991)). *GAF* specifically addressed the admissibility of superseded

pleadings and held that "considerations of fairness and maintaining the integrity of the truth-seeking function of trials" require that "a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation." *GAF*, 928 F.2d at 1260.

This issue arose in *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), which led to a disqualification of counsel. In *McKeon* the defendant's attorney depicted his client's role in the events at issue differently in the opening statement of a later trial than he had in his opening of his previous trial, which ended in a mistrial. *Id*. at 28. The government successfully moved to admit the attorney's previous opening statement as an admission of a party-opponent pursuant to FED. R. EVID. 801(d)(2). *Id.* at 29. This ruling led to a motion to disqualify defense counsel "since [he] 'ought' to be called as a witness to explain the difference between the two opening statements [and therefore] could not continue as trial counsel." *Id.* Citing New York disciplinary rules providing that "when 'it is obvious that [a lawyer] . . . ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial,'" *id.*,[155] the district court ruled that defense counsel must be disqualified. The Second Circuit affirmed. *McKeon*, 738 F.2d at 34. In affirming, the court explained that by allowing an attorney to proceed with evidence that contradicted his earlier admission he "would place himself in the position of an unsworn witness and implicitly put his own credibility at issue." *Id*. at 35 (analyzing *United States v. Cunningham*, 672 F.2d 1064, 1068 (2d Cir. 1982), which "is virtually on all fours" with *McKeon*).

Therefore, when prior admissions of counsel contradict subsequent assertions, not only are the prior statements admissible, but the attorneys who made them may be disqualified from the pending case. This is exactly the situation here. In prior filings and at the June 13, 2003

[155] Citing N.Y. Jud. Law, Disciplinary Rule 5-102(A) (McKinney 1975).

motions hearing, Mr. Morvillo and Ms. Baker made various factual statements about this case. Among them was that the "personnel" Lynne Stewart provided included herself and the translator, Mr. Yousry. *See, e.g.,* Mtn. Tr. at 60 (Mr. Morvillo explaining to the Court that Lynne Stewart provided "personnel" to the Islamic Group "[b]ecause she allowed herself to become subject to the direction and control of the organization"); Gov't Opp. at 40 ("Stewart wholly abandoned her role as a lawyer and became an integral cog in the IG communications machine."); *see also Sattar*, 272 F. Supp. 2d at 359 ("The Government accuses Stewart of providing personnel, including herself, to IG").

Prior statements by government counsel are binding on them and are admissible as evidence, as they constitute admissions by a party opponent, and are not hearsay within the meaning of the Federal Rules of Evidence. *See GAF*, 928 F.2d at 1262 ("if the government chooses to change its strategy at successive trials, and contradict its previous theories of the case and version of the historical facts, the jury is entitled to be aware of what the government has previously claimed"); *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 198 (2d Cir.), *cert. denied,* 280 U.S. 579 (1929) ("A pleading prepared by an attorney is an admission by one presumptively authorized to speak for his principal."); *see also* FED. R. EVID. 801(d)(2). As the Second Circuit explained in *McKeon*, a party "cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the knowledge that the trier of fact never learns of the change in stories." *McKeon*, 738 F.2d at 31.

Now, this prosecution team will be tasked with proving the allegations of the superseding indictment. Among these allegations is that the "personnel" Lynne Stewart provided was not herself or Mr. Yousry, but only her client Sheikh Abdel Rahman. Ind. ¶¶ 38, 41. The

superseding indictment contains no allegation that Ms. Stewart provided herself as personnel to IG.

The current allegation cannot be maintained without materially contradicting previous statements made by these prosecutors. *See GAF*, 928 F.2d at 1262 (2d Cir. 1991) ("if the government chooses to change its strategy at successive trials, and contradict its previous theories of the case and version of the historical facts, the jury is entitled to be aware of what the government has previously claimed").

Mr. Morvillo and Ms. Baker are the only people who can explain these contradictions and thus they must be available to testify. They cannot serve as both witnesses and prosecuting attorneys in this matter. Therefore, Mr. Morvillo and Ms. Baker must be disqualified from further participation in this case.

