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06-5031-CR(CON), 06-5093-CR(CON), 06-5131-CR(XAP),
06-5135-CR(XAP) and 06-5143-CR(XAP)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

—▶◀—
UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

v.

LYNNE STEWART, MOHAMMED YOUSRY, AHMED ABDEL SATTAR,

Defendants-Appellants-Cross-Appellees.

—
*On Appeal from the United States District Court
for the Southern District of New York*

**BRIEF AND SPECIAL APPENDIX FOR
DEFENDANT-APPELLANT-CROSS-APPELLEE
LYNNE STEWART**

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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

The District Court’s jurisdiction is based on 18 U.S.C. §3231. The basis of this Court’s jurisdiction is 28 U.S.C. §1291 and 18 U.S.C. §3742(a). This appeal is from an amended order of Judgment Including Sentence entered October 26, 2006, by the Honorable John G. Koeltl, United States District Judge, Southern District of New York, following Lynne Stewart’s conviction after trial on five counts of Indictment S1 02 Cr. 395 (JGK). A timely Notice of Appeal was filed October 16, 2006. J.A. 2378.¹ Ms. Stewart is appealing a final order of the District Court regarding her convictions. This appeal resolves all claims between the parties with the exception of the government’s cross-appeal with respect to the sentence imposed on Ms. Stewart.

STATEMENT OF THE ISSUES

1. Whether the extraordinary volume and character of evidence introduced with respect to other defendants and/or other counts unduly prejudiced Ms. Stewart, and whether that evidence and the District Court’s unprecedented number of limiting instructions – at least 750 – so overwhelmed the jury that such instructions were futile

¹ “J.A.” refers to the Joint Appendix filed herewith.

and ineffectual.

2. Whether the evidence on Counts Four and Five was insufficient as a matter of law because the “personnel” Ms. Stewart allegedly provided as “material support” consisted of speech protected under the First Amendment, and therefore is not proscribed under 18 U.S.C. §2339A.
3. Whether the evidence on Counts Four and Five was insufficient as a matter of law because the government failed to prove Ms. Stewart’s knowledge or intent to provide “material support” to the 18 U.S.C. §956(a) conspiracy to murder charged in Count Two, and/or any connection between Ms. Stewart’s conduct and that conspiracy.
4. Whether §2339A and the term “personnel” (defining “material support”) were unconstitutionally vague as applied to Ms. Stewart in this case.
5. Whether Ms. Stewart’s conviction on Count One should be reversed and the charge dismissed because (a) the government failed to prove a conspiracy to defraud the government; (b) the Attorney General lacked authority to subject attorneys to criminal penalties for violations of the Special Administrative Measures (hereinafter “S.A.M.’s”) imposed on prison inmates; (c) the District Court erred

by not permitting Ms. Stewart to challenge the validity of the S.A.M.'s in the context of this case; and (d) the S.A.M.'s were unconstitutional as applied in this case.

6. Whether the allegations in Counts Six and Seven fail to state an offense under 18 U.S.C. §1001 because the statute proscribes false *statements*, and not false *promises*.
7. Whether the District Court erred in (a) denying Ms. Stewart's post-trial motion for disclosure whether any communications related to the investigation, prosecution, or defense of the case had been intercepted pursuant to the National Security Agency's warrantless electronic surveillance program; and (b) denying Ms. Stewart's security-cleared counsel access to the government's *ex parte* submissions in response to the motion.
8. Whether the District Court erred in denying Ms. Stewart's motion to suppress the fruits of the electronic surveillance conducted pursuant to the Foreign Intelligence Surveillance Act.
9. Whether the District Court erred in denying Ms. Stewart's motion for dismissal based on selective prosecution.

PRELIMINARY STATEMENT AND INTRODUCTION

This Brief on Appeal is submitted on behalf of Defendant-Appellant Lynne Stewart. This case represents a classic example of the government's repeated insistence on attempting to force a square peg into a round hole: assembling a cluster of non-criminal conduct – mostly speech protected by the First Amendment – and contriving a series of insufficient and unfounded charges alleging “material support” for terrorism, conspiracy to defraud the U.S., and false statements.

Indeed, the government's first attempt was rejected by the District Court. Undeterred, however, the government simply switched statutes, but not its underlying invalid theory. In so doing, the government expanded the reach of the operative statute, §2339A, beyond its permissible boundaries, and failed to specify essential elements of the object offense, a conspiracy to kill persons overseas (in violation of 18 U.S.C. §956(a)).

The government also improperly leveraged purported violations of administrative rules applicable to inmates – the Special Administrative Measures imposed by the Bureau of Prison upon Ms. Stewart's client, Sheikh Omar Abdel Rahman – into conspiracy and false statement charges.

Ms. Stewart is not alleged to have provided money, arms or any similar items, resources, or support to any terrorist organization or conspiracy. The government could not point to any violent conduct intended or even contemplated

by Ms. Stewart, or that occurred as a result of her alleged conduct. Indeed, the result of her conduct was the *continuation of a cease-fire that existed between the government of Egypt and the Islamic Group*.

Instead, the “material support” Ms. Stewart allegedly provided to the conspiracy to kill consisted of Sheikh Rahman as “personnel,” but even that was ephemeral and insufficient. All that was “provided” by Ms. Stewart was Sheikh Rahman’s speech, protected by the First Amendment and, as detailed below, safely within the standards for permissible exercise of First Amendment rights. By design, such First Amendment activity is not within the scope of §2339A, and cannot serve as the requisite “material support.”

In addition, there were dispositive evidentiary problems in the case. The District Court permitted admission of an extraordinary volume of unfairly prejudicial evidence that was extraneous to Ms. Stewart, and coupled that avalanche with a corresponding deluge of more than 750 limiting instructions that the jury could not reasonably digest or apply, precluding its focus on the appropriate criteria for its deliberation and determination.

Many of these issues are of first impression for this Court. All are critically important in the context of the First, Fourth, Fifth and Sixth Amendments, respectively, in the contexts of free speech, electronic surveillance under the

Foreign Intelligence Surveillance Act, the Due Process's void-for-vagueness doctrine, and the integrity of adversary proceedings.

As Mark Neely, Jr. writes in *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, (1991), "if truth is the first casualty of wartime, then civil liberties is surely the second." Here, that caution has manifested itself in full relief.

As set forth in POINT I, that unfairly prejudicial evidence rendered the series of limiting instructions meaningless. Indeed, the number of such instructions themselves exceeded any threshold that a jury could reasonably follow, particularly in light of the severely prejudicial nature of the evidence at issue.

POINT II discusses the infirmities in Counts Four and Five, the "material support" charges, which must be dismissed because the government failed to provide sufficient proof that Ms. Stewart provided, or conspired to provide, "personnel" to the §956(a) conspiracy to kill charged in Count Two. Instead, at most the government established that Ms. Stewart disseminated constitutionally protected speech uttered by either herself or her client, Sheikh Omar Abdel Rahman. Since such speech cannot constitute "material support," the convictions on Counts Four and Five cannot survive.

POINT III also addresses Counts Four and Five, and demonstrates that the

government failed to provide sufficient proof of Ms. Stewart's knowledge of the §956(a) conspiracy to murder (charged in Count Two) or its particular illegal objectives, or her specific intent to provide material support, in the form of "personnel," to that conspiracy.

If the "material support" counts survive the statutory challenges, they are nevertheless, as detailed in POINT IV, unconstitutionally vague as applied to Ms. Stewart. POINT V sets forth why Count One, charging a conspiracy to defraud the U.S. (in violation of 18 U.S.C. §371), was deficient as well: (a) the government failed to prove Ms. Stewart's intent to defraud; (b) the Attorney General lacked authority to impose criminal punishment on an attorney for violation of the S.A.M.'s; (c) the District Court erred in not permitting Ms. Stewart to challenge the validity of the S.A.M.'s in the context of her criminal prosecution; and/or (d) the S.A.M.'s are unconstitutionally vague as applied to Ms. Stewart herein.

POINT VI addresses another issue of first impression, as the false statements counts – Counts Six and Seven – are premised on an improper theory under 18 U.S.C. §1001: false *promises* instead of false *statements*.

As detailed in POINT VII, the District Court erred in denying Ms. Stewart's post-trial motion for disclosure whether any interceptions made pursuant to the

National Security Agency's warrantless electronic surveillance program were relevant to the investigation, prosecution, or defense in this case, and POINT VIII sets forth how the District Court erred in denying Ms. Stewart's pretrial motions to suppress the fruits of the Foreign Intelligence Surveillance Act electronic surveillance. POINT IX demonstrates why the Indictment should be dismissed because it constitutes a selective prosecution, as Ms. Stewart was prosecuted while her co-counsel, who performed the same acts she did during the relevant time period, were not targeted.

Accordingly, it is respectfully submitted that Ms. Stewart's convictions on all counts should be reversed, and the Indictment against her dismissed.

STATEMENT OF THE FACTS

This Statement of the Facts provides an overview of the case. For purposes of continuity and ease of reference, many relevant facts are also incorporated in the Points of this Brief to which they pertain.

At the time the alleged offense conduct, Ms. Stewart was a criminal defense lawyer with an active and well-known practice, and almost 25 years of experience. At the time of the initial Indictment in 2002, she was 63 years old. She had attended Hope and Wagner Colleges, obtaining her Bachelor of Arts degree in 1961. In 1964, she obtained a Masters degree in Library Science from Pratt

University. She worked in the New York public education system, and was active in community movements to improve education for all children, but particularly for poor people and people of color.

Subsequently, Ms. Stewart attended Rutgers (Newark) Law School, and received her Juris Doctor in 1975. During her legal career, she concentrated on representing people accused of crimes, and most of her clients were of limited means. Given the nature of the criminal justice system, her clients were also predominantly people of color. She is a familiar figure in New York area courts. *See, e.g.,* S. Arena, *New York's 10 Best Criminal Defense Attorneys*, NEW YORK DAILY NEWS, March 12, 1995 at 38-9 (Ms. Stewart is the only woman on the list).

Many of Ms. Stewart's cases involved issues of great public concern, including police brutality, the Black liberation movement, secret evidence, bias crime, terrorism, and apartheid. *See, e.g.,* *People v. Yuwnas Mohammed*, Ind. No. 2053/92 (Sup. Ct. N.Y. Co. 1992); *United States v. Shakur*, 82 Cr. 312 (KTD) (S.D.N.Y. 1982); *United States v. Nasser Kadi Ahmed Ali El Momnosany*, 99 Cr. 42 (JBW) (E.D.N.Y. 1999); *People v. Mazen Assi*, Ind. No. 4848/2000 (Sup. Ct. N.Y. Co. 2000); *United States v. Abdel Rahman*, 93 Cr. 181 (MBM) (S.D.N.Y. 1993); *People v. Larry Davis*, Ind. No. 6315/86 (Sup. Ct. Bx. Co. 1986); *United States v. Levasseur*, 85 Crim. 143 (E.D.N.Y. 1985). Of course, she also

represented scores of ordinary defendants in ordinary cases.

A. *The Initial Indictment*

Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart, and Mohammed Yousry were charged in a five-count Indictment returned April 8, 2002. Count One of that initial Indictment charged them with conspiracy to provide material support and resources to a Foreign Terrorist Organization (“FTO”) in violation of 18 U.S.C. §2339B.

Count Two alleged that they provided and attempted to provide material support and resources to an FTO in violation of 18 U.S.C. §§2339B. Count Five charged Ms. Stewart with making false statements in violation of 18 U.S.C. §1001.

The initial Indictment alleged that Sheikh Omar Abdel Rahman, Ms. Stewart’s client who was serving a life sentence at the Federal Medical Center in Rochester, Minnesota (“FMC Rochester”), was a principal leader of the Islamic Group, (“IG”). J.A. 108 ¶4. The IG had since 1997 been designated by the Secretary of State as an FTO. J.A. 117 ¶18.

That Indictment described Sheikh Rahman as “one of the principle leaders of IG” from at least the early 1990's and the leader, or “emir,” of IG in the United States. J.A. 108 ¶4. While Sheikh Rahman was not personally involved in carrying out terrorist activities, the government claimed that he “played a key role

in both defining and articulating the goals of IG.” *Id.*

In 1997, the Bureau of Prisons, at the direction of the Attorney General, imposed Special Administrative Measures (hereinafter “S.A.M.’s”) upon Sheikh Rahman, restricting his access to the mail, the telephone, and visitors, and prohibiting him from speaking with the media. J.A. 111-12 ¶¶6. Counsel for Sheikh Rahman were required to sign an affirmation stating they and their staff would abide fully by the S.A.M.’s before being allowed access to their client. J.A. 111-12 ¶¶6.

The affirmation provided that counsel would “only be accompanied by translators for the purpose of communicating with the inmate Abdel Rahman concerning legal matters.” J.A. 112 ¶¶7. Since at least in or about May 1998, the affirmation provided that counsel would not use “meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman.” J.A. 112 ¶¶7.

The initial Indictment alleged that, after Sheikh Rahman’s imprisonment, defendants acted as a “communications hub” for IG. Messages and information from Sheikh Rahman would pass through his attorneys and interpreter to Mr. Al-Sirri and Mr. Sattar, who would then disseminate that information to IG members around the world. J.A. 114-116 ¶¶12, 13-15.

The initial Indictment also alleged that Ms. Stewart violated the S.A.M.'s by facilitating and concealing messages between her client and IG leaders around the world. J.A. 115-116 ¶16. It also alleged that she took affirmative steps to conceal the May 2000 discussions from prison guards and subsequently, in violation of the S.A.M.'s, announced to the media that Sheikh Rahman had withdrawn his support for the cease-fire. J.A. 115-116 ¶16.

B. *The District Court's Partial Dismissal of the Initial Indictment*

The District Court dismissed Counts One and Two of the initial Indictment, finding 18 U.S.C. §2339B's prohibition on the provision of "communications equipment" and "personnel" as alleged in the initial Indictment unconstitutionally vague as applied. *See United States v. Sattar*, 272 F. Supp.2d 348 (S.D.N.Y. 2003) (hereinafter "*Sattar I*").

Regarding the allegation of providing "communications equipment," which according to the government arose from use of the telephone and other communications equipment, the District Court found that "by criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application[.]" 272 F. Supp.2d at 358.

The District Court also held §2339B unconstitutionally vague as applied to the allegations in the Indictment relating to the provision of "personnel," finding

that it was “not clear from §2339B what behavior constitutes an impermissible of personnel to an FTO.” *Id.* at 359. The District Court adopted the position of the Ninth Circuit Court in *Humanitarian Law Project v. Reno*, that “[s]omeone who advocates the cause of the [FTO] could be seen as supplying them with personnel.” 272 F. Supp.2d at 359, *quoting Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000).

C. *The Superseding Indictment*

The government filed a seven-count Superseding Indictment November 19, 2003.² Count One alleged that, from in or about June 1997 through in or about April 2002, Mr. Sattar, Ms. Stewart, and Mr. Yousry, as well as Sheikh Rahman and Taha, together with others known and unknown, in violation of 18 U.S.C. §371, conspired to defraud the United States by obstructing the Department of Justice and the Bureau of Prisons in the administration and enforcement of the SAMs imposed on Sheikh Rahman. J.A. 143-144 ¶29.³

Count Two charged that, from in or about September 1999 through in or

² The Superseding Indictment did not charge Yassir Al-Sirri, a defendant in the original Indictment, but did identify two unindicted co-conspirators, Sheikh Rahman, and IG leader Rifa‘i Ahmad Taha Musa (hereinafter “Taha”).

³ Unless noted, subsequent references to Counts and the Indictment refer to the Superseding Indictment. J.A. 131.

about April 2002, in violation of 18 U.S.C. §§956(a)(1) and (a)(2)(A), Mr. Sattar, Sheikh Rahman, Taha, and others known and unknown, conspired to murder and kidnap persons in a foreign country. J.A. 156 ¶32.⁴

Count Four charged that, from in or about September 1999 through in or about April 2002, Ms. Stewart and Mr. Yousry, together with others, conspired, in violation of 18 U.S.C. §371, to violate 18 U.S.C. §2339A. J.A. 160 ¶37. The alleged object of the conspiracy was to provide material support and resources, in the form of “personnel,” by making Sheikh Rahman available as a co-conspirator, and to conceal and disguise the nature, location, and source of personnel by concealing and disguising that Sheikh Rahman was a co-conspirator. J.A. 160 ¶38.

Count Five charged defendants Stewart and Yousry with committing a substantive violation of §2339A (the object of the conspiracy charged in Count Four). J.A. 161-162 ¶41.

Counts Six and Seven charged Ms. Stewart with making false statements in her affirmations submitted to the United States Attorney’s Office for the Southern District of New York, in May 2000 and May 2001, respectively, stating that she

⁴ Count Three charged Mr. Sattar alone with soliciting persons to engage in crimes of violence in violation of 18 U.S.C. §373.

would abide by the terms of the S.A.M.'s imposed on Sheikh Rahman. J.A. 162-165 ¶¶43, 45. The May 2001 affirmation was also alleged to be false in stating that Ms. Stewart “will only allow the meetings to be used for legal discussion between Abdel Rahman and [her].” J.A. 164-165 ¶45.

D. *The Trial*

1. *The S.A.M.'s*

The government introduced the S.A.M.'s to establish that Sheikh Rahman, with few exceptions, was prohibited from, *inter alia*, passing or receiving communications from third persons. Under the terms of the S.A.M.'s, Sheikh Rahman was permitted to communicate with his attorneys concerning legal matters. He could receive visits only from his attorneys and certain family members, and could communicate by telephone only with his legal spouse and his attorneys.

The S.A.M.'s required Sheikh Rahman's attorneys to sign an affirmation providing that counsel and anyone acting on counsel's behalf would abide by the S.A.M.'s. J.A. 167-210, 248-258, 261-272, Government Exhibits (hereinafter “GX”) 2-6, 11, 13. *See also United States v. Sattar*, 395 F. Supp.2d 79, 84

(S.D.N.Y. 2005) (hereinafter “*Sattar 29/33*”).⁵

The evidence also established that Ms. Stewart executed attorney affirmations dated May 16, 2000 and May 7, 2001, J.A. 169-210, 259-260, which affirmations constituted the statements that served as the basis for the charges in Count Six and Seven. J.A. 209-210, 259-260.

Mr. Clark had also signed the attorney affirmations. However, after the Luxor massacre in 1997, he issued a press release on behalf of Sheikh Rahman supporting peace. T. 7640. While Ms. Stewart testified that she was not informed prior to the announcement, she believed that the press release would be helpful in furthering the defense team’s goal of keeping the Sheikh in the public eye in order to pressure Egypt to repatriate him:

I think we thought it would open doors to us that hadn’t been opened, . . . this showed a more reasonable approach and one that perhaps could be opened up to the Egyptian government as a solution to some of their problems as well as what we saw as a solution to the American problem of keeping him on American soil.

T. 7647.

Ms. Stewart’s ultimate hope for Sheikh Rahman, after all his appeals had

⁵ The evidence at trial is presented, consistent with the legal standard, in the light most favorable to the government, and essentially tracks the recitation by the District Court in its decision denying Ms. Stewart’s post-trial motions (*Sattar 29/33*).

been exhausted, was to have him returned to Egypt: “[it] was the only road to really accomplishing something positive for him.” T. 7699.

2. *The March 1999 Visit to Sheikh Rahman*

In March 1999, Ms. Stewart and Mr. Yousry visited Sheikh Rahman at FMC Rochester. GX 305, 306. At the time, a cease-fire agreement between the government of Egypt and IG was in effect, under which the latter had suspended terrorist operations in Egypt in an effort to persuade the Egyptian government to release IG leaders, members, and associates who were imprisoned in Egypt. J.A. 590-604.

Also, prior to the March 1999 visit, Mr. Sattar received a letter from Gamal Sultan and Kamal Habib, who requested an opinion from Sheikh Rahman concerning whether IG should form a political party in Egypt. J.A. 446-448. In addition, in advance of the meeting, Mr. Sattar spoke with Mustafa Hamza, who conveyed a message for Sheikh Rahman seeking support for Taha’s position to end IG’s cease-fire. J.A. 456-457.

Sheikh Rahman rejected the proposal that the Islamic Group form a political party, stating that the “cessation of violence” was a “matter of tactics and not of principle.” J.A. 1526; *see also* J.A.455, 458-459. In response to Taha’s request for Sheikh Rahman’s support in ending the cease-fire, Sheikh Rahman stated that

he had “no objection,” even though others were calling for the halt of violence. Sheikh Rahman instructed that “[n]o new charter, and nothing should happen or be done without consulting me, or informing me.” J.A. 456-457. Following the visit, Mr. Sattar relayed Sheikh Rahman’s messages to both Taha and Mustafa Hamza. J.A. 455-459, 461-462, 465-466. Taha told Sattar that he wanted the letter for him “a little stronger.” J.A. 465.

3. *The May 2000 Visit to Sheikh Rahman*

Ms. Stewart and Mr. Yousry next visited Sheikh Rahman at FMC Rochester May 19 and 20, 2000. Three days before that visit, on May 16, 2000, Ms. Stewart signed an attorney affirmation. J.A. 196-210. She submitted the attorney affirmation to the United States Attorney’s Office on May 26, 2000, ten days after she signed it, and six days after the May 2000 prison visit. T. 7691, 8280-81.⁶

Ramsey Clark, co-counsel for Sheikh Rahman, testified that over the years Sheikh Rahman made approximately 200-300 phone calls and the vast majority went to his office. In fact, “the understanding was that the call would come to my office. And when Lynne could take the call, we would call out there and tell them. . . .” T. 8744, 8754.

⁶ “T.” refers to the transcript of the trial, which has been bound separately from the Joint Appendix, and is submitted herewith.

As Mr. Clark pointed out in his subsequent letter to the Court in connection with Ms. Stewart's sentencing, Ms. Stewart made only "three prison visits, March 1999, May 2000, July 2001 [] each separated by fourteen months, and one phone call on June 20, 2000. []" J.A. 2205 (citations omitted).

Mr. Clark continued that "[i]n contrast lawyers in my office, Abdeen Jabara, Larry Schilling and I, had hundreds of phone calls usually scheduled for two a week and Mr. Jabara and I had more than twice as many visits as Ms. Stewart."

Id.

During the May 2000 visit, Ms. Stewart and Mr. Yousry brought a number of letters for Sheikh Rahman. J.A. 966-68, 1012-1013, 1018-1021. Among the correspondence was a letter from Mr. Sattar containing a message from Taha seeking Sheikh Rahman's support in ending the cease-fire. J.A. 018-1021. In the letter, Sattar and Taha asked Sheikh Rahman to take a "more forceful position," and to "dictate some points" that Ms. Stewart could announce to the media. *Id.*

The first day of the visit, May 19, 2000, Ms. Stewart had Mr. Yousry read to Sheikh Rahman the letter from Mr. Sattar with Taha's message. Ms. Stewart testified that Mr. Yousry translated that letter with Taha's message to her before their May 19, 2000, visit with Sheikh Rahman. T. 7766. *See Sattar 29/33*, 395 F. Supp.2d at 86.

According to the videotape recordings admitted in evidence, Ms. Stewart, who had brought Mr. Sattar's letter into the prison concealed in a legal pad, handed the letter to Mr. Yousry shortly before he read it to Sheikh Rahman. When Ms. Stewart passed the letter to Mr. Yousry, she mentioned to him that Sheikh Rahman would need to think about his response to the letter, and Mr. Yousry so informed Sheikh Rahman. J.A. 1012-1013.

Just before Mr. Yousry was about to read Taha's message to Sheikh Rahman, Mr. Yousry saw the prison guards outside the window of their meeting room and alerted Ms. Stewart to that fact. Ms. Stewart spoke to Sheikh Rahman as if they were engaged in conversation. Ms. Stewart and Mr. Yousry then laughed while acknowledging that if the prison guards discovered that they were reading the letter to Sheikh Rahman, they would be "in trouble." J.A. 1014.

While Mr. Yousry read Mr. Sattar's and Taha's message to Sheikh Rahman, Ms. Stewart pretended to be participating in the conversation with Sheikh Rahman by making extraneous comments about food and eating. J.A.1014-1021. *See also Sattar 29/33*, 395 F.Supp.2d at 86.

During the second day of the May 2000 visit, Sheikh Rahman dictated letters to Mr. Yousry in response to Taha's and Mr. Sattar's message. In his letter, Sheikh Rahman stated, among other things, "what use is the initiative . . . where

we declared the halt of violence . . . and the government continues to arrest the Islamic Group members, puts them to military trials, continues to execute and re-arrest them?” J.A. 1088. He urged that the opposition voice be heard and that Taha should be given “his natural right . . . as head of the Group . . . [if not] the least is to have the person in charge consult with him. . . .” J.A. 1089; *see also* J.A. 1133-1136.

Ms. Stewart and Mr. Yousry brought out of the prison with them Sheikh Rahman’s dictated letters in response to Taha’s and Sattar’s message. The letters were later provided to Mr. Sattar, who relayed Sheikh Rahman’s message to Hamza and Taha. J.A. 530-534, 550-551. Ms. Stewart testified that, after the visit, Mr. Yousry translated for her Sheikh Rahman’s response to Sattar’s and Taha’s letter. T. 8300.

4. *The June 2000 Press Conference*

In a June 13, 2000, telephone conversation, Ms. Stewart and Mr. Sattar relayed Sheikh Rahman’s position on the cease-fire to Reuters reporter Esmat Salaheddin, who was based in Cairo, Egypt. T. 5569-72, 5605-06. Mr. Salaheddin testified at trial about his conference call with Ms. Stewart and the accuracy of his article reporting the contents. T. 5569-75.

In disseminating Sheikh Rahman’s statement, Ms. Stewart told Mr.

Salaheddin that “Abdel Rahman is withdrawing his support for the cease-fire that currently exists.” T. 5574, 5617; J.A. 413-415. Ms. Stewart also told Mr. Salaheddin that “[prison authorities] may bar me from visiting him because of this announcement.” T. 5574; J.A. 226-247. The following day, Reuters and various Middle Eastern newspapers published articles about Sheikh Rahman's withdrawal of support for the IG's cease-fire in Egypt. J.A. 226-247, GX 1115 at 2.

Ms. Stewart's dissemination of Sheikh Rahman's position with respect to the cease-fire, and publication thereof in the media, produced conflict within IG between pro- and anti-cease-fire factions, with pro-cease-fire advocates denying that Sheikh Rahman had issued the withdrawal. J.A. 586-604, 607, 690-693.

Ms. Stewart and Mr. Sattar responded by issuing a statement June 21, 2000, disseminated to Mr. Salaheddin. J.A. 1534-1538, 629-631, 636-643, 649-651. The statement explained that, according to Sheikh Rahman, “. . . I did not *cancel* the cease-fire. I do withdraw my support to the initiative. I expressed my opinion and left the matters to my brothers to examine it and study it because they are the ones who live there and they know the circumstances where they live better than I. I also ask them not to repress any other opinion within the Gama'a [IG], even if that is a minority opinion.” J.A. 1534-1538 (emphasis in original).

Ms. Stewart stated that she issued the press release because “it was a

communication that we felt was necessary to maintain his posture within the support group in Egypt.” T. 8068. She testified that she was most afraid of having Sheikh Rahman forgotten by the outside world: “[i]t was my belief, my underlying belief . . . that . . . I needed to keep him in the public eye, that the worst thing that could happen to him was to be . . . locked in a box in Minnesota with no support whatsoever.” T. 7722. *See also* T. 7750, 7752, 7938.

Ms. Stewart also made it very clear that she did not share Sheikh Rahman’s beliefs and her representation of him had nothing to do with the fact that he was an Islamic fundamentalist:

Q. Did your representation of him in your view involve furthering his political goals?

A. No. I’m my own person. I have my own politics. They are not fundamentalist.

T. 7472.

5. *The July 2001 Visit to Sheikh Rahman*

Ten months later, July 13 and 14, 2001, Ms. Stewart and Mr. Yousry visited Sheikh Rahman at FMC Rochester. Previously, on May 7, 2001, Ms. Stewart had signed and faxed to the United States Attorney’s Office for the Southern District of New York an affirmation that provided that she would abide by the terms of the S.A.M.’s. J.A. 259-260.

During the visit, at Mr. Sattar's request, Ms. Stewart and Mr. Yousry brought a message to Sheikh Rahman from his son, Mohammed Abdel Rahman, which urged Sheikh Rahman to continue to support an end to the cease-fire. They also brought to Sheikh Rahman messages and correspondence from other persons. J.A. 681-682, 1243-1244, 1321-1329.

Also during this visit, Ms. Stewart and Mr. Yousry told Sheikh Rahman that Mr. Sattar had been informed that the *U.S.S. Cole* had been bombed on Sheikh Rahman's behalf, and that Mr. Sattar was asked to convey to the U.S. government that additional incidents would follow if it did not free Sheikh Rahman. J.A. 1294-1296. Sheikh Rahman's response was that negotiations should go through a lawyer. J.A. 1295.

During the entire period Mr. Clark and Mr. Jabara had continued to visit Sheikh Rahman more often than Ms. Stewart. T. 7719, 7734, 7844.

6. *The Verdict*

After nearly eight months of trial, the jury returned its verdict February 10, 2005, and found the each of the defendants guilty on all respective counts charged against them.

7. *Post-Trial Proceedings*

Ms. Stewart filed post-trial motions for a judgment of acquittal, pursuant to

Rule 29(a) & (c), and a new trial, pursuant to Rules 33 & 34, Fed.R.Crim.P., on June 3, 2005. The District Court denied those motions in an October 24, 2005, opinion. *See Sattar 29/33*.

Ms. Stewart also filed a motion, June 19, 2006, to compel government disclosure whether Ms. Stewart or her co-defendants, their present or former lawyers, witnesses, or any other involved in the case were subject to electronic surveillance of their telephone, facsimile, e-mail, or other electronic or other communications, or surveillance or interception of any kind, pursuant to the National Security Agency's warrantless electronic surveillance program (publicly revealed in December 2005) or any other such program or operation. The District Court denied the defense motion for disclosure, except for one letter the District Court directed the government to provide to the defense. This appeal followed.⁷

ARGUMENT

POINT I

MS. STEWART'S CONVICTIONS SHOULD BE VACATED, AND A NEW TRIAL ORDERED, BECAUSE THE ACCUMULATION OF UNFAIR PREJUDICE FROM EVIDENCE INTRODUCED AT TRIAL DENIED HER A FAIR TRIAL, AND SHOULD HAVE RESULTED IN A SEVERANCE

⁷ Ms. Stewart has not appealed her sentence. Issues related to sentencing will be addressed in response to the government's cross-appeal of that sentence.

At trial, Ms. Stewart suffered under an avalanche of unfairly prejudicial evidence, much of it not admissible against her, and a significant portion not offered for the “truth,” all of which undoubtedly prevented the jury from affording her the individualized determination to which she was entitled, from compartmentalizing the evidence against her, and from restricting its consideration to whether the government had proved beyond a reasonable doubt the elements of the offenses charged against her.

The District Court recognized the adverse impact of that evidence upon Ms. Stewart, and attempted to stem the tide of undue prejudice by issuing a steady stream of limiting instructions. In fact, the District Court delivered no fewer than 750 limiting instructions of varying character and direction on differing pieces of evidence.

Nevertheless, those instructions were unavailing. Ultimately, there was an excess not only of prejudicial evidence, but also of the limiting instructions themselves, which were too voluminous for jury to follow, and which could not overcome the character and volume of prejudicial evidence.

Indeed, the impact of that evidence, consisting of probably the most prejudicial material conceivable in a trial in New York City – parading before the jury images and statements of Usama Bin Laden and accounts of terrorist violence

with which Ms. Stewart did not have the slightest connection – could not be ameliorated by any limiting instruction in a trial in this jurisdiction in 2004.

As a result, Ms. Stewart was denied a fair trial, and should have been granted severance pursuant to Rule 14, Fed.R.Crim.P., which she requested from the outset of the case, and repeatedly thereafter.

A. *The Law Relevant to Severance Generally*

In its two pretrial opinions, and its opinion denying Ms. Stewart’s post-trial motions, the District Court set forth the general principles of the law relating to severance. *See, e.g., United States v. Sattar*, 272 F. Supp.2d 348, 380-81 (S.D.N.Y. 2003) (hereinafter “*Sattar I*”); *United States v. Sattar*, 314 F. Supp.2d 279, 311 (S.D.N.Y. 2004) (hereinafter “*Sattar II*”). *See also United States v. Sattar*, 395 F. Supp.2d 79, 103 (S.D.N.Y. 2005) (hereinafter “*Sattar 29/33*”).

While noting the preference for joint trials, *id.*, the District Court did recognize that

[a] danger of “prejudicial spillover,” where evidence which would be inadmissible against one defendant if tried individually could be introduced in a joint trial, could provide a basis for a severance. Hence, a severance could be warranted where “evidence of a codefendant’s wrongdoing in some circumstances erroneously could lead a jury to conclude that defendant was guilty.”

Sattar I, 272 F. Supp.2d at 380, quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993) [in turn citing *Kotteakos v. United States*, 328 U.S. 750, 774-775 (1946)].⁸

The District Court tempered that principle by pointing out that “claims of prejudicial spillover rarely succeed, particularly in the context of conspiracy cases because the evidence could be admitted in the separate trials.” *Id.*, citing *United States v. Muyet*, 945 F.Supp. 586, 596 (S.D.N.Y.1996); *United States v. Haynes*, 16 F.3d 29, 32 (2d Cir. 1994); *United States v. Szur*, 1998 WL 132942, at *12-13 (S.D.N.Y. March 20, 1998), *aff’d*, 289 F.3d 200 (2d Cir. 2002).

