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

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

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This motions cycle began when the prosecutors offered yet another "evolving definition" of statutory terms and legal theories in the November 19, 2003 superseding indictment. By superseding rather than going to trial on the remaining counts, the prosecutors are trying to sidestep this Court's July 22, 2003 holding and overcome the Solicitor General's decision to foreclose an appeal. The long and convoluted superseding indictment demands a thorough analysis and challenge, which we provided in our Memorandum of Law in Support of Lynne Stewart's Second Omnibus Motion to Dismiss the Indictment and for Other Relief ("Stewart Mem.").

The government's Memorandum of Law in Opposition to Defendants' Pretrial Motions Regarding the Superseding Indictment ("S1 Opp.") fails to rebut many of our arguments; therefore, much of the government's discussion requires no comment here. We reaffirm the arguments we previously presented. However, we must respond to some of the government's points, as well as to its mistaken view of the facts and law. We also emphasize that the government does not deny that (1) the superseding indictment implicates First Amendment

freedoms, and (2) it must therefore be closely scrutinized. *See* Stewart Mem. 8 n.15 (citing *United States v. Lamont*, 236 F.2d 312, 314-16 (2d Cir. 1956)).

Throughout its Opposition, the government characterizes evidence and makes various factual assertions. Pretrial motions are not the appropriate forum to confront such statements, no matter how baseless and incorrect they are. At the proper procedural hour, we will challenge the government's characterization of the evidence, its claims of historical fact, and the validity and authenticity of its translations, audio and video recordings, and any other proffered evidence. We do not waive any right to challenge any aspect of the government's case by refraining from doing so at this procedurally inappropriate juncture.

The government's Opposition contains much inflammatory rhetoric, as if turning up the heat could cure all the ills of this prosecution. Taken all together, the government's announced approach to this case, if permitted, would consume months of trial time and require substantial litigation over issues such as relevance and prejudice.

A fundamental error runs throughout the government's pleading. These prosecutors seem to believe that they, representing the executive branch, are solely responsible for defining and enforcing the law. They ignore the functions of Article Three judges. They trivialize or ignore the vital role that lawyers play in protecting liberty in times of crisis. They overstate their own importance. Chief Judge William Young has written of judges: "Possessed of a portion of the very sovereignty of the nation, they declare its publicly held values." He wrote of lawyers: "The nation's preeminent law teachers, they are our surest guarantee of individual liberty."[1]

[1] As we contemplate an eventual trial in this case, we think also of Judge Young's characterization of jurors as "the most stunning experiment in direct democracy in the history of the world."

I. Lynne Stewart's Status as a Lawyer is Clearly Relevant

As it did previously, the government attempts to deny the plain fact that Lynne Stewart served as legal counsel to Sheikh Abdel Rahman for many years, until her initial indictment and arrest on April 9, 2002. She was, in fact, appointed by Judge Michael B. Mukasey to represent Sheikh Abdel Rahman for part of this time. The government does not claim merely that Lynne Stewart, the lawyer, acted improperly in the course of her legal representation of her controversial client. Rather, it claims that she "was not engaged here in acts of legal representation," S1 Opp. 4, "wholly abandoned her role as a lawyer," *id.*, and, by reference to its earlier motions, "wholly abandoned her role as a lawyer and became an integral cog in the IG communications machine." Government's Memorandum of Law in Opposition to Defendants' Pretrial Motions ("Gov't Opp.") at 40 (relied upon by S1 Opp. 4).[2]

The government provides nothing more than bare assertions in support of these claims.[3] We previously addressed such claims in our Reply to the superseded indictment and incorporate those arguments by reference here. *See* Lynne Stewart's Reply Memorandum of Law ("Reply Mem.") at 34-37. As Chief Judge Young explained in *United States v. Reid*, 214 F. Supp. 2d 84,

[2] There is an obvious contradiction here and in the government's previous claim that Lynne Stewart was part of an IG "communications machine," Gov't Opp. 40, and that her actions "constituted criminal provision of material support and resources to IG." Gov't Opp. 50. By citing and relying upon pages 40, 50, and 51 of its initial Opposition brief, the government incorporates those statements by reference into its instant papers. As we discuss *infra* section VII, its contradictory statements are admissible and must be explained at trial, thus requiring the disqualification of Ms. Baker and Mr. Morvillo. Because AUSA Anthony S. Barkow appeared as counsel to the government in Gov't Opp., he too must be disqualified as he may be called as a witness to explain the contradiction in the portion of those papers now adopted in the present S1 Opp. regarding the superseding indictment.

[3] In a bit of non-responsive surplus argument, the government makes the point that "lawyers can violate the law, just like non-lawyers can." S1 Opp. 3. We never claimed otherwise. In the interest of brevity, we refer the Court, and the government, to our earlier papers, particularly Stewart Mem. sections I.C., I.D., VII.A. and VII.B., regarding the import of Ms. Stewart's status as a lawyer in analyzing the charges against her.

94 (D. Mass. 2002), defense attorneys "are zealously to defend [their clients] to the best of their professional skill without the necessity of affirming their bona fides to the government."

This Court previously found that Lynne Stewart's status as a lawyer is highly relevant to charges based on her alleged conduct in the course of representing her client. *See United States v. Sattar*, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003) (explaining that "the Government fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to criminal prosecution as a 'quasi-employee' allegedly covered by the statute."); *see also* Transcript, June 13, 2003 Motions Argument ("Mtn. Tr.") at 62 (the Court recognizing that "what the role of the lawyer is, and . . . whether they are violating the law by what they are doing" is a "very difficult" question). Those same concerns apply to the instant charges.

The government does not challenge our points that "New York law is the source of Lynne Stewart's rights and obligations as a lawyer," Stewart Mem. 19, and that "[t]he prosecutors, even with the blessing of the Attorney General, cannot legislate or otherwise impose attorney conduct rules that undercut state bar disciplinary rules." *Id*. at 20. In fact, the government simply ignores our discussion at Stewart Mem. 19. *See also id.* at 19-29 (providing analysis discussed above).[4]

The government does not answer our arguments regarding the role of defense lawyers, failing to address *Legal Services Corp. v. Valazquez*, 531 U.S. 533 (2001), *Polk County v. Dodson*, 454 U.S. 312 (1981), and *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). *See*

[4] This governmental obliquity with respect to a lawyer's duty strikes at the heart of this case. Our initial memorandum makes this point. The proper role of lawyers – as advocates, counselors, spokespersons, and representatives – is defined in the first instance by the First, Fifth and Sixth Amendments and by state bar rules. Stewart Mem. I.A.-I.D. It is ironic, even bitterly so, that in these troubled times these prosecutors should be echoing the attacks on lawyers that were the hallmark of earlier efforts to undermine people's rights. *See, e.g., Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

Stewart Mem. 29-33 (discussing and analyzing these cases as they apply to the instant indictment). Thus, Stewart Mem. 19-33 stands unchallenged.

II. Counts One, Six, and Seven Must Be Dismissed for Failure to State an Offense

A. Law Of The Case Not Inflexible

Despite stating that the superseding indictment rests on a "different legal foundation"[5] and attempting to resurrect, under a slightly different 18 U.S.C. § 2339A rubric, material support charges previously dismissed as unconstitutional, the government seeks to foreclose our challenge to counts One, Six, and Seven by wrapping them in the law of the case cloak. Not only is this argument disingenuous when the proponent itself seeks to avoid prior decisions of this Court, but law of the case does not dictate such an inflexible approach.

As Justice White explained in *Arizona v. California*, 460 U.S. 605, 618 (1983), a case upon which the government relies at S1 Opp. 7-8, "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power." Justice Breyer recently restated this idea, citing Justice Holmes and explaining that the doctrine:

> simply "expresses" common judicial "practice"; it does not "limit" the courts' power. It cannot prohibit a court from disregarding an earlier holding in an appropriate case. . . .

Castro v. United States, ___ U.S. ___, 124 S. Ct. 786, 793 (2003) (internal citation omitted). *See also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("law of the case . . . merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power") (cited with approval by *Castro*, 124 S. Ct. at 793).

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[5] 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.