XI. MS. STEWART'S CASE SHOULD BE SEVERED

In her original motion papers, Lynne Stewart moved for severance pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure and *Bruton v. United States*, 391 U.S. 123 (1968). She incorporates by reference those arguments and respectfully requests that the Court conduct a pretrial *Bruton* hearing as authorized by Rule 14. She also renews her request under Fed. R. Crim. P. 14(b) for production of all defendants' statements that the government intends to use as evidence. The superseding indictment charges three conspiracies, and the government has refused to identify the individuals who are co-conspirators in each.[156]

[156] Actually, there are four conspiracies, because the government has chosen to charge Count Three, 18 U.S.C. § 373, as a continuing offense. As such, it appears to be multiplicitous of Count Two, for neither count specifies where, against whom, when or how the object offenses were to be committed. Although § 373 has been codified just after § 371, it is not in fact a continuing offense in our view. The federal solicitation statute borrows more from the California Penal Code model, which specifies only certain offenses as objects. *See People v. Miley*, 204 Cal. Reptr. 347 (Cal. Ct. App. 1984). It rejects the Model Penal Code formulation. Model Penal

Stripped of its rhetoric, this indictment charges Mr. Sattar – a "surrogate for" Sheikh Abdel Rahman, with conspiracy to murder and kidnap (Count Two) and soliciting terrorism (Count Three). It charges Ms. Stewart with being an able lawyer, representing her client, Sheikh Abdel Rahman, and as a result of that representation making her client available to his followers (Counts Four and Five) and defrauding the United States of its interests in administering certain Department of Justice regulations (Count One). Ms. Stewart alone is also charged with lying to the government about her intentions with respect to that representation (Counts Six and Seven).

The indictment catalogues the purported political goals and ideological underpinnings of certain identified and unidentified terrorists and their followers. Yet it makes no connection between Ms. Stewart's acts and any death or violence. Ms. Stewart's purported wrongdoing appears to be signing the affirmations and submitting them to the government (Ind. ¶¶ 30(i), 30(q), 30(dd), 43 and 45); commenting to Sheikh Abdel Rahman about his prospects for release following the Abu Sayyaf kidnappings (Ind. ¶ 30(j)); encouraging Mr. Yousry to read correspondence to Sheikh Abdel Rahman (Ind. ¶ 30(l)); concealing Mr. Yousry's communications with Sheikh Abdel Rahman from prison guards (Ind. ¶¶30(m), 30(o) 30(ee)); laughing with Mr. Yousry while Mr. Yousry translated for Sheikh Abdel Rahman (Ind.¶ 30(n)); quoting Sheikh Abdel Rahman to the press, expressing concern that her statement would become known to the prosecutors (Ind. ¶¶ 30(r) and 30(s)), and telling Mr. Yousry that she could not deny the statement quoting Sheikh Rahman (Ind. ¶ 30(aa)); and discussing with Mr. Sattar Sheikh Abdel Rahman's diabetes treatment or lack thereof (Ind. ¶ 30(ii)). The sole commonality

---

Code § 5.02 (all offenses are potential objects). Professor LaFave has located only one case on point, but that case holds that solicitation is not a continuing offense, and that each solicitation is a separate offense. W. LaFave, CRIMINAL LAW § 11.1(e), at 577 (4th ed. 2003). The more sensible view is to treat solicitation as analogous to attempt. In this Circuit, two efforts to rob the same bank, each of which is abandoned, make two crimes. *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977).

is that each of the defendants has some relationship to Sheikh Abdel Rahman. Mr. Sattar is his "surrogate." Ind. ¶ 27. Ms. Stewart is his lawyer, and Mr. Yousry was the translator who enabled Ms. Stewart to communicate with Sheikh Abdel Rahman. *Id.* While Sheikh Abdel Rahman is alleged to be a co-conspirator, the government has not provided any definition of what conspiracy or conspiracies he is said to have joined. Accordingly, the individual relationships are not a sufficient connection for joinder.