However, as detailed below, the law applicable to severance generally is of extremely limited pertinence in the context of the extraordinary and likely unprecedented circumstances present in this case.

B. *The Unfairly Prejudicial Evidence That Inundated the Trial*

The government introduced at trial 917 exhibits, many of which were transcripts (of intercepted conversations) or other documents that were read to the jury in their entirety. Of those exhibits, 254 were originally in Arabic (but translated into English for purposes of the investigation and prosecution), a language Ms. Stewart does not read, speak, or understand (and therefore could not

⁸ In addition, the District Court has a continuing duty to evaluate the need for severance, including during and after trial. *See, e.g., United States v. Figueroa*, 618 F.2d 934, 945-46 (2d Cir. 1980).

have been relevant to her knowledge or intent). Also, 138 Government Exhibits were admitted not for their “truth,” but for other purposes. In response, Ms. Stewart repeatedly moved for a severance before, during, and after trial. J.A. 1873, 2324-2328.

At trial, Ms. Stewart did prepare and present three separate charts that categorized the exhibits and the varying limitations on their use by the jury. J.A. 2164-2190. However, not every piece of unfairly prejudicial evidence introduced at trial need or can be catalogued here. Thus, this Brief will provide illustrative examples of the type of evidence and the magnitude of the prejudice Ms. Stewart suffered.

1. *The Two Videotapes Featuring Usama Bin Laden*

GX 538/538T was a videotape of an *Al-Jazeera* broadcast of a September 21, 2000, event featuring Usama Bin Laden, Ayman Al-Zawahari and Rifa’i Taha (with a person alleged to be Sheikh Rahman’s son speaking off camera), under a banner entitled “Convention to Support Honorable Omar Abdel Rahman.” Sheikh Rahman’s son says, “avenge your Sheikh” and “go to the spilling of blood.”

The government timed the admission and publication of the videotape for maximum prejudicial effect: September 7, 2004, just four days before the third

anniversary of the events of September 11, 2001 (hereinafter “9/11”).⁹ The image of Mr. Bin Laden, approximately 15 feet high, hung in the courtroom. This evidence, admitted not for the “truth” and accompanied by a limiting instruction, was not introduced against Ms. Stewart.

Another videotape of Mr. Bin Laden, GX 2422-1, seized from co-defendant Mohammed Yousry and admissible only against him, *see also* GX 2313-2 (Reuters report with respect to Mr. Bin Laden admitted against Mr. Yousry only), was also admitted. J.A. 1522.

2. *The Numerous Newspaper Articles and Media Broadcasts Admitted at Trial Regarding Deadly and Violent Terrorist Acts*

Also admitted were numerous newspaper articles and media broadcasts and reports, including GX 2313-1T, GX 508/508T, GX 544, GX 2028, GX 2656, GX 2313-4, GX 540/540T, GX 542/542T, regarding Mr. Bin Laden, the bombing of the United States Embassies in Kenya and Tanzania in 1998, the bombing of the U.S.S. Cole in 2000, the 1997 attack at the Egyptian pyramid sites at Luxor, which killed 58 tourists, and violence in other countries.

None of those articles and reports were “offered for the truth” of their

⁹ The timing also coincided with publication of numerous news articles and photos about Mr. Bin Laden and Mr. Al-Zawahiri, al-Qaeda, and 9/11 in various New York newspapers (and on local and national television stations).

content, but only as to “knowledge, intent, or state of mind,” and many were not introduced against Ms. Stewart at all. For example, among such exhibits *not* admitted against Ms. Stewart were:

- a 1999 article by Mr. Taha entitled “Luxor: Incident and Effect,” GX 2405-7, as well as an entire envelope containing approximately 30 news reports regarding the Luxor attack, GX 2421-2, including a 1997 *New York Times* article regarding the incident (GX 2421-2A);
- a 1995 *New York Times* article entitled “Egyptian Group Says It Tried to Kill Mubarak” (GX 2406-1);
- a printout of a statement by IG in Arabic praising an “operation” in Gaza (GX 2415-1); and
- a facsimile transmission of an IG statement taking responsibility for killing Greek tourists in Cairo (GX 2415-2).¹⁰

Similarly, the following sampling (of a much larger number) of exhibits seized from Ms. Stewart’s files in her law office were admitted against her, but not for their “truth”:

- a 1996 *New York Times* article entitled “Militants In Egypt Threaten Americans With Retaliation,” which included an IG official

¹⁰ Most of these were also not offered for their “truth.” J.A. 2164-2190.

proposing a plan to kidnap Americans in order to secure Sheikh Rahman's release (GX 2611);

- an undated article (apparently from *The New York Times*) entitled "Suspects in Tourist Deaths Battle Egyptian Police; 6 Die" (GX 2612);
- a *New York Times* article co-written by Judith Miller entitled "U.S. Says It Was Warned On Egyptian Islamic Group: A Faction Is Said to Be Linked to Bin Laden," in which the September 21, 2000, video was discussed. GX 2620. The "faction" mentioned in the article was Egyptian Islamic Jihad (hereinafter "EIJ") (Mr. Al-Zawahiri's organization), not IG;
- an undated *New York Times* article entitled "Suicide Bomber in Pakistan Kills 15 at Egypt's Embassy" (GX 2623);¹¹ and
- an undated *New York Times* article entitled "Islamic Militants' War on Egypt: Going International," which discusses IG's claimed responsibility for terrorist attacks and assassination attempts outside

¹¹ The bombing reported in the article occurred in 1995, and has been attributed to EIJ, and not IG. See Lawrence Wright, *The Looming Tower: Al Qaeda and the Road to 9/11* (Alfred A. Knopf 2006), at 217-18; Steve Coll, *Ghost Wars* (Penguin Books 2002), at 639 n. 13.

Egypt (GX 2624).

3. *The “Fake Fatwah” Erroneously Attributed to Sheikh Rahman*

The government also introduced what became known at trial as the “fake *fatwah*,” GX508, an October pronouncement entitled “*Fatwah* Mandating the Killing of Israelis Everywhere,” that did not emanate from Sheikh Rahman, but was attributed to him by others. J.A. 151-152 ¶¶ 30(w) through 30(z); T. 5516-23. That “fake *fatwah*,” which urged “the Muslim nation” to “fight the Jews by all possible means of *Jihad*, either by killing them as individuals or by targeting their interests, and the interests of those who support them, as much as they can,” GX. 508T, was issued at a time when Ms. Stewart was not only forbidden to see or speak to Sheikh Rahman, but had been refused a visit that she sought with him. *See* J.A. 1523 (September 11, 2000 Letter from Constance Reese, Warden, Federal Medical Center – Rochester, to Ms. Stewart, rescinding previous approval of legal visit scheduled for September 15-16, 2000).

4. *Tape Recordings Not Admitted Against Ms. Stewart*

Among the government’s exhibits were tape recordings evidencing a connection between co-defendant Sattar and Alaa Abdul Raziq Atia (the military leader of IG), J.A. 492-529, 653-667, which were not admissible against Ms. Stewart. *See also* J.A. 441-444 (redacted newspaper article in which Mr. Taha

threatened to avenge Mr. Atia's death).

5. *Sheikh Rahman's Undated Will and Other Documents*

Sheikh Rahman's undated Will, J.A. 1529, as well as a *CNN* broadcast about it, GX 2405-6, were introduced by the government. The *CNN* report included the passage in which Sheikh Rahman urged his sons to seek revenge on the United States for his imprisonment. *Id.*

Also admitted were excerpts from Mr. Taha's book (J.A. 1542-1703) (again not admissible against Ms. Stewart), and a copy of the *Protocols of the Elders of Zion*, J.A. 1373-1445, which also was not admitted against Ms. Stewart.

Moreover, the government exploited this evidence to enormous advantage at every opportunity: during opening statement, during direct and cross-examinations, during summations, and even, as noted **ante**, at 30, in the timing of the introduction of certain evidence.¹² That represented a continuation of a tactic employed since the commencement of the prosecution, when the Attorney

¹² An April 29, 2005, *Newark Star-Ledger* article entitled "Prosecutors Are Succeeding By Playing the Osama Card," explained the benefits of that strategy. Ronald Goldstock, a former president of the American Bar Association's Criminal Justice Section (and former chief Organized Crime prosecutor for the State of New York), commented that "[t]o the extent you can mention Osama Bin Laden, the heinousness is impacted dramatically. Whether that is factual or emotional, you have to leave it to the jury." The URL for the article is <www.defenddemocracy.org/in_the_media.htm?doc_id=275055>.

General's media plan the day the Indictment was announced included a dramatic visit to Ground Zero – visibly linking these defendants with the events of September 11, 2001, despite the lack of any connection between the events of that day and their conduct, or of that alleged in the Indictment.¹³

Also, the government's focus, during its cross-examination of Ms. Stewart about her own political beliefs, reinforced the adverse and improper association the jury could not help but infer between Ms. Stewart, her co-defendants, and the others not in the courtroom physically – Sheikh Rahman, Mr. Bin Laden, and Mr. Atia – but whose presence loomed large nonetheless. T. 8636-39.

Certainly any affiliation with Mr. Bin Laden, no matter how remote, would strike a raw and emotional nerve with any New York juror. Nor is Sheikh Rahman, convicted of participation of a plot to launch terrorist attacks on New York City landmarks and commuter tunnels, any less reviled. Much of the evidence with respect to stale information about Sheikh Rahman – well before Ms. Stewart is alleged to have joined the conspiracy – no doubt revived that episode for a jury of New Yorkers, and merged the perception of the lawyer and the client

¹³ This evidence explains why the jury would convict Ms. Stewart even though the government had not presented sufficient evidence on any of the charges. *See post*, at POINTS II, III & V.

into a single entity.¹⁴

No rational juror, sitting in a New York courtroom, in the jurisdiction most devastated by and most sensitive to terrorism generally and the 9/11 tragedy in particular, could have withstood that onslaught of evidence and still maintained the requisite objectivity with respect to Ms. Stewart.¹⁵

C. *The District Court's Decisions Below Denying Ms. Stewart A Severance*

In its opinion denying Ms. Stewart's motion for a new trial pursuant to Rule 33, Fed.R.Crim.P., the District Court concluded that "[t]here [was] no basis to reconsider [its previous] rulings and grant a new trial[]" on the ground that Ms. Stewart should have been granted a severance. *Sattar 29/33*, 395 F. Supp.2d at 103.

¹⁴ Anti-lawyer sentiment is not new, *see, e.g.*, L. Friedman, A HISTORY OF AMERICAN LAW 303-05 (2d ed. 1985) (lawyers were Tory, parasite, usurer, land speculator, corrupter of the legislature, note shaver, panderer to corporations; tool of the trusts, shyster, ambulance chaser, loan shark), but its danger to a fair trial for a lawyer perceived as too close to a despised client is no less severe now. *See also* Curtin, *Killing All The Lawyers*, ABA Journal 8 (September 1990); Zunker, *Public Perception of the Legal Profession*, TEXAS BAR JOURNAL 78 (January 1985).

¹⁵ The anonymity of the jury only added further to the clear suggestion that the defendants were dangerous, and/or were linked to persons who could effect reprisals against the jurors, thereby reinforcing the impact of the unfairly prejudicial evidence to which Ms. Stewart was subjected at trial. As noted **post**, at POINT X, Ms. Stewart joins her co-appellants' Briefs, which includes Mr. Yousry's challenge to the anonymous jury.

The District Court summarized its rationale as follows:

much of the evidence about which Stewart complains, and which she claims should have justified a severance, would have been admissible at a trial of Stewart alone because it supported the existence of the Count Two conspiracy, which the Government was required to prove as an element of the charges against Stewart in Counts Four and Five.

Id.

Regarding the unfair prejudicial impact of the evidence, the District Court stated that

[t]o the extent Stewart is complaining about the admission of evidence that she claims was unfairly prejudicial, the Court made the careful balancing analysis throughout the trial under Federal Rule of Evidence 403, excluding evidence where the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Id., at 103-04.

The District Court also relied on the myriad limiting instructions it provided to the jury, pointing out that it “gave careful limiting instructions with respect to the consideration of evidence, limiting the jury’s consideration of evidence where appropriate to specific defendants or for specific purposes.” *Id.*, at 104.

Similarly, the District Court stated that “[j]urors are presumed to follow such instructions, and there is no basis to believe that they did not do so here.”

Id., citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *United States v. Salameh*, 152 F.3d 88, 116-17 (2d Cir. 1998).

The District Court added that “[i]n addition[] to the limiting instructions that were given when exhibits were introduced, repeated reference was made throughout the trial to such limiting instructions, including during the Government’s cross-examination of certain witnesses. (*See, e.g.*, Tr. at 9732-34, 10506-514.)” *Id.* Also, the District Court recounted that

before any exhibit was sent to the jury during deliberations, the Court included any limiting instructions relating to the exhibit in the note sent to the jury with the exhibit. Finally, the Court gave careful instructions to the jury in its final charge, including instructions that the jury was required to follow any limiting instructions (Tr. 12276), that the jury was required to make a separate determination of each defendant’s guilt (Tr. 12280), and that the verdict as to any defendant on any count should not control the decision as to any other defendant or any other count. (Tr. 12300-01).

Id.

D. *Ms. Stewart Should Have Been Granted Severance Due to the Volume and Magnitude of Unduly Prejudicial Evidence*

However, the District Court’s continued denial of Ms. Stewart’s motion for severance does not withstand analysis. The amount and character of the unfairly prejudicial evidence *not* admissible against Ms. Stewart, or for “the truth,” was

alone sufficient to warrant severance for Ms. Stewart, as that evidence made it impossible for the jury to compartmentalize the evidence against Ms. Stewart.

As a threshold issue, while the District Court, in denying Ms. Stewart's motions for severance, *see ante*, at 36-38, noted that some of the unfairly prejudicial evidence may have been admissible against Ms. Stewart, if tried alone, to prove the existence of the underlying §956(a) conspiracy (charged in Count Two), that would not resolve the issue. Even if that were an accurate assessment, the *other* evidence that does *not* fall into that category – *i.e.*, evidence not admissible against her at all – was more than sufficiently prejudicial to compel a severance.

In *United States v. Figueroa*, 618 F.2d 934, 940-45 (2d Cir. 1980), this Court cautioned that

[e]vidence that might be admissible under Rule 403 in a trial of one defendant is not inevitably admissible in a joint trial. In some situations the danger of unfair prejudice to co-defendants may be so great that the prosecution must be put to a choice of forgoing either the evidence or the joint trial.

618 F.2d at 945.

In the evidentiary context, this Court continued, “if the evidence creates a significant risk of prejudice to the co-defendants, a further issue arises as to

whether the evidence is admissible in a joint trial, even though limited by cautionary instructions to the ‘case’ of a single defendant.” 618 F.2d at 944.

This Court also made clear that certain tactics were not acceptable: “[t]he advantages to the prosecution of a joint trial do not include th[e] maneuver . . . of put[ting a defendant] on trial with two co-defendants and then offering evidence against him on grounds available, if at all, only as to his co-defendants. *Cf. United States v. DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970) (condemning prosecution’s evidence of a defendant’s prior similar act as a basis for inferring the intent of a co-defendant).” *Id.* at 940. *See also United States v. Cambindo Valencia*, 609 F.2d 603, 629 (2d Cir. 1979) (reversing convictions of defendants because “there was simply too much other evidence offered of entirely separate actions and unconnected defendants, fanning the flames of prejudicial spillover”).

Conversely, even with respect to the evidence that would have been admissible to prove the §956(a) conspiracy in a separate trial of Ms. Stewart, that evidence, as it most often the case in a separate trial, would have been substantially circumscribed.

A trial of Ms. Stewart alone would have dramatically changed not only her strategic choices (*i.e.*, whether and to what extent to stipulate to certain evidence in order to alleviate its prejudicial impact, and to foreclose as a result the necessity

for the admission of other, even more prejudicial evidence), but also the context of the Rule 403 analysis (particularly with respect to undue prejudice as well as the cumulative nature of the evidence) because the evidence would not have been related directly to any defendant on trial. *See, e.g., United States v. Bin Laden*, 109 F. Supp.2d 211, 218 (S.D.N.Y. 2000). *See also Figueroa*, 618 F.2d at 945-46. *See also United States v. Ferguson*, 246 F.3d 129, 137 (2d Cir. 2001) (noting that District Court cited prejudicial spillover and the failure to grant severance as important factors in the decision to grant Rule 33 motion).

The District Court also failed to address the question of the scope of the charged conspiracy, and whether the evidence would indeed have been admissible against Ms. Stewart. As this Court explained in *McDermott*, “[i]n order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a *collective venture directed toward a common goal*.” 245 F.3d 133, 137 (2d Cir. 2001) (emphasis added).

Here, each of the three conspiracy counts contained a unique set of alleged co-conspirators. *Compare* J.A. 143-144, 156, 160 ¶¶29 *with* ¶¶32 *with* ¶¶37. Ms. Stewart did not join the conspiracy until May 2000. Thus, the jury heard *years*’ worth of evidence about defendants (and alleged co-conspirators) other

than Ms. Stewart, and about activities in which she concededly did not participate. *See ante*, at 40.

Nor do the cases cited by the District Court (or the government below) apply to the specific set of circumstances herein. For instance, in *Salameh*, this Court noted that “all the defendants [were] charged under the same conspiracy count.” 152 F.3d at 115. Likewise, 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.”¹⁶

The “fake *fatwah*” provides a prime example of extremely prejudicial evidence that, in a separate trial of Ms. Stewart, would be admissible only to the extent that she knew about it and had some power to affect its issuance and distribution. Yet at this joint trial it came in without limitation. T. 5467, T. 5663.

As set forth *ante*, at 33, the “fake *fatwah*” was issued at a time when Ms. Stewart was denied access to Sheikh Rahman either by phone or visit. In addition,

¹⁶ In *United States v. Rosa*, 11 F.3d 315, 323-24 (2d Cir. 1993), two charged conspiracies included the same five defendants. In *United States v. Scarpa*, 913 F.2d 993, 998 (2d Cir.), the movant was charged in two conspiracy counts in which all seven appellants had been 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. In *United States v. Rahman*, 854 F. Supp. 254, 262 (S.D.N.Y. 1994), “all defendants [were] charged with participating in the seditious conspiracy described in Count One.”

the evidence established that Sheikh Rahman was unaware of the “fake *fatwah*” until Mr. Yousry read him the newspapers. *See* GX 1193 at 3. Mr. Yousry was likewise surprised, as were all of the lawyers. *Id.*

A communication that did not originate and could not have originated from Sheikh Rahman could not be a part of the charged §956(a) conspiracy or any provision of “material support” under §2339A as it was not provided by Sheikh Rahman and did not constitute a violation of the S.A.M.’s. Nor could Sheikh Rahman’s directive to his attorneys not to disavow the *fatwah* constitute “material support,” since it provided *nothing* to any §956(a) conspiracy, but instead represented merely *inaction*.

This type of highly volatile evidence renders ordinary severance principles of only marginal applicability to the extraordinary circumstances herein – a staggering 750 limiting instructions relating to evidence (including 138 documents not admitted for their “truth”) tending to link the defendant to the most devastating terrorist attack on U.S. soil in history, and to the agenda of an inmate convicted of plotting to destroy New York’s most cherished institutions as well as its most highly-traveled arteries.

All New Yorkers were putative victims of both Sheikh Rahman and Usama Bin Laden. Evidence about them cannot be equated with that in ordinary cases,

and the images and passion they invoke are, for this generation, *sui generis*. As a result, Ms. Stewart was irremediably prejudiced, should have been granted a severance, and was denied a fair trial.

E. *The District Court's Attempted Curative Instructions Were Unavailing*

The District Court's more than 750 limiting instructions – two of which were related to Mr. Bin Laden specifically – failed to ameliorate the prejudice that Ms. Stewart suffered as a result of the introduction of the evidence set forth **ante**. Despite the Court's efforts, those instructions could not have overcome the impact that evidence – both in volume and subject matter – unquestionably had on the jury.

The limiting instructions suffered from several fatal problems that rendered them insufficient and ineffectual: there were *too many* limiting instructions; they were, over time and because of their differing character, too complicated; and they could not overcome the prejudicial evidence, the manner and timing in which it was introduced, and its cumulative impact.

1. *The District Court's Pre- and Post-Trial Opinions*

In its initial opinion, addressed to the first Indictment, the District Court indicated its confidence that limiting instructions would, as they are in conventional cases with conventional evidence, serve their curative purpose:

“[t]his case simply is not one where ‘the risk that the jury will not, or cannot, follow instructions is so great . . . that the practical and human limitations of the jury system cannot be ignored.’” *United States v. Cardascia*, 951 F.2d 474, 484 (2d Cir.1991) (quoting *Bruton*, 391 U.S. at 135, 88 S.Ct. 1620).

Sattar I, 272 F. Supp.2d at 380.

After trial, the District Court defended its denial of Ms. Stewart’s severance motion, and its complex matrix of limiting instructions, by citing the additional limiting instructions it delivered as part of its ultimate jury charge, and which accompanied the submission of any exhibits to the jury during deliberation. *Sattar 29/33*, 395 F. Supp.2d at 104 (quoted **ante**, at 37-38).

Yet that completely misses the point, and suggests that the solution for *too many* limiting instructions is *more* limiting instructions. Of course, since the jury was overwhelmed by the instructions during trial, simply adding instructions after the close of evidence would not have ameliorated the problem, but only exacerbated it. As a result, the only proper solution was severance.

The District Court’s reliance on cases endorsing limiting instructions, and/or finding them sufficient to allay prejudice, are simply inapposite in a case involving so many instructions. Indeed, if the number in this case is not excessive, then what would be a number that would constitute too much to bear? The

number of limiting instructions, and/or, as detailed **post**, the fact that Count Two was subsumed within Counts Four and Five, each render that claim unsustainable.

In a case with a manageable amount of evidence in such different categories, or a reasonably small number of limiting instructions, perhaps the prejudice to a defendant such as Ms. Stewart might arguably be less material. Here, however, the amount of evidence that was introduced for varied purposes, and the gross number of limiting instructions – themselves of varying character – renders purely fictional any claim that the jury could keep the evidence, and the impact on its determination with respect to Ms. Stewart, separate and individualized.

The District Court adhered to its conclusion even after trial, *see ante*, at 38 (*Sattar 29/33*, 395 F. Supp.2d at 103-04), finding it probative that “[d]espite the number of limiting instructions in this case, Stewart does not point to the inaccuracy of any such limiting instruction.” *Id.*, at 104.

Yet the District Court’s limiting instructions were not necessarily accurate in the long run because over the course of the trial they were not applied uniformly to the same categories of evidence. For example, the District Court initially told the jury that certain evidence related to Count Two’s §956(a) conspiracy to kill

charging only Mr. Sattar, was not admissible directly against Ms. Stewart or Mr. Yousry.

Subsequently, though, the Court modified that instruction: if the jury found the existence of §956(a) conspiracy to kill, and that Ms. Stewart and Mr. Yousry aided that conspiracy, it could use that evidence against them. T. 12339-12341. Thus, the bar to using that highly prejudicial evidence was diluted considerably, thereby eliminating any effectiveness.¹⁷

In addition, the District Court's position that "compartmentalization" was possible because the evidence at issue was admissible only against the defendant from whom the evidence was seized is completely at odds with its companion assertion that much of the prejudicial evidence was admissible against Ms. Stewart to prove Count Two's §956(a) conspiracy to murder.

Consequently, the District Court repeatedly asked the jury to apply contrary standards to separate but similar items of evidence – some only against Mr. Sattar, some only against Mr. Yousry, some "not for the truth," but still others not directly or initially admissible against Ms. Stewart, but indirectly and ultimately used against her in the form of Count Two's §956(a) conspiracy that formed an

¹⁷ Throughout the trial, counsel for Mr. Yousry engaged the District Court in an ongoing colloquy with respect to what constituted an appropriate limiting instruction. *See, e.g.*, T. 2708, 2945-46, 3281-85, 4730-42, 5289-5294.

essential component of the counts premised upon §2339A (Counts Four and Five).¹⁸

Indeed, that persistent inconsistency is fatal to the claim that the 750 limiting instructions were sufficient to alleviate the problems the prejudicial evidence presented. While the District Court may have cautioned the jury not to consider against Ms. Stewart evidence admitted against Mr. Sattar because it was related exclusively to the §956(a) conspiracy in Count Two, T. 4108, the District Court also instructed the jury that the existence of the Count Two conspiracy, and Ms. Stewart's knowledge or intent to assist it, was an essential element of Counts Four and Five against her. T. 12,333-49. Thus, the structure of §2339A, incorporating Count Two's §956(a) conspiracy allegations, ensured that such evidence prejudiced Ms. Stewart regardless of the number or nature of the limiting instructions.

In *United States v. McDermott*, 245 F.3d 133 (2d Cir. 2001), this Court reversed a conviction because prejudicial spillover was so significant that joinder

¹⁸ Moreover, Ms. Stewart was put at an additional disadvantage because her counsel was not in a position – certainly strategically and perhaps in some instances even legally – to cross-examine regarding any such evidence that was explicitly not admitted against her. Subsequent instructions that changed the use of such evidence might have altered that approach, but it was already too late. See *United States v. McVeigh*, 169 F.R.D. 362, 366 (D. Colo. 1996).

was improper. That was a securities fraud prosecution, not a case involving charges of providing material support to international terrorism in a venue still scarred – physically, emotionally, and psychologically – by the worst terrorism attack on U.S. soil. Added to that mix were two personalities, Sheikh Rahman and Mr. Bin Laden, directly associated with terrorist plots, successful and attempted, against New York and New Yorkers.

Yet the Court in *McDermott* pointed out in that much less highly charged atmosphere that while it has noted that “proper jury instructions can diminish the likelihood of prejudice, . . .” it has “also repeatedly stated that this presumption fades when there is an overwhelming probability that the jury will be called upon to perform humanly impossible feats of mental dexterity.” 245 F.3d at 139-40 (citations omitted).

Here, notwithstanding the District Court’s pre- and post-trial confidence in the jury’s capacity to adhere to limiting instructions, *Sattar I*, 272 F. Supp.2d at 380, instructing the jury to eliminate its predispositions and apprehensions about, *inter alia*, Mr. Bin Laden, about Sheikh Rahman, and about international terrorism, including the lives lost in the Embassy Bombings, the sailors killed and injured in the bombing of the U.S.S. Cole, and the 58 tourists and others killed in the 1997 Luxor attack, during its consideration of Ms. Stewart was the equivalent

of asking it to perform “impossible feats of mental dexterity” (and emotional detachment as well). *See United States v. McVeigh*, 169 F.R.D. 362, 364 (D. Colo. 1996) (concluding in Oklahoma City bombing case that cautionary instructions could not overcome the risk of undue prejudice because “[t]he nature and scope of the charges, the quantity of the evidence and the intensity of the public interest in all aspects of this criminal proceeding compel caution”).¹⁹

As this Court has recognized, not all prejudice is equal. Thus, in *United States v. Cardascia*, 951 F.2d 474, 483 (2d Cir. 1991), this Court pointed out that “[r]elief by severance may be more appropriate when the unrelated evidence reflects activities of a violent nature because the risk of substantial prejudice is greater.” 951 F.2d at 483.²⁰

The complexity of the charges also contributed to negating any salutary impact of the limiting instructions here. *Cf. Scales v. United States*, 367 U.S. 203,

¹⁹ Here, given the public’s antipathy toward Mr. Bin Laden and Sheikh Rahman, and the emotional scars of 9/11, as the District Court realized in *McVeigh* prospectively, it was unreasonable to expect jurors to “exercise their individual and collective discipline to follow such instructions in” this case. 169 F.R.D. at 368.

²⁰ In *Cardascia*, this Court determined that the partial verdict acquitting defendants on some counts demonstrated that the jury was able to follow the limiting instructions. 951 F.2d at 484. Here, that factor is decidedly absent – all three defendants were convicted on *all* counts.

232 (1961) (subtler and more complex statutes require stricter examination with respect to sufficiency of the evidence); *Yates v. United States*, 354 U.S. 297, 326 (1957) (same). *See also McVeigh*, 169 F.R.D. at 364.

Thus, there are limits to the efficacy of limiting instructions, and they were well exceeded in this case. As the Supreme Court pointed out in *Bruton v. United States*, 391 U.S. 123 (1968), “[a] jury cannot segregate evidence into separate intellectual boxes.” 391 U.S. at 131, *quoting People v. Aranda*, 63 Cal.2d 518, 528-29, 407 P.2d 265, 271-72 (1965) (Traynor, C.J.) (since superseded by statute and state constitutional amendment).

Similarly, Justice Jackson made the oft-quoted observation that “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.” *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (internal citations omitted).²¹

²¹ There is extensive literature on the capacity of jurors to follow judges’ instructions to disregard prejudicial or inadmissible evidence, and it is unanimous in finding this capacity to be severely limited. *See, e.g.,* K. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUMAN BEHAVIOR 407 (1995); A. Reifman, et al., *Real Jurors’ Understanding of the Law in Real Cases*, 16 LAW & HUMAN BEHAVIOR 539 (1992); G. Kramer, et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUMAN BEHAVIOR 409, 430 (1990) (“[o]ur results are completely consistent with prior research on the ineffectiveness of judicial cautionary instructions. An admonition from the judge to ignore all publicity had no effect on juror or jury verdicts”).

This Court recognized the wisdom of those axioms in *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994), in which it ruled that when “there is an overwhelming probability that the jury will be unable to follow the court’s instructions and the evidence is devastating to the defense . . . it would be quixotic to expect the jurors to perform such mental acrobatics called for by the district judge.” 16 F.3d at 493, *citing Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.). *McVeigh*, 169 F.R.D. at 364 (“[t]he frailties of human nature require some constraints on the procedures used to achieve an acceptable outcome”).²²

Here, expecting the jury to absorb *more than 750 limiting instructions* – some with changing and even contradictory directions – and process them seamlessly in the face of the most prejudicial evidence imaginable for a New York jury is asking it to perform “mental acrobatics,” to (impossibly, according to the Supreme Court) “segregate evidence into separate intellectual boxes,” and is indeed “quixotic.”

The District Court’s reminder to the jury during its final instructions that the jury had to abide by the limiting instructions, T. 12276; 395 F. Supp.2d at 104, did

²² In *Bruton*, the Court devoted a long footnote to a catalog of Judge Hand’s repeated criticism of limiting instructions. 391 U.S. at 132 n. 8.

not suffice to overcome the volume and breadth of the prejudicial evidence covered by that avalanche of *more than 750* limiting instructions.

Indeed, Judge Learned Hand referred to limiting instructions as a “placebo,” *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956) (a decision effectively reversed by *Bruton*), and in this case, given the number of such instructions, the jury no doubt overdosed on those “medicinal lies.” *See United States v. Grunewald*, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., *dissenting*).

Thus, in *McDermott*, this Court pointed out the futility of limiting instructions in certain cases:

[a]lthough the district court here provided the jury with standard limiting instructions, we find that under the circumstances of the case, where the prejudicial spillover was so overwhelming, they cannot be presumed to be effective.

245 F.3d at 140.

This, too, is such a case. Here there was indeed the proverbial “800-pound gorilla” present throughout the trial – the specter of 9/11 and the embodiment of the terror and anger it produced in every New Yorker – and it remained in the jury room during deliberations in the form of the evidence enumerated **ante**. Thus, as was the case in *McDermott*, here with respect to Ms. Stewart, “the prejudicial spillover was so overwhelming” that the Court’s cautionary instructions “cannot

be presumed to be effective.” 245 F.3d at 140. Accordingly, the District Court abused its discretion in repeatedly denying Ms. Stewart’s motion for severance.

POINT II

MS. STEWART’S CONVICTIONS ON COUNTS FOUR AND FIVE SHOULD BE VACATED, AND THE CHARGES DISMISSED, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT SHE PROVIDED “PERSONNEL” UNDER §2339A

Ms. Stewart’s convictions on Counts Four and Five, which allege a conspiracy to violate 18 U.S.C. §2339A (charged under 18 U.S.C. §371), and a substantive violation of §2339A, respectively, must be vacated, and a judgment of acquittal entered, because the “material support” upon which the government relied, and for which the jury convicted, constituted protected speech that cannot serve as the basis for prosecution under §2339A.

As detailed below, the statute itself, the Congress that enacted the legislation (and subsequent Congresses), the courts that have interpreted the “material support” statute(s), and even the Department of Justice (hereinafter “DoJ”) itself, have all been steadfast in assuring that the “material support” statute does not criminalize or punish protected First Amendment activity.

In fact, it was not “personnel,” in the form of Sheikh Rahman, that the government’s evidence purports to establish Ms. Stewart “made available” to

Count 2's conspiracy to kill under 18 U.S.C. §956(a); rather, it was Sheikh Rahman's *words* – his *speech* – that Ms. Stewart allegedly “made available” to the alleged conspiracy.

Yet, because such speech cannot form the foundation of a “material support” violation, the government impermissibly attempted to convert that *speech* into “personnel.” Similarly, §2339A's element of “concealment” – in this instance, allegedly surreptitiously making Sheikh Rahman “available” to the Count 2 conspiracy to murder – consisted solely of protected speech, and therefore was not satisfied. Ms. Stewart did not allegedly conceal anything corporeal; rather, again, it was only Sheikh Rahman's – and her – protected speech, which cannot form the basis for criminal liability under §2339A.