The government concedes that the issue currently before the Court implicates only the "more flexible" branch of the doctrine, which applies "in the absence of an intervening ruling on the issue by a higher court." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002); *see* S1 Opp. 7. In Stewart Mem. I.A., we discussed the law of the case doctrine, noting its attenuated application to the prosecutors' self-styled "different legal foundation." Stewart Mem. 8-9. Indeed, dogmatic application of the doctrine is inappropriate even in the less flexible arm of the doctrine that applies to appellate court rulings:

> [T]he doctrine of law of the case is not an inviolate rule in this Circuit, and . . . the doctrine merely expresses the general practice of refusing to reopen what has been decided. In regard to prior decisions of a circuit court, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case. However, reconsideration may be justified if the following grounds are present: an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

United States v. Melendez-Carrion, 820 F.2d 56, 60 n.1 (2d Cir. 1987) (internal citations and quotation marks omitted).

If further justification for considering our arguments is necessary, we point to the revelations from the Fitzgerald Memoranda, the recasting of the unconstitutional material support charges, and the addition of a second 18 U.S.C. § 1001 count. The first amounts to new evidence that sheds new light on the government's conduct and motivations, and the latter two underscore the fact that justice demands a full and fair consideration of all charges brought in the superseding indictment.

"Finality in litigation" is not an aria the government is entitled to sing. Litigation about the constitutionality of the "terrorism" charges ended with this Court's July 22, 2003 Opinion and the government's October 3, 2003 withdrawal of its notice of appeal. Instead of going to

trial as scheduled, the government chose to open pretrial litigation anew with the superseding indictment.

B. Dennis *Argument Not Waived*

The government argues that our explanation that the requirements of *Dennis v. United States*, 384 U.S. 855 (1966), and its progeny, do not apply to lawyers in such situations "has been waived." S1 Opp. 10-11. In so doing, it incorrectly claims that Ms. Stewart "did not put forward this theory in connection with her motion to dismiss the charges in the original Indictment." *Id.* at 11. In fact, this point was addressed at argument on the initial motions to dismiss, Mtn. Tr. at 5-6, and was the subject of our letter to the Court dated June 14, 2003. In the *Sattar* opinion, this Court explicitly stated that "[t]he Court has considered all of the arguments raised by the parties." *Sattar*, 272 F. Supp. 2d at 384. The government is simply wrong when it claims that this theory was not raised in the prior motions cycle.

Moreover, the September 29, 2003 evidentiary hearing provided new documents and novel testimony that informed this discussion and elucidated the applicability, or lack thereof, of *Dennis* to this case. If the government may bring new charges based on a reevaluation of evidence already within its possession, certainly a defendant facing possible incarceration may reemphasize, expand upon, and even raise anew if necessary, all arguments relevant to her innocence.

C. *Stewart Makes No Claim that Lawyers Are Exempt from the Law*

We do not maintain that any citizen, regardless of profession, is exempt from the law. The government mischaracterizes our arguments by referring to "Stewart's claim that she was torn between 'her duty to the disciplinary rules' and her obligations to abide by federal criminal law." S1 Opp. 12. Rather, as we explained, the choice was "(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," a choice "informed by the fact that there was an articulable basis in the law for believing that the affirmations were not enforceable or, if enforceable, were sanctionable only on pain of losing access to one's client." Stewart Mem. 70.[6]

D. Attorney Affirmations Are Not Statutes, Regulations, or Court Rules

The government seeks to avoid the important implications of *In re Oliver*, 452 F.2d 111 (7th Cir. 1971), and the Third and Fourth Circuits' rulings in accord with *Oliver*, on this prosecution by simply stating that these cases "involved attorney disobedience of rules promulgated by courts, not positive enactments such as statutes or regulations." S1 Opp. 12-13. The Attorney Affirmations at issue, however, are simply fiats from low-level executive branch employees. They certainly are not "positive enactments such as statutes or regulations." Whatever the nature of the various letters from then-AUSA Patrick Fitzgerald that comprise the attorney affirmation record in this case, they certainly have a great deal less dignity and force than the court orders and rules discussed in *Oliver, Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.) (*en banc*), *cert. denied*, 371 U.S. 888 (1962), *overruled on other grounds*, *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985), and *In re Morrissey*, 996 F. Supp. 530 (E.D. Va. 1998).

Maness v. Meyers, 419 U.S. 449 (1975), deals with a court order, the most significant command known to the legal system. Moreover, as exemplified by *United States v. Dickinson*, one can violate an unconstitutional statute with impunity. 465 F.2d 496, 510 (5th Cir. 1972) ("When legislators or executive agencies – State or Federal – have transgressed constitutional or statutory bounds, their mandates need not be obeyed . . . if the directive is invalid, it may be

[6] We again emphasize that 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.

disregarded with impunity."). We addressed these points in our moving papers, Stewart Mem. 75-87. The government acknowledges these arguments in a footnote, S1 Opp. 6 n.4, but fails specifically to oppose them and does not address *Maness*, *Dickinson*, and related authority.

E. Admitted Ambiguity of the Indictment Demonstrates the Failure of Count One to State a Case and its Impermissible Vagueness

The government claims that certain of our arguments related to Count One are based on a "misread[ing of] the S1 Indictment." S1 Opp. 6 n.4. While we do not abandon our arguments, we acknowledge what the government here admits: the indictment is susceptible to numerous, and conflicting, interpretations. *See, e.g.,* S1 Opp. 53 ("[Stewart's assertion] misconstrues the allegation in the S1 Indictment"); *id.* at 62 n.29 ("Stewart . . . misunderstands Abdel Rahman's status in the S1 Indictment"); *id.* at 64 ("Again, Stewart misconstrues . . . the charges"); *id.* at 70 ("Stewart's argument misreads and misconstrues the charges in the S1 Indictment.").

The government's assertion makes our point. When an indictment, or a statute, is legitimately subject to two or three or more interpretations, that fact alone demonstrates that it fails to give constitutionally-adequate notice.[7]

We further note the paradox between the government's attempt to punish Ms. Stewart for an alleged conspiracy to defraud while it intentionally misled Ms. Stewart to convince her that her communications with Sheikh Abdel Rahman were privileged and private. *See* Stewart Mem. 87-88; *see also Securities and Exchange Comm'n v. ESM Gov't Sec., Inc.*, 645 F.2d 310 (5th Cir. 1981) (holding that information improperly obtained by federal agents through deception could not be used to enforce a subpoena duces tecum).

[7] *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 130 (5th Cir. 1962) ("While it is true that indictments are to be construed in a common sense way, where one is subject equally to one of two interpretations, one of which states an offense and the other which does not, the indictment is insufficient since there is no assurance that the Grand Jury would have returned the indictment had the words been employed in the sense necessary to sustain the conviction.").

III. Counts One and Four are Multiplicitous

As we stated, "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." Stewart Mem. 65. Application of the *Korfant*[8] factors leads to this conclusion, as "[p]articipants, time, scope and interdependence all speak to a single result – one offense." *Id*. at 65.

In response, the government admits, as it must, that "many of the facts" alleged in the two counts "overlap." S1 Opp. 19. It claims, though, that because the intent and motives differ in the two charges, they amount to separate conspiracies. However, the government ignores the rule that a single conspiracy may have multiple illicit ends. *Braverman v. United States*, 317 U.S. 49, 52 (1942) ("a single agreement to commit an offense does not become several conspiracies because it continues over a period of time . . . there may be such a single agreement to commit several offenses") (internal citations omitted).

Moreover, the government provides a circular justification for the charges based on mischaracterizations of the evidence. As we stated at the outset, we refrain from explicitly challenging the government's "factual" statements at this procedural stage, but reserve the right to do so at a more appropriate hour. Even the government's own formulation, however, does not demonstrate the existence of separate conspiracies. It claims:

> For instance, the facts that Stewart applauded the hostage-taking by Abu Sayyaf terrorists and encouraged Abdel Rahman to issue inflammatory statements to his terrorist followers (S1 Ind. ¶¶ 30(j)-(s)) (while also demonstrating circumvention of the SAMs) demonstrates her state of mind with respect to the material-support charge. Whereas Stewart's conduct in committing other violations of the SAMs - such as permitting Yousry to relay to Abdel Rahman uncleared correspondence and other information

[8] *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1985). *See* Stewart Mem. 65 (setting forth the factors and applying them to this case).