As this court observed in deciding Ms. Stewart's original severance motion, multiple defendants may be charged and tried for multiple offenses only if "the charged acts are part of a 'series of acts or transactions constituting offenses'" *Sattar*, 272 F. Supp. 2d at 378 (quoting *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir. 1988). The superseding indictment does not spell out a "series of acts or transactions" as required by Rule 8(b). Rather, it sets out two such series – one involving allegations of murder and kidnapping, the other involving legal services provided to Sheikh Abdel Rahman. In *Turoff* the severance analysis was undertaken in the context of an indictment that charged three defendants with two fraudulent schemes, one a mail fraud involving the installation of taxi meters, the other a tax fraud scheme involving failures to report interest income. The court refused to grant a severance because it found that "one scheme stemmed from the other." *Id.* at 1044. In other words, "the proof of one scheme [was] indispensable for a full understanding of the other." *Id.* In this case, no such linkage exists. There is no need to prove the conspiracy to kidnap or solicit acts of terrorism in order to understand the purported false statements to the government or the conspiracy to defraud the United States in its administration of the Bureau of Prisons' regulations. Similarly, there is no need to prove the SAM violations in order to understand the allegations lodged against Mr. Sattar. The government conceded as much in the first indictment when it charged that the

lawyers – including Ms. Stewart – wanted to pursue their representation of Sheikh Abdel Rahman "legally." *See* Section VIII.B., *supra*. This admission stands in strong contradistinction to the conduct alleged against Mr. Sattar.

An analysis of the joinder in the superseding indictment using the formulation set forth in *United States v. Attanasio*, 870 F.2d 809 (2d Cir. 1988), fares no better. In *Attanasio*, there were two separate conspiracies charged. The court upheld joinder because "the transactions alleged in both conspiracy counts were part of a series of acts that shared a common purpose. . . . Furthermore, there was an overlap of participants and acts." *Id.* at 815. This indictment contains no allegations of common purpose. Moreover, there is no overlap of participants or acts. The counts that charge Mr. Sattar with conspiracy to murder and kidnap (Count Three) and solicitation of terrorism (Count Four) do not name either Ms. Stewart or Mr. Yousry. Similarly, with the exception of Count One, the other counts that name Ms. Stewart and Mr. Yousry do not name Mr. Sattar.

This Court has decided a number of severance motions. One of those cases is *Gallo*, 1999 WL 9848, in which the Court granted a severance under Rule 8(b). In *Gallo*, the defendants were in two separate groups, each under the control of a different crime syndicate. Both groups were shaking down the same business. When it became clear that both were going after the same business, the two groups had meetings to discuss how the conflict could be resolved. The government argued that because all were aware of what was going on and talked to each other about it, the two shakedown schemes were separate. The Court granted severance because membership of each conspiracy was alleged to be distinct from the other, and the indictment did not "recite any facts that indicate a connection between the two conspiracies." *Id.* at *3 (citing *United States v. Camacho*, 939 F. Supp. 203, 209 (S.D.N.Y. 1996)). No defendant was alleged

to be a member of both conspiracies, and it was not alleged that the two conspiracies had a common purpose. This Court reasoned that the meetings were merely each group separately attempting to further their own interest in their respective schemes. *Id.* at *4. In support of its holding, the court cited a number of cases in which severance was granted:

> *United States v. Killeen*, No. 98 CR 143, 1998 WL 760237, at *3 (S.D.N.Y. Oct. 29, 1998) (finding joinder under Rule 8(b) improper where the defendant was not alleged to have been aware of or participated in other schemes charged in the indictment); *United States v. Lech*, 161 F.R.D. 255, 257 (S.D.N.Y. 1995) (granting severance to defendant under Rule 8(b) where he had no involvement in the other schemes charged in the indictment and only cursory knowledge of them); *United States v. Kouzmine*, 921 F. Supp. 1131, 1133 (S.D.N.Y. 1996) (granting severance under Rule 8(b) where both conspiracies alleged were not part of a single overarching scheme and there was no identity of participants); *United States v. Giraldo*, 859 F. Supp. 52, 54 (E.D.N.Y. 1994) (finding joinder under Rule 8(b) improper where "[a]lthough the Government contends that all of the drug sales were made to a single cooperating witness, there is no suggestion that [the defendants] ... knew of or were involved in any overall scheme") (internal quotation marks and citations omitted), *aff'd*, 80 F.3d 667 (2d Cir. 1996); *see also United States v. Saleh,* 875 F.2d 535, 538 (6th Cir. 1989) (finding that even under a "liberal construction of Rule 8(b)" it was not proper to join both defendants in the same indictment where the evidence indicated "only that each defendant violated the same statutes at the same time and place").

Gallo, 1999 WL 9848 at *3 (internal citations expanded where necessary).