A. *The Applicable Principles and Standards for Reviewing Whether the Evidence at Trial Was Sufficient Beyond a Reasonable Doubt*

As this Court pointed out in *United States v. Jones*, 393 F.3d 107, 111 (2d Cir. 2004), “[a] criminal defendant who challenges the sufficiency of evidence shoulders a heavy burden, but not an impossible one.” The Court in *Jones* added that while a Court “defer[s] to a jury's assessments with respect to credibility, conflicting testimony, and the jury's choice of the competing inferences that can

be drawn from the evidence, specious inferences are not indulged.” 393 F.3d at 111 (internal quotations and citations omitted).²³

Thus, while a reviewing court must view all of the evidence in the light most favorable to the prosecution to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt[,]” *United States v. Samaria*, 239 F.3d 228, 233 (2d Cir. 2001), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), this Court has repeatedly instructed, “the government must do more than introduce evidence ‘at least as consistent with innocence as with guilt.’” *United States v. D’Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994), quoting *United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991) (other citations omitted). See also *United States v. Walker*, 191 F.3d 326, 333 (2d Cir. 1999).

In addition, “[t]hese principles apply whether the evidence being reviewed is direct or circumstantial.” *Jones*, 393 F.3d at 111, quoting *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). However, in *United States v. Martinez-Sandoval*, 2003 WL 1442454 (S.D.N.Y. 2003), the District Court also explained that the

²³ The principles discussed in this section apply as well to the subsequent POINTs that also raise issues of sufficiency of the evidence (*i.e.*, POINT III & POINT V), but will not be repeated therein.

standard of review of the evidence is somewhat different when the entirety of the evidence as to one or more elements is circumstantial in nature:

the test does not address the situation where the evidence is all inferential and equal inferences of guilt and innocence can be drawn by the jury. In that situation, it has been the law for several years in other circuits that ‘if the evidence . . . [viewed in the light most favorable to the government] gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, [then] a reasonable jury must necessarily entertain a reasonable doubt.’”

2003 WL 1442454, *5, quoting *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996). See also *United States v. Andujar*, 49 F.3d 16, 20 (1st Cir. 1995); *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir. 1992); *United States v. Wright*, 835 F.2d 1245, 1249 n. 1 (8th Cir. 1987); *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982). See also J.A. 2079.²⁴

The Court in *Martinez-Sandoval* also noted that in 2002 this Court had “adopted the same view when the evidence against a defendant is entirely circumstantial[,]” 2003 WL 1442454, at *5, citing *United States v. Glenn*, 312

²⁴ As a result, the District Court’s statement, in its opinion denying Ms. Stewart’s Rule 29 & 33 motions, that “[t]he jury’s verdict ‘may be based entirely on circumstantial evidence[,]’” 395 F. Supp.2d at 83, citing *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir.1995) (other citations omitted), was not entirely correct because it failed to factor in this Court’s additional analysis when the evidence is *entirely* circumstantial.

F.3d 58, 64 (2d Cir. 2002) (footnote omitted), although this Court had repeatedly employed that formulation in practice, if not in name, in evaluating the sufficiency of circumstantial evidence. *See United States v. Al Jabori*, 90 F.3d 22, 26 (2d Cir. 1996); *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995).

Thus, “when a jury finds – based solely on inferences – that the government proved an *element* of a crime, a reviewing court must be satisfied ‘that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt.’” *Jabori*, 90 F.3d 22, 26 (2d Cir. 1996) (emphasis in original) (citation omitted). *See also Samaria*, 239 F.3d at 236.

As this Court made clear in *United States v. Friedman*, 300 F.3d 111 (2d Cir. 2002), *cert. denied*, 538 U.S. 981 (2003),

where the Government seeks to prove a fact that is also an element of the offense by circumstantial evidence, “[w]e must . . . be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt.”

300 F.3d at 124, *quoting United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995) (alterations in original). *See also United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004).

As a result, as this Court pointed out in *Rodriguez*, “it thus remains axiomatic that ‘it would not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty.’” 392 F.3d at 544, *quoting Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (alterations and emphasis by the Court in *Rodriguez*).

In addition, as detailed **post**, at 68-69, special limitations apply when the allegations against the defendant implicate expression and activity protected by the First Amendment: under the standards enunciated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), and applied in numerous cases since, speech is protected unless it is specifically intended and likely to cause imminent unlawful action.

Here, notwithstanding the formidable barrier faced by Ms. Stewart with respect to sufficiency, and viewing the totality of the evidence – introduced by both the government and the defense – in the light most favorable to the government (as the Court must), it was simply insufficient to prove beyond a reasonable doubt that Ms. Stewart provided any “personnel” cognizable under §2339A and/or the First Amendment.

B. *The “Material Support” Alleged At Trial In the Form of “Personnel” Constituted No More Than Sheikh Rahman’s and Ms. Stewart’s Constitutionally Protected Speech, and Therefore Cannot Constitute “Material Support” Under §2339A*

Arguably speech, even constitutionally protected speech, can be *evidentiary* in the context of a “material support” (or other criminal) prosecution. As the Supreme Court noted in *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993), “[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *See also United States v. Salameh*, 152 F.3d 88, 111-112 (2d. Cir. 1998) (upholding “evidentiary use of speech to establish the elements of a crime or to prove motive or intent” in face of defendant’s First Amendment challenge).

Thus, a defendant’s (or third person’s) statements could theoretically be used to establish knowledge and intent to assist a terrorist conspiracy. Nevertheless, that speech cannot constitute the *substance* of the offense, *i.e.*, the “material support” itself, unless it also fails the test for constitutionally protected speech set forth by the Supreme Court in *Brandenburg*.

At trial, the government was unable to enumerate any conduct by Sheikh Rahman, or any speech that is not wholly protected by the First Amendment. In addition, particular provisions of the “material support” statutes constrain their application with respect to First Amendment activity. As set forth below, both Sheikh Rahman’s and Ms. Stewart’s statements stayed well within the acceptable limits established by *Brandenburg*.

1. *The “Personnel” Allegedly Provided By Ms. Stewart Was Limited to Sheikh Rahman’s Constitutionally Protected Statements*

a. *The Allegations of “Personnel” In the Successive Indictments*

The initial Indictment alleged that members of IG functioned as a “communications hub” in the U.S., J.A. 113 ¶ 12, and that Ms. Stewart “facilitated and concealed *communications* between Sheikh Rahman and IG leaders around the world.” J.A. 115-116 ¶ 16 (emphasis added). The initial Indictment further alleged that Ms. Stewart and Mr. Yousry provided “personnel,” including themselves, to IG, “in order to assist IG leaders and members in the United States and elsewhere around the world, in communicating with each other[.]” J.A. 117 20(b).

Following the District Court’s decision dismissing the “material support” counts from the initial Indictment, *see Sattar I*, the Superseding Indictment alleged that Ms. Stewart “would and did provide personnel by making Abdel Rahman available as a co-conspirator[.]” and that she “would and did conceal and disguise the nature, location, source, and ownership of material support and resources, to wit, would and did conceal and disguise the nature, location, source and ownership of personnel by concealing and disguising that Abdel Rahman was a co-conspirator[.]” J.A. 160-162, ¶¶ 38 (Count Four), 41 (Count Five).

As the District Court acknowledged, the factual allegations and general theory in the Superseding Indictment were essentially the same as in the initial Indictment:

[i]n both indictments the Government alleges that Stewart participated in what can be characterized as “a communications pipeline staffed by the defendants that enabled Sheikh Abdel Rahman and other [Islamic Group] leaders around the world to communicate with one another.”

Sattar II, 314 F. Supp.2d at 315-16, *quoting Sattar I*, 272 F.Supp.2d at 361.

The superseding Indictment also mentions certain *statements* by Sheikh Rahman – but no *conduct* – including the following, all of which constitute protected speech:

- Sheikh Rahman “at times provided [IG] strategic advice concerning whether such activities would be an effective means of achieving [its] goals.” J.A. 133 ¶ 5;
- Ms. Stewart, “through her continued access to Abdel Rahman, *enabled him to remain in contact with his co-conspirators and followers.*” J.A. 142-143 ¶ 27 (emphasis added);
- “[i]n that statement, Abdel Rahman rejected a proposal that the Islamic Group form a political party in Egypt.” J.A. 145 ¶ 30(d); and

- Sheikh Rahman “demand[ed] that [his] brothers, the sons of the Islamic Group, do a comprehensive review of the Initiative and its results. [He] also demand[ed] that they consider themselves absolved from it.” J.A. 145 ¶ 30(e);

The superseding Indictment also alleged that Sheikh Rahman “played a key role in defining and articulating the goals, policies, and tactics of the Islamic Group.” J.A. 134-135 ¶8 ¶.

b. *The Evidence of “Personnel” Presented At Trial*

The evidence at trial established beyond question that the “personnel” Ms. Stewart provided amounted only to Sheikh Rahman’s statements. In fact, the government did not attempt to argue otherwise. Sheikh Rahman did not provide any tangible services to any alleged conspiracy, or any expertise in any technical or other subject matter. He did not direct any violent acts or provide intelligence or information in that regard.

Rather, the dissemination of opinions and statements from him, was the sum total of that which Ms. Stewart arguably “provided” to the outside world, including Count Two’s conspiracy to murder in violation of §956(a). Moreover, *nothing ever happened* as a result of the alleged “material support” Ms. Stewart

purportedly provided, and the government did not allege any: no terrorist act, plot, plan, or purpose was even implicated or commenced, much less realized.

In fact, the government's specious "jailbreak" argument during opening statement, T. 2126,²⁵ merely illustrates the point: it was Sheikh Rahman's "message" – not any conduct on his part – that the government's opening claimed Ms. Stewart "broke out" of jail.

Thus, all that was potentially "broken out" as a result of Ms. Stewart's conduct were Sheikh Rahman's *words*. No other support or resources, material or otherwise, were "broken out," "made available," or "provided" (even assuming *arguendo* they were provided to Count 2's §956(a) conspiracy to kill).

Indeed, in that context, the Superseding Indictment, exposed to the glare of trial, turned out to be as deficient as the initial accusatory instrument. In its opinion denying Ms. Stewart's motion(s) to dismiss the Superseding Indictment, the District Court noted that "[w]hile the factual allegations are similar [to those in the initial Indictment], the critical statute is different, the elements of the offense, including scienter, are different, and the allegations as to how the defendants'

²⁵ The government argued in its opening that "[u]sing the pretext of attorney-client visits and telephone calls, these defendants were able to *break Abdel Rahman's message of terror out of jail* and deliver it to the very people who never should have heard it, other terrorists who still walk the streets and were still able to follow his instructions." T. 2126 (emphasis added).

conduct violated the statute are different.” *United States v. Sattar*, 314 F. Supp.2d 279, 295 (S.D.N.Y. 2004) (hereinafter “*Sattar II*”).

As the evidence at trial established, however, the government’s case ultimately consisted of the same inadequate “material support” dressed up in different packaging. The “personnel” alleged in the Superseding Indictment was no more valid factually than it was legally in the initial Indictment. The government’s designation of Sheikh Rahman as “personnel” means it is not just *Ms. Stewart*’s conduct or speech in the context of First Amendment rights that is at issue, but whether *Sheikh Rahman*’s utterance of constitutionally protected speech can form the basis of “personnel” under §2339A(b).

In its opinion denying Ms. Stewart’s post-trial motions, the District Court, while failing to recognize what its language indicated, characterized the government’s case in terms that clearly describe protected speech:

- an IG member “requested an opinion from Abdel Rahman as to whether the Islamic Group should form a political party in Egypt. (GX 1005X at 2-4).” *Sattar 29/33*, 395 F. Supp.2d at 85;
- “[a] rational jury could find that, during the course of the March 1999 visit, Stewart and Yousry relayed to Abdel Rahman the requests from

Taha and from Sultan and Habib, and received Abdel Rahman's response. (GX 2415-6T.)” *Id.*

- “[i]n response to Sultan’s and Habib’s letter, Abdel Rahman rejected the proposal that the Islamic Group form a political party. Abdel Rahman stated that the ‘cessation of violence’ was a ‘matter of tactics and not of principle.’ (GX 2415-6T; *see also* GX 1007X at 3, 6-7.) In response to Taha’s request for Abdel Rahman’s support in ending the cease-fire, Abdel Rahman stated that he had ‘no objection,’ even though others were calling for the halt of violence.” *Id.*, at 85-86;
- “[o]n June 13, 2000, Stewart and Sattar relayed Abdel Rahman’s withdrawal of support for the cease-fire to Reuters reporter Esmat Salaheddin, who was based in Cairo, Egypt. (Tr. 5569-72, 5605-06.) Salaheddin testified at trial as to his conference call with Stewart and the accuracy of his article. (Tr. 5569-75.) In disseminating Abdel Rahman’s statement, Stewart told Salaheddin that ‘Abdel Rahman is withdrawing his support for the cease-fire that currently exists.’” (Tr. 5574, 5617; GX 524.)[.]” *Id.*, at 87;
- “Stewart’s dissemination of Abdel Rahman’s withdrawal of support for the cease-fire and its publication in the media produced conflict

within the Islamic Group between pro-cease-fire and pro-violence factions, with pro-cease-fire advocates denying that Abdel Rahman had issued the withdrawal. (GX 1111X at 4-22; GX 1114X at 2; GX 1250X at 1-4.) Stewart and Sattar responded by issuing Abdel Rahman's reaffirmation of his withdrawal of support for the cease-fire on June 21, 2000, by relaying it to Salaheddin. (GX 2663; GX 1151X at 1-3; GX 1152X at 1-4; GX 1153X at 1-4; GX 1155 at 1-3.) The statement reaffirmed that everything that was said in the previous statement was correct and that Abdel Rahman said those things. The statement also stated, '... I did not *cancel* the cease-fire. I do withdraw my support to the initiative. I expressed my opinion and left the matters to my brothers to examine it and study it because they are the ones who live there and they know the circumstances where they live better than I. I also ask them not to repress any other opinion within the Gama'a, even if that is a minority opinion.' (GX 2663 (emphasis in original).) The jury could reasonably find that the 'other opinion' was a reference to Taha." *Id.*, at 87-88.

Nor can the presence of the S.A.M.'s in this case transform otherwise constitutionally protected speech into a violation of §2339A. For example, if

Sheikh Rahman were not in prison or even under indictment, the statements by him (and for which Ms. Stewart allegedly acted as a conduit) at issue in this case could not sustain a prosecution under §2339A. Even if Sheikh Rahman were under indictment, such statements would still be constitutionally protected, and not actionable under §2339A. If he made the statements in open court during trial or sentencing (or other proceedings), they would not constitute “material support.” Similarly, if Sheikh Rahman were in prison, but not subject to the S.A.M.’s, the statements by him, and by Ms. Stewart, would not constitute “material support.”

Also instructive is an incident that occurred a year after §2339A was enacted. In 1995, the attorney for Ramzi Youssef (later convicted as the coordinator of the 1993 World Trade Center bombing), while Mr. Youssef’s criminal prosecution was pending, released a statement by Mr. Youssef, in which he stated that “all Muslims, Palestinians and Lebanese have the right to regard themselves in a state of war with the U.S. Government[,]” and “tried to justify attacks against the United States targets as acts of war and compared them with the bombing attacks on Japan by the United States during World War II, which he called ‘the worst terrorist acts in human history.’” *See* “Bombing Suspect Claims The U.S. Deserves Attack,” *The New York Times*, Saturday, March 25, 1995 (J.A. 2083-2084).

While the attorney's public distribution of Mr. Youssef's statement occurred before §2339A was enacted, and before imposition of the S.A.M.'s, is there any doubt the attorney's conduct was not actionable under §2339A? Or that Mr. Youssef himself could not be prosecuted for his statement, which strayed far closer to the limits prescribed in *Brandenburg* than anything Sheikh Abdel Rahman said in connection with this case, and which the government described as incriminating in that it provided a motive for Mr. Youssef conduct?

Certainly the attorney's dissemination of the statement did not engender any approbation at the time, or any disciplinary or other action. Thus, it is plain that the S.A.M.'s, and violations thereof, were indeed a necessary predicate to the prosecution of Ms. Stewart, but they cannot transform Sheikh Rahman's protected speech into *conduct*.²⁶

²⁶ While in *Sattar I* the District Court insisted that with respect to the "material support" counts (that were dismissed on other grounds), "the SAMs or the attorney affirmation are irrelevant to those counts and could not form a basis for their dismissal[.]" 272 F. Supp.2d at 370, the District Court tacitly acknowledged in *Sattar II* the connection between the S.A.M.'s and the §2339A counts, noting the government's argument "that Stewart and Yousry conspired to and did conceal and disguise the fact that Sheikh Abdel Rahman was a continuing member of the conspiracy to kill and kidnap persons in a foreign country and *made it appear that he was simply a prisoner complying with his SAMs.*" *Sattar II*, 348 F. Supp.2d at 300 n. 10 (emphasis added).

The imposition of the S.A.M.'s does not change that conclusion. While the S.A.M.'s can arguably regulate the communications between a defendant and the outside world, and counsel's ability to convey a defendant's statements, at worst that dissemination constitutes a violation of the terms of the attorney affirmation attendant to the S.A.M.'s. That does not make such statements "material support," or strip them of First Amendment protection in the context of §2339A.²⁷

Speech such as that at issue herein cannot be permissible under §2339A if uttered by someone in the public thoroughfare, or in prison under ordinary circumstances, but prohibited, constituting "material support," merely because the speaker (either a defendant or his lawyer) is subject to the S.A.M.'s. As long as the speech is protected, "conduct" in support of group advocacy cannot be punished. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-12 (1982); *White v. Lee*, 227 F.3d 1214, 1226-28 (9th Cir. 2000). The District Court opinion denying Ms. Stewart's post-trial motions fails to address that critical issue at all:

²⁷ Whether counsel's communication of such statements to others constitutes a violation of the attorney affirmation or the S.A.M.'s, and whatever sanction is available and appropriate for any such transgression, is a separate question. But as the District Court noted in its opinion dismissing part of the initial Indictment in this case, a violation of the S.A.M.'s is not congruent at all with a violation of §2339A. *See Sattar I*, 272 F. Supp.2d at 348.

that without the S.A.M.'s, and the restrictions they imposed upon Sheikh Rahman, there could not have been any offense.

Thus, the First Amendment protection afforded Sheikh Rahman's statements cannot be evaded by merely characterizing them as "personnel," as the District Court did repeatedly in denying Ms. Stewart's post-trial motions. *See, e.g.,* 395 F. Supp.2d at 100-01. *See also id.,* at 100 n. 5 ("[i]n this case, Abdel Rahman was sought as a co-conspirator to do more than speak on behalf of the organization. A reasonable jury could have found that Stewart provided and conspired to provide Abdel Rahman's to the Court Two conspiracy for his leadership as a co-conspirator").

Yet that supposed "leadership" consisted of no more than protected speech. The District Court engaged in further semantics by remarking that "the jury found that Stewart knowingly or intentionally made Abdel Rahman available to participate in the Court Two conspiracy as a co-conspirator, as opposed to merely making Abdel Rahman's speech available." *Id.,* at 101. However, that ignores the fact that all Ms. Stewart knowingly or intentionally provided was merely *speech protected* under the First Amendment, and therefore not a "co-conspirator" under clear First Amendment doctrine discussed **post**.

Thus, the District Court created a false tautology: that the §2339A charges and evidence did not implicate the First Amendment and the *Brandenburg* standard because Ms. Stewart provided “personnel.” Yet the District Court did so without addressing substantively just what was “provided” by Ms. Stewart, and what comprised that “personnel”: speech protected under *Brandenburg* and the First Amendment. Consequently, the District Court’s analysis in that regard was both conclusory and circular, and succeeded only in evading the heart of the issue.

Moreover, this is not even a close case in which a defendant’s speech might arguably forfeit constitutional protection, *i.e.*, telling a confederate to “connect the blue wire to the green wire” in order to make a viable explosive device, or “I am in favor of attacking a specific target at a specific time.” *Cf. United States v. Khan*, 309 F. Supp.2d 789 (E.D. Va. 2004) (defendants constituted “personnel” because they went to Pakistan to train as soldiers, recruiters, and “procurers of supplies”); *United States v. Lindh*, 227 F. Supp.2d 541, 570 (E.D. Va. 2002) (defendant provided personnel by providing terrorist group “services as a combatant”).

Here, Sheikh Rahman’s statements (and as communicated by Ms. Stewart) stand in stark contrast to the concept of “personnel” recognized by the courts in other “material support” cases. For example, in *United States v. Khan*, 309 F. Supp.2d 789 (E.D. Va. 2004), which involved a prosecution of Virginia residents

who, after September 11, 2001, traveled to Pakistan to train with a Kashmiri separatist group as a springboard for participating in *jihād* activities in Kashmir (against the Indian government), Afghanistan (against U.S. and coalition troops), and Chechnya (against the Russian military), the District Court, in denying certain defendants' Rule 29 motions with respect to the charged §2339A conspiracy, pointed out that

[t]he conspiracy alleged . . . *was not to provide "personnel" who would speak on behalf of LET [a Kashmiri separatist organization in Pakistan], or provide moral support, or simply receive training, but to provide personnel who, after receiving training, would serve that organization as soldiers, recruiters, and procurers of supplies.*

309 F. Supp.2d at 82 (emphasis added).

Neither Sheikh Rahman's nor Ms. Stewart's statements or conduct remotely resemble the type of activity the Court in *Khan* described as proscribed by §2339A. Instead, tellingly, it mirrors that which the Court in *Khan* found would *not* be prosecutable under the statute: someone (Sheikh Rahman) who "would speak on behalf" of an organization or "provide moral support."

Nor was the content more than classic political speech: as the Superseding Indictment itself alleges, the "[c]ease-fire was designed as an 'initiative' . . . in which the [IG] would suspend terrorist operations in Egypt in a tactical effort to

persuade the Egyptian government to release [IG] leaders, members, and associates who were in prison in Egypt.” J.A. 140 ¶ 22 (internal quotation marks omitted). Moreover, regardless of any rhetoric in ¶ 30(e), *not a single act of violence, or even any plan or scheme*, occurred as a result of Sheikh Rahman’s ambiguous statements about the cease-fire. It was all part of *political* maneuvering by IG with respect to its position within Egypt’s polity.

c. *Any Alleged “Concealment” Was Directly Related to Protected Speech*

To the extent there was any “concealment” of “providing” Sheikh Rahman to Count Two’s alleged §956(a) conspiracy to kill – a particularly unsustainable claim in light of the *manner* in which he was allegedly provided: a press release read to a reporter – all that was concealed was the very same protected speech by Sheikh Rahman.

Indeed, the inherent and irreconcilable contradiction in the government’s position – that Ms. Stewart “concealed” her “providing” Sheikh Rahman by issuing a press release – was not successfully resolved by the District Court. In fact, the District Court’s analysis only illustrated that logical tension even further.

For example, while the District Court wrote that “the jury could have concluded that Stewart made Abdel Rahman available as a co-conspirator by

bringing out of prison his withdrawal of support for the cease-fire, and by concealing from the prison authorities the fact that she was doing so[.]" *Sattar* 29/33, 395 F. Supp.2d at 94-95, in the next passage it pursues a *non sequitor*: "[t]he context of the letter from Sattar and Taha that Stewart brought into the prison, together with the context of the message that *she brought out and publicly disseminated*, support her knowledge that she was making Abdel Rahman available to the Count Two conspiracy." *Id.*, at 95 (emphasis added).

Nor could the District Court even keep these diametric concepts – concealment and dissemination – from clogging the same sentence: "Stewart secretly brought this message out of prison, and it was delivered to Sattar and communicated to Taha and Hamza, and was the basis for the subsequent press release." *Id.*

Ultimately, though, the District Court settled on the press release as the means of "material support" provided by Ms. Stewart:

[a] rational jury could have inferred that, *by relaying a statement withdrawing support for a cessation of violence by an influential, pro-violence leader of a terrorist group*, Stewart knew that she was providing support to those within the IG who sought to return to violence—who the jury could have found were participants in the Count Two conspiracy, particularly Taha.

Id., at 96-97 (emphasis added).

Obviously, it is fundamentally and fatally incongruous for Ms. Stewart to have “concealed” providing Sheikh Rahman to Count Two’s alleged §956(a) conspiracy to kill persons in a foreign country by use of newspapers and the international media to make Sheikh Rahman’s position *publicly known as widely as possible*.

If “concealment” had been Ms. Stewart’s goal (or if she wished to aid IG as opposed to Sheikh Rahman in his effort to secure a prisoner transfer to Egypt), she would have passed Sheikh Rahman’s message to IG clandestinely, or through untraceable channels. Clearly, her public dissemination of Sheikh Rahman’s position was consistent with her exercise of First Amendment rights, and her position presented at trial that it was part of a transparent legal strategy to keep Sheikh Abdel Rahman’s name in the news for the purpose of facilitating a transfer to Egypt.

In addition, the District Court’s futile attempts at finding “concealment” further demonstrate that the only “material support” Ms. Stewart provided was *speech*, since Sheikh Rahman’s statements – all constituting protected speech – were all the District Court could cite with respect to what Ms. Stewart allegedly concealed.

2. *Congress, the Courts, and the DoJ All Agree That Protected First Amendment Activity Does Not Constitute “Material Support”*

The “material support” statutes by design do not reach speech protected by the First Amendment. Indeed, that First Amendment activity generally, and constitutionally protected speech in particular, is insulated from prosecution and punishment under §2339A is a position asserted not just by Ms. Stewart, but also by Congress, the courts, and DoJ itself.

a. *The “Material Support” Statutory Language*

Of course, “speech” was not included in the definition of “material support” or resources in §2339A(b) that applied to this prosecution. It likewise does not appear in the current version of the section (amended twice since then), in which “material support” is defined as:

- (1) any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1) or more individuals who may be or include oneself), and transportation, except medicine or religious materials;
- (2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
- (3) the term “expert advice or

assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.²⁸

In fact, in 2004, Congress, as part of S. 2845, the Intelligence Reform and Terrorism Prevention Act of 2004, explicitly reinforced the exclusion of First Amendment activity by enacting §2339B(i), which provides as follows:

Rule of construction. – Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

18 U.S.C. §2339B(i).²⁹

²⁸ While the term “personnel” was redefined by an additional 2004 amendment as well, *see* §2339B(h), the District Court noted that “[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 I*, 272 F. Supp.2d at 356 n. 4. *See also post*, at n.29.

²⁹ There is no reason why Congress’s intent with respect to §2339B(i) should not also apply to §2339A. The definitions of “material support” apply equally to both §§2339A & B; the only difference is that “material support” for §2339B is to an FTO, while §2339A requires the “material support” be provided for another offense, in this case Count Two’s §956(a) conspiracy to kill persons overseas (in the context of the activities of IG, *an FTO*). The protected First Amendment activity – advocacy, opinion, and political speech – is the same for both statutes, and is no more proscribed if provided in support of a §956(a) conspiracy than it is to an FTO. As the Supreme Court emphasized in *Claiborne Hardware, group* (or individual) advocacy via protected speech does not make the speaker a co-conspirator. 458 U.S. at 908. Also, as set forth *post*, at 88-89, the government itself has in other cases acknowledged that §2339A does not punish protected First Amendment activity. Furthermore, because the Ninth Circuit found the term to be *facially vague* when used to prohibit activities in support of a single act, *i.e.*, providing material support to a designated terrorist organization

b. *The Congressional Intent Is Explicit*

As the District Court noted in its opinion dismissing part of the initial Indictment, the Congress that passed §2339B, in the legislative history, was careful to point out that the statute was not designed to cover protected speech:

the ban does not restrict an organization's or an individual's ability to freely express a particular ideology or political philosophy. Those inside the United States will continue to be free to advocate, think and profess the attitudes and philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups, or their subsidiary groups, overseas.

Sattar I, 272 F. Supp.2d at 357-58, quoting H.R. Rep. 104-383 at 45. See also H.R. Rep. No. 104-383, at 44 (“[t]here is no proscription on one’s right to think, speak, or opine in concert with, or on behalf of, [a foreign terrorist] organization.”); Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. Nat’l Security & Pol’y ___ (forthcoming) (hereinafter “Peterson”), at 14 (“[a] balancing of associational and free speech rights with the government’s interest in

(§2339B), *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9th Cir. 2000) (hereinafter “*HLP II*”), affirmed after remand by *Humanitarian Law Project v. U.S. Dept. of Justice*, 352 F.3d 382 (9th Cir. 2003) (hereinafter “*HLP III*”), a decision vacated only after the 2004 amendments altered the definition of “personnel”, 393 F.3d 902 (9th Cir. 2004) (*en banc*), *a fortiori*, that same term is unconstitutionally vague when used to prohibit “material support” to any of the 35 different offenses enumerated within § 2339A.

preventing terrorist activity was present from the conception of ‘material support’”).³⁰

That same House Report discussed how §2339B should interact with the First Amendment: citing *Elfbrandt v. Russell*, 384 U.S. 11 (1966), the Report stated that “the Court held ‘that an individual cannot be restricted from joining such a group.’ The Court noted that, ‘[a] blanket prohibition of association with a group having both legal and illegal aims would pose a real danger that legitimate political expression or association would be impaired.’” *Id.* at 15, citing *Scales v. United States*, 367 U.S. 203, 229 (1961). See also Peterson, at 52 (“[t]he fundamental policy problem for Congress in creating the ‘material support’ prohibitions has not changed: how to create an acceptable legal line between criminal support for terrorism and the legitimate exercise of protected First Amendment speech and association rights”).

As noted **ante**, at 78, Congress has also subsequently reiterated that intention with the addition of §2339B(i). Consequently, it is Congress’

³⁰ See also Peterson, at 11 (“[t]he development of the ‘material support’ statutes shows that Congress has struggled with exactly what level of involvement with terrorists or terrorist organizations was sufficient to implicate a third party. Initially, ‘material’ support was more akin to participating in or aiding a violent act. Congress was trying to create a term that would differentiate between ‘mere membership’ in a terrorist organization and those who actually supported and carried out a group’s violent activities”).

indisputable and continuing intention to exclude protected First Amendment activity from the scope of the definition of “material support.”

c. *The Courts’ Interpretation Has Been Uniform and Unambiguous*

The Courts, too, have been clear in distinguishing “material support” from constitutionally protected First Amendment activity, including speech. For instance, below, in *Sattar II*, the District Court, recapitulating its analysis of the initial Indictment in *Sattar I*, stated that “by prohibiting the provision of personnel, including oneself, to a foreign terrorist organization, §2339B could conceivably apply to someone engaging in advocacy on behalf of such an organization, conduct protected by the First Amendment.” *Sattar II*, 314 F. Supp.2d at 296, *citing Sattar I*, 272 F. Supp.2d at 358-59 (internal quotations omitted).

Here, it does not make any difference that the “personnel” is not the defendant, but rather a *third* person who is merely “engaging in advocacy[,] . . . conduct protected by the First Amendment[,]” and whose statements are simply repeated by the defendant. The impropriety of using that third person to constitute “personnel” is further aggravated in the First Amendment context when that third person is the client of a lawyer who is duty-bound to protect the client’s legal interests and public image. *See In re Grand Jury Subpoenas dated March 24,*

2003, 265 F. Supp.2d 321, 330 (S.D.N.Y. 2003) (characterizing use of the public forum to gain advantages for the client as involving “some of [a lawyer’s] most fundamental client functions”).

As noted by the Court in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001), and *Gentile v. State Bar of Nevada*, 501 U.S.1030, 1034 (1991), a lawyer’s speech on behalf of her client constitutes protected, private speech under the First Amendment. Also, the Court in *Gentile* explicitly rejected a “balancing test” with respect to noncommercial attorney speech, 501 U.S. at 1051-52, finding instead that attorney speech may be restricted (in language shadowing the *Brandenburg* standard) only to the extent it creates “a danger of imminent and substantial harm.” *Id.* at 1036. Here, Ms. Stewart’s statements at no point threatened even remotely to approach that level.³¹

³¹ An attorney’s obligation to provide zealous representation only enhances the protected character of speech on a client’s behalf. During the historic divorce trial of Queen Caroline, Henry Peter Brougham furnished the classic statement, apt in this instance as well, of the responsibilities of ethical and competent defense counsel:

[s]eparating the duty of a 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). *See also Queen Caroline’s Case*, 129 Eng. Rep. 976 (1820).

Other courts, too, have recognized the critical and dispositive distinction between “material support” and constitutionally protected activity and speech, and how First Amendment activity is exempt from prosecution under the “material support” statutes. In *HLP II*, the Ninth Circuit explained that §2339B,

does not prohibit being a member of one of the designated groups or *vigorously promoting and supporting the political goals of the group*. *Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends*. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.

205 F.3d at 1133 (emphasis added). *See also HLP II*, 205 F.3d at 1134

(“[a]dvocacy is always protected under the First Amendment”) & 1137 (“advocacy is pure speech protected by the First Amendment”), *vacated by en banc*

Humanitarian Law Project v. U.S. Dept. Of Justice, 352 F.3d 382 (9th Cir. 2003)

(hereinafter “*HLP III*”), *vacated on other grounds by* 393 F.2d 902 (9th Cir. 2004)

(*en banc*); *Humanitarian Law Project v. U.S. Dept. Of Justice*, 2004 WL 547534, at *15 (C.D. Cal. March 17, 2004) (hereinafter “*HLP IV*”).