> unrelated to any legal matter or terrorist activity, *e.g.,* a letter from a follower - demonstrates only her intent to disregard the SAMs.

S1 Opp. 19.

The government fails to explain how Ms. Stewart's alleged uttering of the words "Good for them" in a jailhouse meeting with her client amounts to an overt act in furtherance of the Count Four conspiracy to provide material support to terrorists. A private conversation such as that alleged, never communicated to an outside individual, even if made "during" a conspiracy, cannot be "in furtherance" of that conspiracy. *See United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) ("The requirement that the statements have been in furtherance of the conspiracy . . . is not satisfied by a conversation . . . which amounted to no more than idle chatter."). There is no allegation, for example, that Ms. Stewart, communicated anything to "Abu Sayyaf terrorists" or that any statements uttered by, or even in the presence of, Ms. Stewart constituted a clear and present danger sufficient to overcome the speech protections of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny. At some point, we will if necessary litigate the authenticity of this recording and its alleged contents.

To the extent that they have any applicability to Ms. Stewart's interaction with her client, the remaining cited paragraphs of the indictment in support of the Count Four allegation, S1 Ind. ¶¶30(k) – (s), address exclusively Ms. Stewart's alleged conduct permitting the reading or dictation of letters during prison meetings. Such alleged conduct is explicitly the subject of the Count One conspiracy.

At best, the government has provided a vague series of allegations susceptible to various interpretations. As the Second Circuit stated in *Grimes v. United States*, 607 F.2d 6, 13 n.6 (2d Cir. 1979), "doubt will be resolved against turning a single transaction into multiple offenses."

The government's attempt to avoid multiplicity problems creates further confusion. It claims that the object of the Count One conspiracy was to "interefer[e] with the legitimate functions of the Bureau of Prisons and in its administration and enforcement of the SAMs for Abdel Rahman" while the Count Four conspiracy's object was the conspiracy "as charged in Count Two." S1 Opp. 18. Yet, it makes no sense to claim that circumvention of the SAMs constitutes a conspiratorial end in itself. Rather, the SAMs' announced purpose was intimately related to the matters covered in Count Four.

The government's threat to "seek a second superseding indictment charging a single Section 371 conspiracy count containing the two objectives," S1 Opp. 21, in the event that Counts One and Four are dismissed as multiplicitous should have no bearing on the Court's evaluation of these charges. First, multiplicitous charges are unconstitutional and violate FED. R. CRIM. P. 8(a). *See* Stewart Mem. 53-54. Second, permitting the government to proceed on multiplicitous charges is impermissibly prejudicial. To many jurors, more charges may connote more culpability. Third, the government cannot assume that such charges in a theoretical second superseding indictment will withstand pretrial motions to dismiss. Finally, it is the grand jury's province to charge.

The superseding indictment charges multiplicitous conspiracies on its face and therefore there is no need to defer dismissal of Counts One and Four until all evidence has been presented at trial.

IV. Counts Four and Five Must be Dismissed

The government struggles to articulate a construction of § 2339A as applied that does not violate constitutional rights or the dictates of statutory interpretation and notice. It asks this Court to join it in that circuitous, and ultimately futile, quest. That such contortions are

necessary to attempt to reach an acceptable application of § 2339A proves our contention that Counts Four and Five as applied to Ms. Stewart are unconstitutionally vague and impermissibly pleaded. Just as in the first round of pretrial motions, the government is unable to provide a clear, succinct, and consistent definition of key statutory terms (e.g., "personnel" and "provides") and cannot set forth a reasonable, articulable, and constitutional application of a statute proscribing material support to Ms. Stewart.

We reply below to various of the government's claims.

A. "Provides" and "Personnel" in § 2339A

Tyler v. Cain, 533 U.S. 656 (2001), on which the government relies, is irrelevant. In *Tyler*, the Supreme Court told us how judges should construe the statutory term "made" in the context of federal habeas litigation. As the Court admitted,

> As commonly defined, "made" has several alternative meanings, none of which is entirely free from ambiguity. *See, e.g.,* Webster's Ninth New Collegiate Dictionary 718-719 (1991) (defining "to make" as "to cause to happen," "to cause to exist, occur or appear," "to lay out and construct," and "to cause to act in a certain way").

Tyler, 533 U.S. at 662.

The Court then resorted to statutory context – "the overall statutory scheme" – to choose a definition.

Tyler did not involve a challenge for unconstitutional vagueness. Its discussion was not addressed to statutes that "persons of common intelligence" must understand and obey at their peril. It was addressed to expert deciders – Article Three judges – and even as to them, the case's procedural history shows that the statutory term was indeed ambiguous. Simply put, the Court did not hold there was no ambiguity, it resolved an ambiguity that it said was there.

Tyler neither cites nor considers the body of vagueness doctrine that governs here. Nor does its analysis assist the government.

For our purposes, we need not search far to find the term "provides." Section 2339A's companion statute, 18 U.S.C. § 2339B(a)(1), contains the term and in another subsection, it explicitly points to § 2339A for the definition of "material support or resources," the providing of which is prohibited by both parts of § 2339. *See* 18 U.S.C. § 2339B(g)(4) (regarding definition of terms). This Court previously rejected the government's attempts to extend § 2339B's reach by defining "provides" to encompass "making available":

> The Government argued in its brief that the defendants are charged not merely with using their own phones or other communications equipment but with actively *making* such equipment *available* to IG and thus "providing" IG with communications resources that would otherwise be unavailable to the FTO. That argument, however, simply ignores the reality of the facts charged in the Indictment in which various defendants are accused of having participated in the use of communications equipment. The government subsequently changed course and stated at oral argument that the mere use of one's telephone constitutes criminal behavior under the statute and that, in fact, "use equals provision.". . . Such changes in the Government's interpretation of § 2339B demonstrate why the provision of communications equipment as charged in the Indictment is unconstitutionally vague: a criminal defendant simply could not be expected to know that the conduct alleged was prohibited by the statute. . . . The defendants were not put on notice that merely using communications equipment in furtherance of an FTO's goals constituted criminal conduct. Moreover, the Government's evolving definition of what it means to provide communications equipment to an FTO in violation of § 2339B reveals a lack of prosecutorial standards that would "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358.

Sattar, 272 F. Supp. 2d at 358 (emphasis added).

The Court's prior analysis of § 2339B's shared statutory term "provides" applies with equal force to the current charges against Ms. Stewart. Lynne Stewart simply could not be expected to know that the conduct alleged here – somehow "providing" "personnel" as "material

support" by "making available" her client in some non-tangible sense and concealing the "location" "nature" "source" and "ownership"[9] of that human being who was at all times in the custody of the Bureau of Prisons – was prohibited by the statute.

The government's attempt to evade the legislative history of the term "provides," S1 Opp. 29-30 n.13, is similarly unavailing. While perhaps a later Congress's view cannot "control the interpretation of an earlier enacted statute," *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996), it is certainly relevant to the inquiry. *United States v. Burke*, 504 U.S. 229, 237 n.6 (1992). In this case, § 2339B contains explicit reference to § 2339A, and Congress presumably was aware of the definition of the § 2339A language when it mirrored and referenced it in the later enactment. *Torres-Lopez v. May*, 111 F.3d 633, 642 (9th Cir. 1997) (when it "chose to borrow" the Fair Labor Standards Act's definition of "employ" and incorporate it into the later-enacted Migrant and Seasonal Agricultural Worker Protection Act, "Congress presumably knew what it was doing").

The government is incorrect that "[l]imiting the definition of 'provides' in Section 2339A to exclude 'makes available' would render meaningless the statutory ban on 'provid[ing]' 'financial services, lodging, training, safehouses, . . . [and] facitilies.'" S1 Opp. 28-29. First, we must address the allegations as pled to determine if they withstand scrutiny. They do not. Second, one need not struggle to contemplate permissible applications of § 2339A that do not require reading the term "makes available" into the statute. "Providing" a safehouse, for example, may involve a physical transfer of keys to the door of the safehouse location to a

[9] Apparently conceding that one human being cannot "own" another, *see* Stewart Mem. 34, the government acknowledges in a footnote that the superseding indictment improperly alleges that Ms. Stewart concealed or disguised the "ownership" of her client and agrees to strike the word "ownership." S1 Opp. 44 n.23. This concession does not, however, change the fact the government's overall attempt to apply § 2339A to Ms. Stewart is infirm.

person. The same goes for "lodging" and "facilities." Similarly, "providing" "training" may involve giving one a weapon for target practice. As we stated in our moving papers, "[w]e 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." Stewart Mem. 38 n.55.