There is also the unresolved issue of the conspiracies' durations and participants. The indictment appears to charge at least four separate conspiracies. Count One – the conspiracy to defraud the government of its administration of the Bureau of Prisons' regulations – runs from about June 1997 through April 2002 (Ind. ¶ 29). Count Four – the conspiracy to violate 18 U.S.C. § 2339A – runs from about September 1999 until April 2002 (Ind. ¶ 37). It is unclear, but implied that the conspiracy to conspire to commit the acts set forth in Count Two also runs from September 1999 until April 2002 as those are the dates set forth in Count Two. Similarly, Count Three runs from about September 1999 until April 2002.

Although, the government has refused to identify the co-conspirators in each of the different conspiracies, it has seized more than 100,000 statements – mostly telephone calls, faxes and emails – between and among the defendants and others. No doubt it will seek to use some large number of these statements against one or more of the defendants – some of which may be admissible against one or more of the defendants but not the others. We cannot of course at this time speak with specificity about the statements because not only has the government not identified the co-conspirators, but it has not identified the statements it will seek to use at trial. Nonetheless, sorting out the statements, allowing sufficient evidentiary foundation for their admissibility, and crafting individual instructions on the limited use that the jury can make of each of the statements invites confusion. Even if the court were to rule that certain statements were made in furtherance of one or the conspiracies charged, there is no way around the multiple conspiracy problem. A statement made in furtherance of one conspiracy may not be in furtherance of another even where there may be overlap of participants. There are also likely statements made during the pendency of one or more of the conspiracies, but not in furtherance of any of the conspiracies. Co-conspirator statements are only admissible against another co-conspirator when the declarant-co-conspirator making the statement does so with the intention of furthering the conspiracy's objective. *United States v. Guttierez*, 48 F.3d 1134, 1137 (10th Cir.), *cert. denied*, 515 U.S. 1151 (1995). This requires a contextual analysis of the declarant's intent at the time that the statement was made. *See United States v. Lieberman*, 637 F.2d 95, 102-103 (2d Cir. 1984) ("casual conversations" not in furtherance); *United States v. Blakey*, 960 F.2d 996 (11th Cir. 1992) (distinguishing statements in furtherance from blame-shifting). The hours of time that it will take the court to sort through these problems and the risks that the jury will be left with utter confusion at the end of the exercise are precisely the problems addressed by FED.

R. CRIM. P. 14 and the basis for giving the court discretion to grant a severance when justice so requires.

Rule 14, FED. R. CRIM. P. provides, in relevant part, that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." A Rule 14 severance is committed to the "sound discretion" of the trial court after weighing the "risk of prejudice." *United States v. Zafiro*, 506 U.S. 534, 541 (1993). We have already detailed the risks of prejudice that attend a joint trial of a lawyer and a "surrogate" for her client where the alleged criminal conduct of the surrogate is of a markedly different type than that of the lawyer. The risk is that a jury will be unable to sort out the confusion that arises from distinction between the acts with which Mr. Sattar is charged and Ms. Stewart's duties and responsibilities to Sheikh Abdel Rahman. A similar unfairness attends the problem of inadmissible hearsay statements.

In her original motion, and again here Ms. Stewart stresses the unique role of a lawyer and the difficulty of defending the lawyer's role in a prosecution with highly prejudicial joinder. The rhetoric used in the superseding indictment gives these observations new meaning and strengthens Ms. Stewart's arguments. Severance is necessary.

XII. THE COURT SHOULD ORDER THE GOVERNMENT TO PROVIDE A BILL OF PARTICULARS

As demonstrated in the foregoing arguments, the superseding indictment is vague, ambiguous, and fraught with complexity. In the event that this Court denies Ms. Stewart's motion to dismiss the allegations, she respectfully requests that the government be ordered, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, to provide a bill of particulars "to identify with sufficient particularity the nature of the charge[s] pending against [her], thereby

enabling [her] to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should [she] be prosecuted a second time for the same offense." *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (citing *Wong Tai v. United States*, 273 U.S. 77, 82 (1927)).