In *Boim v. Quranic Literacy Institute, et al.*, 291 F.3d 1000 (7th Cir. 2002), the Seventh Circuit articulated a clear distinction between affiliation with the

goals – even the violent goals – of a designated organization, activity which cannot constitutionally be proscribed, and material support of those goals: §2339B did *not* impose liability “on the basis of membership alone or because a person espouses the views of an organization that engages in illegal activities[,]” as defendants could “with impunity, become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas.” *Id.*, at 1026.

Similarly, in *Holy Land Foundation v. Ashcroft*, 219 F. Supp.2d 57 (D.D.C. 2002), *aff’d* 333 F.3d 156 (D.C. Cir. 2003), the District Court emphasized that government blocks on funds to Hamas had “not restricted HLF’s ability to express its viewpoints, even if these views include *endorsement* of Hamas.” *Id.*, at 82 (emphasis added).³²

³² The Fourth Circuit, too, in *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004), *remanded for resentencing on other grounds*, 405 F.3d 1034 (4th Cir. 2005), stated that §2339B “does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated FTO.” *See also id.*, at 330 (“Hammoud is free to advocate in favor of Hizballah or its *political objectives* – §2339B does not target such advocacy”) (emphasis added); *United States v. Lindh*, 212 F. Supp. 2d 541, 572 (E.D. Va. 2002) (Court interprets §2339B to preclude possibility that “providing ‘personnel’ . . . could in certain instances amount to nothing more than the mere act of being physically present among members of a designated organization,” and thereby “present[] a constitutionally unacceptable risk that a mere bystander, sympathizer, or passive member will be convicted on the basis of association alone”).

In that context, even in the light most favorable to the government, Sheikh Rahman’s activity (and Ms. Stewart’s by extension) here with respect to IG was no different: there were no *acts*, only advocacy and political speech “advocat[ing] the goals and philosophies of” IG.

Indeed, the District Court’s pretrial opinion below provides a perfect example of genuine “material support”: “the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.”

Sattar II, 314 F. Supp.2d at 301. *See also* Robert M. Chesney, *Beyond*

Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated

Terrorism, 80 S. Cal. L. Rev. 425, 499-50 (2007) (hereinafter “*Beyond*

Conspiracy?”) (listing cases and fact patterns).³³

Of course, in this case there is a rather conspicuous absence of “weapons, gunpowder, and gasoline” (or anything remotely close) in connection with Sheikh

³³ A leading First Amendment scholar has described this as the “punish the actor, not the speaker” principle. *See* Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* (W.W. Norton: 2004), at 10-11. Professor Stone is the Harry Kalven, Jr. Distinguished Professor of Law at the University of Chicago (and Dean of the Law School from 1987 to 1994), and author of texts on the First Amendment and constitutional law.

Rahman, and that is the point: the proof at trial failed to meet the requisite standard for establishing “personnel” under §2339A(b).³⁴

Here, Sheikh Rahman was clearly pursuing such “political objectives,” including whether IG should form a political party, or whether, in order to motivate the Egyptian government to release IG members held as political prisoners,³⁵ IG should continue supporting a cease-fire. Thus, as In *HLP II*, in

³⁴ As noted in *Sattar 29/33*, “the Court instructed the jury that the “material support or resources” at issue here was “personnel” in the form of Abdel Rahman’s participation, as a co-conspirator, in the Count Two conspiracy to kill. (See Tr. 12336-38 (“[T]he term ‘personnel’ refers to individuals jointly engaged in a common undertaking, namely, persons preparing for, or carrying out, the conspiracy to murder . . . persons outside the United States that is charged in Count Two.”)).” 395 F. Supp.2d at 93. Elaborating, the District Court charged the jury that

the government has the burden of proving beyond a reasonable doubt that the defendant you are considering provided material support or resources by making Abdel Rahman available as a co-conspirator-that is, as personnel-to the conspiracy charged in Count Two, or that the defendant you are considering concealed the nature, location, or source of Abdel Rahman as personnel for that conspiracy.

Id., citing T. 12337.

³⁵ There cannot be any doubt – and certainly the U.S. State Department (as well as many non-governmental organizations that have studied the situation) has none – that Egypt has detained and imprisoned thousands of political prisoners (and continues to do so), the predominant share of which are members of Islamic organization such as IG and/or the Muslim Brothers. See, e.g., Country Reports

which the Ninth Circuit also recognized that “personnel” in particular, in the context of §2339B, “blurs the line between protected expression and unprotected conduct,” 205 F.3d at 1137, §2339A does the same here.

d. *The Department of Justice’s Position In Other Cases Is Consistent With That of Congress and the Courts*

The interpretation set forth above, that protected First Amendment activity, including speech, cannot constitute “material support,” is precisely the interpretation of “material support” DoJ has adopted in other cases. For instance, in the *Humanitarian Law Project* cases, DoJ repeatedly urged a construction that would leave First Amendment activity unaffected, or conceded that such activity was not within the law’s ambit. *See, e.g., HLP II*, 205 F.3d at 1137-38; *HLP III*, 352 F.3d at 403; *Humanitarian Law Project v. U.S. Dept. Of Justice*, 2004 WL 547534, at *15 (C.D. Cal. March 17, 2004) (hereinafter “*HLP IV*”).

Indeed, in *HLP III*, DoJ even pointed to additions to the United States Attorney’s Manual’s description (at §9-91.100)³⁶ of “personnel” for the purpose of

on Human Rights Practices, Egypt – 2000, Released by the Bureau of Democracy, Human Rights, and Labor, Feb. 23, 2001, available at: <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm>.

³⁶ The revision to the United States Attorneys’ Manual established a DoJ policy that:

a person may be prosecuted under § 2339B for providing

removing any threat to First Amendment activity. *HLP III*, 352 F.3d at 403. *See also United States v. Khan*, 309 F. Supp.2d at 822.³⁷

Similarly, in *United States v. Al-Hussayen*, Cr. No. 03-48-C-EJL (D. Idaho), a prosecution involving *both* §2339A and §2339B, DoJ was adamant that it was not considering protected speech (on web sites and in electronic mail messages) to serve as the “material support” charged in the indictment. In its Memorandum In Opposition to Defendant’s Motion to Dismiss Count One of the Superseding

“personnel” to a designated foreign terrorist organization if and only if that person has knowingly provided the organization with one or more individuals to work under the foreign entity’s direction or control. Individuals who act independently of the designated foreign terrorist organization to advance its goals and objectives are not working under its direction or control and may not be prosecuted for providing “personnel” to a designated foreign terrorist organization. Only individuals who have subordinated themselves to the foreign terrorist organization, *i.e.*, those acting as full-time or part-time employees or otherwise taking orders from the entity, are under its direction or control.

United States Attorneys’ Manual, at §9-91-100; *see also Khan*, 309 F. Supp.2d at 822. That narrowing construction of §2339B was effectively codified in the 2004 amendments at §2339A(b)(2) (further defining “personnel”). *See* §2339B(h); **ante**, at 78 n. 28. That narrowing construction of §2339B was effectively codified in the 2004 amendments at §2339B(h).

³⁷ Again, consistent with the unitary set of definitions for §§2339A & B, *Khan* applied to §2339A the interpretation of “personnel” developed by the courts and the government with respect to §2339B.

Indictment (Docket No. 482), at 6, the prosecutors there repeated that “Section 2339A prohibits conduct, not speech. *See also id.*, at 3 (“Count One therefore charges Mr. Al-Hussayen not with *advocating* unlawful conduct but rather with *engaging in* unlawful conduct. The charges in Count One are predicated upon provision of these things of value, and not upon Mr. Al-Hussayen’s speech or the speech of others”) (emphasis in original). *See also* Docket No. 484.³⁸

As a result, it is clear that the statute, Congress, the Courts, and even DoJ all agree that “material support” does not include protected First Amendment activity. Here, examination of the parameters of protected First Amendment activity, including speech, compels the conclusion that the “personnel” charged in the Superseding Indictment fails to constitute anything more than protected speech.

3. *Analysis of First Amendment Doctrine Demonstrates That the “Personnel” Ms. Stewart Allegedly Provided In This Case Consisted Only of Sheikh Rahman’s Statements Constituting Protected First Amendment Activity*

The First Amendment right to free speech includes the freedom to advocate the use of force or the violation of the law, *see Brandenburg*, 395 U.S. at 447-49, to advocate for illegal action at some indefinite time in the future, *Hess v. Indiana*,

³⁸ *See also id.*, at 3 (“[t]he government is well aware of this distinction and has specifically charged Mr. Al-Hussayen with the criminal act of giving material support and not with the protected practice of abstract advocacy”).

414 U.S. 105, 108-09 (1973) (*per curiam*), to advocate the political goals of a terrorist organization, including praising such groups for using terrorism to achieve its objectives, *HLP II*, 205 F.3d at 1133, and even to advocate for action that makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1015 (9th Cir. 2001) (hereinafter “*PPCW I*”), *vacated on other grounds by* 290 F.3d 1058 (9th Cir. 2002) (*en banc*) (hereinafter “*PPCW II*”), *cert. denied* 539 U.S. 958 (2003). Moreover, “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

Examination of the facts of several cases, and the boundaries of permissible expression as explicated by the Supreme Court and the lower courts, demonstrates that the statements by Sheikh Rahman that Ms. Stewart communicated to others, and which allegedly “provided” Shiekh Rahman to Count Two’s §956(a) conspiracy to murder, fall comfortably within the limits of protected First Amendment speech. Indeed, Sheikh Rahman’s statements are far less controversial than many the Supreme Court and this Court have found to constitute allowable expression under the First Amendment.

For example, *Brandenburg*, the Supreme Court’s definitive advocacy case, established that advocacy for the use of force or violation of the law is constitutionally protected. 395 U.S. at 449 (stating that a statute which “purports to punish for mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action . . . falls within the condemnation of the [First Amendment]”).

In *Brandenburg*, a leader of an Ohio Ku Klux Klan group had been filmed (by a news reporter) making a speech. 395 U.S. at 444-45. One portion of the film showed Brandenburg and several individuals, some of whom were armed, wearing hoods and gathering around a large burning cross. 395 U.S. at 445-46. Other portions of the film showed Brandenburg making a speech warning of “revengeance” if the suppression of the white race continued, and making several derogatory comments regarding African-Americans and Jews, including exhortations to “[b]ury” the former, and send the latter “back to Israel.” 395 U.S. at 446-47; 446 n.1.

In striking down the Ohio statute under which Brandenburg had been convicted, the Court reasoned that its prior decision in *Noto v. United States*, 367 U.S. 290 (1961), distinguished between the mere abstract teaching of the moral propriety or moral necessity to resort to force and violence and actually preparing

a group for violence and setting it into action. 395 U.S. at 447-48. *See Noto*, 367 U.S. at 297 (“advocacy, *even though uttered with the hope that it may ultimately lead to violent revolution*, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis* [*v. United States*, 341 U.S. 494 (1951)]”) (emphasis added); *Yates v. United States*, 354 U.S. at 321 (explaining that the “mere doctrinal justification of forcible overthrow, [even] *if engaged in with the intent to accomplish the overthrow*,” is not punishable absent evidence . . . that action will occur”) (emphasis added).

In doing so, the Court established a new (and by now enduring) standard for the constitutional guarantee of free speech by holding that the First Amendment provides protection for the advocacy of force or the violation of the law “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” 395 U.S. at 448.

Applying this test to the Ohio statute, the Court found that it impermissibly:

punishes persons who advocate or teach the *duty, necessity, or propriety of violence as a means of accomplishing . . . political reform*; or who *publish or circulate* or display *any book or paper containing such advocacy*; or who *justify the commission of violent acts* with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or who voluntarily assemble with a group formed to teach or advocate the doctrines of criminal syndicalism.

Id. (emphasis added). *See also United States v. Rahman*, 1994 WL 388927, at *2 (S.D.N.Y. 1994) (distinguishing between protected speech and that which exceeded the bounds permitted by *Brandenburg*: “that speech may sound constitutionally protected does not mean that it is, *if that speech was intended and likely to generate imminent criminal action by others*”) (emphasis added).

Accordingly, the Court found that the Ohio statute violated the First Amendment because it failed to distinguish between advocacy and the intentional incitement of likely imminent lawless action. 395 U.S. at 448-49. Here, it is simply indisputable that the statements attributable to Sheikh Abdel Rahman, and upon which rest the “material support” allegations against Ms. Stewart, are within that protected sphere: at worst they constitute advocating “the propriety of violence as a means of accomplishing . . . political reform[;]” at worst, Ms. Stewart’s dissemination of those ideas to a reporter merely “published” them. *See Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (*per curiam*) (conduct of giving or spending money in political campaigns may not be regulated when conduct is integrally intertwined with communication); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933-34 (9th Cir. 2006) (First Amendment “breathing space principle” prescribes that “certain conduct, not in itself speech, is protected in order

adequately to protect the actor’s ability to exercise his free speech rights”) (citations omitted).

Indeed, as noted **ante**, at 86, Sheikh Rahman’s position was neither “pro-violence” or a directive to IG. As reported by Reuters, Ms. Stewart stated that Sheikh Rahman “is withdrawing his support for the ceasefire that currently exists[,]” adding that “[t]he people who launched the ceasefire have good faith but the (Egyptian) government has shown no good faith.” GX 524H (parentheses in original). As a result, Sheikh Rahman counseled, according to Ms. Stewart, that “[h]e wants people not to place hope in this process because nothing is moving forward.” *Id.* See also T. 5574, 5617 (testimony of Esmat Salaheddin).

That statement’s meaning was so difficult to determine that a subsequent clarification was required. One week after the initial press release, Ms. Stewart issued another, in which Sheikh Rahman explained,

I have not canceled the [peace] initiative but I have withdrawn my support for it. I have made my position clear and *left it to my brothers to consider the initiative and its benefits, since they are better acquainted with this situation than I am, they are the ones who are living it.*

J.A. 1534 (emphasis added).

As reported in the June 23, 2000, edition of *Al-Hayat* (GX 534-T), that second statement “was much clearer than the previous one, to which the reactions from the supporters and opponents of the peace initiative caused a crisis.” *See also id.* (second statement “put an end to a dispute that lasted for almost a week over [Sheikh Rahman’s] position on the peace initiative”).³⁹

Thus, while the government possesses apparent certitude as to the meaning of Sheikh Rahman’s statements, those in Egypt, and in IG, who purportedly were the members of Count Two’s §956(a) conspiracy to kill, to which Sheikh Rahman was allegedly “provided” as “personnel,” were evidently quite perplexed by them.

Nor was Sheikh Rahman’s clarifying statement received as a call to violence. The *Al-Hayat* article quoted Egyptian attorney Muntasir Al-Zayyat as stating that “the latest development does not constitute ‘a defeat for the peaceful tendency within the group [IG].’” *Id.* Similarly, even before the clarifying statement, Salah Hashem, IG’s founder, told *Al-Hayat* that IG’s leaders “still maintain their stand on their initiative and have not changed it[,]” and that the cease-fire represented “a strategic choice that the group will not deviate from.”

³⁹ Even the Superseding Indictment, at ¶ 30(v), notes that Sheikh Rahman was not repudiating the cease-fire, but simply urging IG to reconsider its efficacy. J.A. 151.

GX 526-T. *See also* GX 528. *Nor was there any evidence at trial that there was any deviation from the cease-fire.*

Moreover, as detailed **ante**, at 94-95, the aftermath of the publication of Sheikh Rahman's statement regarding the cease-fire demonstrated that he was not acting in a leadership role. There was not obedience, but controversy and disagreement with respect to his opinion, even to the extent of precipitating a further statement.

As a result, the District Court's citation to Sheikh Rahman's "instruct[ion to] his followers from prison that '[n]o new charter, and nothing should happen or be done without consulting me, or informing me[,]' (GX 1007X at 5.)," *Sattar* 29/33, 395 F. Supp.2d at 100, did not reflect the reality of IG's situation.

Nor did Sheikh Abdel Rahman's statement alter IG's policy on the issue. Indeed, the Superseding Indictment, at ¶ 30(u) (J.A. 151), refers to the "fierceness of the debate within" IG that the press release precipitated – and what better describes protected First Amendment speech than a "fierce" (and non-violent) debate over the political course an organization should pursue?

Likewise, any rhetorical leadership provided by Sheikh Abdel Rahman to IG would not transgress the *Brandenburg* standard, as in that case *the speaker was the leader*. Sheikh Abdel Rahman's "leadership" through his words is

indistinguishable from that provided by the Klan leader in *Brandenburg*, or by Charles Evers in *Claiborne*, discussed **post**, at 102-103, and is similarly precisely the type of speech that is protected by the First Amendment.

Consequently, the District Court's statement that "[a] reasonable jury could find that Abdel Rahman was a participant in the Court Two conspiracy to kill, and that the methods of his participation occurred by his *words, statements, directives, and leadership*["] *Sattar 29/33*, 395 F. Supp.2d at 99, is in direct and irreconcilable conflict with the First Amendment.

The Supreme Court's next treatment of the issue occurred in *Hess v. Indiana*, 414 U.S. 105 (1973), in which the Court held that advocating illegal action at some indefinite time in the future was protected by the First Amendment. Again, the facts are instructive. Hess had been a participant in an antiwar demonstration at Indiana University during which several individuals had entered a public street disrupting the flow of traffic. 414 U.S. at 106.

When the demonstrators failed to obey verbal orders of the sheriff to clear the street, the sheriff and his deputies began walking up the street, causing the demonstrators to retreat to the sidewalks. *Id.* As the sheriff walked up the street he heard Hess yell an expletive, and arrested him for disorderly conduct. 414 U.S.

at 107. It was later determined that Hess had actually stated “We’ll take the []ing street later,” or “We’ll take the []ing street again.” *Id.*

The Supreme Court rejected the Indiana court’s determination that Hess’s statement was designed to “incite further lawless action” and “was likely to produce such action,” declaring:

[a]t best, however, the statement could be taken as counsel for present moderation; at worst, *it amounted to nothing more than advocacy of illegal action at some indefinite future time.* This is not sufficient to permit the State to punish Hess’ speech. Under our decisions, *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.* Since the uncontroverted evidence showed that Hess’ statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, *those words could not be punished by the State on the ground that they had a tendency to lead to violence.*

414 U.S. at 108-09 (internal citations and quotations omitted) (emphasis added).

Accordingly, the Court reversed Hess’s conviction. 414 U.S. at 109.⁴⁰ *See also White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (“advocacy is unprotected only if it is intended to produce and likely to produce, imminent disorder; advocacy of illegal action at some indefinite future time is not actionable”) *quoting Hess*, 414 U.S. at 108-09 (internal quotations omitted); *HLP II*, 205 F.3d at 1134 (basing criminal behavior on the dissemination of such materials would violate the First Amendment unless that expression exceeded the standard as set forth in *Brandenburg* and its progeny).

Here, again, Sheikh Rahman’s statements fit squarely within the contours of protected speech, as his statements about continuation of the cease-fire at worst surely “amounted to nothing more than advocacy of illegal action at some indefinite future time.” Neither his statements, nor Ms. Stewart’s repetition of

⁴⁰ *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (ban on virtual child pornography violates First Amendment notwithstanding government’s argument that such pornography “whets the appetite of pedophiles and encourages them to engage in illegal conduct”; there are “vital distinctions between words and deeds, between ideas and conduct,” and the “government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time’”), *quoting Hess* (other citations omitted). The Court in *Ashcroft* added that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” 535 U.S. at 253. Thus, here, too, such speech cannot be subject to criminal prosecution, even if Sheikh Rahman’s statements, or Ms. Stewart’s conveyance of them to the media, “increase[d] the chance an unlawful act” might be committed at some future date.

them in public met the standard of advocacy “directed to inciting or producing imminent lawless action and [] likely to incite or produce such action.”

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) provided the Court with its next opportunity to identify further the extent to which the First Amendment protects against liability. In *Claiborne*, a boycott included watching the targeted stores, recording the names of African-Americans who violated the boycott, and publishing their names in a local paper entitled “Black Times.” 458 U.S. at 903-04.

These persons were branded as traitors, called demeaning names, and socially ostracized. 458 U.S. at 904. In addition, some violators were victims of retaliation – gunshots were fired into the houses of two violators, and a brick was thrown through a windshield of another, among other acts. 458 U.S. at 904-05.

In the course of its analysis, the Court first rejected liability based upon the defendants’ participation in the boycott itself, noting that all such acts consisted of various forms of protected conduct and speech. 458 U.S. at 907. The Court emphasized the importance of group advocacy, *id.* [quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)] (stating “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process”), the

constitutional protections afforded such activities, 458 U.S. at 908 (*quoting Citizens Against Rent Control*, 454 U.S. at 296) (“[t]here are, of course, some activities, legal if engaged by one, yet illegal if performed in concert with others, but political expression is not one of them”), as well as the fact that such protections are not forfeited by members of the group merely because other members may have participated in unprotected conduct. 458 U.S. at 908-09, *citing De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“[t]he question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bound of the freedom of speech which the Constitution protects”). *See also id.*, at 909 (“[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that is not itself protected”); *Scales v. United States*, 367 U.S. 203, 224-25 (1961).⁴¹

⁴¹ *See also United States v. Spock*, 416 F.2d 165, 179 (1st Cir. 1969) (“expressing ones views in broad areas is not foreclosed by knowledge of the consequences . . . one may belong to a group, knowing of its illegal aspects, and still not be found to adhere thereto”). *Spock* was cited with approval by this Court in *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999); *see also United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) (“court . . . may not impute the illegal intent of alleged co-conspirators to the actions of the defendant”) (citing *Spock*, *Scales*, and *Noto*, 367 U.S. at 298-300).

Thus, having determined that participating in the boycott was protected activity, the Court next addressed the speech utilized in support of it. The Court noted that those participating in the boycott had repeatedly urged nonparticipants to join through public and personal solicitations, as well as through social pressure and the threat of social ostracism. 458 U.S. at 909.

Such attempts at persuasion, however, did not place their actions outside the protections of the First Amendment. Rather, the Court stated, “[s]peech does not lose its protected character, however, simply because it may embarrass others or *coerce them into action.*” *Id.* (emphasis added).

Thus, even if Sheikh Abdel Rahman’s statements were intended to persuade IG into action, they would still be protected. Indeed, in *Claiborne* the Court emphasized that “[t]he claim that the expressions were intended to exercise a coercive impact on [others] does not remove them from the reach of the First Amendment. . . . [As long as] the means are peaceful, the communication need not meet standards of acceptability.” 458 U.S. at 911 [*quoting Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)].

The Court also considered whether the NAACP’s field secretary, Charles Evers, could be held liable for his public speeches on the ground that they were likely to incite lawless action. 458 U.S. at 926-27. Evers had made three speeches

in which he had warned against violating the boycott – his warnings varied from subtle implications, *e.g.*, telling violators that they were not protected because the Sheriff could not sleep with them at night, 458 U.S. at 927, to direct threats of future violence, *e.g.*, stating that violators would “have their necks broken.” 458 U.S. at 900 n. 28.

Nevertheless, the Court, applying the *Brandenburg* test, found Evers’s speech to be constitutionally protected. 458 U.S. at 927-28. It reasoned that Evers had used strong language in his advocacy, but noted that none of his pleas had been followed by immediate violence. 458 U.S. at 928. Specifically, with the possible exception of an incident in which two violators had gunshots fired into their home, 458 U.S. at 905, the acts of violence following his speeches had occurred “weeks or months” afterward. 458 U.S. at 928.

Accordingly, Evers’s speech had not been directed to incite or produce— nor was it likely to incite or produce – *imminent* lawless action. As a result, the Court concluded that

[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the “profound national commitment” that “debate on public issues should be uninhibited, robust, and wide-open.”

Id., quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

In applying the *Brandenburg* standards, the lower courts have recognized also that timing is an important element of the analysis. For example, in *McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002), in which a former gang member had been convicted under an Arizona statute for participating in a criminal street gang, the Ninth Circuit explained that

[u]nder *Brandenburg* timing is crucial, because speech must incite imminent lawless action to be constitutionally proscribable. Thus, several years later in *Hess v. Indiana*, the Court made explicit what was implicit in *Brandenburg*: a state cannot constitutionally sanction advocacy of illegal action at some indefinite future time.

282 F.3d at 631.

Later, in *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists (PPCW I)*, the Ninth Circuit further clarified the limits as set forth in *Brandenburg*:

[p]olitical speech may not be punished *just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party*. In *Brandenburg*, the Supreme Court held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of “producing imminent lawless action.” *It doesn't matter if the speech makes future violence more likely; advocating “illegal action at some indefinite future time” is protected.*

244 F.3d at 1015 (internal citations omitted) (emphasis added).

Accordingly, the Ninth Circuit stated that speech which merely encourages unrelated terrorists to commit violent acts is protected by the First Amendment. *Id.* See *PPCW I*, 244 F.3d at 1015 (“[b]ut if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment”).⁴² Here, the government certainly did not establish *more* than that with respect to Sheikh Rahman’s speech, relayed by Ms. Stewart, as even the government’s most serious allegations consisted only of speech making “it more likely that someone will be harmed at some unknown time in the future by an unrelated third party.”

Also in *PPCW I*, the Ninth Circuit elaborated in a manner that resonates profoundly with respect to the circumstances of this case:

speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment. . . . If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications their words do not literally convey but are

⁴² This statement was endorsed by the *en banc* panel in *PPCW II*: “had [the defendants] merely endorsed or encouraged the violent actions of others, [their] speech would be protected. . . . [A]dvocating violence is protected. . . .” 290 F.3d at 1072. The *en banc* panel in *PPCW II* merely found that the statement made by the defendant’s did constitute a “true threat.” It did not reject the state of the law as described in *PPCW I*.

later “discovered” by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control.

244 F.3d at 1019. *See also Boim*, 291 F.3d at 1026 (“[a]dvocacy is always subject to the highest levels of scrutiny under the First Amendment”); *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999) (“political speech and religious exercise are among the activities most jealously guarded by the First Amendment”).⁴³

The court concluded that if such were allowed to occur, “it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause . . . [because a] party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.”

⁴³ Indeed, political speech is at the core of the First Amendment’s protection. *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1079 (9th Cir.1990) (“[p]olitical speech lies at the core of the First Amendment's protections”). *See also Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs”); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) (holding that statute requiring disclosure of organizations to which teachers made contributions implicated the “right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society”). *See also New York Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart J., concurring) (importance of First Amendment freedoms in context of national defense and international affairs).

244 F.3d at 1018. *See also Claiborne Hardware*, 458 U.S. at 908-09, *citing De Jonge v. Oregon*, 299 U.S. at 365 (quoted **ante**, at 102).

Here, the circumstances are even more dramatic than in *Claiborne Hardware*, since the government could not point to *any* violence, much less imminent, that resulted from Sheikh Abdel Rahman's statements or Ms. Stewart's transmitting them. *See* T. at 8411-12. Conversely, there was testimony from United States Attorney Patrick J. Fitzgerald⁴⁴ that Sheikh Rahman's statements were not necessarily followed by the Islamic Group or others, and that in 1997, even after Sheikh Rahman had called for a "cease fire," opponents of the Egyptian government had performed the deadliest act of violence against civilians in that conflict. T. 2556-57.

The temporal attenuation of the discussion about the cease-fire also demonstrates that Sheikh Rahman's statements, and Ms. Stewart's public repetition thereof, could not have crossed the *Brandenburg* line, and/or constituted "material support" to Count Two's §956(a) conspiracy to kill. Spread over visits separated by 14 months, and spanning 28 months in total, it is absurd to think that

⁴⁴ While Mr. Fitzgerald was as Assistant United States Attorney in the Southern District of New York during the period his testimony covered, he had by the time of his testimony been appointed U.S. Attorney for the Northern District of Illinois. T. 2302.

such meager contact and sporadic discussion could perpetuate Sheikh Rahman's "position as the spiritual leader of" an organic entity such as IG. Moreover, as *Brandenburg* and *Claiborne* demonstrate, even a position of leadership in an organization does not transform protected speech into criminal conduct.

Indeed, Sheikh Rahman's statements herein in many ways pale before those described in the above-discussed cases (including his own prosecution). None of his conversations with Ms. Stewart included discussion of prospective terrorist or violent acts, specific, general, or philosophical, or any plans or plots related thereto.

His statements were not uttered to incite imminent lawless action (and indeed they did not) – in fact, they were equivocal and did not order any violent acts, recommend any violence, or seek to direct a decision on future violence (*i.e.*, whether or not to continue the "cease fire"); they neither identified specific targets (as in *Brandenburg* and *Claiborne Hardware*), nor issued specific threats; and they were not directly confrontational in a heated setting (in contrast to those at issue in *Hess*). *See* J.A. 41-421, 1534-1538.

Nor, as *Claiborne* makes clear, could violence committed by members of IG transform Sheikh Rahman's (or Ms. Stewart's) speech into unlawful conduct. Nor could their respective associations with IG render their speech unprotected unless

it “transcend[ed] the bound of freedom of speech which the Constitution protects[,]” *i.e.*, the *Brandenburg* standard – which it most certainly did not.

In fact, one of the significant problems with the instant application of §2339A is that it treats IG as Count Two’s §956(a) conspiracy itself – a problem stemming from the initial, dismissed Indictment that charged “material support” to IG (as an FTO) under §2339B.

However, IG is *not* consonant with Count Two’s §956(a) conspiracy, but the District Court (and the government) nevertheless inappropriately conflated the two, *Sattar 29/33*, 395 F. Supp.2d at 94-95 (*see ante*, at 96) thereby running afoul of integral First Amendment doctrine promulgated in cases such as *Scales* and *Yates*, which prescribe strict limits on penalizing those who are members of or associate with organizations that have hybrid qualities (legal and illegal), and whose association consists not of illegal activity, but exercise of First Amendment expression. *See Yates*, 354 U.S. at 329 (rejecting government argument that “the Communist Party of California, constituted the conspiratorial group, and that membership in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party’s affairs and thus inferentially parties to its tenets”); *Scales*, 367 U.S. at 229 (if government could punish mere membership in or association with a “hybrid group,” there existed “a

real danger that legitimate political expression or association would be impaired”).
See also Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (“laws such as this which are not restricted in scope to those who join with the ‘specific intent’ to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization”).⁴⁵

Even outside the First Amendment context, in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), this Court has recognized that in organized crime cases, in which the “ relevant conspiracy may grow quite large[,]” *id.*, at 82, there are limits to the scope of a conspiracy.

Thus, in *Gigante*, in evaluating the admissibility of alleged co-conspirator statements, this Court instructed that “[t]he district court in each instance must

⁴⁵ As noted by Professor Chesney, distinguishing between association with an organization and membership in a conspiracy “is particularly important where a sufficiently-specific agreement clearly exists as to one set of individuals, but the question is close as to others who are not in direct contact with the former group.” *Beyond Conspiracy*, at 31. In that context, Professor Chesney, who has written perhaps more extensively than anyone on the “material support” statutes, examined fact patterns for virtually all §2339A prosecutions, and found that in some “the defendant allegedly has some direct connection to those who will actually perpetrate the anticipated harmful act, coupled with an awareness at least of the nature of the harm and the manner in which the support rendered would be employed toward that end.” *Id.*, at 73. However, he also found that “[a] number of §2339A prosecutions lack even these characteristics, however. In these “open-nexus” fact patterns, the defendant has only an attenuated relationship to the anticipated harmful act.” *Id.* Among the latter was this case. *Id.*, at 74.

find the existence of a specific criminal conspiracy beyond the general existence of the Mafia.” *Id.*

As a result, in finding certain statements not “in furtherance of” a specific conspiratorial goal, this Court pointed out that “[t]he district court’s rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia[,]” *id.* at 83, an improper expansion of the charged *conspiracy*.

As this Court explained,

it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place – organized crime membership alone does not suffice.

Id. at 83.

Moreover, the content of IG’s (or Sheikh Rahman’s) message cannot serve as a justification for repressing it, and/or for prosecuting Ms. Stewart for communicating it. As the Supreme Court made clear in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), in invalidating a flag-burning statute because such conduct was protected when constituting a means of political expression, “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea because society finds the idea itself

offensive or disagreeable.” *See also New York Times v. Sullivan*, 376 U.S. at 279 n. 19 [quoting from John Stuart Mill, *On Liberty* (1st ed. 1859): “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error’”]. *See also United States v. Rahman*, 189 F.3d at 117 (“courts must be vigilant to insure that prosecutions are not improperly based on the mere expression of unpopular ideas”), *citing United States v. Spock*, 416 F.2d 165, 169-71 (1st Cir. 1969).

This Court, too, has reiterated that “[t]he Supreme Court has warned that ‘[r]egulations which *permit* the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.’” *Lusk v. Village of Cold Spring*, 475 F.3d 480, 493-94 (2d Cir. 2007), *quoting Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (emphasis added by Court in *Lusk*). *See also White*, 227 F.3d at 1227 (group advocacy maintains its constitutional protections regardless of its admirability, or lack thereof), *citing Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

The foregoing analysis illuminates how Sheikh Abdel Rahman’s statements that form the substance of the “material support” allegedly provided by Ms. Stewart – regardless of the government’s transparently contrived characterization

of those statements as “personnel” – are firmly within the boundaries of protected First Amendment speech.