As to "personnel," we have analyzed the unconstitutional vagueness and overbreadth of the term as applied to Ms. Stewart in both our pleadings on the superseded indictment and our moving papers here. *See* Memorandum of Law in Support of Lynne Stewart's Omnibus Motion to Dismiss the Indictment and for Other Relief ("Stewart MTD") at 56-58; Stewart Mem. 38-41. We need not repeat that analysis. It is odd that the government would have the Court disregard its prior interpretation of § 2339A's companion provision, the actual text of § 2339A and § 2339B, and congressional statements about specific terms shared by both provisions in favor of various lay dictionary definitions of the terms or references to unrelated statutes. *See* S1 Opp. 30-32.

B. 18 U.S.C. § 2339A Cannot Be Applied to Ms. Stewart On the Facts As Alleged

The government takes issue with our point that:

> 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.

Stewart Mem. 47; *see also* S1 Opp. 33.

Yet, the government's retreat into the language of the statute provides no cover for its impermissible application of § 2339A to Ms. Stewart. First, it ignores the actual statutory text "and other physical assets," which necessarily implies that the preceding items also involve "physical assets." If the rules posted at a swimming pool, for example, prohibit "running, diving

in shallow water, snapping towels, horseplay, and other dangerous activity," the necessary implication is that running, diving in shallow water, snapping towels, and horseplay are types of "dangerous activities" prohibited. One can assume that playing an organized game of water polo does not constitute "horseplay" because it is not a "dangerous activity." One can assume that shaking dirt off of a towel does not constitute "snapping towels" because it is not a "dangerous activity."

Case law further demonstrates this point. For example, a crewmember on a noncommercial ship cannot be prosecuted under 18 U.S.C. § 1115, which imposes criminal penalties for misconduct upon "[e]very captain, engineer, pilot, or other person employed on any steamboat or vessel . . . ." *United States v. La Brecque*, 419 F. Supp. 430, 434-35 (D.N.J. 1976) (recognizing the doctrine of *ejusdem generis* in its analysis) (emphasis added). In *La Brecque*, despite any misconduct by a captain of non-commercial pleasure vessels, the government could not prosecute him under 18 U.S.C. § 1115 because he was not employed on the vessels. *La Brecque* further explained that the *ejusdem generis* maxim:

> has particular force where . . . the interpretation of a criminal statute is involved, since "courts are compelled to construe [such statutes] rigorously in order to protect unsuspecting citizens from being ensnared by ambiguous statutory language."

Id. at 435 n.6 (quoting *United States v. Insco*, 496 F.2d 204, 206 (5th Cir. 1974)).

We addressed the government's fallacious argument that "makes available" should be read into the statute in Stewart Mem. 35-37.

C. 18 U.S.C. § 2339A Is Unconstitutionally Vague As Applied to Lynne Stewart

Throughout its papers, the government faults our interpretation of the charges, our understanding of the specifics of which acts are alleged in which conspiracies, and our conclusions as to which alleged conspiracy is charged in which count. *See*, *e.g.*, S1 Opp. 44

("This complaint misreads the statute"); *id.* at 62 n.29 ("Abdel Rahman is not, as Stewart suggests, named as a co-conspirator in the Count *Four* conspiracy, nor was he provided to the Count *Four* conspiracy as a co-conspirator."); *id.* at 64 ("Again, Stewart misconstrues the statute and the charges"); *see also supra* section II.E (providing additional examples). Regardless of whether our interpretation or the government's is correct, the fact that two legal teams come to different conclusions on such basic aspects of this case demonstrates the impermissibly vague application of 18 U.S.C. § 2339A to Lynne Stewart. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"). Assuming, *arguendo*, that the government is correct in its interpretation and our moving papers demonstrate a misunderstanding of the allegations against Lynne Stewart, the indictment and charges obviously flunk the standard articulated in *Kolender*. Even persons studied in the law are incapable of understanding what conduct is prohibited by its application of § 2339A to Lynne Stewart.

We explained how this application of the statute is not saved by the scienter requirement and how it "permit[s] 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections'"[10] in our moving papers and will not repeat that discussion here. *See, e.g.,* Stewart Mem. 9-18, 33-46.

The government attempts to mischaracterize our "as applied" challenge as a facial vagueness challenge to § 2339A. We clearly stated that the challenge is to the statute "as applied to Lynne Stewart," Stewart Mem. 6,[11] and that "[w]e are not saying that the statute will always

[10] *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).
[11] Indeed, this language was in the capitalized heading of the vagueness section of our memorandum. Stewart Mem. 6 ("I. COUNTS FOUR AND FIVE MUST BE DISMISSED

flunk a vagueness test." Stewart Mem. 38 n.55. Therefore, the government's reliance on cases such as *United States v. Chestaro*, 197 F.3d 600 (2d Cir. 1999), and *United States v. Harriss*, 347 U.S. 612, 618 (1954), is misplaced and misleading. *See* S1 Opp. 40. In *Harriss*, the Court specifically explained:

> We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged "invalidity" of the statute on which the information is based.

Harriss, 347 U.S. at 617.

Similarly, *Parker v. Levy*, 417 U.S. 733 (1974), addressed whether a military physician could be prosecuted for "conduct unbecoming an officer and a gentleman" and "prejudice of good order and discipline in the armed forces" under articles 133 and 134 of the Uniform Code for Military Justice for "his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so . . . ." *Parker*, 417 U.S. at 757. The Court of Appeals held that even though his conduct was proscribed by the Code, possible other applications of the articles were constitutionally impermissible and thus "appellee [had] standing to challenge both articles on their face." *Id.* at 742. The case, therefore, is relevant only to a facial vagueness challenge. Further, it addressed application of the Uniform Code of Military Justice, not civilian law, so is even further removed from the as applied vagueness challenge to § 2339A that is before this Court. As the *Parker* Court emphasized:

> For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. [] [E]ach

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BECAUSE 18 U.S.C. § 2339A IS VOID FOR VAGUENESS AS APPLIED TO LYNNE STEWART").

> of these differentiations relates to how strict a test of vagueness shall be applied in judging a particular criminal statute.

Id. at 756.

Such mischaracterization and lack of candor infect the government's entire discussion of the vagueness issues.

In painting our as applied challenge as a facial attack, the government also fails to acknowledge the need to evaluate vagueness as applied to the charged conduct and the defendant who is named. It again fails to acknowledge the relevance of the fact that Lynne Stewart is a lawyer charged with conduct allegedly committed in the course of her representation of a controversial client. Certainly a lawyer with legal duties based in state law approaches decisions with more difficulty than, for example, the defendant in *Rose v. Locke*, 423 U.S. 48 (1975). *See* S1 Opp. 41-42 (citing and relying upon *Rose v. Locke*). In *Rose*, the defendant brandished a knife and committed sex acts on a woman without her consent. *Rose*, 423 U.S. at 48. His argument on appeal was only that he did not know that forcible cunnilingus constituted a "crime against nature" under Tennessee law. The *Rose* Court recognized the importance of the facts of a particular case to the analysis, emphasizing that "[t]his is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny, see *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974)." *Rose*, 423 U.S. at 50 n.3.[12]

D. The Government's Impermissibly Vague Application of "Concealing Or Disguising the Nature, Location, Or Source of Personnel"

The government again claims that statutory terms applied to Lynne Stewart are not unduly vague or indefinite, and yet chides us for "misread[ing] the statute." S1 Opp. 44. Its

[12] As we noted previously, the government took no issue with, and thus concedes, our point that the superseding indictment implicates First Amendment freedoms and therefore must be closely scrutinized.

circular justification of the indictment's language is uncompelling. Its "burka" analogy, S1 Opp. 46, is inapt, inflammatory, and offensive.