On January 9, 2004, Ms. Stewart made an informal discovery request with respect to the superseding indictment seeking information pursuant to, among other things the Fifth and Sixth Amendments to the Constitution, FED. R. CRIM. P. 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giles v. Maryland*, 386 U.S. 66 (1967), *United States v. Agurs*, 427 U.S. 97 (1976), *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny. By letter of January 12, 2004, the government refused to provide any of the particulars sought.[157]

The particulars we seek are stated below and parallel the indictment – in heading and subheading form:

INTRODUCTION

"Sheikh Omar Abdel Rahman"

1. Identify the "terrorist organizations based in Egypt and elsewhere" of which Sheikh Omar Abdel Rahman ("Sheikh Abdel Rahman") is alleged to have been an "influential and high-ranking member" in paragraph one of the indictment.

2. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the "public remarks in 1990" to which paragraph two of the indictment makes reference.

3. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the statements by Sheikh Abdel Rahman on which paragraph 3 of the indictment relies. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of statements by the Sheikh in which he has "supported and advocated jihad" for purposes other than those specifically enumerated in paragraph three of the indictment. [Emphasis in original.]

[157] Filed herewith is a declaration of Jill R. Shellow-Lavine stating that counsel attempted to resolve informally this discovery matter as required by Local Criminal Rule 16.1.

4. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the speech given by Sheikh Abdel Rahman "prior to May 2, 1994" to which paragraph four of the indictment makes reference.

5. With respect to paragraph five of the indictment

(a) Identify by date and location when Sheikh Abdel Rahman "exercised leadership."

(b) Identify the "strategic advice" provided by Sheikh Abdel Rahman.

(c) Identify by name the "followers" and "associates" to which this paragraph makes reference.

(d) Identify by name those whom Sheikh Abdel Rahman is alleged to have "solicited" and the "violent terrorist actions" discussed.

(e) Identify those instances in which Sheikh Abdel Rahman is alleged to have served as a "mediator of disputes."

6. Identify each of the "various facilities operated by the Bureau of Prison" in which Sheikh Abdel Rahman is alleged to have been incarcerated since his arrest as discussed in paragraph six of the indictment.

7. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the "message" referred to in paragraph seven of the indictment.

8. Identify any and all groups as to which Sheikh Abdel Rahman is alleged to have been a spiritual leader in addition to that one identified in paragraph eight of the indictment.

9. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the "public remarks" referred to in paragraph nine of the indictment.

10. Identify by name the "followers" to which paragraph ten of the indictment makes reference.

"Efforts to Secure Abdel Rahman's Release"

11. Identify by name the "terrorists, supporters and followers" referenced in paragraph 11 of the indictment. Specifically identify by date and

location the "threatened and committed acts of terrorism" to which paragraph 11 makes reference.

12. Identify by location and provide a complete copy (in the original language and as translated by the government) of the quoted material attributed to defendant Ahmed Abdel Sattar in paragraph 12 of the indictment.

13. Identify by location and provide a complete copy (in the original language and as translated by the government) of the "statement" to which paragraph 13 of the indictment makes reference. Identify by name the author of the "statement" to which paragraph 13 makes reference.

14. Identify by name the co-conspirator referenced in paragraph 14 of the indictment as "CC-1." Identify by location and provide a complete copy (in the original language and as translated by the government) of the "interview" to which paragraph 14 makes reference.

15. Identify by location and provide a complete copy (in the original language and as translated by the government) of the "statement" to which paragraph 15 of the indictment makes reference. Identify by name the author of the "statement" to which paragraph 15 makes reference.

16. Identify by location and provide complete copies (in the original language and as translated by the government) of the two statements to which paragraph 16 of the indictment makes reference: (a) the May 5, 1997 "statement issued in the name of the Islamic Group" and (b) the "statement released to the media on May 2, 1997, by one of Abdel Rahman's attorneys." Identify by name the author of the May 5, 1997 statement.

17. Identify by name the "assassins" and "terrorists" to which paragraph 17 of the indictment makes reference.

18. Identify by location and provide a complete copy (in the original language and as translated by the government) of the "statement" to which paragraph 18 of the indictment makes reference. Identify by name the author of the "statement to which paragraph 18 makes reference.

19. Identify by location and provide a complete copy (in the original language and as translated by the government) of the "statement" to which paragraph 19 of the indictment makes reference.

20. Identify by name the "individuals claiming association with … Abu Sayyaf" who "demanded the release from prison" of Sheikh Abdel Rahman and identify to whom that demand was made as referenced in paragraph 20 of the indictment. With respect to those to whom the demand was made, provide all statements they issued and other documents (in the original language and as

translated by the government) that pertain to the demand referenced in this paragraph.