As the Ninth Circuit stressed in *HLP II*, in the context of §2339B and the ban on donations to and fundraising for foreign terrorist organizations,

[a]dvocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts. Plaintiff here do not contend they are prohibited from advocating the goals of the foreign terrorist organizations, espousing their views or even being members of such groups. They can do so without fear of penalty right up to the line established in *Brandenburg v. Ohio*.

Id. at 1133-34 (internal citation omitted).

Here, neither Ms. Stewart, in her relaying of protected speech, nor Sheikh Abdel Rahman in his similarly insulated statements, even approached that line established in *Brandenburg*. Accordingly, the government failed to prove that Ms. Stewart provided “personnel” within the meaning of §2339A(b).

4. ***Rules of Statutory Construction Demonstrate That Sheikh Rahman’s Statements Do Not Constitute “Personnel” or “Material Support”***
 - a. ***Constitutional Avoidance Requires That §2339A Be Construed Not to Include Sheikh Rahman’s Statements as “Personnel” or “Material Support”***

Holding otherwise would also contravene the doctrine of constitutional avoidance, which applies when “a statute is susceptible of two constructions, by

one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter.” *United States ex rel. Attorney General, v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). *See also Jones v. United States*, 526 U.S. 227, 239-40 (1999). *Accord Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997); *United States v. Al-Arian*, 329 F. Supp.2d 1294, 1298 & n. 11 (M.D. Fla. 2004) (relative to §2339B); *United States v. Khan*, 309 F. Supp.2d at 822 (applying the same principle to “personnel” in the context of §2339A).

b. *Other Canons of Statutory Construction Similarly Compel Reversal Here*

Moreover, other canons of statutory construction further support that conclusion. For instance, in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005), the Court cautioned that,

“[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling v. United States*, 473 U.S. 207 (1985), and our of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).”

Id., quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

The Court in *Andersen* added that “[s]uch restraint is particularly appropriate here, where the act underlying the conviction . . . is itself innocuous.” *Id.*⁴⁶ Such restraint is equally, if not more, necessary here, since the government, in alchemizing protected First Amendment activity into “material support,” seeks to punish conduct which, as the Ninth Circuit found in the specific context of “personnel” under §2339B, “blurs the line between protected expression and unprotected conduct[.]” *See HLP II*, 205 F.3d at 1137.

As the Supreme Court explained in *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citations omitted), “[t]hese [First Amendment] 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. [] Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. []” *See also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *HLP III*, 352 F.3d at 403-04.

c. *The Rule of Lenity Requires a Narrow Reading of §2339A*

When interpreting a criminal statute that does not explicitly reach the conduct in question, courts should be reluctant to base an expansive reading of the

⁴⁶ In *Andersen*, that otherwise innocuous act was “persuasion” (in the context of alleged obstruction of justice).

statute on inferences. *See Williams* 458 U.S. at 286 (applying rule of lenity to a false statements statute). As the Supreme Court has instructed, “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *United States v. Bass*, 404 U.S. 336, 347 (1941).

In *United States v. Brown*, in the context of 18 U.S.C. §666, the Fifth Circuit declared, in language more applicable to §2339A in this instance in light of the First Amendment interests at stake, “[w]e resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases. Instead, we apply the rule of lenity and opt for the narrower, reasonable interpretation that here excludes the Defendants’ conduct.” 459 F.3d at 523, *citing McNally v. United States*, 483 U.S. 350, 360 (1987). *See also United States v. Ford*, 435 F.3d 204, 211 (2d Cir. 2006) (“[a]s the Supreme Court noted in its recent decision in [*Arthur Andersen*, 544 U.S. at 703-704], restraint must be exercised in defining the breadth of the conduct prohibited by a federal criminal statute out of concerns regarding both the prerogatives of Congress and the need to give fair warning to those whose conduct is affected”).

Also, the government’s extraordinarily strained version of “personnel,” and its exclusive reliance on protected speech, renders the statute ambiguous, making application of the rule of lenity, which the District Court declined to apply pre-trial, *Sattar II*, 314 F. Supp.2d at 299, necessary at this stage. *See Chapman v. United States*, 500 U.S. 453, 463 (1991).

Accordingly, the offense conduct charged against Ms. Stewart in Counts Four and Five was based wholly on statements that Congress, the courts, and even DoJ in other cases, have steadfastly concluded are afforded First Amendment protection, and therefore cannot constitute “material support.”

Consequently, it is respectfully submitted that her convictions on Counts Four and Five must be reversed and the charges dismissed because the government failed to prove the element of “personnel” beyond a reasonable doubt.

POINT III

**MS. STEWART’S CONVICTION ON
COUNTS FOUR AND FIVE SHOULD BE
REVERSED, AND THOSE COUNTS
DISMISSED, BECAUSE THE EVIDENCE
WAS NOT SUFFICIENT TO ESTABLISH
HER KNOWLEDGE OR SPECIFIC
INTENT BEYOND A REASONABLE DOUBT**

In its decision denying Ms. Stewart’s challenge to the Superseding Indictment, the District Court admonished the government that its burden of proof

would be “rigorous,” and that the charges involving §2339A would be subject to a “heightened specific intent” standard. *Sattar II*, 314 F. Supp.2d at 296. The government did not meet that “rigorous” burden of proof, however, and, as a result, Ms. Stewart’s convictions on Counts Four and Five must be vacated, and the charges dismissed.⁴⁷

In recent years, this Court, and in turn the District Courts, have repeatedly reversed convictions for conspiracy and other offenses that require knowledge or specific intent because the proof, even if it provided evidence from which the defendant’s knowledge that a crime was underway could be found, nevertheless failed to establish beyond a reasonable doubt that the defendant either (a) knew the specific criminal activity and/or conspiracy she was alleged to have joined; or (b) possessed the requisite specific intent. The same deficiencies doom Ms. Stewart’s convictions on Counts Four and Five as well.

A. *The District Court’s Construction of the Government’s Burden Under §2339A*

In *Sattar II*, the District Court described the allegations in Counts Four and Five as follows:

⁴⁷ The District Court’s unfortunate abandonment of its pledge to impose a “heightened” standard of intent, instead allowing the government to reprise the theory and allegations from the defective initial Indictment, is detailed, **post**, at POINT IV.

providing and conspiring to provide personnel – by making Sheikh Abdel Rahman, not themselves, available as a co-conspirator – to the conspiracy alleged in Count Two, namely the conspiracy to kill and kidnap persons in a foreign country. It also charges them with concealing and disguising the nature, location, and source of that personnel by disguising that Sheikh Abdel Rahman was a co-conspirator.

Sattar II, 314 F. Supp.2d at 296. *See also Sattar 29/33*, 395 F. Supp.2d at 93.

Regarding the government’s burden with respect to those charges, prior to trial the District Court held that the government needed to prove beyond a reasonable doubt that “[t]hese actions were allegedly done with the knowledge and intent that such personnel was to be used in preparation for, or in carrying out, the conspiracy to kill and kidnap persons in a foreign country.” *Id.* As the Court stated, “[t]his is the heightened specific intent required by § 2339A.” *Id.*⁴⁸

As detailed below, the government did not meet that “heightened” standard imposed by the Court. As a result, Ms. Stewart’s convictions on Counts Four and Five should be reversed, and those counts dismissed.

B. *The General Principles Governing Knowledge and Specific Intent*

⁴⁸ The District Court stated the same with respect to the concealment-related allegations “that Stewart and Yousry conspired to and did conceal and disguise the fact that Sheikh Abdel Rahman was a continuing member of the conspiracy to kill and kidnap persons in a foreign country and made it appear that he was simply a prisoner complying with his SAMs.” *Sattar II*, 314 F. Supp.2d at 300 n. 10. The patent inadequacy of the charges of concealment is addressed *ante*, at 74.

In a continuing series of cases, this Court has scrutinized very carefully convictions based entirely on circumstantial evidence, and which involved simply the accumulation of inferences that did not, when combined, provide the requisite proof of the defendant's knowledge or intent. *See, e.g., United States v. Jones*, 393 F.3d 107, 111-12 (2d Cir. 2004); *United States v. Rodriguez*, 392 F.3d 539 (2d Cir. 2004); *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004); *United States v. Cruz*, 363 F.3d 187 (2d Cir. 2004); *Samaria*, 239 F.3d at 233-42; *Friedman*, 300 F.3d at 124-26; *United States v. Howard*, 214 F.3d 361, 363-64 (2d Cir. 2000) (circumstantial evidence insufficient to establish defendant's knowledge that handgun in his possession had been stolen).

In fact, *Rodriguez* and *Cruz* were co-defendants in a drug prosecution. Yet, while expressly “mindful of the deferential standard of review” of jury verdicts, *Rodriguez*, 392 F.3d at 545, this Court nevertheless reversed the convictions in *both* cases in separate opinions, even though there was sufficient evidence that both *Rodriguez* and *Cruz* had acted as lookouts, thereby reinforcing the importance of monitoring convictions in cases in which knowledge or specific intent are necessary elements of the charged offenses.

As a threshold issue, as the Court explained in *Rodriguez*, it observed in *Cruz* that “[t]o prove that the defendant acted with . . . specific intent, the

government must show that [the defendant] knew of the proposed crime.”

Rodriguez, 392 F.3d at 546, quoting *Cruz*, 363 F.3d at 198 [in turn quoting *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990)], and citing *Samaria*, 239 F.3d at 233. See also *Friedman*, 300 F.3d at 124.

Thus, as this Court summarized in *Rodriguez*, “the conspiracy and substantive charges, both of which are specific intent crimes, required the government to establish that Rodriguez knowingly and intentionally participated in the [charged] drug deal[.]” 392 F.3d at 545 (citations omitted).

This Court characterized the defendant’s knowledge of the precise crime to be undertaken, and the concurrent specific intent to commit it, as triggering “the critical question []: whether the government proved beyond a reasonable doubt that Rodriguez had the knowledge and specific intent to aid and abet a *drug* transaction.” 392 F.3d at 546, citing *Samaria*, 239 F.3d at 237-38 (emphasis in original).

Also, with respect to *Cruz*, the Circuit reiterated that,

[a]s we have held numerous times before, the defendant’s mere presence at the scene of the crime or association with wrongdoers does not constitute intentional participation in the crime, *even if the defendant had knowledge of the criminal activity.*

363 F.3d at 199 (emphasis added).

Application of those principles in *Rodriguez* and *Cruz* compelled reversal of their convictions, even though Rodriguez sat in the back seat with the package containing the heroin, had brought weapons with him to the transaction, and engaged in countersurveillance. According to the Court, “the government nonetheless failed to prove that Rodriguez knew the purpose of his countersurveillance was to facilitate a narcotics deal.” 392 F.3d at 546, *citing Friedman*, 300 F.3d at 126.

C. The Government Failed to Establish Ms. Stewart’s Knowledge or Specific Intent With Respect to the §2339A Charges and Their Relationship to Count Two’s §956(a) Conspiracy to Kill

Here, Ms. Stewart is in very much the same position: the government abjectly failed to present sufficient evidence that Ms. Stewart knew her conduct – whether in the form of making statements to the media, or (assuming *arguendo*) contravening the S.A.M.’s by disseminating Sheikh Rahman’s communications to third parties (and passing messages from third parties to Sheikh Rahman), or concealing conversations between the interpreter and Sheikh Rahman (in effect, acting as a “lookout” just like the defendants in *Cruz* and *Rodriguez*) – was for the purpose of facilitating the §956(a) conspiracy to murder charged in Count Two, the particulars of which even the government could not identify (in terms of location, victims, or any specific violent act or plan).

1. *The Evidence Regarding the Nexus to Count Two's §956(a) Conspiracy to Murder Was Absent*

Also, while the District Court ruled in *Sattar II* that the Superseding Indictment need not identify the “foreign country” or any victims with respect to the §956 conspiracy (in order to provide sufficient notice for defense and Double Jeopardy purposes), *see* 314 F. Supp.2d at 304, the government’s failure to provide evidence of either simply reveals a fatal weakness in the government’s case because it never provided any nexus between Ms. Stewart’s conduct, knowledge, or specific intent and a concrete §956(a) conspiracy to murder.

The District Court charged the jury that “the government need not prove the identity of any contemplated victim and that defendant need not be proved to know the identity of any particular person targeted for death or kidnap. Nor must defendant be proved to know all details of plan or identification.” T. 12,388.

As this Court has often explained, *see, e.g., United States v. McDermott*, 245 F.3d 133, 137-38 (2d Cir. 2001), “the fundamental element of a conspiracy is unlawful agreement.” *United States v. Mittelstaedt*, 31 F.3d 1208, 1218 (2d Cir. 1994), *quoting United States v. Rubin*, 844 F.2d 979, 983 (2d Cir. 1988). *See also United States v. Tejada*, 956 F.2d 1256, 1264 (2d Cir. 1992) (“agreement defines the conspiracy”); *Sattar 29/33*, 395 F. Supp.2d at 102.

In addition, as the Fourth Circuit noted in *United States v. Manbeck*, 744 F.2d 360 (4th Cir. 1984), “[p]roof of an agreement to enter into a conspiracy is not to be lightly inferred.” 744 F.2d at 390, quoting *United States v. Johnson*, 439 F.2d 885, 888 (5th Cir. 1971).⁴⁹

While a defendant need not know all members of a conspiracy, or all acts or objectives, or victims, government has to establish *an agreement* with respect to *some articulable and specific* criminal objective, *i.e.*, a *conspiracy to kill somebody*. Mere reference to IG is not sufficient.

As this Court stated long ago, “nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it.” *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand). See also *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand), *aff’d*, 311 U.S. 205 (1940) (conspiracy liability requires proof that defendant associated herself with the known unlawful objective); *United States v. Provenzano*, 615 F.2d 37, 44 (2d

⁴⁹ The Third Circuit, in *United States v. Wexler*, 838 F.2d 88 (3d Cir. 1988), pointed out that “[o]ne of the requisite elements the government must show in a conspiracy case is that the alleged conspirators shared a ‘unity of purpose,’ the intent to achieve a common goal, and an agreement to work together toward the goal.” 838 F.2d at 91, citing *United States v. Kates*, 508 F.2d 308, 310-11 (3d Cir. 1975) (footnotes omitted). See also *McDermott*, 245 F.3d at 137.

Cir. 1980) (requiring agreement to “commit a particular offense and not merely a vague agreement to do something wrong”).

Those essential principles have endured through the decades. For example, in *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), Judge Friendly recognized that when a conspiracy prosecution targets “the conduct of an illegal business over a period of years[,] . . . there has been a tendency in such cases ‘to deal with the crime of conspiracy as though it were a group (of men) rather than an act’ of agreement Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine *what kind of agreement or understanding existed as to each defendant.*” *Id.*, at 384 (emphasis added) (internal citations omitted). *See also McDermott*, 245 F.3d at 137-38.

This Court continued its explication of that doctrine in *United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977), in which it noted that its “difficulty with Rosenblatt’s conviction arises from the lack of any agreement between him and Brooks concerning *the type of fraud in which they were engaged.*” *Id.*, at 37 (emphasis added). Elaborating, this Court pointed out that “[t]he law of conspiracy requires agreement as to the ‘object’ of the conspiracy[,] . . . mean[ing]

that the ‘essential nature of the plan’ must be shown.” *Id.*, at 38, *citing Blumenthal v. United States*, 332 U.S. 539, 557 (1947) (other citation omitted).

In *Rosenblatt*, this Court surveyed the cases, citing *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970), for the proposition that “‘at the very least’ the government was required to show ‘that [the defendant] knew that a bank was to be robbed.’” 554 F.2d at 39. Also, in *Gallishaw*, the Court “explained that the defendant ‘had to know what kind of criminal conduct was in fact contemplated.’” *Id.*, quoting *Gallishaw*, 428 F.2d at 763 n. 1, and *citing cf. United States v. Calabro*, 467 F.2d 973, 982 (2d Cir. 1972) (supplier of false identification must have known that it would be used in a transaction involving forged bonds in order to be guilty as an aider and abettor; generalized suspicion of illegal use would not suffice). *See also Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982) (question existed whether defendant had participated in burglary, or was just fencing stolen goods).

As a result, this Court in *Rosenblatt* stated, “it is clear that a general agreement to engage in unspecified criminal conduct is insufficient to identify the essential nature of the conspiratorial plan[,]” and perceived the need to add, “[t]he importance of making this determination cannot be overstated.” 554 F.2d at 39. *See also Ingram v. United States*, 360 U.S. 672 (1959). As this Court expounded

more recently in *Friedman*, “[p]roof that the defendant knew that *some* crime would be committed is not enough.” 300 F.3d at 124 (emphasis in original), *citing United States v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1996).

Here, proof of that essential element of *specific agreement* is missing with respect to Ms. Stewart. As this Court reasoned in *United States v. Cepeda*, 768 F.2d 1515 (2d Cir. 1985), “it is of course true that parties cannot agree if they are not aware of the agreement[.]” 768 F.2d at 1516, *citing United States v. Falcone*, 311 U.S. 205, 210 (1940).

Whatever spin the government may put on the evidence at trial, and whatever purpose may be ascribed to Ms. Stewart’s motives and intentions, certainly there was not remotely sufficient evidence to prove her specific intent to provide material support for the §956(a) conspiracy to murder charged in Count Two.

In *Falcone*, the Supreme Court held that even though it was assumed for purposes of argument that “respondents or some of them knew that the materials [they had sold] would be used in the distillation of illicit spirits,” that evidence “fell short of showing respondents’ participation in the conspiracy or that they knew of it.” 311 U.S. at 208. Also, the Court held that it could not be inferred “from the casual and unexplained meetings of some of the respondents with others

who were convicted as conspirators that respondents knew of the conspiracy.”

311 U.S. at 209.

Similarly, in *Cepeda*, this Court reviewed examples of fact patterns that did not suffice to establish a conspiratorial agreement:

- “evidence that a defendant resided at an apartment occupied by several others and used as a cutting mill, even coupled with knowledge that a crime was being committed there, has been found insufficient to sustain a conspiracy conviction[,]” 768 F.2d at 1517, *citing United States v. Soto*, 716 F.2d 989, 991-92 (2d Cir. 1983);
- “one who ‘cased’ a bank for bank robbers could not be held guilty absent evidence of a knowing agreement to rob the bank or conscious assistance in the commission of the crime in some active way[,]” *id.*, *citing United States v. Di Stefano*, 555 F.2d 1094, 1103 (2d Cir. 1977);
- “defendant [was] not a conspirator simply by virtue of efforts to conceal conspirators after initial scheme miscarried[,]” because “comfort or assistance to a member of an aborted or completed conspiracy [will not] make a defendant a participant in the conspiracy[,]” *id.*, *citing United States v. Freeman*, 498 F.2d 569, 575 (2d Cir. 1974).

A frequent commentator on the “material support” statutes has pointed to the dangers §2339A prosecutions present in this regard (particularly when a §956 conspiracy is charged as the objective of the “material support”) if they are pursued “. . . without any attempt on the part of prosecutors to prove that the agreement was particularized as to the individuals to be harmed, where the harm might occur, when the harm might occur, or how the harm might be inflicted.”

Chesney, *Beyond Conspiracy?*, at 50. See also *id.*, at 58 (§2339A’s “virtue has the potential to be a vice insofar as the scope of conspiracy liability is concerned. It runs the risk of portraying the entire movement as one giant agreement to commit murder and mayhem, making every single adherent around the world a potential §956(a) conspirator”).⁵⁰

Recently, in *United States v. Awan*, 459 F. Supp.2d 167 (E.D.N.Y. 2006), the District Court dismissed as insufficiently pleaded §2339A counts because the object §956 conspiracy allegations omitted “any specific allegations about the alleged incident[.]” *Id.*, at 176. Cf. *United States v. Khan*, 309 F. Supp.2d 789, 822 (E.D. Va. 2004) (noting that the government established India as the locus for the §956 conspiracy charged in that case).

In another terrorism case, *United States v. Salameh*, 152 F.3d 88, 154 n. 16 (2d Cir. 1998), this Court did not dilute the standard, ruling that while the defendant need not have been aware of the “specific target of the bombing,” he indeed had to be aware of a plot to bomb, and that the targets were within the

⁵⁰ As a result, according to Professor Chesney (and consistent with this Court’s treatment of the related issue in *Gigante*), “the scope of conspiracy liability must have limits. Conspiracy prosecutions premised on involvement in the global jihad movement pose a particular risk in this regard, in light of the temptation to portray the movement artificially in monolithic, organizational terms and thus to spread a vast, attenuated net of conspiracy liability.” Chesney, *Beyond Conspiracy?*, at 493.

United States. The corresponding elements of §956(a) are what the government failed to prove here with respect to Counts Four and Five against Ms. Stewart.

Moreover, as in *United States v. Atehortva*, 17 F.3d 546, 552 (2d Cir. 1994), “this is not a case in which there is no other plausible explanation for the [the defendant’s] actions[,]” since Ms. Stewart’s conduct, even if, assuming *arguendo*, it constituted a violation of S.A.M.’s, was susceptible of manifold “plausible explanations” that did not include providing “material support” for Count Two’s §956(a) conspiracy to murder, *i.e.*, pursuing a legal strategy aimed at a prisoner transfer of Sheikh Abdel Rahman to Egypt. The government is not entitled to a “default” inference that Ms. Stewart’s conduct, knowledge, or specific intent were aimed at aiding Count Two’s §956(a) conspiracy to kill.

In fact, the Superseding Indictment itself states Ms. Stewart’s motivation clearly, and in her words, alleging she informed Sheikh Rahman that “she believed he could be released from prison if the government in Egypt were changed.” Ms. Stewart also said it was “‘very, very crucial’ that Abdel Rahman not be forgotten as a hero of the ‘*Mujahadeen*.’” J.A. 148 ¶ 30(j). *See also ante*, at 23.

Nor was that strategy solely Ms. Stewart’s – it was a joint effort by all of Sheikh Abdel Rahman’s attorneys, including Ramsey Clark and Abdeen Jabara – or merely a pipe dream. Even in the midst of the Cold War, prisoners were

exchanged to achieve political goals. One well-known instance was 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 was holding 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).⁵¹

Rather, the government was required to *prove* that connection, beyond a reasonable doubt, and it did not even come close. There was not *any* evidence that

⁵¹ Prisoner releases have also been used to assist in peace processes, as well as efforts at rapprochement between the government of Egypt and dissident groups within that country. 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 periodically releases political detainees, and shortly prior to trial in this case released 1,000 members of IG. *See* C. Levinson, *In two new books, the Gamaa Islamiya continues to distance itself from violence*, available at <http://www.cairotimes.com/news/Pamphlets0731.html>. The Israeli government has often released members of the Palestinian Liberation Organization, and even Hamas, 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).

Ms. Stewart knew or had any contact or connection with Rifa'i Taha, or that she had even heard of Alaa Abdul Raziq Atia (both figures with IG in Egypt). In that context, a translation of a newspaper article (J.A. 1539-41) mentioning Taha, and found in a file folder for another client in Ms. Stewart's office, is hardly evidence of the type of connection required to establish Ms. Stewart's knowledge of Count Two's §956(a) conspiracy to kill, or her specific intent to join it. *See Sattar 29/33*, 395 F. Supp.2d at 96.

Herndon v. Lowry, 301 U.S. 242 (1937), illustrates this point. Herndon was a Communist Party organizer convicted of "attempted insurrection" under the sedition laws of the State of Georgia. Literature espousing Communist Party principles was found in a box on his person and at his apartment. *Id.* at 247-48.

As Justice Roberts noted, "the proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents." *Id.* at 260. *See also United States v. Giese*, 597 F.2d 1170, 1209 (9th Cir. 1979) (Hufstedler, J., dissenting) ("[t]he Government's theory . . . that the ideas of an author of a book may properly be attributed to the reader of the book and then used against him to prove disposition to commit a crime, motive to

undertake criminal action, or proof that he did the acts charged . . . is [not] constitutionally permissible. . . .”).⁵²

The impropriety of using such newspaper articles in this case is amplified by Ms. Stewart’s position as an attorney, as lawyers regularly come into possession of a substantial volume of documents that are relevant to some matter, and are placed in the file, sometimes without being read, and often without being cross-referenced to some other client to whom they might be pertinent.

Moreover, the First Amendment context again adds an important layer to the analysis. Under such circumstances, courts apply the doctrine of *strictissimi juris* to ensure that “one in sympathy with the legitimate aims of an organization, but not specifically intending to accomplish them by resort to violence [is not] punished for [her] adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which [she] does not necessarily share.” *Noto*, 367 U.S. at 299-300. *See also Scales*, 367 U.S. at 232 (“the Smith Act offenses, involving as they do subtler elements than are presented in most other crimes, call for strict standards in assessing the adequacy of the proof needed

⁵² The failure to establish an essential element of the substantive count (Count Five) also dooms the conspiracy count. *United States v. Frampton*, 382 F.3d 213, 219 n. 5 (2d Cir. 2004). *See also Jones*, 393 F.3d at 112-13.

to make out a case of illegal advocacy”); *Yates*, 354 U.S. at 326 (acknowledging that these distinctions “are often subtle and difficult to grasp”).

As this Court has framed the standard, “[u]nder *strictissimi juris*, a court must satisfy itself that there is sufficient direct or circumstantial evidence of the defendant's own advocacy of and participation in the illegal goals of the conspiracy and may not impute the illegal intent of alleged co-conspirators to the actions of the defendant.” *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991); *Spock*, 416 F.2d at 173 (“[t]he specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof. . . . The metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*”) (internal citations omitted).

In *Noto*, for example, the defendants were accused of pursuing solely illegal ends – advocacy through an organization of illegal activities; but the Court concluded that the ends were entirely legal – mere membership in and sympathy with such an organization. *Noto*, 367 U.S. at 299. As such, the Court determined that *strictissimi juris* applied. *Id.*; see also *Spock*, 416 F.2d at 172-73 (applying *strictissimi juris* where both legal and illegal ends existed, namely forcible advocacy of and incitement to resist the draft, and the expression of support and

sympathy with such aims); *United States v. Dellinger*, 472 F.2d 340, 392-393 (7th Cir. 1970) (applying *strictissimi juris* principle in *Spock* to evaluation of individual counts against defendants who had also been charged with conspiracy when the group's goals were both legal and illegal).⁵³

2. *Mere Association, Even With Knowledge, Is Insufficient to Establish Membership In a Conspiracy*

The proof against Ms. Stewart can be reduced to mere association, which alone is not sufficient for substantive or conspiratorial liability. For example, in *United States v. Casamento*, this Court cautioned that “[a]n individual is not a conspirator merely because he is aware of a conspiracy and associates with its members.” 887 F.2d 1141, 1167 (2d Cir. 1989), *citing Nusraty*, 867 F.2d at 763, *citing United States v. Young*, 745 F.2d 733, 764 (2d Cir. 1984) (other citations omitted).

Similarly, as this Court pointed out in *United States v. Salameh*, 152 F.3d at 151 (a case involving allegations of a *terrorist* conspiracy, and not, as here, that

⁵³ In *Montour* this Court ultimately decided not to apply *strictissimi juris* because all alleged acts were in fact criminal. 944 F.2d at 1024. There, however, the defendant was indicted for conspiring to block and individually blocking the execution of search warrants by federal agents on an Indian reservation, and with an individual firearms charge. The court concluded that because both the alleged means and ends of the charged conspiracy were illegal, *strictissimi juris* did not apply.

which occurred in the context of an otherwise *legitimate* legal practice), “[m]ere association with conspirators and suspicious circumstances . . . are insufficient bases for a conspiracy conviction.” *Accord, Samaria*, 239 F.3d at 235 (“association with conspirators does not constitute intentional participation in the conspiracy, *even if the defendant has knowledge of the conspiracy*”) (emphasis added), *citing United States v. Jones*, 30 F.3d 276, 282 (2d Cir. 1994) (other citations omitted). *See also Jones*, 393 F.3d at 111; *United States v. Young*, 745 F.2d at 764; *United States v. Johnson*, 513 F.2d at 824 (“[g]uilt may not be inferred from mere association with a guilty party”).

Building upon its language in *Salameh*, this Court emphasized in *Friedman* that in such a case the proof was insufficient as to the defendant in question because “the evidence merely establishe[d] that [the defendant] ‘associated with conspirators’ under ‘suspicious circumstances,’ *see United States v. Salameh*, 152 F.3d at 151, and suspected (or should have suspected) ‘that [a crime] might occur.’” 300 F.3d at 126, *quoting Pipola*, 83 F.3d at 562. Likewise, this Court stated in *Samaria* that permitting a guilty verdict without proof of a defendant’s knowledge of the conspiracy’s illegal objective, and his specific intent to join the conspiracy in furtherance of that objective, “would be to permit suspicious

circumstances or association with criminals to suffice as proof of conspiracy.”
239 F.3d at 240.

These principles apply regardless of the nature of the charged conspiracy, and regardless of the “unsavory” or immoral nature of the conspirators with whom a defendant might associate without joining the conspiracy itself. As the Fifth Circuit stated in *United States v. MMR Corporation*, 907 F.2d 489 (5th Cir. 1990), “[t]his court has a ‘long-established rule that a defendant’s guilt may not be proven by showing that he associates with unsavory characters[.]’” 907 F.2d at 500, quoting *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982) (other citation omitted), adding that the Court has “emphasized that evidence that one associates with a criminal is not probative of a defendant’s guilt . . .” 907 F.2d at 500. See also *United States v. Cardenas Alvarado*, 806 F.2d 566, 569-70 (5th Cir. 1986) (“[s]imilarly, the government cannot prove a conspiracy by presenting evidence that only places the defendant in ‘a climate of activity that reeks of something foul’”), citing *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir. 1982).

The Third Circuit concurred in *United States v. Wexler*, noting that “[t]he inferences rising from ‘keeping bad company’ are not enough to convict a defendant for conspiracy[.]” 838 F.2d at 91 (citation omitted), as did the Eleventh

Circuit in *United States v. Villegas*, in language particularly pertinent to charges of “material support” for terrorism: “the presumption of innocence remains constant, irrespective of the heinous nature of condemned activity, . . .” 911 F.2d at 630.⁵⁴

Nor is knowledge of a conspiracy sufficient to establish membership therein. In *United States v. Martino*, 759 F.2d 998 (2d Cir. 1985), this Court explained that,

absent evidence of purposeful behavior, mere presence at the scene of a crime, *even when coupled with knowledge that a crime is being committed*, is insufficient to establish membership in a conspiracy; and mere association with conspirators is similarly insufficient.

759 F.2d at 1002 (emphasis added) (citations omitted).⁵⁵

While the government may rely on circumstantial evidence to prove a defendant’s membership in a conspiracy, that evidence must provide not just suspicious conduct or associations, including with persons who in fact *are*

⁵⁴ In *Villegas*, the Eleventh Circuit also commented that conspiracy “cannot be proved solely by a family relationship or other types of close association.” 911 F.2d at 630, *citing United States v. White*, 569 F.2d 263 (5th Cir. 1978) (other citations omitted). Here, the attorney-client relationship between Ms. Stewart and Sheikh Abdel Rahman is equally insufficient to prove a *conspiratorial* relationship.

⁵⁵ *See also Jones*, 393 F.3d at 111; *United States v. Cruz*, 363 F.3d at 198; *Samaria*, 239 F.3d at 233-34; *United States v. Nusraty*, 867 F.2d 759, 764 (2d Cir. 1989); *United States v. Soto*, 716 F.2d 989, 991-92 (2d Cir. 1983); *United States v. Johnson*, 513 F.2d 819, 823-24 (2d Cir. 1975).

conspirators, but also the defendant's *knowledge* of the illegal conspiratorial objective(s), and her *specific intent* to join the conspiracy and its illegal goals. See *Samaria*, 239 F.3d at 233-34.

In *United States v. Ceballos*, 340 F.3d 115 (2d Cir. 2003), this Court reaffirmed the principles governing conspiratorial liability: that “[i]n order to convict a given defendant of conspiracy, the government must prove that he knew of the conspiracy and joined it . . . with the intent to commit the offenses that were its objectives, . . . that is, with the affirmative intent to make the conspiracy succeed.” 340 F.3d at 123-24 (citations omitted).⁵⁶

Thus, in *Ceballos*, which involved bribery as the objective of the conspiracy, the Court emphasized that “to establish the intent, the evidence of knowledge must be clear, not equivocal[,]” 340 F.3d at 124, *quoting Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), and that “[w]here the conspiracy involves a specific-intent crime, ‘the government [must] establish beyond a reasonable doubt that the defendant had the specific intent to violate the

⁵⁶ In addition, this Court reiterated in *Ceballos* that “knowledge of the existence and goals of a conspiracy does not of itself make one a coconspirator.” 340 F.3d at 124, *quoting United States v. Cianchetti*, 315 F.2d 584, 588 (2d Cir. 1963). See also *id.* (“[t]here must be something more than [m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy”), *quoting Cianchetti*, 315 F.2d at 588 (internal quotation marks omitted).

substantive statute.” 340 F.3d at 124, *quoting Samaria*, 239 F.3d at 234. *See Rodriguez*, 392 F.3d at 545; *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984) (same).

Nor is a defendant’s political persuasion, or sympathy for or approval of a conspiracy’s goal, sufficient to establish membership in a conspiracy. As this Court made clear in *Ceballos*,

a defendant may not be convicted of conspiracy merely because he knows of, approves of, or acquiesces in the objective of a conspiracy. There must be proof that he intended to join the conspiracy, that is, that he participated in it, or in some way made an affirmative attempt to further the conspiracy’s purposes, or made it his own venture in the sense of having a stake in its outcome.