E. Government's Inferences are Neither Obvious Nor Appropriate

Throughout its papers, the government makes sweeping conclusions that simply do not follow. An example appears at S1 Opp. 61, where it claims that "withdrawal of support [for a cease-fire] was tantamount to a directive to followers to kill people." That conclusion is invalid and demonstrates a disregard for speech protections as embodied in *Brandenburg* and its progeny. The line between protected speech and criminal culpability was further explained in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972):

> For our purposes the most fundamental principle guarding against removal from first amendment protection is that the removed expression must have a very substantial capacity to propel action, or some similarly entwining relationship with it. This requirement is at the heart of the clear and present danger test enunciated by Mr. Justice Brandeis in *Whitney v. California*, [274 U.S. 357, 372 (1927)]. It is implicit in the distinction in *Yates v. United States*, [354 U.S. 298, 325 (1957)], between advocacy to do something and advocacy to believe in something. It is the essence of the dual requirement in *Brandenburg v. Ohio*, [395 U.S. 444 (1969)], that before advocacy of the use of force of law violation can be proscribed it must be shown (1) that "such advocacy is directed to inciting or producing *imminent* lawless action" and (2) that such advocacy "is *likely* to incite or produce such action."

Id. at 359-60 (internal footnotes omitted).

Pretrial motions are not the forum for litigating the meaning of words. The government's assertion about "withdrawal of support" finds no support in the indictment's allegations. The evidence at trial will show that Sheikh Abdel Rahman's announced position posed no danger to anybody. For present purposes, however, we note that the allegations of this indictment represent a type of speech that the Supreme Court has repeatedly held is protected by the First Amendment.

F. A Linguistic Analysis Demands Dismissal of these Charges As Applied to Ms. Stewart

We reply to the government's challenge to our conjunctive/disjunctive argument by attaching Professor Layman Allen's linguistic and legal analysis of § 2339A as Appendix A. *See generally* L. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833 (1957). Appendix B contains Professor Allen's curriculum vitae. Due to the short motions schedule, Professor Allen was not able to provide his analysis until late February. We then reviewed the analysis and discussed it with him, formatted it, and provided it as soon as we could.

G. Inchoate Infirmities of the Charges Against Ms. Stewart

The government's reliance on *United States v. Mowad*, 641 F.2d 1067 (2d Cir. 1981), *see* S1 Opp. 68-69, does not resolve the concerns we raised in our moving papers. It, and other cases cited by the government, address certain "conspiracies to attempt." As we explained previously, we face here, however, a "conspiracy to facilitate to conspire," which is even more problematic than a "conspiracy to conspire" formulation which itself is impermissible.[13]

As to conspiracies to attempt, *Mowad* explained:

> Although it is probable that the "conspiracy to attempt" charge against Mowad was the result of careless indictment drafting and not innovative legal reasoning, the Government's charge contains all elements necessary to prosecute a conspiracy: a provision making the act of conspiring a crime and a provision making the object of the conspiracy a crime.

Mowad, 641 F.2d at 1074.

The charges here more closely resemble those forbidden in *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982). *See also* Stewart Mem. 50, 52. As we explained previously, the government alleges "a conspiracy with the aim not of actually

[13] The government again claims we misunderstand the charges, but fails to provide a cogent and consistent interpretation of the indictment. We address this *supra* sections II.E. and IV.C.

carrying out the second conspiracy, but with the lesser and more remote aims of assisting and disguising (i.e. facilitating) that second conspiracy" and "Ms. Stewart is not charged in the second conspiracy." Stewart Mem. 49; *see generally* Stewart Mem. 48-53. Therefore, *United States v. Clay*, 495 F.2d 700 (7th Cir. 1974), in which a concrete "offense against the United States" was charged as the object of the conspiracy, similarly does not resolve our challenge. The fact remains that "[w]e are not dealing with the bizarre formulation of an agreement to agree to do X . . . but with the yet more bizarre formulation of an agreement to facilitate to agree to do X." Stewart Mem. 49.

Even by its own articulation, the government has impermissibly charged offenses with multiple level of inchoateness. The government states earlier in its brief that the object of the Count Four conspiracy was the conspiracy "as charged in Count Two." S1 Opp. 18. Count Two does not charge "an offense against the United States," but rather a *conspiracy* to commit "an offense against the United States." By the government's own admission, therefore, Count Four is not a "conspiracy to attempt," which is permissible in some cases, but the impermissible "conspiracy to conspire," a charging formulation for which it offers no cogent justification.

A textual analysis exposes the government's error. Title 18 United States Code § 371 speaks of a "conspiracy" to commit "an offense against the United States." Thus, the section refers to two separate concepts – "conspiracy" and "offense." Therefore, the section does not permit charging a "conspiracy" to conspire.

Even though the government's own citations are not solid support for a conspiracy to attempt, that sort of charge is fundamentally different. FED. R. CRIM. P. 31(c) permits a jury to find a defendant guilty of an attempt when a completed offense is charged. The statutory penalty for an attempt, absent some special statutory provision, is the same as for a completed offense.

A jury could not, however, find a defendant guilty of the inchoate offense of conspiracy under a count charging the substantive offense.

The government's analogy at S1 Opp. 70 is absurd and underscores that the charges are vague as applied for lack of sufficient notice. One presumably knows that giving a homicidal person a gun to do with what he wishes may likely lead to a crime. The same cannot be said of someone charged with speech acts and acts allegedly committed in the course of representing an imprisoned client. The analogy also demonstrates that some element of physicality is necessary in order for "providing material support" to pass constitutional muster as applied to Lynne Stewart. *See supra* section IV.A.-B.

The government's overstated analogy also ignores Learned Hand's celebrated statement in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), noting that traditional definitions of accomplice liability "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about . . . ." *See also People v. Swersky*, 111 N.E. 212, 214 (1916) (Cardozo, J.) ("words that sound in bare permission make not an accessory"). *See* our discussion of the special role of those providing legitimate services to an enterprise that turns out to be criminal. Stewart Mem. 23, 28-33. *See also United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (knowing facilitation falls short of the state of mind required for a conviction for conspiracy).

The government has yet to articulate a line between permissible legal representation, zealous advocacy for a client, and criminally-culpable conduct. While these prosecutors may

believe they "know it when they see it," that belief is insufficient to justify the prosecution of Ms. Stewart.

V. The New Charges Against Lynne Stewart are Vindictive

The government challenges our motion by first citing two cases that address *selective* rather than *vindictive* prosecution. *See* S1 Opp. 80 (relying upon the selective prosecution cases *Wayte v. United States*, 470 U.S. 598 (1985) and *United States v. Armstrong*, 517 U.S. 456 (1996)). The issue here, however, is not the propriety of a decision about "who should be prosecuted," but rather the propriety of *how* the prosecution against Ms. Stewart has progressed and the motives underlying the new charges. Taking up the government's challenge on its terms, however, there is certainly an issue of selectivity bound up with the vindictiveness challenge. FBI agents have repeatedly violated FISA court orders limiting the permissible scope of electronic surveillance in this case. *See, e.g.,* Letter from R. Baker to Counsel, Jan. 20, 2004 (possibly under seal and subject to the protective order in this case). If done with proscribed intent, those violations are at least contumacious and at most criminal violations of civil rights.

Any presumption of regularity that may exist is rebutted in this case, where the facts underlying the superseding indictment demonstrate a "reasonable likelihood" of vindictiveness. *See United States v. King*, 126 F.3d 394, 397 (2d Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (noting that a presumption of prosecutorial vindictiveness applies when the circumstances of a case pose a "realistic likelihood" of vindictiveness).

The government fails to recognize that *United States v. Hinton*, 703 F.2d 672 (2d Cir.), *cert. denied*, 462 U.S. 1121 (1983), left open the possibility that a pre-trial presumption of vindictiveness may arise. *Id.* at 679 (ruling that "these circumstances, occurring prior to trial, *without more*, do not warrant a presumption of prosecutorial vindictiveness.") (emphasis added).