"Other Relevant Events"

21. Identify by date and location all occasions "starting in or about July 1997" when "certain Islamic Group leaders and factions" called for a "ceasefire" as discussed in paragraph 22 of the indictment and provide all documents (in the original language and as translated by the government) pertaining thereto. Identify by name the "Islamic Group leaders" referenced in paragraph 22.

22. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the "fatwah" to which paragraph 23 of the indictment makes reference, and identify by name the individuals who "issued" the referenced "fatwah." [Emphasis in original.]

23. Identify by name the "two terrorists" to which paragraph 24 of the indictment makes reference and provide any and all documents (in the original language and as translated by the government) that refer or relate both to them and to any of the alleged indicted and unindicted co-conspirators in the instant indictment.

"The Special Administrative Measures Imposed on Abdel Rahman"

24. Identify by name the individual at the Bureau of Prisons who "(at the direction of the Attorney General) imposed Special Administrative Measures ('SAMs')" on Sheikh Abdel Rahman as referenced in paragraph 25 of the indictment, identify by name the individuals who participated in preparing the SAMs referred to in paragraph 25 and provide all documents that refer or relate to the preparation of the SAMs referred to in paragraph 25.

25. Identify specifically any and all authority on which the government relies for the issuance of the "affirmations" referenced in paragraph 26 of the indictment.

"The Defendants"

26. Identify how Lynne Stewart "enabled" Sheikh Abdel Rahman "to remain in contact with his co-conspirators and followers" as discussed in paragraph 27 of the indictment. Identify by name the "co-conspirators and followers" to which paragraph 27 makes reference, and provide all documents that refer or relate to Ms. Stewart's alleged acts of enabling.

COUNT ONE

27. Identify the date on which it is alleged that Lynne Stewart first became a member of the conspiracy charged in Count One.

28. Identify by name all of the alleged co-conspirators. Insofar as there are at least three separate conspiracies charged in the indictment, separately state the alleged co-conspirators as to each such conspiracy.

29. Identify all locations encompassed by the term "elsewhere" as used in paragraph 29 of the indictment.

30. Identify by date and location each act performed by Lynne Stewart in furtherance of the conspiracy charged in Count One.

31. Provide all documents that refer or relate to the telephone conversation referenced in paragraph 30(a) of the indictment.

32. Provide all documents that refer or relate to the visit referenced in paragraph 30(b) of the indictment.

33. Identify the source for the parenthetical definition of "Mujahadeen" as used in paragraph 30(j) of the indictment. [Emphasis in original.]

34. Identify by date and location and provide a complete copy (in the original language and as translated by the government) of the "inflammatory statement by Taha" that defendant Mohammad Yousry read to Sheikh Abdel Rahman as referenced in paragraph 30(k) of the indictment.

35. Identify by name all parties to the telephone conversation referenced in paragraph 30(s) of the indictment. State whether any information known by the government, or any evidence in the government's possession, custody or control, related to paragraph 30(s) was obtained by a search or eavesdropping, and provide a copy of all documents that relate to this telephone conversation.

COUNT TWO

36. Identify by name all of the alleged co-conspirators in Count Two, including but not limited to the "associate of Alaa Abdul Raziq Atia referred to as "CC-2" in paragraph 33(c) of the indictment. Insofar as there are at least three separate conspiracies charged in the indictment, separately state the alleged co-conspirators as to each such conspiracy.

37. Identify all locations encompassed by the term "elsewhere" as used in paragraph 32 of the indictment.

38. Identify the "persons" that were sought to be murdered or kidnapped as discussed in paragraph 32 of the indictment.

39. Identify the "foreign country" referenced in paragraph 32 of the indictment.

40. What is meant by the word "action" as it is used in paragraph 33(e) of the indictment?

41. What is meant by the word "capacity" and the phrase "do something" as they are used in paragraph 33(h) of the indictment?

42. Identify by date and location any act performed by Lynne Stewart in furtherance of the conspiracy charged in Count Two.

COUNT FOUR

43. Identify the date on which it alleged that Lynne Stewart first became a member of the conspiracy charged in Count Four.

44. Identify by name all of the alleged co-conspirators.

45. Identify all locations encompassed by the term "elsewhere" as used in paragraph 37 of the indictment.

46. Identify by date and location each act performed by Lynne Stewart in furtherance of the conspiracy charged in Count Four.