340 F.3d at 127-28;⁵⁷

Nor are “suspicious” circumstances or behavior sufficient to sustain Ms. Stewart’s convictions. *See Jones*, 393 F.3d at 111; *Nusraty*, 867 F.2d at 763. *See also United States v. Kearse*, 444 F.2d 62, 64 (2d Cir. 1971). Moreover, in *Samaria*, this Court found that even if the defendant’s conduct indicated his

⁵⁷ *See also Manbeck*, 744 F.2d at 390 (“[m]ere knowledge, acquiescence or approval without cooperation or agreement to cooperate is not enough to constitute one part of a conspiracy”), *quoting United States v. Mendez*, 496 F.2d 128, 130 (5th Cir. 1974); *United States v. Villegas*, 911 F.2d 623, 629 (11th Cir. 1990).

suspicion that *some* criminal activity was afoot, that activity “was equally consistent with any number of different criminal offenses . . .[,]” but not necessarily that alleged as the objective of the charged conspiracy. 239 F.3d at 237 (footnote omitted). *See also United States v. Wexler*, 838 F.2d 88, 91-92 (3d Cir. 1988).

Thus, association, presence, and knowledge are insufficient to prove a defendant’s participation in a conspiracy. Indeed, in *Falcone*, the Supreme Court held that

one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale *may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.*

311 U.S. at 210-11 (emphasis added). *See also United States v. Samaria*, 239 F.3d at 233-35; *United States v. Wexler*, 838 F.2d at 91 (government must prove the defendant “had knowledge of the illegal objective contemplated by the conspiracy”) (citations omitted).

Here, too, even if Ms. Stewart was aware of the illicit activities of others, those activities were equally consistent with innocence, and/or with other conduct that was not part of the conspiracy, *i.e.*, merely the alleged violation of the S.A.M.’s. In that context, the lack of specificity of County Two’s §956(a)

conspiracy to murder and the stringent First Amendment principles discussed **ante**, at 106, must be layered atop the ordinary sufficiency standards to create a daunting burden the government simply did not meet.

There simply was not sufficient proof that Ms. Stewart's perceptions of either Sheikh Rahman, or IG – or both – were infused in any way with an intent to further a conspiracy *to murder*. Indeed, the gravity of those charges illuminates the failure of proof, particularly in light of the *Brandenburg* standard, that Ms. Stewart ever contemplated – much less possessed an intention that ripened sufficiently to membership in a conspiracy – *murder* as a consequence of her efforts on behalf of her client, Sheikh Rahman (regardless whether or not she knew she was abridging the S.A.M.'s), and/or dissemination of his statements.

Thus, as in *Martinez-Sandoval*, in which the government argued that the defendant's failure to "walk away" from a situation he knew was suspicious proved his criminal intent, here with respect to Ms. Stewart "the circumstantial evidence regarding Defendant's specific intent to join the conspiracy [or, here, the fraudulent scheme as well] equally supports competing theories of guilt and innocence." 2003 WL 1442454, *6. *See also United States v. Andujar*, 49 F.3d 16, 22 (1st Cir. 1995) (drug conspiracy conviction reversed because evidence "offer[ed] equal support to both [the defendant's] mere presence theory, and the

prosecution's theory that [the defendant] was knowingly acting as a facilitator and go-between in the conspiracy[,]” and “[w]hen a jury is confronted as here with equally persuasive theories of guilt and innocence it cannot rationally find guilt beyond a reasonable doubt”) (footnote omitted).

The same result should obtain here for the same reasons. There simply was not sufficient, if any, evidence of Ms. Stewart's knowledge of the §956(a) conspiracy to murder charged in Count Two, or her specific intent to aid it with “material support” in the form of Sheikh Abdel Rahman. It was not enough for the government to prove that Ms. Stewart, in the course of her legal work on Sheikh Abdel Rahman's behalf, inadvertently or accidentally aided a conspiracy to murder persons overseas. The government had to prove that such murderous conspiracy *was her conscious intention*.

Examined in light of that standard, it is undeniable that the government's theory at trial, consisting of conclusory inferences attempting to prove that Ms. Stewart's legal representation of Sheikh Rahman, and her strategy to secure his transfer to Egypt, operated in some way as a cover for an underlying and unexpressed terrorists agenda in concert with IG – all pure invention by the government – simply will not suffice for proof beyond a reasonable doubt, even

when viewing the evidence and those inferences in the light most favorable to the government.

As this Court cautioned in *Ceballos*, the standard of review notwithstanding, “the jury’s inferences must be based on evidence and must be reasonable.” 340 F.3d at 125, *citing Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 108 (2d Cir. 1997) (“[t]he jury’s role as the find of fact does not entitle it to return a verdict based only on confusion[or] speculation . . . ; its verdict must be reasonably based on evidence presented at trial”) (internal quotation marks omitted).

Here, the government’s case against Ms. Stewart was built from and upon inferences that do not measure up to the “rigorous” standard of proof and “heightened specific intent” requirement the Court declared the government must meet in order to sustain her convictions. Accordingly, it is respectfully submitted that Ms. Stewart’s convictions on Counts Four and Five should be reversed, and those counts dismissed.

POINT IV

**MS. STEWART’S CONVICTIONS ON COUNTS
FOUR & FIVE MUST BE REVERSED BECAUSE
§2339A IS UNCONSTITUTIONALLY VAGUE
AS APPLIED TO MS. STEWART IN THIS CASE**

In the event the allegation of “personnel” in Counts 4 and 5 passes statutory muster under §2339A(b)(1) (*see ante* at POINT II), and the evidence was sufficient to establish Ms. Stewart’s specific intent to provide “material support” to the §956(a) conspiracy to kill charged in Count 2 (*see* POINT III), §2339A is unconstitutionally vague as applied to Ms. Stewart in this case.

Here, §2339A fails to satisfy the requirements of Due Process not only because this prosecution impermissibly infringes upon protected First Amendment protections, but also because the District Court’s ultimate construction of the statute, manifested in its rulings and eventual instructions to the jury, allowed intolerable vagueness and overbreadth to permeate the charges and proof.

In fact, the District Court should not have retreated from its position in *Sattar I*: that the government’s theory of liability was deficient, and raised intractable constitutional problems with respect to vagueness and overbreadth. While the government recast its case cosmetically, and opted for §2339A instead of §2339B, its essence, as well as its fatal flaws, remained.

Yet the District Court, while acknowledging that with respect to the facts, failed to recognize the dispositive legal implications. Instead, the District Court seized on what it described as §2339A’s “heightened specific intent” requirement

(in comparison with §2339B) as a means of distinguishing the Superseding Indictment from its invalid predecessor.

However, the District Court completely undermined its own effort to impose a “heightened specific intent” requirement by departing from that standard in jury instructions, by failing to require specificity with respect to the predicate §956(a) conspiracy to kill (again, reflected in the jury instructions), and by permitting the government to present its initial inadequate theory of “personnel” dressed up in different statutory clothing, but which lacked any legal distinction from its failed antecedent.

A. *The Fundamentals of the Void-for-Vagueness Doctrine*

As this Court stated in *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006), and repeated most recently in *Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007), the void-for-vagueness doctrine is one of the “most fundamental protections of the Due Process clause[.]” 486 F.3d at 65, *quoting Farrell*, 449 F.3d at 484. In order to survive a vagueness challenge, “[i]n short, the statute must give notice of the forbidden conduct and set boundaries to prosecutorial discretion.” *United States v. Handakas*, 286 F.3d 92, 101 (2d Cir. 2002). *See also United States v. Rybicki*, 354 F.3d 124, 132 (2d Cir. 2003) (*en banc*).

The doctrine requires that “laws be crafted with sufficient clarity to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’ and to ‘provide explicit standards for those who apply them,’”

Betancourt v. Bloomberg, 448 F.3d 547, 552 (2d Cir.2006), quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). See also *Thibodeau*, 486 F.3d at 65.

The general standards also govern a vagueness challenge “as applied” to a particular case. See *Farrell v. Burke*, 449 F.3d 470, 486 (2d Cir. 2006); *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993). See also *Thibodeau v. Portuondo*, 486 F.3d at 67-68; *Handakas*, 286 F.3d at 111 (“[t]he principle that a statute must provide both ‘notice’ and ‘explicit standards’ to survive an ‘as-applied’ constitutional challenge based on vagueness is well established”).

Accordingly, in evaluating an as-applied challenge, “in determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which a defendant is charged.” *Farrell*, 470 F.3d at 491. See also *Sattar I*, 272 F. Supp.2d at 357 (“[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”), *citing Handakas*, 286 F.3d at 111-12 (other citation omitted).

The First Amendment implications of this application of §2339A adds another dimension to the analysis. Thus, if the statute under consideration “is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Farrell v. Burke*, 449 F.3d at 486.

In *NAACP v. Button*, the Supreme Court further explained the different presumptions that apply when First Amendment activities are at issue:

[i]f the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression.

371 U.S. at 432. *See also Sattar I*, 272 F. Supp.2d at 357. *See also Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

When Congress has condemned non-speech activity – providing material support to terrorists – and an individual is accused of performing such conduct through speech, the individual acts that are alleged to be criminal must be scrutinized to avoid unconstitutional overreaching into First Amendment protected

activity. *Dennis v. United States*, 341 U.S. 494, 505 (1951). *See also Yates v. United States*, 354 U.S. 298, 322-23 (1957):

B. *The District Court’s Construction of §2339A’s Intent Requirement*

The District Court’s ultimate construction of §2339A was a product of its two pretrial opinions resolving defendants’ motions to dismiss. The District Court dismissed the “material support” counts from the initial Indictment, finding them unconstitutionally vague, but sustained them in the Superseding Indictment. In order to identify the District Court’s mistakes in addressing the Superseding Indictment, those two opinions require examination.

1. *The District Court’s Opinion Dismissing the Initial Indictment*

In evaluating the “material support” counts in the initial Indictment, charged under §2339B, the District Court concluded that “criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application such that it is unconstitutionally vague as applied.” *Sattar I*, 272 F. Supp.2d at 358.

The District Court also noted how the government’s theory of how Ms. Stewart’s conduct may have constituted “material support” changed over time. *Id.*, at 358 (noting the government’s position that “use equals provision,” and that

“using the conference call feature on a person’s phone in furtherance of an FTO was prohibited”) (citations omitted).

The government’s theory with respect to “personnel” suffered similar deficiencies. Accordingly, the District Court held that “§2339B is void for vagueness as applied to the allegations in the Indictment[,]” *id.*, adding that “[i]t is not clear from § 2339B what behavior constitutes an impermissible provision of personnel to an FTO. Indeed, as the Ninth Circuit Court of Appeals stated in *Humanitarian Law Project*, ‘Someone who advocates the cause of the [FTO] could be seen as supplying them with personnel.’” *Id.*, at 359, *quoting Humanitarian Law Project*, 205 F.3d at 1137.

2. *The District Court’s Opinion Upholding the Superseding Indictment*

The Superseding Indictment, which couched the charges as violations of §2339A, and alleged the “material support” to be “personnel” in the form of Sheikh Rahman, withstood defendants’ pretrial challenge.

The District Court justified its different conclusion with respect to the Superseding Indictment as follows:

[w]hile the factual allegations are similar, the critical statute is different, the elements of the offense, including scienter, are different, and the allegations as to how the defendants’ conduct violated the statute are different.

314 F. Supp.2d at 295.

Comparing the elements of §§2339A and 2339B, the District Court pointed out that while §2339B proscribes providing “material support” to an FTO, §2339A “makes it a crime to provide material support or resources or conceal or disguise the nature, location, or source of such material support or resources ‘knowing or intending that they are to be used in preparation for, or in carrying out, a violation’ of specific violent crimes – in this case, a violation of 18 U.S.C. § 956, which prohibits a conspiracy to kill or kidnap persons in a foreign country.” *Id.*, at 295-96.⁵⁸

In light of that difference, the District Court noted that the Superseding Indictment

no longer charges Stewart and Yousry with providing themselves as personnel to an FTO, but rather with providing and conspiring to provide personnel – by making Sheikh Abdel Rahman, not themselves, available as a co-conspirator – to the conspiracy alleged in Count Two, namely the conspiracy to kill and kidnap persons in a foreign country. It also charges them with concealing and disguising the nature, location, and source of that personnel by disguising that Sheikh Abdel Rahman was a co-conspirator.

Id., at 296.

⁵⁸ The jury found only a §956(a) conspiracy to kill (and not also to kidnap). *See Sattar 29/33*, 395 F. Supp.2d at 101.

Focusing on §2339A's elements, the District Court emphasized that “[t]hese actions were allegedly done with the knowledge and intent that such personnel was to be used in preparation for, or in carrying out, the conspiracy to kill and kidnap persons in a foreign country. *This is the heightened specific intent required by § 2339A.*” *Id.* (emphasis added).

As a result, the District Court rejected defendants' vagueness challenge to the Superseding Indictment, stating that “due process concerns about notice under the test for vagueness are “ameliorated” when a statute contains a scienter requirement.” *Id.* at 301 (citations omitted). *See also id.* (“[a] defendant cannot complain about a lack of notice when the statute requires a high level of specific intent for a violation”).

In addition, the District Court remarked that “the Government has not sought to provide any evolving definitions of ‘personnel’ to preserve the constitutionality of § 2339A, *compare Sattar I*, 272 F.Supp.2d at 358-60, and ‘personnel’ is appropriately read in the context of § 2339A as those persons jointly involved in preparing for or carrying out the enumerated crimes.” *Id.*, at 301 n.

11.

C. *The District Court Failed At Trial to Apply Any “Heightened Specific Intent” Requirement to §2339A*

While the District Court predicated its refusal to dismiss the Superseding Indictment upon §2339A’s “heightened specific intent” requirement, at trial the District Court failed to adhere to that standard. In three distinct ways, the District Court undermined its stated intention and allowed the government to proceed under a decidedly relaxed standard of proof. Consequently, the District Court permitted the government to proceed, in effect, with the same theory and proof of “personnel” that the District Court had found, with respect to the initial Indictment, were unconstitutionally vague as applied.

1. *The District Court’s Instructions Failed to Require That the Jury Find “Specific Intent”*

Despite the District Court’s claim that it would apply a “heightened specific intent” requirement, in fact it did not. As detailed below, while §2339A is a specific intent crime, the District Court’s instructions defined a crime that *failed to require intent at all*. Accordingly, the “heightened specific intent” requirement was absent, and the vagueness that plagued the initial §2339B charges was present with respect to the §2339A counts as well.

a. *The Meaning of “Specific Intent”*

“Specific intent” is a heightened standard of *mens rea* within criminal law, and is defined as “[i]n criminal law, the intent to accomplish the precise act which the law prohibits; e.g. assault with intent to rape.” *United States v. Jennings*, 855

F. Supp. 1427, 1439 (M.D. Pa. 1994), *aff'd* 61 F.3d 897 (3d Cir. 1995), *quoting Black's Law Dictionary* 810 (6th ed. 1990). *See also United States v. Brown*, 459 F.3d at 519 (specific intent requires a “conscious knowing intent” to defraud); *United States v. Ford*, 435 F.3d 204, 211, 213 n. 5 (2d Cir. 2006); *United States v. Rodriguez*, 392 F.3d at 545 (*see ante*, at 140).⁵⁹

b. §2339A Is A Specific Intent Crime

Courts, including the District Court below, have held that §2339A requires proof of a person’s “specific intent” to provide material support to terrorists. *United States v. Awan*, 459 F. Supp.2d 167, 179 (E.D.N.Y. 2006); *United States v. Sattar*, 314 F. Supp.2d 279, 296, 301 (S.D.N.Y. 2004). *See also* Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt By Association Critique*, 101 Mich. L. Rev. 1410, 1446 n. 164 (2003) (hereinafter “*Guilt By Association Critique*”) [§2339A cast the “material support” net wide because (ameliorating the impact of that scope) it “requires proof of the supporter’s intent to facilitate a criminal act”].

⁵⁹ In contrast, “[g]eneral intent’ is defined as ‘[i]n criminal law, the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which eventuated.’” *Jennings*, 855 F. Supp. at 1439, *quoting Black's Law Dictionary* 810 (6th ed. 1990). General intent is also defined as “[t]he intent to perform an act even though the actor does not desire the consequences that result.” *Black's Law Dictionary* (8th ed. 2004).

In both *Awan* and *Sattar*, federal district courts reached this conclusion based, in part, on comparing §2339A's language to §2339B's language. *Awan*, 459 F. Supp.2d at 179; *Sattar*, 314 F. Supp.2d at 301.⁶⁰

Again, too, the First Amendment context is important. In *United States v. Spock*, the First Circuit, in reversing a conviction for conspiring to aid and abet draft resistance, concluded that although one of the defendants drafted a call to action against conscription, and stated "he was willing to 'do anything' asked to further opposition to the war," such actions did not establish specific intent. *Spock*, 416 F.2d at 178.

In contrast, the court upheld convictions of co-defendants who made specific public statements that they wished to "encourage [draft resisters] and aid and abet and counsel them in every way we know how." *Id.* at 177 (quoting defendant's remarks).

As a result, §2339A's specific intent requirement means that here the government was required to prove that Ms. Stewart harbored a "conscious knowing intent" to provide "material support" to Count Two's §956(a) conspiracy to kill persons overseas.⁶¹

⁶⁰ See also *United States v. Awan*, 2007 WL 749739, at *4 (E.D.N.Y. 2007).

⁶¹ During oral argument on the motion to dismiss the initial Indictment, the government had suggested a similar intent requirement for §2339B, conceding that

c. *The Jury Instructions on §2339A’s Mens Rea Requirement*

Having declared §2339A a specific intent crime, and that a “heightened specific intent” requirement would apply, *see ante*, at 154, *Sattar II*, 314 F. Supp.2d at 296, the District Court inexplicably abandoned that promise at the critical juncture of the trial. Thus, four different times in its instructions the District Court informed the jury it could convict Ms. Stewart based on only her knowledge *or* intent. T. 12,336, 12,337 & 12,338 (twice). Not once did the District Court charge the need for specific intent, *i.e.*, knowledge *and* intent.

As a result, the jury could well have convicted Ms. Stewart *absent any finding of intent at all*, since the instructions permitted conviction based on *knowledge alone*. In addition, the jury’s questions with respect to the §2339A *mens rea* instructions demonstrated that the jury charge on that issue was critical.

“[i]t may be, your Honor, that in such instances, the Court needs to apply a heightened level of scienter for certain aspects of the statute like perhaps personnel, in other words, to show an intent on the behalf of the attorney to further the illegal objectives of the terrorist organization.” Transcript, May 19, 2004, at 59-60. The government subsequently withdrew by letter that concession. *Sattar I*, 272 F. Supp.2d at 360.

T. 12,731-32.⁶² Moreover, Ms. Stewart objected to the charge, and requested a charge requiring knowledge *and* intent. J.A. 2079.

In contrast, in *United States v. Awan*, 459 F. Supp.2d 167, 190 (E.D.N.Y. 2006), prior to trial the District Court announced that “the government must prove that defendant provided the ‘material support’ (however it is ultimately defined by the government) ‘knowing and intending’ that it be used to prepare for ‘a conspiracy to murder, kidnap or maim[.]’” Similarly, twice in its pretrial opinion the District Court herein employed the “knowledge *and* intent” construction. *Sattar II*, 314 F. Supp.2d at 296, 301.

However, in *Awan*, the District Court held fast to its pledge and instructed the jury that the government was required to establish both knowledge *and* intent. *See United States v. Awan*, 06 Cr. 154 (CPS) (E.D.N.Y. 2006), Transcript,

⁶² The jury inquired as follows with respect to Count Five:

Paragraph 41 of the indictment states towards the end, "that such material support and resources were to be used in preparation for, or in carrying out . . . the conspiracy charged in Count Two. . ." How is the phrase, “were to be used,” to be interpreted? Must a defendant, to be found guilty, have, explicitly know their material support would, be used to murder or kidnap? Or, is it sufficient that the material support could, be used to murder or kidnap, or could reasonably be suspected to support possible, murder or kidnapping?

December 19, 2006, at 2372.1-2372.84). Here, the District Court did not, and the impact was adverse and material.

Thus, the District Court's claim that "[t]he jury also found that Stewart acted with the requisite 'high scienter' that the Court relied upon in its previous decision as curative of any alleged vagueness problems with Stewart's prosecution for this conduct. (See Tr. 12337-38 (jury instruction on knowledge or intent element)[,]" *Sattar 29/33*, 395 F. Supp.2d at 101, was not accurate because *the District Court failed to impart that standard of proof to the jury for determination of the "material support" counts*. Consequently, the District Court completely undercut its attempt to cure, with respect to the §2339A charges in the Superseding Indictment, the vagueness it had found in the §2339B counts in the initial Indictment.

2. *The District Court Impermissibly Diluted the Proof Required for the §956(a) Conspiracy to Kill Charged In Count Two*

The District Court compounded its error with respect to the jury charge on §2339A's intent standard by relieving the government of any genuine obligation to prove specificity with respect to Count Two's §956(a) conspiracy, and/or how the "material support" Ms. Stewart allegedly provided – Sheikh Rahman's statements – related to that conspiracy.

In addition, §2339A's status as a potentially multi-level inchoate offense was realized in this case, with that danger aggravated by the District Court's failure to require the appropriate level of proof with respect to the nexus between the alleged "material support" and the §956(a) conspiracy to murder charged in Count Two.

- a. ***By Failing to Require Sufficiently Specific Proof of the §956(a) Conspiracy to Kill, the District Court Fatally Undermined Any Restrictions a Proper Intent Requirement Could Impose on the Scope of §2339A***

The District Court's commitment to a "heightened specific intent" requirement for §2339A was further undone by its failure to demand the proper level of proof with respect to the alleged object of the "material support": Count Two's §956(a) conspiracy to kill. Indeed, it is ironic that the District Court distinguished §2339A from §2339B by citing a specific intent requirement for §2339A with respect to the provision of "material support" to a conspiracy to violate §956(a), while at the same time relieving the government of the need to prove *anything* specific with respect to the §956(a) conspiracy and/or Ms. Stewart's connection to it.

The District Court's instructions to the jury on that issue were simply inadequate. T. 12,338. *See ante*, at 156. *See also Sattar 29/33*, 395 F. Supp.2d at 98 ("the Government was not required to allege or prove the identity of

contemplated victims or the specific location outside the United States where the contemplated killing is to occur for purposes of the Section 956 conspiracy[;] nor was such evidence required with respect to a defendant charged with providing “material support” to such a conspiracy), *citing Sattar II*, 314 F.Supp.2d at 303-05.

That intolerably low threshold for proof of a conspiracy, and its connection to the alleged “material support,” stands in stark and unacceptable contrast to the strict requirements for conspiracy liability detailed **ante**, at 124, 128-129.

Indeed, the paucity of proof required manifests the dangers Justice Jackson envisioned in *Krulwitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, *J.*, concurring), in which he commented that the “modern crime of conspiracy is so vague that it almost defies definition,” and cataloged the many advantages the charge provided the government.

The deficiencies in the connection between Count Two’s §956(a) conspiracy to kill and the alleged “material support” – as well as the (lack of) proof of Ms. Stewart’s intent to aid that conspiracy (or knowledge that she was aiding a *conspiracy to kill*) are set forth **ante**, at 155, and will not be repeated here (although they apply equally in this context).

The failure to require specificity with respect to the object of the “material support” renders any “heightened specific intent” requirement – even if the

District Court had adhered to that standard – a nullity because “knowing” and “intentional” material support is meaningless if the purported destination of that “material support” is not sufficiently defined.

Without that requisite specificity, the “material support” allegedly provided drifts unmoored, and the government is free to attach it to the vaguest of objects. That cannot satisfy Due Process, regardless whether there exists a *mens rea* requirement or not. *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).

**b. §2339A Operates Impermissibly
 As a Multi-Level Inchoate Offense**

The §2339A counts also impermissibly charge a multi-level inchoate offense – in effect, a *conspiracy to prepare to commit another conspiracy* – that far exceeds any appropriate limit for such offenses, and which accordingly denies Ms. Stewart Due Process.

The most comprehensive treatment of the viability of “double inchoate” offenses appears in a 1989 law review article, *Double Inchoate Crimes*, 26 HARV.J. ON LEGIS. 1 (Winter 1989) (hereinafter “Robbins”), by Professor Ira P.

Robbins, Barnard T. Welsh Scholar and Professor of Law and Justice at The American University, Washington College of Law.

In his article, Professor Robbins defines an inchoate offense as one that “allow[s] punishment of an actor even though he has not consummated the crime that is the object of his efforts.” Robbins, at 3. *See also id.*, at 7 n. 10; *United States v. Awan*, 459 F. Supp.2d at 183 n. 30 (“[a]n inchoate offense is one in which a party takes “a step toward the commission of another crime, the step in itself being serious enough to merit punishment”), *citing* Black's Law Dictionary 1111 (8th ed.2004). Inchoate crimes include conspiracy, attempt and solicitation. *Id.*⁶³

The problems inherent in multi-level inchoate offenses have long been recognized. Professor Robbins points out that the “main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.” Robbins, at 3. In discussing “double inchoate” offenses, Professor Robbins states that “[j]udicial inquiry into the validity of double inchoate offenses has focused on the question of whether an inchoate offense can have as its object another inchoate offense.” Robbins, at 5. He also

⁶³ In *Awan*, the District Court found that §2339A was not an impermissibly inchoate crime. 459 F. Supp.2d at 183-84. Here, the District Court held the same. *Sattar II*, 314 F. Supp.2d at 306.

concludes that “the courts faced with such indictments have divided over the validity of double inchoate offenses.” *Id.* (footnote omitted).

**i. *The Logical Absurdity of
Multi-Level Inchoate Offenses***

The “logical absurdity” of multi-level inchoate crimes was initially expressed in *Wilson v. State*, 53 Ga. 205 (1874), in which the Court held that the offense of “attempted assault” did not exist because

as an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter still more definitely, it is to do any act towards doing an act towards the commission of the offense.

Id. See also *Allen v. People*, 175 Colo. 113, 115, 485 P.2d 886, 888 (1971)

(“[p]erhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not to attempt to act”); *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912) (“one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt”).

The same conclusion is required when “conspiracy” is substituted for “attempt”: a “conspiracy to conspire” is a logical absurdity. Indeed, in *United States v. Yu-Leung*, 51 F.3d 1116, 1122 n. 3 (2d Cir. 1995), this Court characterized an “attempted conspiracy” as “a creature unknown in federal

criminal law.” *See also* Robbins, at 15 ns. 271 & 272.⁶⁴ A “conspiracy to conspire” is just as “unknown,” and even more untenable as a matter of logic (or, as discussed below, as a matter of Due Process).

Professor Robbins also recognized that piling inchoate offenses atop each other “raise[s] the possibility of regression of liability to merely preparatory acts[,]” – what he deemed the “most valid criticism inherent in the logical-absurdity approach – defendants do not conspire or solicit another to attempt to commit a crime; rather, they act *with the intention of committing the completed offense itself.*” Robbins, at 72 (footnotes omitted) (emphasis added).

The thrust of the “logical absurdity” objection is that the practice of pyramiding inchoate offenses “would impart criminal liability to acts so removed from the ultimate offense as to qualify as mere preparation – that is, acts to which a court *cannot impute a fully formed intent.*” Robbins, at 65 (footnote omitted) (emphasis added).

Here, of course, there is no “completed offense itself,” but, instead, merely *preparation for another conspiracy.* Consequently, logically, the “regression of

⁶⁴ In the state court context, a California appellate court held that a charge of conspiracy to attempt theft simply did not exist. *People v. Travis*, 171 Cal. App.2d 842, 846 n. 1, 431 P.2d 852, 853-54 n. 1 (1959). Here, of course, even the object crime alleged is not a substantive offense, but rather the preparation for another conspiracy.

liability” in this case is even further removed from an “ultimate offense[;]” indeed, it is removed to the logically absurd point of acts that “qualify as mere preparation” for *preparation* – a point at which “a court cannot impute a fully formed intent.”

ii. *Multi-Level Inchoate Offenses Violate Due Process*

Professor Robbins further acknowledges that “a court’s use of a double inchoate offense raises a significant question of due process.” Robbins, at 75. *See also* Robbins, at 116 (“[a] strong argument can be made that the due process concept of notice outweighs the necessity for courts to prevent harm to society through double inchoate crimes”); Robbins, at 34 n. 148.

Again, the same rationale Professor Robbins applies to “attempt” applies with equal force to “conspiracy.” A regression to the point of a conspiracy to conspire, or worse, as with Count Four, a conspiracy to prepare to conspire, so attenuates the nature of the offense from any criminal conduct and/or ultimate harm that the flimsy notice afforded by conspiracy statutes generally, *see Krulewitch v. United States*, 336 U.S. 440, 452-53 (1949) (Jackson, J., *concurring*), and §2339A in particular, falls below the Due Process threshold.

A commentator has noted that §2339A “provides liability in circumstances that are – or at least should be – beyond the scope of liability under inchoate crime

concepts such as conspiracy and attempt.” Chesney, *Beyond Conspiracy?*, at 429. *See also* Peterson, at 7 (“[t]he reason that the material support statutes have become so prevalent is simple: material support prohibitions function as additional inchoate terrorist crimes”).

Thus, “whereas the object of a conspiracy must be the actual commission of an unlawful act, the ‘object’ of support given in violation of §2339A may either be the actual commission of a predicate offense *or* conduct merely constituting ‘preparation for’ commission of such an offense.” Chesney, *Beyond Conspiracy?*, at 479; *see also id.*, at 480 (“one might describe §2339A as prohibiting the provision of support with intent to facilitate either a violation of a predicate statute *or* activity preliminary to such a violation”).⁶⁵

Here, the alleged “material support’s” contribution to Count Two’s §956(a) conspiracy to kill (as opposed merely to IG) is so attenuated that the layers of inchoate liability present an intractable Due Process problem. The Superseding Indictment raises all of the red flags attendant to multi-level inchoate offenses:

⁶⁵ “Preparation” is a word of art in the law of attempt, as in “mere preparation.” *United States v. Stallworth*, 543 F.2d 1038, 1039-41 (2d Cir. 1976). *See United States v. Plotitsa*, 2001 WL 1478806 (S.D.N.Y. Nov. 19, 2001); *see also United States v. Rosa*, 11 F.3d 315, 337-40 (2d Cir. 1993) (court found no “substantial step” in defendant Rosa’s actions to support a conviction of attempt); *United States v. Coplton*, 185 F.2d 629, 633 (2d Cir. 1950) (Judge Learned Hand discussing preparation as opposed to attempt).

“knowing and intending that such material support and resources were to be used in *preparation for*, and in carrying out, a violation of” §956 (“the conspiracy charged in Count Two of this Indictment”). J.A. 160-62, at ¶¶ 38 (Count Four), 41 (Count Five) (emphasis added).

Indeed, Counts Four and Five present the “inane” scenario feared by the Fifth Circuit in *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982):

[i]t 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.

This remoteness from conduct makes the “membership” cases under the Smith Act, particularly *Noto v. United States*, 367 U.S. 290 (1961), instructive. In *Noto*, the Court cautioned that

. . . this [intent] element of the membership crime, like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically

intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

367 U.S. at 299-300. *See also Virginia v. Black*, 535 U.S. 1094 (2003); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Yates v. United States*, 354 U.S. 298 (1957).

As Professor Robbins recognized, “[t]he past use of conspiracy law against labor organizers and political protestors has also emphasized the conflict of conspiracy law’s reliance on the group-danger rationale with the freedoms of speech and association guaranteed by the first amendment.” Robbins, at 28, n. 114, *citing* Nathaniel L. Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock*, 65 NW. U.L. REV. 153 (1970).

Here, the multi-level inchoate structure of Counts Four and Five brings that danger into stark relief. Particularly with respect to First Amendment expression, the possibility of prosecution for a “conspiracy to conspire” would compel “citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *See also NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (“[t]he

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”).

3. *The District Court Impermissibly Allowed Protected Speech to Serve As the “Personnel” Provided to Count Two’s §956(a) Conspiracy to Kill*

a. *The “Personnel” Alleged In the Superseding Indictment Is Merely An Unavailing Variant on the Initial Indictment’s Invalid Theory of “Material Support”*

Notwithstanding the attempts by the government in the Superseding Indictment, the “material support” allegations therein are, and have always remained: a rehash of the defective initial Indictment. The Superseding Indictment did not eliminate the vagueness of its predecessor; rather, it merely manipulated the terminology.

The Superseding Indictment did not remove the problem with respect to defining “material support” to IG, an FTO under §2339B. Instead, it simply substituted the §956(a) conspiracy for the FTO and used §2339A. Yet the object

of the “material support” – IG – remained unchanged. Thus, the government presented the same, invalid §2339B allegations disguised as a §2339A charge.⁶⁶

The District Court recognized, as a factual matter, that

[i]n the original indictment and the S1 Indictment, and in the briefs concerning each, the Government has not changed its allegations of what Stewart did. In both indictments the Government alleges that Stewart participated in what can be characterized as “a communications pipeline staffed by the defendants that enabled Sheikh Abdel Rahman and other [Islamic Group] leaders around the world to communicate with one another.”

Sattar II, 314 F. Supp.2d at 315-16, *quoting Sattar I*, 272 F.Supp.2d at 361.