Here, we have that "more." Therefore, the government's reliance on *Paradise v. CCI Warden*, 136 F.3d 331 (2d Cir. 1998), and *United States v. Eichman,* 957 F.2d 45 (2d Cir. 1992), is misplaced. As we have discussed, numerous interrelated factors give rise to a presumption of vindictiveness in this prosecution. The superseding indictment, issued less than two months before trial was to begin, was the culminating event in a series of actions by these prosecutors that creates a reasonable likelihood of vindictiveness.

The government's attempt to distinguish *Blackledge v. Perry,* 417 U.S. 21 (1974), as a post-conviction case is unavailing. The fact that these prosecutors have "upped the ante" is more central to a vindictive prosecution claim than the fact that *Blackledge* did not involve a pretrial setting.

The government mischaracterizes our motion by claiming "the presumption of vindictiveness does not apply merely because charges could have been brought at an earlier time or in an original indictment." S1 Opp. 87. We did not argue that the presumption is warranted *solely* because the government could have brought the second 18 U.S.C. § 1001 count in the original indictment. While that fact is certainly a component of what amounts to a "reasonable likelihood" of vindictiveness, we presented other factors that establish such likelihood. For example, the guideline ranges on the new counts also present a dramatic increase in the potential sentence to which Ms. Stewart is exposed. The Solicitor General's refusal to grant the appeal these prosecutors desired is also relevant.

The government criticizes our motion at length for a perceived lack of "direct evidence, of genuine animus on the part of the United States Attorney's Office." S1 Opp. 92, 95. Presumably, such evidence may include internal memoranda, statements to colleagues, and the like. Yet, in the same breath, the government again complains that certain of such documents,

which it voluntarily entered into evidence at the September 29, 2003 hearing, are still in our possession and that we refer to them generally in support of our vindictiveness claim. The government, therefore, proposes an impossible standard to raise even a reasonable likelihood of vindictive motive: 1) the defendant must prove beyond a doubt what is in the prosecutors' mind, 2) she must do so without the benefit of any discovery, regardless of how suspect the charges appear based on available evidence, 3) and if she even refers generally to prosecutor's memoranda that were voluntarily disclosed, she is to be reprimanded.[14]

Precisely to head off this argument, the law of vindictive prosecution speaks of two procedural rules. First, as we have discussed, the circumstances of this case create a presumption of vindictiveness. That presumption, therefore, shifts the burden of going forward. *King*, 126 F.3d at 399. Second, a presumption of regularity can be rebutted by evidence to the contrary. *Id*. at 397. The facts we have presented rebut any such presumption of regularity that may exist. It is now the government, therefore, that must come forward to justify its suspect actions.

VI. Impermissible Surplusage Must be Stricken from the Indictment

We have moved to strike language from the indictment that is "prejudicial, inflammatory, vague, [and] irrelevant." Stewart Mem. 112. The government fails to demonstrate that the challenged language is permissible, and admits it "does not even begin to attempt exhaustively to list all possible ways in which allegations or evidence are relevant." S1 Opp. 98. Rather, through speculation and embellishment it attempts to justify its allegations. The government must not be permitted to amend its charges now in an attempt to justify the irrelevant, inflammatory, and prejudicial language contained in the superseding indictment.

[14] The government makes the baseless claim that we "inappropriately" referred to the Fitzgerald Memoranda, and yet again seeks their return. As noted previously, "[w]e refrain from quoting directly from these materials . . . [and] [a]ny details about their content discussed herein have already been stated in open court." Stewart Mem. 108 n.110.

Additionally, the government claims without any support whatsoever, that retaining irrelevant, inflammatory, and prejudicial language creates "no risk of unfair prejudice to Stewart." S1 Opp. 98. This is wrong. The indictment is a public document, available not only to potential jurors, but also to Ms. Stewart's colleagues, acquaintances, friends, and potential clients. Further, surplusage "creates the danger that the prosecutor at trial may impermissibly enlarge the charges contained in the Indictment returned by the grand jury." *United States v. Washington*, 947 F. Supp. 87, 90 (S.D.N.Y. 1996). Trials, after all, begin by reading the indictment.

We disagree that our surplusage discussion "can be broken down into eight categories," S1 Opp. 99, and ask that surplusage not addressed by the government be deemed conceded.

A. Paragraphs 1-27 Are Not Acceptable "Background Evidence"

It is true that background evidence may be admissible and thus may not be surplusage. *United States v. Mulder*, 273 F.3d 91, 99-100 (2d Cir. 2001). However, paragraphs 1-27 are so far removed from any chargeable offense that they do not qualify as background evidence. We have analyzed these paragraphs in detail. *See* Stewart Mem. 120-47.

As we discussed in our moving papers, these paragraphs are not part of any "count" and thus violate the dictates of FED. R. CRIM. P. 7(c)(1). The government's footnote citation to *United States v. Hubbell*, 177 F.3d 11, 13 (D.C. Cir. 1999) (*per curiam*), is non-responsive. *Hubbell* addressed a vagueness challenge and did not consider a motion to strike surplusage or Rule 7(c)(1).

B. "Terror" References Are Surplusage As Used in This Indictment

We rely primarily on the discussion in our moving papers, but note that the definitions in 18 U.S.C. § 2331, upon which the government relies in part to justify the use of "terror" terms,

were added in October 2001, as part of the PATRIOT Act, and thus have no relevance to the case against Ms. Stewart. Moreover, the court's refusal to strike references to "terrorist groups and affiliated terrorist groups" in *United States v. Bin Laden*, 91 F. Supp. 2d 600 (S.D.N.Y. 2000), does not justify use of "terror," "terrorist," and/or "terrorism" here. In *Bin Laden*, a defendant moved to strike references to "terrorist groups and affiliated terrorist groups," *id*. at 621, not simply "references to terrorism," as the government's papers imply. S1 Opp. 104. Judge Sand refused, as the *Bin Laden* defendant was charged with participating in five different conspiracies with the alleged terrorist groups. The terms "terrorist groups and affiliated terrorist groups," therefore were central to the charged conduct, unlike the terms we seek here to strike.

C. Sheikh Abdel Rahman's Statements are Surplusage

Citing *United States v. Diaz*, 176 F.3d 52, 78 (2d Cir. 1999), the government claims that Sheikh Abdel Rahman's prior acts and speech are evidence of his intent to participate in the Count One and Two conspiracies. S1 Opp. 105-06. Yet, as *Diaz* emphasized, "FED. R. EVID. 404(b) bars the admission of 'evidence of other crimes, wrongs, or acts' to prove the defendant's propensity to commit the crime charged." *Diaz*, 176 F.3d at 79. In *Diaz*, the "bad acts" admitted were in furtherance of the conspiracies charged. *Id*. Here, the "bad acts" are alleged by the government only to demonstrate Sheikh Abdel Rahman's propensity to commit the crimes charged in this prosecution. Therefore, Rule 404(b) provides an additional reason why this language must be stricken from the present indictment.

Additionally, the *Diaz* citation proves too much, in two distinct ways. First, Sheikh Abdel Rahman is not on trial here. Inflammatory evidence, arising from a time well before the charged conspiracy allegedly began, is irrelevant to Lynne Stewart's culpability and highly prejudicial. By announcing an intention to tell the Sheikh's alleged story from a time long

before he ever met Lynne Stewart, the government invites the Court to open up a collateral evidentiary battle that will waste court time and inflame juror passion.

Second, the government's vigorous insistence that Sheikh Abdel Rahman was disposed to be a conspirator long before he met Lynne Stewart belies the central allegation that Lynne Stewart somehow provided him to a conspiracy.

The speculative, irrelevant, inflammatory, and prejudicial nature of this language is further demonstrated by the government's justification for paragraphs 10-18. It claims that paragraphs 10-18 are "directly relevant to the Count Two conspiracy to murder and kidnap," S1 Opp. 106, and that "the agreement to murder and kidnap persons outside the United States commenced as early as January 1996, when Abdel Rahman was sentenced." *Id.* This latter claim relies upon paragraph six of the superseding indictment for support, yet paragraph six is merely a recitation of the procedural history of Sheikh Abdel Rahman's conviction and does not mention any agreement commencing at this, or any other, time. The government then contradicts its own prior claim, stating that "[t]he agreement to murder and kidnap may have commenced as early as 1981." S1 Opp. 106 n.51.