COUNT FIVE

47. Identify all locations encompassed by the term "elsewhere" as used in paragraph 41 of the indictment.

48. Identify by date, location and participants each act of provision of "material support and resources," referenced in paragraph 41 of the indictment.

49. Identify by date, location and participants each act of provision of "personnel" as referenced in paragraph 41 of the indictment.

50. Identify by date, location and participants each act that "concealed and disguised" as referenced in paragraph 41 of the indictment.

51. Identify by date, location and participants each act of "preparation" as referenced in paragraph 41 of the indictment.

52. As to each of the acts referenced in paragraph 48 of this letter, identify the "material support and resources" that were provided on each such date and identify to whom they were provided.

53. As to each of the acts referenced in paragraphs 49, 50, 51, and 52, of this letter identify by name the person or persons who directly committed each such act.

54. State whether Lynne Stewart is charged as an aider and abettor under 18 U.S.C. § 2, and the manner in which she is said to have aided and abetted.

COUNT SIX

55. Identify all locations encompassed by the term "elsewhere" as used in paragraph 43 of the indictment.

56. Identify the date of each of the alleged "false, fictitious, and fraudulent statements and representations" referenced in paragraph 43 of the indictment.

57. Identify the "false writing and document" referenced in paragraph 43 of the indictment.

58. As to each item identified in response to the request in paragraphs 54 and 55, of this letter, state the contents of each such item.

59. As to each item identified in response to the request in paragraphs 54 and 55, of this letter, identify the falsity, fictitiousness or fraud in each item.

60. Identify the "other things" referenced in paragraph 43 of the indictment.

COUNT SEVEN

61. Identify all locations encompassed by the term "elsewhere" as used in paragraph 45 of the indictment.

62. Identify the date of each of the alleged "false, fictitious, and fraudulent statements and representations" referenced in paragraph 45 of the indictment.

63. Identify the "false writing and document" referenced in paragraph 45 of the indictment.

64. As to each item identified in response to the request in paragraphs 62 and 63, of this letter, state the contents of each such item.

65. As to each item identified in response to the request in paragraphs 62 and 63, of this letter, identify the falsity, fictitiousness or fraud in each item.

66. Identify the "other things" referenced in paragraph 45 of the indictment.

Ms. Stewart has a constitutionally-protected right to be tried on an indictment that provides her with notice of her alleged criminal conduct. *Russell*, 369 U.S. at 763-64. As demonstrated in the foregoing sections, this indictment is ambiguous and complex in the extreme, and its notice infirmities are not cured by the weight of the discovery produced. Ms. Stewart has requested specific particulars designed to apprise her of the conduct charged. She seeks neither the government's witness list, nor a sneak-preview of the evidentiary details or legal theories of the government's case. Rather, as we have already argued, at issue is Ms. Stewart's conduct as a lawyer engaged in the active representation of a client. A lawyer's conduct is regulated by the courts and those regulations establish that in certain situations lawyers are privileged to engage in conduct that would be prohibited to non-lawyers. Because this indictment relates to Ms. Stewart's conduct as a professional, she is entitled to know with specificity which aspects of her representation the government has charged constitute a crime as distinguished from those as to which the government has no complaint. *Cf. United States v. Szur*, 1998 WL 132942, at *8 (S.D.N.Y Mar. 20, 1998) (ordering the government to provide particulars in connection with venue where more than one venue was available).

Ms. Stewart recognizes that the trial court has broad discretion to order the government to provide a bill of particulars. *United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir. 1988).

Among the factors courts consider in making this determination are "the complexity of the offense, the clarity of the indictment, and the discovery otherwise available to the defendants." *United States v. Weinberg*, 656 F. Supp. 1020, 1029 (E.D.N.Y. 1987); *see United States v. Shoher*, 555 F. Supp. 346, 349 (S.D.N.Y. 1983). Because this indictment pleads an unprecedented conspiracy to conspire to prepare or perhaps a conspiracy to prepare to conspire to facilitate (Ind. ¶ 38), the need for a bill of particulars is acute. The need is compounded by an indictment that makes liberal use of such phrases as "among others" (Ind. ¶¶ 30, 33, 39); "and elsewhere" (*id.* ¶¶ 30, 32, 37, 39, 41, 43, and 45); and "among other things" (*id.* at ¶¶ 30(m), 30(o), 30(v), 30(ee), 30(hh), 43, and 45).