Yet the District Court failed to appreciate the legal implications of that consonance. Combined with the District Court’s abandonment of the “heightened specific intent” requirement, and its refusal to require specificity with respect to the §956(a) conspiracy, its lack of recognition that the Superseding Indictment was merely an insufficiently retooled version of the initial Indictment rendered the application of §2339A unconstitutionally vague as applied in this case.

b. “Personnel” Remains Unconstitutional

⁶⁶ See Chesney, *Beyond Conspiracy?*, at 466-467 [noting that this case was one of two examined in which “the link between the defendants and the violent objective of the alleged §956(a) agreement consists of their activities in support of an FTO”].

As Applied to Ms. Stewart In This Case

The term “personnel” within the definition of “material support” has already been found unconstitutionally vague by the Ninth Circuit. *Humanitarian Law Project*, 205 F.3d 1130, 1137-38 (9th Cir. 2000). As the Court concluded in a subsequent opportunity to review the term, it “could be construed to include unequivocally pure speech and advocacy protected by the First Amendment” or to “encompass First Amendment protected activities.” 352 F.3d 382, 404 (9th Cir.2003).⁶⁷

“Personnel” is defined the same for both §§2339A and 2339B. Thus, the analysis in *Humanitarian Law Project* applies here as well. In pointing out that “[s]omeone who advocates the cause of the [FTO] could be seen as supplying them with personnel[,]” 205 F.3d at 1137, the Court in *HLP* could just as easily been describing the “personnel” Ms. Stewart allegedly provided here: someone (Sheikh Rahman) who “advocates the cause” of IG. *See also Sattar I*, 272 F. Supp.2d at 359.

Also, in the context of the initial Indictment, the District Court below rejected the government’s attempt to engraft on to “personnel” modifying

⁶⁷ The Ninth Circuit subsequently vacated that decision, 393 F.2d 902 (9th Cir. 2004) (*en banc*), but only because of the 2004 amendments to the definition of “personnel” that do not apply to the analysis here.

language that was not part of the definition. *Sattar I*, 272 F. Supp.2d at 359 (“the terms “quasi-employee” or “employee-like operative” or “acting at the direction and control of the organization” are terms that are nowhere found in the statute or reasonably inferable from it”). *See also Handakas*, 286 F.3d at 109-110 (“[i]f the words of a criminal statute insufficiently define the offense, it is no part of deference to Congress for us to intuit or invent the crime”).

The “personnel” used in the Superseding Indictment suffered from the same limitations, but the District Court inexcusably chose not to analyze the same definition from the same statutory subsection in a consistent manner. The continuing evolution of the government’s theory of “personnel” that the District Court condemned in *Sattar I*, 272 F. Supp.2d at 359-60 – at one point during oral argument, the government, asked how to distinguish membership in an FTO from being a “quasi-employee,” responded, “You know it when you see it” – did not cease with the dismissal of the initial Indictment. It continued unabated with the Superseding Indictment.

Thus, the objection to the initial Indictment stated by the District Court in *Sattar I*, “the statute [§2339B] provided no means to distinguish providing oneself to an organization from mere membership in the organization[,]” 272 F.Supp.2d at 359, applies with equal force to the Superseding Indictment and the allegation of

“providing” Sheikh Rahman to Count Two’s §956(a) conspiracy to kill – which the government and District Court improperly conflated with IG: there was simply no means of distinguishing Sheikh Rahman’s membership in IG from providing him as “material support” to the Count Two conspiracy. In that manner, the government’s serial §2339A and §2339B theories merge inseparably, as do their legal infirmity.

Therefore, the District Court’s definition of “personnel” in *Sattar II* – “persons who are jointly involved in participating in those crimes [enumerated in §2339A as objects of the ‘material support],” 314 F. Supp.2d at 298 – does little to advance the analysis, because, as was the case with respect to the §2339B charges in the initial Indictment, and particularly in the First Amendment context, “[i]t is not clear . . . what behavior constitutes an impermissible provision of personnel to an FTO.” *Sattar I*, 272 F. Supp. 2d at 359.

As a result, the District Court’s contrasting opinions cannot be reconciled. Here, like §2339B in the initial Indictment, §2339A fails to clarify what behavior constitutes an impermissible provision of personnel, or concealment of personnel, to terrorist activity, namely, Count Two’s §956(a) conspiracy to kill. *Accord Humanitarian Law Project v. United States Department 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”).⁶⁸

Ultimately, the problem was not the particular statute utilized; it was, and remains, the government’s *theory of “personnel”* that is faulty regardless of the statute employed. Thus, resort to §2339A is unavailing, and cannot save the “material support” counts.⁶⁹

c. *The Application of §2339A to Ms. Stewart Herein Constitutes An Example of Arbitrary and Discriminatory Enforcement*

Clearly, §2339A and “personnel” are susceptible to arbitrary and discriminatory enforcement. Indeed, that vice has manifested itself in this very case, as the treatment of Ms. Stewart compared with her co-counsel, Ramsey Clark, demonstrates. As detailed below, at POINT IX, that Mr. Clark’s continued violations of the S.A.M.’s and public recitation of Sheikh Abdel Rahman’s

⁶⁸ See also Peterson, at 23 (“[w]ould a UN diplomat who had allowed Yasir Arafat to use her office phone on one of his UN visits be presumptively providing ‘material support’ to a terrorist? Attempting to read meaningful distinctions into the two uses of the term is nearly impossible”).

⁶⁹ Nor is the vagueness of “personnel” in this case alleviated by the supposed intent requirement adopted – but not applied – by the District Court. An intent requirement does not save a statute in which the critical definitional terms are themselves vague. See *United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001); *Nora Records, Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983). See also *ante*, at 171-173. Thus, in *Hill v. Colorado*, 530 U.S. 703 (2000), the “zones” that protesters could not enter were clearly defined.

statements were never prosecuted establishes a paradigm of arbitrary and discriminatory enforcement.

Accordingly, §2339A and “personnel” are unconstitutionally vague as applied to Ms. Stewart in this case.

POINT V

MS. STEWART’S CONVICTION ON COUNT ONE SHOULD BE REVERSED, AND THE CHARGE DISMISSED, BECAUSE (A) THE GOVERNMENT FAILED TO PROVE A CONSPIRACY TO DEFRAUD THE U.S.; (B) THE PROSECUTORS LACKED AUTHORITY TO HOLD MS. STEWART CRIMINALLY LIABLE FOR VIOLATION OF THE S.A.M.’S; AND (C) THE DISTRICT COURT ERRED IN DENYING MS. STEWART THE OPPORTUNITY TO CHALLENGE THE VALIDITY OF THE S.A.M.’S

Count One suffers from multiple fatal defects. Pursuant to the same analysis set forth *ante*, in POINT III with respect to the elements of knowledge and specific intent necessary to prove a particular’s defendant’s membership in a conspiracy, Ms. Stewart’s conviction on the conspiracy charged in Count One cannot survive because the government failed to prove beyond a reasonable doubt a conspiracy to *defraud* rather than merely to *defy*.

Also, as detailed below, the Executive lacked the authority to seek criminal punishment of Ms. Stewart for her alleged violations of the S.A.M.’s. In addition, the District Court erred in holding that Ms. Stewart could not, in the context of her

criminal prosecution, challenge the validity of the S.A.M.'s, which were unconstitutionally vague as applied in this case.

A. *The Government Proved At Most a Scheme to Defy the Government, Not Defraud It*

In the context of a prosecution for fraud, “[t]he Government is required to prove beyond a reasonable doubt that the defendant was guilty of a ‘conscious knowing intent to defraud.’” *United States v. Regan*, 937 F.2d 823, 827 (2d Cir. 1991), quoting *United States v. Kyle*, 257 F.2d 559, 564 (2d Cir. 1958). See also *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999), quoting *United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995) (internal quotations omitted).

Also, as this Court cautioned in *United States v. Rosenblatt*, “[t]he potential for abuse in allowing the government to manipulate a prosecution by easy access to the conspiracy-to-defraud clause is clear. The crime of conspiracy to defraud is broader and less precise than that of conspiracy to commit a particular offense.” 554 F.2d at 41 n. 6. See also *Dennis v. United States*, 384 U.S. 855, 860 (1966) (conspiracy to defraud prosecutions are “scrutinized carefully”).

The Superseding Indictment charged a conspiracy, in violation of 18 U.S.C. §371, “to defraud the United States by obstructing the Department of Justice and Bureau of Prisons in the administration and enforcement of the S.A.M.’s imposed

on Sheikh Abdel Rahman.” *Sattar II*, 314 F. Supp.2d at 290 (*citing* Superseding Indictment, at ¶ 29).

However, the government failed to establish a scheme to *defraud*. In fact, not only did the government not prove any agreement or conspiracy to violate the S.A.M.’s for the purpose of defrauding the government, but the principal example the government offered of a S.A.M. violation by Ms. Stewart was entirely open and notorious: her June 2000 statements to the media. *See* J.A. 413, 419, 1534.

Below the government argued that Ms. Stewart issued the press release relating Sheikh Abdel Rahman’s position on the cease-fire in Egypt “knowing that she was violating the S.A.M.’s and *defrauding the government by issuing such a statement.*” Government’s Memo of Law in Opposition to Ms. Stewart’s Rule 29 & 33 Motions, at 21 (emphasis added).

That argument, however, is a complete *non sequitor* – that Ms. Stewart defrauded the government by issuing a public statement that the government does not, at any point, allege was false or misleading in its content. In fact, the transparency of the press release issued by Ms. Stewart is what the government claims is the essence of the offense.

In fact, the government could not identify a single *secret* message that Ms. Stewart communicated from Sheikh Abdel Rahman; nor could it articulate any other strategic issue or purpose served by the alleged violations of the S.A.M.'s.

Indeed, Ms. Stewart is quoted directly in the article, J.A. 413, and is mentioned specifically in the clarifying statement she issued subsequently on Sheikh Abdel Rahman's behalf. *See* J.A. 419, 1534. Moreover, Ms. Stewart released the statement not to some small regional press organ, but to *Reuters*, a worldwide wire service that enjoys vast syndication in the U.S. as well. Again, the government's arguments defy logic and common sense.

Also, Ms. Stewart was well aware that her media disclosure would be discovered – thereby eliminating the possibility of “fraud” on the government. The Superseding Indictment itself alleges that June 14, 2000, “during a telephone conversation with another person, STEWART stated her concern that she would not be able to ‘hide’ from the United States Attorney’s Office the fact that she had issued the press release.” J.A. 150 ¶30(s).

The lack of any intent to defraud is also evident from Ms. Stewart's statement to Mr. Yousry during a tape-recorded telephone conversation, and alleged in the Superseding Indictment, to the effect that “she could not deny that

she had issued the press release in June 2000, and that her position was that Abdel Rahman ‘is going to get his message out no matter what.’” J.A. 152 ¶30(aa).

The District Court’s decision denying Ms. Stewart’s post-trial motions unwittingly illuminates the contradiction most strikingly: “defendants [defrauded the government] primarily by *smuggling messages* to and from Abdel Rahman *and by disseminating his statements to the media* in the form of two press releases in June 2000, announcing his withdrawal of support for a cease-fire.” *Sattar 29/33*, 395 F. Supp. at 85 (emphasis added). *See also ante*, at 178 (allegations of “concealment” in irreconcilable conflict with Ms. Stewart’s public communication of Sheikh Abdel Rahman’s statements).⁷⁰

Thus, at most, the government established at trial that any violation of the S.A.M.’s committed by Ms. Stewart was designed to *disseminate* information, and in the process, openly *defy*, and not *defraud*.

Consequently, because Ms. Stewart disclosed any such violation of the terms of the attorney affirmation for the S.A.M.’s to the world, much less the government, no rational juror could have found that such conduct was part of a conspiracy to defraud. “Fraud” is defined as “[a] knowing misrepresentation of

⁷⁰ The District Court’s ruling that “[t]his was not a case of defiance of the SAMs as opposed to the dishonest effort to violate them[,]” *Sattar 29/33*, 395 F. Supp.2d at 372, fails entirely to address this contrary evidence.

the truth or concealment of a material fact to induce another to act to his or her detriment.” *Black’s Law Dictionary* (8th ed. 2004). *See United States v. Pisani*, 590 F. Supp. 1326 (S.D.N.Y. 1984) (defining the elements of “fraud” within the context of the federal mail fraud statute); *see also United States v. Colton*, 231 F.3d 890, 894-904 (4th Cir. 2000) (discussing the elements that the government must prove to establish a conspiracy to commit bank fraud). *See also United States v. Rybicki*, 354 F.3d 124, 141-42 (2d Cir. 2003) (*en banc*) (in fraud prosecutions under 18 U.S.C. §1346, elements include demonstrating that defendant “secretly” acted in his own interests and also materially misrepresented or did not disclose this information to an entity or person entitled to such information).

Therefore, the government failed to prove a conspiracy to defraud the government and, at most, proved an intention by Ms. Stewart to defy the government by publicly disseminating Sheikh Rahman’s statements.

B. *The Government Failed to Prove Ms. Stewart Had Any Intention Beyond Pursuing a Legal Strategy to Obtain a Prisoner Transfer for Sheikh Rahman*

The government did not offer evidence sufficient to dispute Ms. Stewart’s testimony that any violations of the S.A.M.’s were not designed to defraud the government, but were committed to achieve the utterly transparent objective of

securing for Sheikh Rahman a transfer to Egyptian custody, and, in the course of advancing that legal strategy, to provide Sheikh Rahman the zealous representation to which he was entitled, and which she was obligated to provide, and *not* for the purpose of defrauding the government. T. 7804.

That motive was corroborated by Ramsey Clark, whose testimony on cross-examination by Ms. Stewart's counsel included the following exchange:

Q. Did you have an opinion why it was important for you and the other lawyers to speak to the media about the Sheikh?

A. Yes.

Q. What was that opinion?

A. Well, I – it's pretty much the reasons that I thought I'd mentioned; that it was important to keep the memory of the Sheikh alive. He was prohibited from communicating himself. We couldn't patch calls through from him. We couldn't put him on a speaker phone. We couldn't let anybody else listen to the phone calls. We couldn't tape-record them and put them out on a loud speaker from the top of a mosque. His lawyers had a duty in representing him and hoping to protect all of his rights to remind the world of his existence so he wouldn't be completely forgotten.

T. 8759.

As noted **ante**, “the government must do more than introduce evidence ‘at least as consistent with innocence as with guilt.’” *United States v. D’Amato*, 39 F.3d at 1256, *quoting United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991) (other citations omitted). Yet the government has not met that burden with respect

to Count One and proof of Ms. Stewart's specific intent to engage in a conspiracy to defraud the government.

C. *The Attorney General Lacked Authority to Punish Lawyers Criminally for Violations of the S.A.M.'s*

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. This case is predicated upon affirmations drafted by prosecutors who imposed the S.A.M.'s upon Sheikh Rahman, and prosecuted him.

The S.A.M.'s are authorized by 28 C.F.R. §501.3. S.A.M.'s are a form of administrative adjudication against inmates who are uniquely named as those entitled to seek administrative relief therefrom. 28 C.F.R. §501.3(e). That regulation is silent with respect to regulating the practices of attorneys, and there is no mention of subjecting attorneys to the S.A.M.'s.

The regulations do not contain any provision authorizing issuance of an attorney affirmation in connection with the S.A.M.'s; nor is there authority for criminal sanction for any violation of such an affirmation. Rather, S.A.M.'s are directed at inmates. 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 S.A.M.'s themselves rely on prosecutors and FBI agents as the principal sources of information and power. There is also no instance on record in which an inmate, represented or not, has succeeded via administrative channels within the Bureau of Prisons in reversing the imposition of S.A.M.'s once they have been implemented.

In addition, the Executive's attempt to impose upon an attorney an affirmation that limits the scope of professional representation violates the separation of powers doctrine. That is particularly so when the purported authority to proscribe attorney conduct is nothing more than the general regulatory authority of the Attorney General to issue S.A.M.'s.

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. *See United States v. Seeger*, 303 F.2d 478, 484 (2d Cir. 1962) (discussing insufficient pleading of the authority of the subcommittee before which the crime was allegedly committed) (internal citations and quotations omitted). *See also United States v. Reid*, 214 F. Supp. 2d 84, 92-96 (D. Mass. 2002) (refusing to require defense counsel to sign an affirmation before communicating with a client also held in pretrial detention).

When, as here 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 v. United States*, 396 U.S. 295, 306 (1970) (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 involved administrative decisions to issue passports to U.S. citizens or withhold them), *overruled on other grounds as stated in Regan v. Wald*, 468 U.S. 222 (1984).

In denying Ms. Stewart’s motions on this issue, and holding that “[t]he Department of Justice had the colorable authority to implement the SAMs[,]” *Sattar I*, 272 F. Supp.2d at 371, the District court relied 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). *Id.* at 372.

Yet *Davis* involved an *inmate*, not a lawyer or other visitor. *Salman* involved a false statement a prison visitor made to a local prison official responsible for confinement of federal prisoners. 189 F. Supp.2d at 362. The

issue was whether that was within the U.S. Marshals' jurisdiction for purposes of a prosecution under 18 U.S.C. §1001. *Id.*, at 363. Thus, neither *Davis* nor *Salman* is apposite. Consequently, the Attorney General was without authority to impose criminal penalties upon Ms. Stewart for any violation of the S.A.M.'s.

D. *The District Court Should Have Permitted Ms. Stewart to Challenge the Validity of the S.A.M.'s In the Context of Her Prosecution*

The District Court held below that Ms. Stewart “cannot defeat the charges against her by attacking the legality or constitutionality of the statute or requirement that prompted her alleged deceit.” *Sattar I*, 272 F. Supp.2d at 370. The District Court cited *Dennis v. United States*, 384 U.S. 855, 857-58 (1966), for the proposition that such a claim “will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional.” *Id.* at 371, quoting *Dennis*, 384 U.S. at 867.

The District Court did acknowledge, however, that prior to *Dennis*, this Court, in *United States v. Barra*, 149 F.2d 489, 490 (2d Cir.1945), “recognized a narrow exception to these fundamental principles where there is no colorable authority for the Government’s action.” *Sattar I*, 272 F. Supp.2d at 371. As noted **ante**, at 182, that is precisely the situation here, since the Attorney General lacked

authority to impose criminal sanctions upon Ms. Stewart for an alleged violation of the S.A.M.'s.

Indeed, in facts remarkably similar to the attorney affirmations at issue herein, 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 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.

Identifying the “the threshold issue [as] whether Oliver may challenge the validity of the rule he violated[,]” *id.*, the Seventh Circuit held that he could, explaining 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 & Talbort, Inc.*, 307 F.2d 729 (3d Cir. 1962) (*en banc*) (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) (“it is well settled that a lawyer may challenge the constitutionality of a rule in a proceeding to determine whether he has violated it”).

Here, Ms. Stewart’s conduct was 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 when 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).

Therefore, Ms. Stewart was entitled to test the validity of the S.A.M.’s affirmations. As exemplified by *United States v. Dickinson*, in which disobedience to a Congressional demand for information could not be punished as contempt of Congress if the demand was constitutionally infirm, one can violate an unconstitutional statute with impunity. 465 F.2d 496, 510 (5th Cir. 1972) (“[w]hen 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 disregarded with impunity”) (citations omitted). *See also United States v. Eichman*, 496 U.S. 310, 319 (1990).⁷¹

Here, even pursuant to the District Court’s analysis, Ms. Stewart’s challenge to the validity of the S.A.M.’s falls comfortably within the exception applicable when there is no colorable authority for the government’s action. As in *Barra*, *Oliver*, and the other cases cited above, Ms. Stewart should have been afforded the right to challenge the S.A.M.’s in the context of her criminal prosecution.

E. *The S.A.M.’s Are Unconstitutionally Vague As Applied In This Case*

The District Court repeatedly denied Ms. Stewart’s claim that the S.A.M.’s were unconstitutionally vague as applied to her in this case *See Sattar I*, 272 F. Supp.2d at 363; *Sattar II*, 314 F. Supp.2d at 308-10; *Sattar 29/33*, 395 F.

⁷¹ Recently, it was revealed that Martin Luther King, Jr.’s *Letter from a Birmingham Jail* (April 16, 1963) was smuggled out of prison by his lawyer, Clarence Jones:

“I would take sheets from a yellow legal pad and stuff them into my shirt,” Jones remembers, using papers from his desk to re-enact the scene. “Martin would then write like mad. Very hard to decipher. I’d sneak the pages out.”

Douglas Brinkley, “The Man Who Kept King’s Secrets,” *Vanity Fair* (April 2006).

The *Vanity Fair* articles also recounts how Jones, “with a proud grin, [] hunts around his office and finds a letter from then-president Bill Clinton praising Jones for his part in ‘giving us Dr. King’s wonderful letter from Birmingham jail.’”

Supp.2d at 103. Those decisions, however, were erroneous. The principles of vagueness analysis set forth *ante*, at POINT IV, apply here as well.

U.S. Attorney Fitzgerald’s testimony persuasively established both prongs of traditional vagueness analysis. Indeed, the affirmations’ vagueness is further demonstrated by the government’s revisions made to them between May 2000 and May 2001. As Mr. Fitzgerald explained during the September 29, 2003 hearing, “I thought, you know, if she doesn’t get it she ought to understand....” Transcript, September 29, 2003, at 91.

While he stated he thought “the special administrative measures were clear beforehand,” *id.*, his testimony and the altered language demonstrate an acknowledgment that they may not in fact have been “clear” to Ms. Stewart. 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.⁷²

The flip side, of course, is that decision-making according to the criteria used to prosecute Ms. Stewart, and forego prosecution of Messrs. Clark and Jabara, represents the epitome of arbitrary and discriminatory enforcement. The

⁷² Ms. Stewart does not acknowledge that the May 2001 affirmation was sufficiently clear.

picking and choosing of targets based not on their (identical) conduct, but on other extraneous personal factors and behavior – particularly those protected by the First Amendment – is the ultimate in arbitrariness and discrimination.

Again, the standards employed to determine who was prosecuted, and who was not, are not found anywhere in the S.A.M.'s themselves, or in any other protocols or guidelines. The result is that the decision whether or not to prosecute is left to the whim of the prosecuting authorities. Nor is it some fanciful parade of horrors to envision that such decisions would be made on the basis of a particular person's political beliefs or history of opposition to the government – because that is precisely what happened to Ms. Stewart in this very case. *See post*, at POINT IX.

Moreover, it is particularly difficult for lawyers to evaluate just what conduct of theirs will cross the line (and violate the S.A.M.'s) when the line shifts depending on the prosecutors' assessment of the potential violator, as opposed to the conduct itself. Implicit in the Supreme Court's decision in *Arthur Andersen*, 544 U.S. 696 (2005), is the proposition that lawyers perform certain legitimate and legally permissible functions that at the same time could conceivably fall within the scope of criminal statutes if they are read too broadly, or are applied in a

manner that does not require “the requisite consciousness of wrongdoing.” 544 U.S. at 704, 706.

In addition, a public relations campaign designed to counteract a negative public image or adverse publicity, or to influence the ultimate decision-makers with respect to a client’s future, is well within the confines of appropriate legal services. Indeed, Judge Kaplan, in *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp.2d at 330, characterized as “some of [a lawyer’s] most fundamental client functions” the use of the public forum to gain advantages for the client. Judge Kaplan also recognized that strategies pursued *out of court*, and not directly in the context of litigation, are among not only a lawyer’s legitimate functions, but also those “most fundamental client functions.”

Here, Ms. Stewart’s strategic objective – returning Sheikh Abdel Rahman to Egypt – was well within that framework. However, she could not at the same time predict with any accuracy or certainty that her conduct, as opposed to that of others, would be deemed criminal while the others’ was not.⁷³

⁷³ New York lawyers also operate under the “right to defend the client” provisions of §7-107 of the New York Lawyer’s Code of Professional Responsibility (2002), modeled after the American Bar Association Model Rules of Professional Conduct, and which afford attorneys increased leeway in making strategic choices.

In *United States v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993), this Court determined that an order barring defense counsel from making public statements regarding a pending case constituted a prior restraint, and carried “a heavy presumption against its constitutional validity.” In addition, the Court noted that any “limitations on attorney speech should be no broader than necessary to *protect the integrity of the judicial system and the defendant’s right to a fair trial.*” *Id.* at 447 (emphasis added). Here, the S.A.M.’s were not devised, and did not operate, pursuant to such constitutional limitations.

As a result, as applied to Ms. Stewart in this case, the S.A.M.’s, and the charges based on the alleged violation thereof, are unconstitutional as applied to Ms. Stewart. Accordingly, her convictions should be vacated, and the charges against her dismissed.

POINT VI

MS. STEWART’S CONVICTIONS ON COUNTS SIX AND SEVEN SHOULD BE VACATED AND THE CHARGES DISMISSED BECAUSE 18 U.S.C. §1001 PROSCRIBES FALSE STATEMENTS, NOT FALSE *PROMISES*, AND AT MOST ALL THE GOVERNMENT PROVED WERE FALSE PROMISES BY MS. STEWART, AND NOT FALSE STATEMENTS

Ms. Stewart’s conviction on Counts Six and Seven, which allege violations of 18 U.S.C. §1001, must be vacated, and a judgment of acquittal entered,

because, as a matter of law, a false promise of future conduct is not a false *statement* under 18 U.S.C. §1001, and therefore cannot serve as the basis for a violation of that statute. Consistent with that principle, review of the record compels the conclusion that the government failed to prove that Ms. Stewart knowingly and willfully made false statements.

In holding otherwise, the District Court, mistakenly relied on the Fifth Circuit's decision in *United States v. Shah*, 44 F.3d 285 (5th Cir. 1995). *See, e.g., Sattar I*, 272 F. Supp.2d at 377; *Sattar 29/33*, 395 F. Supp.2d at 92-93. However, *Shah's* holding that a promise could be considered a statement of present intent – a factual assertion that is capable of being false – is contrary to the plain meaning of the statute and existing case law, including this Court's and Supreme Court precedent. Indeed, the latter established that including false *promises* within the ambit of a false *statement* statute “would make a surprisingly broad range of unremarkable conduct a violation of federal law[.]” *Williams v. United States*, 458 U.S. 279, 286 (1982).

A. *A False Promise Does Not Violate 18 U.S.C. §1001*

The government's reliance on broken promises of future conduct to prove violations of 18 U.S.C. §1001 is ultimately fatal to the convictions obtained on

Counts Six and Seven, because, as a matter of law, a false promise does not violate 18 U.S.C. §1001.

1. *The Plain Language of §1001 Does Not Include False Promises*

Section 1001 prohibits “false, fictitious or fraudulent statement[s] or representation[s][,]” but does not mention “promises,” unlike at least eight other federal criminal statutes in Title 18.⁷⁴ A bedrock principle of statutory construction is that “[a] court should presume that [a] statute says what it means,” *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993), and should not add to the words used by Congress, thereby distorting the statute’s plain language. *See Wetzler v. Federal Deposit Insurance Corp.*, 38 F.3d 69, 74 (2d Cir. 1994). Applying that canon, the only appropriate conclusion is that the plain language of the statute excludes false promises from its reach.

False statement statutes proscribe the making of false factual representations, which are distinct from false promises. A promise is not a factual assertion at all; it cannot be characterized as “true” or “false;” and it therefore does “not involve the making of a ‘false statement.’” *Williams v. United States*, 458 U.S. at 284. “[P]romises or opinions are too general and difficult to

⁷⁴ Those eight statutes are: 18 U.S.C. §§157, 1031, 1341, 1343, 1344, 1347, 1348, 2314.

substantiate to be considered statements of fact.” *Indemnified Capital Investments, SA v. R.J. O’Brien & Associates, Inc.*, 12 F.3d 1406, 1413 (7th Cir. 1993).

Williams is particularly instructive as to the difference between a false statement and a false promise. In *Williams*, the defendant deposited several checks that were not supported by sufficient funds. He was indicted and convicted of violating 18 U.S.C. §1014, which prohibits the making of a false statement for the purpose of influencing the actions of a federally insured institution. Noting that a check “contains an unconditional promise or order to pay a sum certain in money,” the Court held that a check “is not a factual assertion at all,” but instead is a promise that “cannot be characterized as ‘true’ or ‘false,’” and reversed the conviction.⁷⁵

A court must infer, unless the statute otherwise dictates, that Congress intends to incorporate the established meaning of terms used in statutes. *See Neder v. United States*, 527 U.S. 1, 21 (1999). Specifically, a false representation is a common-law term that carries the elements that the common law has defined it to include. *See Field v. Mans*, 516 U.S. 59, 69 (1995). While common law fraud

⁷⁵ Congress then enacted 18 U.S.C. §1344 to explicitly proscribe false promises to financial institutions – and included an intent to defraud as an element.

required “a material false representation or omission of an existing fact,” *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001), common law distinguished actual fraud, which required an intent to defraud, from false pretenses or false representations that did not.

Intent to defraud is, in fact, the essence of the prohibition on false promises. *See Bixby’s Food Systems, Inc. v. McKay*, 193 F. Supp.2d 1053, 1065 (N.D. Ill. 2002). Thus, federal false promise statutes require a scheme or artifice or intent to defraud, *see* statutes cited **post**, at n. 74, while §1001 contains none of those elements.

Similarly, at common law, false pretenses fraud was limited to “a misrepresentation as to some existing fact, and not a mere promise as to the future.” *Neder*, 527 U.S. at 24, *quoting Durland v. United States*, 161 U.S. 306, 312 (1896) (emphasis added). Even larceny by false pretense did not include larceny by false promise. *See People v. Norman*, 85 N.Y.2d 609, 619 (1995).⁷⁶

⁷⁶ Most courts, including the New York Court of Appeals, held that a promise accompanied by an intention not to perform could not constitute the crime of larceny by false pretense. *See People v. Norman*, 85 N.Y.2d at 618, *Chaplin v. United States*, 157 F.2d 697, 698 (C.A.D.C. 1946) (gathering cases).

Thus, at common law absent an intent to defraud, proscriptions on false statements or representations did not include false promises.⁷⁷

This Court has recognized these principles in holding that a statement or representation that is literally true cannot be the basis for a criminal prosecution under §1001, even if the statement or representation is misleading. *See United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963).⁷⁸ A promise is literally true because the only statement or representation being made is, in effect, “I promise,” not a statement as to the speaker’s subjective intent.

Indeed, subjective intent is irrelevant to a false statement prosecution. *See United States v. Rothhammer*, 64 F.3d 554, 557-58 (10th Cir. 1995) (the subjective intent of the maker of a false promissory is not relevant or material to whether a false statement has been made under 18 U.S.C. §1014). A prosecution for false

⁷⁷ In stark contrast, when enacting the Major Fraud Act of 1988, 18 U.S.C. §1031, to combat government contract fraud, Congress explicitly contrasted that statute with common law misrepresentation as to some existing fact, and not a mere promise, stating its intent that §1031 include everything designed to defraud by representations as to the past or present, or suggestions *and promises as to the future*. S. Rep. No. 100-503, at 12 (1988). Also, as noted above, Congress explicitly required a scheme or artifice or intent to defraud in §1031.

⁷⁸ In *Diogo*, the defendants were charged with falsely representing, in violation of §1001, that they were married. The government proved that the marriages at issue were shams. This Court reversed the convictions, holding that a prosecution for false representations cannot be grounded upon the omission or concealment of facts other than those stated. 320 F.2d at 905.

representations cannot be grounded on the omission of an explanation of what was not true about the statement, *see Diogo*, 320 F.2d at 905, such as the speaker’s intent. Holding otherwise “would distort the language of the statute and assimilate the separate offense of concealment into the different one of false representations solely because of a similarity of prohibited objectives.” *Id.*

2. *The Rule of Lenity Requires a Narrow Reading of the Statute*

When interpreting a criminal statute that does not explicitly reach the conduct in question, courts should be reluctant to base an expansive reading of the statute on inferences. *See Williams* 458 U.S. at 286 (applying rule of lenity to a false statements statute). *See also United States v. Bass*, 404 U.S. 336, 347 (1941), discussed **ante**, at 116.

This canon of statutory construction is particularly appropriate when, as here, a broad reading of the statute would render a wide range of conduct violative of federal law, and the legislative history fails to evidence congressional awareness of the statute’s claimed scope. *See Williams*, 458 U.S. at 290. *See also United States v. Yermian*, 468 U.S. 63, 83 (1984) (Rehnquist, C.J., *dissenting*) (rule of lenity should require the government to prove that a defendant had actual knowledge that false statements under §1001 were made in a matter within federal agency jurisdiction).

A broad reading of the statute would also invite absurd results when an intent to break a promise changes, because a false statement statute carries with it no intent to defraud. *See Williams*, 458 U.S. at 287 n. 8.⁷⁹

3. United States v. Shah Was Wrongly Decided

The District Court's opinions in *Sattar I*, 272 F.Supp.2d at 376 (on the pre-trial motions) and *Sattar 29/33*, 395 F.Supp.2d at 90-93 (on the Rule 29 and 33 motion) found the decision in *United States v. Shah*, 44 F.3d 285 (5th Cir. 1995) dispositive on whether Ms. Stewart's promise could be considered a false statement under §1001. The District Court's adherence to *Shah*, a Fifth Circuit case at odds with established precedent of this and the Supreme Court, effectively precluded an accurate application of the statute and case law.