Once again, the government makes inconsistent claims and provides unsupported factual assertions. In its own words, on the same page of its own pleading, the government cannot consistently state when an alleged conspiratorial agreement began. The government must not be allowed simply to speculate as to the facts of this case to justify its improper use of irrelevant, inflammatory, and prejudicial surplusage.

D. Statements Regarding Taha Improper

Citing *United States v. Layton,* 720 F.2d 548, 555-58 (9th Cir. 1983), the government contends that Taha's statements are "relevant to his intent to further the objects of the

conspiracies charged in Counts One and Two." S1 Opp. 109. However, in *Layton*, statements of a co-conspirator were admissible against the defendant "provided sufficient evidence exists to raise a reasonable inference of conspiracy at the time [the unindicted co-conspirator] made the statements." *Layton*, 720 F.2d at 555. The decision further explains:

> Before admitting a statement of a co-conspirator into evidence against a defendant, the court must have independent evidence of the existence of the conspiracy and of the defendant's connection to it, and must conclude that the statement was made both during and in furtherance of the conspiracy. As to the latter two requirements, sufficient evidence [must] exist to support an inference that the statements were made in furtherance of the conspiracy, while the conspiracy was in existence. . . .

Id. (internal citations and quotations omitted).

The Government has not shown that the alleged statements were made during the course of and in furtherance of the charged conspiracies. The government's claims that it "intends to prove at trial that, in a book he authored, Taha attempts to justify the Luxor massacre," S1 Opp. 110, fails to address these concerns and those we raised in our moving papers.

Regarding acts truly in furtherance of a conspiracy, *Layton* counsels:

> We have, on many occasions, sought to define the "in furtherance of" requirement. We have stated that mere conversations between co-conspirators or merely narrative declarations are not admissible as statements in furtherance of a conspiracy. Instead, the statements must further the common objectives of the conspiracy, or set in motion transactions that [are] an integral part of the [conspiracy]. In short, they must assist the conspirators in achieving their objectives.

Layton, 720 F.2d at 556 (internal citations and quotations omitted).

The government's promise to introduce in evidence a book by Taha in which he "attempts to justify the Luxor massacre" is proof enough that this surplusage must be stricken. Taha's book is probably not admissible. It has not been provided to us in discovery. When and if we get it, and if it is in Arabic, it will have to be translated. A post-Luxor analysis seems to

shed little light on the Luxor events themselves. We will be litigating the issue of whether Taha is or was a member of a conspiracy with Lynne Stewart; the government faces big hurdles in that contest.

Luxor evidence raises serious admissibility issues on a number of bases. Under this Court's surplusage cases, admissibility is a touchstone. An announced intention to try Lynne Stewart based on a book written by someone who is not a defendant, presumably in a foreign language she does not read, is at least problematic.

E. Stewart's Awareness of the Evidence in Her Client's Case Does Not Justify Surplusage

The government apparently seeks to use Ms. Stewart's awareness of the evidence presented at her client's trial against her. Its statement that "the Government intends to prove at trial that evidence was introduced at Abdel Rahman's trial establishing the allegations in paragraphs 1 to 5 and 8 to 9 . . . [and that evidence shows that his attorney was] aware of these facts," S1 Opp. 110, demonstrates these prosecutors' contempt for defense counsel and their fundamental misunderstanding of the role of defense lawyers. By the government's allegations, then, a lawyer's knowledge of her client's case becomes an element of the case against her.

The government thus boldly announces that it intends to introduce some of its own evidence from the Rahman trial. This tactic may open up the need to put on evidence to rebut that material, some drawn from the Rahman trial and some drawn from other sources. If the door is opened, we would be compelled to litigate the corrupt and mendacious conduct of key government witnesses and all the other issues that consumed so many months of jury time in that case.

F. Luxor

The government's dogged determination to reference the Luxor attack is another example of its improper attempts to use world events to unfairly smear and prejudice Ms. Stewart. The Luxor attack occurred in November 1997, before the Count Four conspiracy allegedly began.

G. Abu Sayyaf

Besides being irrelevant, inflammatory, and prejudicial, the government's repeated recounting of this alleged statement by Ms. Stewart demonstrates its disregard for First Amendment rights.[15] The government apparently believes that merely stating "good for them" amounts to an overt act in furtherance of a charged conspiracy.

Regardless of whichever Count the government claims the alleged statement relates to, such speech does not create criminal culpability. Speech, even speech in support of violence or illegality, is beyond the reach of the law unless it presents a clear and present danger of violence that is likely to occur. As the Supreme Court recently explained, it is unconstitutional for the government "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." *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 1547 (2003) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*)). We discussed the *Brandenburg* test and protected speech in our Reply to the superseded indictment. *See* Lynne Stewart's Reply Memorandum of Law ("Stewart Reply") at 28-37.

H. The U.S.S. Cole

As we stated in our moving papers, "[t]his allegation does not even contain any word that signals how it might be relevant to the indictment charges." Stewart Mem. 144. It is also

[15] We will address the government's patent mischaracterization of this alleged statement by Ms. Stewart at the appropriate procedural time.

another example of an irrelevant world event that the government wishes to use improperly to smear and prejudice Ms. Stewart.

I. Other Concerns Regarding Surplusage

Finally, the government does not address our discussion of the terms "jihad," "fatwah," and "radical." Accordingly, the language must be stricken.

VII. Disqualification Is Necessary

In addition to the prosecutors' earlier contradictions, the government's Opposition is again inconsistent. *See, e.g., supra* section I. n.2. We need not repeat our previous discussion of the issue, but the government's response prompts an expansion of our initial motion.

Further examination of the law reveals that the Office of the United States Attorney for the Southern District of New York, and all attorneys employed therein at any time relevant to this case, should be disqualified. According to N.Y. Judiciary Law, Disciplinary Rule 5-102(d):

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

There can be no doubt that any testimony offered by these prosecuting attorneys "may be prejudicial to the client." Disqualification of the office is, therefore, necessary. As New York State Bar Association Committee On Professional Ethics Opinion 670 (1994) explains, "vicarious disqualification consistently has been applied to a District Attorney's office because it is the functional equivalent of a law firm." *See also* Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Opinion 2003-5, (2003) (noting that "commentary to the ABA Model Rules indicates that a government office is a firm."). As we discussed in our motions,

Assistant United States Attorneys must follow the rules of the state in which they practice. *See* Stewart Mem. 19-22 (citing cases and discussing the law).

As an alternative to dismissing the entire "firm," Mr. Barkow now must be added to the witness list and thus must be disqualified for reasons we previously stated. *See supra* section I. n.2.

In opposing our Motion, the government contends that its inconsistencies are not factual in nature, and that "[t]he cases cited by Stewart all relate to *factual assertions* that one party advanced in one proceeding and altered in a later proceeding." S1 Opp. 115 (emphasis in original). The identity or identities are function(s) of those whom the government will try to show Ms. Stewart allegedly "provided" as "personnel." This is a central part of the proof for Counts Four and Five of the superseding indictment. Likewise, her "provision of personnel" was a fundamental part of the original indictment. The government has proclaimed that it will attempt to prove that Ms. Stewart "provided" certain "personnel" at trial; that is, the prosecutors, to be successful, must make Ms. Stewart's "provision of personnel" a *fact* that fits into their legal theories. The prosecutors made factual statements on the record on this subject. The superseding indictment contradicts those statements.

The government also fails to distinguish the cases we cited in our disqualification Motion. In *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), McKeon's attorney was disqualified for making an opening statement at a third trial that "depicted Olive McKeon's role in the events differently than had his opening statement at the second trial." *Id.* at 28. In the superseding indictment, the government depicts Ms. Stewart's role differently than it did at the June 13, 2003 hearing. *McKeon* mirrors this case.