Davidoff is instructive. In *Davidoff*, multiple defendants were charged with a RICO conspiracy and various extortion offenses for allegedly extorting payments from air freight companies in exchange for maintaining labor peace. Davidoff was ultimately tried alone on a redacted indictment containing five counts, including the RICO conspiracy which identified certain alleged extortionate acts but qualified the charges by saying that they "were not limited to" those acts. *Davidoff*, 845 F.2d at 1153. Before trial, Davidoff sought a bill of particulars with respect to the "but not limited to" phrase, but the court denied the request because it "would reveal the Government's proof and . . . some of the information required was already contained in documents previously made available to the defendants." *Id.* At trial, the government was permitted to introduce evidence of extortions directed to companies not named specifically in the indictment because they proved the existence of a RICO enterprise. *Id.* at 1154. Reversing the conviction, the Second Circuit made clear that where, as here, an indictment frames a broad conspiracy charge fairness may require the trial court to order the government "to particularize the nature of the charge to a degree that might not be necessary in the prosecution of crimes of

more limited scope." *Id.* In holding that the trial court abused its discretion by failing to require the government to provide particulars regarding the phrase "but were not limited to" the court emphasized the unfairness of requiring Davidoff to defend against allegations that were not articulated prior to trial. *Id.; see also United States v. Turkish*, 458 F. Supp. 874, 883 (S.D.N.Y. 1978), *aff'd*, 623 F.2d 769 (2d Cir. 1980) (ordering the government to provide a complete response to request for particulars specifying the "other conditions of the Crude Oil Market" alleged in the indictment). If the indictment is not clarified by a bill of particulars, Ms. Stewart may be placed in the unfair position of having to defend against allegations not defined prior to trial. *See United States v. Trie*, 21 F. Supp. 2d 7, 22 (D.D.C. 1998) (where indictment alleged that defendant received benefits from the DNC "including, but not limited to …" the government was ordered to provide particulars specifying the property allegedly obtained so that the defendant could prepare his defense).

Finally, the Court should order the government to provide a bill of particulars that informs Ms. Stewart of the dates on which she is alleged to have first become a member of the conspiracies charged in Counts One and Four. This information is necessary for Ms. Stewart to prepare adequately for trial. Although some courts have refused to order the government to provide such particulars, they have done so only when the "indictment adequately advise[d] defendants of the specific acts of which they [were] accused." *See United States v. Torres*, 901 F.2d 205, 234 (2d Cir.), *cert. denied,* 498 U.S. 906 (1990). That is not the case here. The dates of Ms. Stewart's alleged involvement are critical given her unchallenged role as lawyer for Sheikh Abdel Rahman. Thus, this is exactly the type of case in which the government has an obligation to provide specific dates. *See United States v. Strawberry*, 892 F. Supp. 519, 526-527 (S.D.N.Y. 1995) (government ordered to provide a bill of particulars that included the specific

dates that the defendants allegedly joined and left the conspiracy because information in the indictment was not sufficient). Other authorities that support Ms. Stewart's request are cited in her original motion papers and we need not repeat them here. *See* Stewart MTD at 119-122.

Ms. Stewart is not fishing for the government's evidence or theories or the list of persons it will parade before the jury. Rather, she makes the valid and supportable claim that she is entitled to notice before trial of the crimes against which she must defend not only to prepare adequately for trial and prevent the government from changing direction mid-trial, but also so that she can assert double jeopardy after her acquittal.

CONCLUSION

For the foregoing reasons, and those to be advanced at the hearing of these motions, we request that the relief we seek be granted

Dated: Annapolis, Maryland
January 22, 2004

Michael E. Tigar
Michael E. Tigar
Attorney for Lynne Stewart
626C Admiral Drive, #321
Annapolis, MD 21401
(888) 868-4427
Facsimile (866) 654-7245

Of Counsel:
Jill R. Shellow-Lavine
Jane B. Tigar
Steven P. Ragland

Counsel acknowledges with gratitude the assistance of: Professor Ellen Yaroshefsky; senior law clerks Daniel Habib and Josh Niewoehner; law students Shannon Hall, Spencer Hamlin, and David Maloney; and paralegals Lynn Gillette and Sarah Traugott.