United States v. DeLoach, 34 F.3d 1001 (11th Cir. 1994), upon which the government relies, does not control. DeLoach claimed that the government made statements at closing arguments of a different case ("*Brown I*") that were inconsistent with statements made during his trial. *Id.* at 1005. The Court concluded that the government's statements were neither statements of fact nor inconsistent. The Court noted:

> [T]he *Brown I* prosecutor was engaged in "advocacy as to the credibility of witnesses" and inviting the "jury to draw certain inferences," two circumstances under which *McKeon* expressly stated a lawyer's comments would not be admissible. Also, the prosecutor's comments in *Brown I* were not clearly inconsistent with the evidence presented at DeLoach's trial.

Id. at 1005-06.

Here, Ms. Baker, Mr. Morvillo, and Mr. Barkow have made inconsistent statements in the course of prosecuting the case against Ms. Stewart, and none these was made in closing arguments of a trial.

The government cites only one inapposite case in its argument that no testimony would be required to explain these contradictions. It is also incorrect, as the government claims, that the defendant must "demonstrate 'a compelling and legitimate reason' for the prosecutor's testimony" here. S1 Opp. 118 (citing *United States v. Regan,* 103 F.3d 1072, 1083 (2d Cir. 1997) (collecting cases)). The government fails to define "compelling and legitimate" as *Regan* used that term and does not reveal details about the case. The facts of *Regan* demonstrate that it does not support the government's claim. In *Regan*, the defendant moved to disqualify AUSA Landis for allegedly engaging in governmental misconduct before the grand jury. *Regan*, 103

F.3d at 1083. The Second Circuit ruled that the defendant could not call AUSA Landis, but explained that:

> the district court correctly ruled that the jury would not consider allegations of governmental misconduct before the Grand Jury. . . Moreover, the district court specifically ruled that Regan could call AUSA Gardephe to testify whether there was a hostile or aggressive atmosphere during his questioning before the Grand Jury, as such an atmosphere might have supported the argument that Regan was flustered.

Id.

In *Regan*, no inconsistent statements were made by prosecutors, and the defendant was able to call an AUSA as a witness for the misconduct he alleged. In this prosecution, there is simply no viable alternative to calling the prosecuting attorneys as witnesses. They are the ones who made the inconsistent statements of fact, nobody else.[16]

VIII. The Case Against Lynne Stewart Must be Severed

The government bases its argument against severance on this Court's ruling on the initial indictment. The current indictment, however, contains different charges, different alleged co-conspirators, and different combinations of alleged co-conspirators within the counts charged. Ms. Stewart's motion to sever, therefore, merits consideration.

The government claims that "any claim that Stewart may be 'prejudiced by the admission of evidence at a joint conspiracy trial is insupportable [because] the evidence would [be] admissible against [her] in a separate trial alone as a member of the conspiracy.'" S1 Opp. 123-24 (quoting *United States v. Salameh,* 152 F.3d 88, 115 (2d Cir. 1998)). This contention overstates the law. First, the government's characterization of this trial as "a joint conspiracy

[16] We oppose the government's request to resolve this issue *ex parte*, as the inconsistency revolves around a central fact of this case. We are approaching trial in this "complex case," and the defense deserves a clear presentation of the facts by the prosecution. This can be achieved only through their testimony.

trial" is oversimplified. While there are three (or perhaps four) conspiracies charged,[17] there is also a solicitation charge (Count Three), a provision of material support charge (Count Five), and two false statements charges (Counts Six and Seven). Second, the quotation the Government pulls from *Salameh* refers to a situation where "all the defendants [were] charged under the same conspiracy count." *Salameh*, 152 F.3d at 115. In this superseding indictment, each of the three conspiracy counts contains a unique set of alleged co-conspirators. *Compare* S1 Ind. ¶29 *with* ¶32 *with* ¶37.

The other cases upon which the Government relies are readily distinguished. As the government admits, in *United States v. Miller,* 116 F.3d 641, 679 (2d Cir. 1997), "[a]ll seven [defendants] were indicted on the conspiracy and racketeering counts." S1 Opp. 124. In *United States v. Rosa,* 11 F.3d 315, 323-24 (2d Cir. 1993), two charged conspiracies consisted of the same five defendants. In *United States v. Scarpa,* 913 F.2d 993, 998 (2d Cir.), *cert. denied*, 498 U.S. 816 (1990), the movant was charged with two separate conspiracy counts in which all seven appellants were co-conspirators. The severance in *United States v. Bin Laden,* 109 F. Supp. 2d 211, 214 n.7 (S.D.N.Y. 2000) was denied because all 17 defendants were charged in the same five conspiracies. And finally, "all defendants [were] charged with participating in the seditious conspiracy described in Count One" in *United States v. Rahman,* 854 F. Supp. 254, 262 (S.D.N.Y. 1994).

Further, the government does not confront our argument based on *Bruton v. United States*, 391 U.S. 123 (1968). *See* Stewart Mem. 153; *see also* Stewart MTD 102-117. We again draw the Court's attention to these arguments, and to our request for a pretrial *Bruton* hearing as authorized by FED. R. CRIM. P. 14.

[17] *See* Stewart Mem. 153 n.156.

Finally, the government's inflamed rhetoric is another basis to sever Ms. Stewart's case. Ms. Stewart's interest in litigating the proper role of lawyers must be protected. *See* Stewart Mem. 153-59.

IX. A Bill of Particulars Is Warranted

The government concedes this is a "complex case." S1 Opp. 113. It becomes more so when the government continually changes its characterizations of the evidence. As shown throughout this Reply and our moving papers, that is what they have done. The superseding indictment added "fifteen more paragraphs, ten more pages, and numerous additional overt acts than were in the original indictment." S1 Opp. 127. Far from clearing the murky waters, these additions have only muddied what were originally vague and at times incomprehensible charges. For all these reasons, a bill of particulars is needed. *See United States v. Weinberg*, 656 F. Supp. 1020, 1029 (E.D.N.Y. 1987) ("the complexity of the offense" and "the clarity of the indictment" should be considered in ruling on a bill of particulars request); *United States v. Shoher*, 555 F. Supp. 346, 349 (S.D.N.Y. 1983) (same).

In the Southern District, Judge Sand considered a similar request for particulars in *United States v. Bin Laden*, 92 F. Supp. 2d 225 (S.D.N.Y. 2000), and granted the relief sought. There, the court ordered the government to provide a bill of particulars in part because "the charged conspiracies involve a wide range of conduct, occurring over a long period of time, in various countries around the world." *Id.* at 236. The court further acknowledged that voluminous

discovery may create a burden on defendants that particulars can help resolve, explaining that the *Bin Laden* indictment's allegations:

> [P]rovide too little information to the Defendants and their counsel to permit them reasonably to focus their trial preparations, especially in light of the voluminous amount of material that has been produced in discovery to date.

Id.

The same is true here, and particulars are thus necessary and warranted.

The government argues that this Court's prior denial of particulars compels denial now. We acknowledge this Court's prior ruling, but the vagueness of the superseding indictment and the further confusion caused by the government's Opposition create a different posture for the case and strengthen Ms. Stewart's need for particulars at this time. We also have tailored our particulars in our pending Motion to be more specific than those presented in conjunction with the prior indictment.

We note that particulars cannot correct a vague indictment. *United States v. Murphy*, 762 F.2d 1151, 1154 (1st Cir. 1985); *United States v. Loayza*, 107 F.3d 257, 260 (4th Cir. 1997); *United States v. Salisbury*, 983 F.2d 1369, 1375-76 (6th Cir. 1993); *United States v. ORS, Inc.*, 997 F.2d 628, 631 n.5 (9th Cir. 1993). Particulars can, however, identify legal errors in the government's case and incurable gaps in its proof. *United States v. Kearney*, 451 F. Supp. 33, 35-36 (S.D.N.Y. 1978); *see also* Stewart MTD 90, 99, 107, 118 (addressing *Kearney* issues). The Government does not address this point.

We also ask that the government's pleadings and its statements at argument on these motions be taken as particulars. *See Sattar*, 272 F. Supp. 2d at 361 (noting that government statements in pleadings and in Court "can be taken as a bill of particulars").

CONCLUSION

For the foregoing reasons, we respectfully request the relief outlined in our moving papers.

Dated: Annapolis, Maryland
March 18, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing Reply Memorandum of Law in Support of Lynne Stewart's Second Omnibus Motion to Dismiss the Indictment and for Other Relief on March 19, 2003:

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