In *Sattar I*, the District Court simply restated the government's interpretation of *Shah* "that a promise that a promisor has no intention of keeping when made can form the basis of a §1001 violation." *Id.* at 376. The *Shah* Court – and the government – conceded that a broken promise cannot alone provide a

⁷⁹ The legislative history of §1001 fails to provide any support for a broad reading of the statute to include false promises. Absent support in the legislative history for a broad reading of a criminal statute, the Court should decline the invitation to do so. *Williams*, 458 U.S. at 287.

basis for criminal liability. The government argued, however, that intent may render a promise “true” or “false” when made. *Shah*, 44 F.3d at 290.

However, the government’s reading of *Shah*, and the District Court’s acceptance thereof, glossed over the most pertinent fact distinguishing the two cases: in *Shah*, there was clear evidence that the false promise was made *after* it had already been broken:

[t]he Government argued that the defendant had contacted another competitor after receiving the solicitation from the GSA but before submitting the form and suggested that they exchange bids. The *next day* the defendant allegedly signed and mailed the solicitation to the GSA in which he certified that the prices listed in the bid "have not been and will not be disclosed."

Id. (emphasis added).⁸⁰

Thus, in *Shah* the Fifth Circuit held that a violation of §1001 could be based solely on a false promise, reasoning that a false promise is a false statement of present intent, and that a statement of intent is a fact capable of being false. The decision in *Shah* stands alone, though, and in stark contrast to the decision of the Tenth Circuit in *Rothhammer*, in which the Tenth Circuit held that “a promise to pay in a promissory note is not a factual assertion.” 64 F.3d at 557.

⁸⁰ See *Shah*, 44 F.3d at 287-88, for the chronology of events.

Also, *Shah* failed to acknowledge dispositive language in the Supreme Court's decision in *Williams*. Moreover, the *Shah* opinion failed to examine the legislative history of §1001, did not consider the differences between false promise statutes and §1001, and simply ignored the rule of lenity applied to the federal false statement statute in *Williams*.

In fact, the Court in *Shah* focused on that part of the decision in *Williams* that held that a check was not a statement at all. The Court in *Shah* thereby ignored the *Williams*'s conclusion that a check was a promise to pay, erroneously stating that "the Supreme Court did not hold that a check was a promise and therefore not a statement." *Id.* at 291. Thus, the decision in *Shah* mistakenly concluded that *Williams* had not answered the question whether "a promise can be construed as 'a factual assertion.'" *Id.* The Court in *Shah* therefore affirmed the conviction on the ground that because the jury had evidence of Shah's intent before he made the promise as well as after he made the promise, it could infer that the promise was false when made.⁸¹

⁸¹ Had the Supreme Court engaged in such reasoning in *Williams*, it would have found a representation that sufficient funds were either in the account or would be placed in the account in time for the check to be honored, and the conviction would have been affirmed.

The underpinning of the decision in *Shah* is also directly contrary to this Court's decision in *Diogo*, a holding reaffirmed by this Court in *United States v. Mandanici*, 729 F.2d 914, 921 (2d Cir. 1984).⁸² In *Shah*, the Fifth Circuit held that it could not ignore the plain but implicit meaning of the promise, because a statement that is literally true may be the basis for a false statement prosecution in the Fifth Circuit:

[i]n *United States v. Clark*, 546 F.2d 1130, 1134 (5th Cir. 1977), the defendant submitted a form on which he had made a statement assigning payments "said to be due" to a third party even though that third party was due nothing. *Though the statement on the form was thus literally true, we went beyond these words to consider what the defendant in effect represented, namely that he had something to assign. Id. See United States v. Thomas*, 593 F.2d 615, 620 n. 17 (5th Cir. 1979) (ruling that the statement was in effect false even if literally true), *cert. denied*, 449 U.S. 841 (1980).

44 F.3d at 292 n. 11 (emphasis supplied).

⁸² In *Mandanici*, the defendant submitted a proposal for construction work estimated to cost \$88,000. His application was approved, reaffirming that a minimum investment of \$88,000 was required. Mandanici was required to complete the work by January 30, 1981. On July 1, 1981, Mandanici completed and filed a document representing that he had complied with the contract, including its January 1981 deadline. However, Mandanici admitted in his trial testimony that as of July 1, 1981, he had not spent \$88,000 on the required rehabilitation. Thus, *Mandanici* was a false statement case, not a false *promise* case.

Yet the holding in *Clark*, relied upon by the court in *Shah*, is also directly contrary to the holding of this Court in *Diogo*. Consequently, the government's interpretation of §1001 "would make a surprisingly broad range of unremarkable conduct a violation of federal law," and should be rejected. *See Williams*, 458 U.S. at 286.

Here, in support of its reliance on *Shah*, the District Court also cited *United States v. Uram*, 148 F.2d 187 (2d Cir. 1945), as Second Circuit precedent. However, *Uram*, too, is unavailing, as that decision did not even address this issue or §1001 in its current form. *Uram* involved an earlier and rather different version of the statute, 18 USC §80, 148 F.2d at 190, decades before the Supreme Court's opinion in *Williams* and this Court's opinion in *Diogo*. *See also* Act of June 18, 1934, ch. 587, 48 Stat. 996, 18 U.S.C. §80.

As a result, *Shah* stands alone, and in irreconcilable conflict with this Court's and the Supreme Court's doctrine on the scope of false statement statutes. Consequently, it cannot serve as a valid precedent or basis for sustaining Ms. Stewart's convictions on Counts Six and Seven, which therefore must be reversed.

B. *The Government Failed to Prove That Ms. Stewart Knowingly and Willfully Made False Statements*

Examined in light of the legal principles set forth above, it is clear that the evidence the government introduced with respect to Counts Six and Seven failed

to state a violation of §1001. Count Six charged Ms. Stewart with violating 18 U.S.C. §1001 by submitting a false statement to the United States Attorney's Office for the Southern District of New York in May 2000, in which she agreed to abide by the S.A.M.'s applicable to Sheikh Abdel Rahman. She signed the attorney affirmation accompanying the S.A.M.'s days before a prison visit to Sheikh Abdel Rahman, during which she allegedly violated provisions of those S.A.M.'s, but did not submit the executed affirmation until days after the visit. J.A. 146 ¶¶30(i); 150 ¶¶30(q)

Count Seven of the Indictment charged Ms. Stewart with violating 18 U.S.C. §1001 by submitting to the United States Attorney's Office in May 2001 an allegedly false statement in which she agreed to abide by a latter version of the S.A.M.'s (which she subsequently allegedly violated during a prison visit to Sheikh Abdel Rahman in July 2001). J.A. 154 ¶¶30(dd).

Relative to those allegations, at trial the District Court instructed the jury that, "[t]he alleged false statements were statements, as specified in Counts Six and Seven of the indictment, that she agreed to abide by certain conditions with respect to her contacts with Sheikh Omar Abdel Rahman." T. at 12363.

The District Court added that

[e]ven if you should find that the government proved that defendant Lynne Stewart intentionally violated the

conditions in the affirmation she signed and intentionally broke her promise recited in these affirmations, this does not prove that she is guilty of the crimes charged in Counts 6 and 7 of the indictment. The crimes charged in Counts 6 and 7 of the indictment are not that she broke her word, but that she knowingly and willfully falsely stated that she intended to abide by the conditions at the time she made those statements or used those documents. It is for this reason that the government must prove beyond a reasonable doubt that the defendant Lynne Stewart acted knowingly and willfully at the time she made the statements or used the documents and not at some later time.

T. 12, 364.

Yet the government was unequivocal in summarizing its theory of prosecution – that Ms. Stewart violated § 1001 by falsely *promising* to abide by the S.A.M.'s – arguing that

[a]nd finally, we've proven that Stewart is guilty of deliberately lying to the United States government on two separate occasions when she twice in May of 2000 and May of 2001 submitted false statements to the United States government, *when* she signed attorney affirmations *promising to abide* by the SAMs knowing full well, she had no intention of abiding by those *promises* and of course violating the SAMs, violating those *promises*.

T. 11, 112-13 (emphasis added).

That was by no means the government's sole reference to the § 1001 violations as "promises." Indeed, the government's summation is replete with

references to the “promises” made by Ms. Stewart. With respect to Count Seven, the government argued to the jury that, “despite the fact that she *promised* to abide by the SAMs . . . once again [she] went to a prison . . . and continued to violate the SAMs.” T. 11,450 (emphasis added). According to the government, Ms. Stewart, “clearly understood and knew what the SAMs were about. She read them. She signed affirmations saying that she would *promise* to abide by them.” T. 11,474 (emphasis added). Later, the government claimed that Ms. Stewart, “violated her commitment, violated her *promise*, violated what she called her oath.” T. 11,475 (emphasis added).

As a result, Ms. Stewart’s conviction on Court Six must be vacated and a judgment of acquittal entered because the government failed to present any evidence supporting a finding that she willfully and knowingly made false promises to abide by the S.A.M.’s in May 2000. The government conceded in its closing argument that Ms. Stewart signed the affirmation prior to her May 2000 visit with Sheikh Rahman. In the government’s own words, with respect to that affirmation, “[t]he [one] in May 2000, she signed on May 16 *before the May 2000 visit.*” T. 11474 (emphasis added).

The government, however, presented no evidence that Ms. Stewart intended to make a false statement when she signed the affirmation on May 16, 2000.

Instead, the government bootstrapped by suggesting that Ms. Stewart made the false statement on May 16th, when she signed the affirmation, and on May 26, 2000, when she submitted the affirmation to the United States Attorney's Office. In doing so, the government did exactly what the Supreme Court proscribed in *Williams* – it criminalized a mere broken promise.

In its decision denying Ms. Stewart's post-trial motions, the District Court attempted to sustain the convictions on Counts Six and Seven on the ground that because Ms. Stewart's visit occurred three days after she signed her affirmation, her intent could be inferred by the proximity of the two events:

[t]here is no evidence to support an inference that Stewart's intent to comply with the SAMs changed between her execution of the affirmation and the visit. Instead, the reasonable inference is that Stewart's conduct during the May 2000 prison visit is an accurate reflection of her state of mind at the time she signed the affirmation on May 16, 2000.

Sattar 29/33, 395 F. Supp.2d at 91.

Yet the District Court gave no basis for the "reasonable inference" that her actions during the visit in any way evidenced her earlier intentions. The absence of any such basis merely reinforces the conclusion that promises are not factual representations and, in turn, that the evidence of a false statement was insufficient with respect to Count Six.

Similarly, Ms. Stewart's conviction on Court Seven must be vacated and a judgment of acquittal entered because the government failed to present any evidence supporting a finding that she willfully and knowingly made a false statement to abide by the S.A.M.'s in May 2001. The government offered no evidence, circumstantial or otherwise, from which the jury could conclude that she intended to violate the S.A.M.'s when she signed the attorney affirmation in May 2001, two months prior to the July 2001 visit during which she allegedly violated the S.A.M.'s.

Accordingly, for the foregoing reasons, it is respectfully submitted that Count Six and Seven must be reversed, and Counts Six and Seven dismissed.

POINT VII

**THE DISTRICT COURT ERRED IN DENYING
MS. STEWART'S MOTION TO COMPEL
DISCLOSURE OF ANY WARRANTLESS
ELECTRONIC SURVEILLANCE, AND IN
DENYING HER CIPA-CLEARED COUNSEL
ACCESS TO THE GOVERNMENT'S *EX PARTE*
OPPOSITION TO HER MOTION TO COMPEL**

In December 2005, *The New York Times* reported that sometime after September 11, 2001 (reportedly during the Spring of 2002), President Bush "secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without

the court-approved warrants ordinarily required for domestic spying.” See “Bush Lets U.S. Spy on Callers Without Courts,” *The New York Times*, December 16, 2005. See also *Hepting v. AT & T Corporation*, 439 F. Supp. 2d 974, 986 (N.D. Cal. 2006).

In *Hepting*, the District Court noted that “[t]he following day, President George W. Bush confirmed the existence of a ‘terrorist surveillance program’ in his weekly radio address[.]” *Hepting*, 439 F. Supp. at 986; *ACLU v. National Security Agency*, 438 F. Supp. 2d 754, 764-65 (E.D. Mich. 2006).

Following the initial disclosure of the NSA warrantless electronic surveillance program, Ms. Stewart’s counsel, on her behalf and on behalf of her two co-defendants, wrote the government December 21, 2005,

demand[ing] that the United States Attorney for the Southern District of New York inquire formally of the Director of the National Security Agency (“NSA”) whether defendants, their present or former lawyers, witnesses, or any others involved in the case (for example including, but not limited to, lawyers for Sheikh Omar Abdel Rahman, such as Ramsey Clark, Abdeen Jabara and Lawrence Shilling) were subject to electronic surveillance of their telephonic, facsimile, e-mail, or other electronic or other communications, or surveillance or interception of any kind, pursuant to NSA’s “special collection program,” or any other program or operation.

J.A. 2197-2198.

Two subsequent public disclosures about the NSA Program in particular – in addition to the existence of the NSA surveillance program itself – were pertinent: (1) that the fruits of the NSA surveillance program may have tainted an unquantifiable number of FISA applications made during the period in question; and (2) that the NSA Program apparently did not distinguish between ordinary communications and those between an attorney and client, and therefore intercepted without hesitation or minimization privileged conversations.

After an exchange of correspondence in which the government did not answer the question posed by Ms. Stewart, she filed a motion seeking such disclosure to determine whether communications of the defendants or anyone else had played any role in the investigation and/or prosecution of this case. J.A. 2202, at ¶ 2.

In response to Ms. Stewart's motion to compel disclosure, the government, as part of its orchestrated national strategy in response to all similar inquiries and lawsuits related to and challenging the NSA Program, chose instead to file an *ex parte* classified response. Government's August 18, 2006 Notice of Its *Ex Parte*, *In Camera* Classified Filing.

The District Court then issued an *ex parte*, sealed order, dated October 6, 2006. In response to that order, the government thereafter filed supplemental *ex*

parte, in camera classified submissions on October 6, 2006, October 12, 2006 and October 13, 2006.

The District Court directed the government to disclose immediately the information listed on page 3 of the government's October 12, 2006 letter. October 13, 2006 Order. In a letter dated the same day, the government revealed that telephone conversations between a third party and Ahmed Abdel Sattar were intercepted pursuant to a court-authorized Title III warrant in 1994. The government also claimed that those conversations, or the "fruits" of those conversations, were not used as evidence in the present case, and that there was no *Brady* material. The defense motion was otherwise denied. J.A. 2371.

After Ms. Stewart's counsel restated their objection to the *ex parte* submissions, the District Court subsequently restated its denial of the defense's motion and its request for adversary proceedings. October 26, 2006 Order.

Thus, without any meaningful adversary proceedings on the issue, and despite the fact that at that stage there were two CIPA-cleared lawyers on Ms. Stewart's defense team, the District Court erroneously refused to allow them to see the government's response.

B. *The District Court's Refusal to Grant CIPA-Cleared Defense Counsel Access to the Government's Response Violates the Principles Underlying the Adversary Process*

As the Sixth Circuit has cautioned, “[d]emocracies die behind closed doors.” *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). A multitude of courts – including this Court in more than one opinion within the last few years – have expressed the same sentiment: that *ex parte* proceedings, by their very nature, impair the integrity of the adversary process and the criminal justice system.

As the Ninth Circuit has observed, “ex parte proceedings are anathema in our system of justice.” *Guenther v. Commissioner of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989), *appeal after remand*, 939 F.2d 758 (9th Cir. 1991). *See also United States v. Alisal Water Corp.*, 431 F.3d 643, 657 (9th Cir. 2005), *citing Dusenberry v. United States*, 534 U.S. 161, 167 (2002).

Also, the Supreme Court has recognized that “[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993), *quoting Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., *concurring*). *See also United States v. Madori*, 419 F.3d 159, 171 (2d Cir. 2005), *citing United States v. Arroyo-Angulo*, 580 F.2d 1137,

1145 (2d Cir. 1978) (closed proceedings “are fraught with the potential of abuse and, absent compelling necessity, must be avoided”) (other citations omitted).⁸³

In *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004), this Court reemphasized the importance of open, adversary proceedings, declaring that “[p]articularly where liberty is at stake, due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other.” 389 F.3d at 322-23, *citing McGrath*, 341 U.S. at 171 n. 17 (Frankfurter, J., *concurring*) (noting that “the duty lying upon every one who decides anything to act in good faith and fairly listen to both sides . . . always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view”) (citation and internal quotation marks omitted).

Similarly, in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), which involved national security issues of substantial importance, and for which

⁸³ Conversely, as Judge Learned Hand stated in *United States v. Coplon*, 185 F.2d 629, 638, “[f]ew weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens.”

the need for secrecy was certainly no less compelling than might exist here, the Fourth Circuit reaffirmed the importance of open, adversary proceedings:

[t]he importance of the Sixth Amendment right to compulsory process is not subject to question – it is integral to our adversarial criminal justice system: The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

Id. at 471.

Here, the government’s *ex parte* submission denied Ms. Stewart that opportunity even though her defense team included two CIPA-cleared lawyers. As the Ninth Circuit observed in the closely analogous context of a secret evidence case, “[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations.’ . . . [T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.” *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, at 1069 (9th Cir. 1995) (*quoting* District Court); *see, e.g., id.* at 1070 (noting “enormous risk of error” in use of secret evidence); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 412-14 (D.N.J. 1999) (same).

Similarly, in the Fourth Amendment context, including in relationship to electronic surveillance, the Supreme Court has twice rejected the use of *ex parte* proceedings on grounds that apply equally here. In *Alderman v. United States*, 394 U.S. 165 (1969), the Court addressed the procedures to be followed in determining whether government eavesdropping in violation of the Fourth Amendment contributed to the prosecution case against the defendants. The Court rejected the government's suggestion that the district court make that determination *in camera* and/or *ex parte*.

The Court observed that

[a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.

Id. at 182.

In ordering disclosure of improperly recorded conversations, the Court declared:

[a]dversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the

information contained in and suggested by the materials, will be unable to provide the scrutiny that the Fourth Amendment exclusionary rule demands.

Id. at 184.

Likewise, in *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held that a defendant, upon a preliminary showing of an intentional or reckless material falsehood in an affidavit underlying a search warrant, must be permitted to attack the veracity of that affidavit. The Court rested its decision in significant part on the inherent inadequacies of the *ex parte* nature of the procedure for issuing a search warrant, and the contrasting enhanced value of adversarial proceedings:

the hearing before the magistrate [when the warrant is issued] not always will suffice to discourage lawless or reckless misconduct. The pre-search proceeding is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations.

438 U.S. at 169.

Nor does the Classified Information Procedures Act, 18 U.S.C. App. III, enacted in 1984 to govern and regulate the use of classified information in

criminal proceedings, in any way undermine *Alderman*. In fact, CIPA provides statutory support for the constitutional rule in *Alderman*.

CIPA provides a procedural framework for regulating the use of classified information in criminal proceedings. CIPA was not enacted or designed to alter or supersede the rules of discovery, *United States v. Libby*, 429 F. Supp.2d 1, 7 (D.D.C. 2006), *citing United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989), or to override constitutional and other protections afforded a criminal defendant.

In fact, CIPA's stated purpose was to "protect[] and restrict[] the discovery of classified information in a way that does not impair the defendant's right to a fair trial." *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005), *quoting United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002). *See also United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004), *on rehearing*, 382 F.3d 453 (4th Cir. 2004); *United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir. 1989); *United States v. Marzook*, 412 F. Supp.2d 913, 918 (N.D. Ill. 2006); *United States v. Paracha*, 2006 WL 12768, at *10 (S.D.N.Y. January 3, 2006); *United States v. Cardoen*, 898 F. Supp. 1563, 1571 (S.D. Fla. 1995); *United States v. Poindexter*, 698 F. Supp. 316, 320 (D.D.C. 1988).

Indeed, explicit in CIPA's legislative history is the admonition that "the defendant should not stand in a worse position, because of the fact that classified

information is involved, than he would without this Act.” Senate Report No. 96-823, at 4302. *See also United States v. Lopez-Lima*, 738 F. Supp. 1404, 1407 (S.D. Fla. 1990); *United States v. Poindexter*, 698 F. Supp. at 320. Consistent with that mandate, CIPA also does not diminish the government’s obligation to provide exculpatory material to the defendant in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963). *See United States v. Moussaoui*, 2003 WL 21263699, at *4 (E.D.Va. 2003) (holding that *Brady* principles apply in the CIPA context, including information negating guilt as well as that affecting a potential sentence).

In that context, it is noteworthy that *Alderman* is grounded in Fourth Amendment *constitutional* imperatives that remain unimpeded by CIPA. Consequently, CIPA does not diminish Ms. Stewart’s right to the full adversary hearing provided by *Alderman*. All CIPA does is layer specific rules with respect to classified information, *e.g.*, that the information is released only to cleared counsel, while re-emphasizing the primacy of a defendant’s constitutional rights to information and a fair trial.

Precluding cleared counsel’s access to the government’s answer to the question whether the communications of Ms. Stewart (or anyone else involved in the investigation, prosecution, or defense in this case) were intercepted pursuant to

the NSA’s warrantless electronic surveillance program certainly placed the defendant in a “worse position” solely because the information is classified.⁸⁴

Of the other cases in which the same or similar motions have been made in other cases (*see* J.A. 2227) – in which the motions have been denied by district courts – in all but two the Orders provide no explanation for the Court’s decision. In *United States v. Salah*, 03 Cr. 978 (N.D. Ill. 2006), the District Court addresses only the question of *public* release of the information requested, as opposed to the limited disclosure sought here – to defense counsel with security clearances, and in compliance with the Classified Information Procedures Act (hereinafter “CIPA”).

Only in *United States v. Hassoun, et al.*, No. 04-60001-CR-COOKE/BROWN (S.D. Fla. 2006), did the Court address CIPA and the prospect of disclosure to cleared counsel. Nevertheless, in correctly noting that Section 4 of CIPA permits *ex parte* submissions by the government, the District Court’s conclusion that Section 4 “is clear evidence that Congress intended to protect

⁸⁴ If Ms. Stewart’s communications were intercepted pursuant to a Title III wiretap, or warrantless electronic surveillance that was not deemed classified, she would have an indisputable right to know that fact. *See* 18 U.S.C. §2518(8)(d). Even under the Foreign Intelligence Surveillance Act (hereinafter “FISA”), a person whose communications are intercepted is provided notice if the government offers in evidence “or otherwise use[s]” the fruits of FISA electronic surveillance in a criminal prosecution. *See* 50 U.S.C. §1806(c).

classified information from disclosure throughout criminal processes[.]”

Hassoun Order, at 2, the District Court fails entirely to appreciate or adhere to CIPA’s express purpose of not placing the defendant “in a worse position[] because of the fact that classified information is involved[.]”⁸⁵

In addition, *Alderman* represents only one expression of the principle that a criminal defendant is entitled to notice of illegal eavesdropping. Even prior to *Alderman*, Judge Learned Hand stated in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), an appeal in a national security-oriented prosecution – charging transmittal of “Top Secret” Department of Justice documents to a purported Russian agent – at the height of the Cold War, that the government could not deny a defendant access to materials that could establish that her arrest and conviction were the product of illegal government conduct. (In *Coplon*, as here, the issue unlawful government wiretapping.) 185 F.2d at 631-32.

While conscious of the need to preserve national security, and the existence of a “state secrets” doctrine, 185 F.2d at 638, Judge Hand nevertheless determined

⁸⁵ In *Aref*, this Court, without reaching the merits, denied a petition for a writ of mandamus with respect to the District Court’s refusal to permit defense counsel access to the government’s response. *United States v. Aref*, 452 F.3d 202 (2d Cir. June 23, 2006). The Court held that the petitioner had “wholly failed to establish that other remedies are inadequate[.]” because relief would be available on direct appeal. *Id.* at 206.

that, as this Court had previously held in *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944), “the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such ‘state secrets’ as might be relevant to the defence. To that we adhere.” *Id.*, at 638.

In *Coplon*, this Court also held that the District Court had improperly curtailed defense counsel’s cross-examination designed to ascertain whether the government “informant” whom the government claimed was responsible for commencement of the investigation into Ms. Coplon’s activities, was, in fact, the “wiretapper,” pointing out that “obviously it is as much a use of suppressed evidence to base upon it a finding that further examination will be idle, as it is to base upon it a finding that intercepted talks have not ‘led’ to evidence introduced at the trial.” *Id.* at 640.

As this Court stated,

[w]e need not hold and we do not now decide whether in trying to prove that his telephone talks have been unlawfully intercepted, an accused may never be blocked by the fact that his questions call for answers whose disclosure will be a danger to ‘national security’; and, as we have just said, it may appear from what has already been the testimony that the examination ought not to be prolonged. *But there was as yet nothing to indicate that it would disclose any ‘state secrets’ to learn whether the*

'informant' was a 'wiretapper,' and whether Judith Coplon had been a party to any of the intercepted talks

...

Id. (emphasis added).

Ultimately, Judge Hand framed the issue, and this Court's conclusion, as follows:

[t]he only relevant inquiry comes down to this: was it an error for the judge not to let the defence see those records which he read in camera and on which he in part based his finding that the 'taps' had not 'led' to any evidence introduced at the trial? We cannot see how this action can be sustained[.]

Id., at 637.

It is respectfully submitted that the Court herein is faced with precisely the same question, and that the same answer obtains. In language as profound, eloquent, and enduring today as it was more than a half-century ago, when the United States considered itself in the throes of a new and different type of international conflict with a ruthless, unprincipled, invidious adversary dedicated to the destruction of the U.S. and all of its ideals and institutions, Judge Hand declared:

[i]n the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead,' or might have 'led,' to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's

refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

Id., at 638.⁸⁶

In this instance, insistence on the adversary process would have had considerable salutary effects on the accuracy of decision-making. The disclosures the District Court wrested below from the government (*see ante*, at 25) – only after repeated directives – prove convincingly why the District Court’s refusal to

⁸⁶ Later, in *Dennis v. United States*, 384 U.S. 855 (1966), the Supreme Court cited *Coplon* with approval in determining that *ex parte in camera* proceedings were inappropriate. 384 U.S. at 873 n. 20.

permit Ms. Stewart's CIPA-cleared counsel access to the government's *ex parte* response was erroneous.

They also reaffirm that *ex parte* proceedings are inevitably subject to abuse by the government. Here, even *unclassified* matters were presented under the veil of secrecy. The result, as this process has demonstrated, is inexorable: *ex parte* proceedings will swallow up the adversary system, and due process and adequate notice will be the exception rather than the rule.

Also, as demonstrated here, *ex parte* proceedings veritably guarantee inaccurate determinations based on incomplete information. For example, if the District Court had not ordered the government to disclose the interception of Mr. Sattar during the Title III electronic surveillance, the Court would not have known that the government had failed to provide him the statutorily required notice of such interception(s). J.A.2257.

The District Court's repeated inquiries of the government with respect to Ms. Stewart's NSA Program motion produced additional disclosures, but nevertheless failed to serve as a substitute for attorney access to the information, and the informed advocacy that accompanies such access. J.A. 2227-2259.

In addition, here the government's *ex parte* submissions were used, as they often are, to shield from view government misconduct (such as the violation of

Title III's notice requirements, and any Rule 16, Fed.R.Crim.P., violations that may attend the failure to disclose the interceptions during discovery).

This episode establishes that the price paid for *ex parte* proceedings is unacceptably high. As the government's proclivity for secrecy grows, these incursions upon the adversary system will multiply until there is precious little left of it, or of the due process and accurate decision-making it serves.

Indeed, these facts underscore the fundamental tenet that it is not the Court's function, but *defense counsel's*, to be the vigorous advocate on the defendant's behalf, and point out any deficiencies in the government's response. As the Supreme Court recognized in *Dennis v. United States*, 384 U.S. 855, 875 (1966), "[i]n our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

Similarly, the District Court in *United States v. Marzook*, explained earlier this year in the context of deciding whether to close a suppression hearing to the public because of the potential revelation of classified information thereat, quoting the Seventh Circuit in *Stein v. Department of Justice & Federal Bureau of Investigation*, 662 F.2d 1245, 1259 (7th Cir. 1981),

[i]t is a matter of conjecture whether the court performs any real judicial function when it reviews classified

documents *in camera*. Without the illumination provided by adversarial challenge and with no expertness in the field of national security, the court has no basis on which to test the accuracy of the government's claims.

412 F. Supp.2d at 921.⁸⁷

Likewise, the Seventh Circuit has acknowledged that *ex parte* proceedings inexorably impair a court's ability to render a fully informed and accurate decision, regardless of the government's motivation and intent:

[e]ven where the government acts in good faith and diligently attempts to present information fairly during an *ex parte* proceeding, the government's information is likely to be less reliable and the court's ultimate finding less accurate than if the defendant had been permitted to participate.

United States v. Napue, 834 F.2d 1311, 1319 (7th Cir. 1988).

Moreover, District Courts presiding over civil cases have fashioned solutions that have been designed to resolve the problem of *ex parte* submissions with respect to the NSA Program. Again, in a *criminal* case, at least that much is required. For example, in *Doe v. Gonzales*, 386 F. Supp.2d 66 (D. Conn. 2005) the District Court "direct[ed] the government to attempt, to the extent permitted by

⁸⁷ In *Marzook*, the government agreed that the defendant at issue, and his counsel (as well as counsel for the co-defendant) could be present at the hearing, and cross-examine the witnesses. See 412 F. Supp.2d at 917, 923.

law, to provide plaintiffs' attorney the opportunity to obtain the security clearance required to review and respond to the classified materials." 386 F. Supp.2d at 71.

Here, two of Ms. Stewart's lawyers already possess such clearance. Consequently, the notion that granting such counsel access to the government's response would imperil national security, or cannot be shared with counsel, is specious. *See United States v. Libby*, 2006 WL 862345, at *4 (D.D.C. April 5, 2006) (recognizing that "there are fewer threats to national security in disclosing classified documents to a defendant and his attorney who have obtained security clearances, than when disclosure is made to someone who has not received security clearances").

Thus, this is not a case in which "an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules." *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) [*quoting* H. Rep. No. 831, 96th Cong., 2d Sess. 27 n.22 (1980)]. *See also United States v. George*, 786 F. Supp. 11, 14 n.1 (D.D.C. 1991) (noting that "[t]he concerns of the court and the government in [*United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989)] are not fully applicable here because there has been no allegation that the defendant might use the [classified] information to bring harm to anyone"); *United States v. Poindexter*, 727 F. Supp. 1470, 1473 & n.4 (D.D.C. 1989) (court erred on side of

granting classified discovery of matters encompassed in the indictment, in part “since this defendant, unlike the defendant in such cases as [*Yunis*], had high security clearances, and production of sensitive information would be less likely to harm national security interests”).

1. *The NSA Program’s Potential Taint of the FISA Process Requires Further Review and Participation By Cleared Defense Counsel In This Case*

Another reason for granting cleared defense counsel access to the government’s *ex parte* submission is the NSA Program’s potential taint of FISA electronic surveillance. As reported by *New York Times* journalist James Risen in his book, *State of War* (Free Press: 2006), “[i]n some instances, the government seeks FISA court approval for wiretaps on individuals who have already been secretly subject to warrantless eavesdropping by the NSA.” *State of War*, at 54.

Mr. Risen relates further that

[t]he existence of the Program has been kept so secret that senior Bush administration officials have gone to great lengths to hide the origins of the intelligence it gathers. When the NSA finds potentially useful intelligence in the U.S.-based telecommunications switches, it is “laundered” before it is widely distributed to case officers at the CIA or special agents of the FBI, officials said. Reports are said not to identify that the intelligence came from intercepts of U.S.-based telecommunications.

Id., at 53.

Nor is the prospect of the NSA Program tainting FISA surveillance merely isolated. In fact, according to Mr. Risen, the proportion of FISA applications affected is significant:

[t]he government is apparently following that practice with increased frequency; by the estimate of two lawyers, some 10 percent to 20 percent of the search warrants issued by the secret FISA court now grow out of information generated by the NSA's domestic surveillance program.

Id., at 54.

The problems of FISA abuse and taint are not new. Indeed, the NSA Program's potential impact is just another in a series of revelations that has demonstrated the inevitable abuses that attend a system that is presumptively *ex parte* in theory, and has been entirely *ex parte* in practice. See **post**, at POINT VIII. The NSA Program, and its complete opacity, merely multiply the opportunities for abuse.

As this Court stated last year in the course of condemning a prosecutor's submission of exculpatory material to the trial court *in camera* (because of doubts about the accuracy of the information), instead of to defense counsel, "[t]o allow otherwise would be to appoint the fox as henhouse guard." *DiSimone v. Phillips*, 461 F. 3d 181, 195 (2d Cir. 2006).

Accordingly, it is respectfully submitted that the District Court erred in denying Ms. Stewart's motion for disclosure with respect to the NSA Program, and erred in denying Ms. Stewart's two CIPA-cleared counsel from reviewing the government's classified *ex-parte* opposition to the motion. Either or both of those errors require remand in this case.

POINT VIII

**ALL EVIDENCE OBTAINED DIRECTLY
AND INDIRECTLY VIA FISA-AUTHORIZED
ELECTRONIC SURVEILLANCE SHOULD
HAVE BEEN SUPPRESSED BECAUSE IT
WAS ACQUIRED IN VIOLATION OF
FISA AND THE FOURTH AMENDMENT**

Prior to trial, Ms. Stewart moved to suppress the fruits of electronic surveillance authorized under the Foreign Intelligence Surveillance Act (hereinafter "FISA"), pursuant to which Ms. Stewart's and her co-defendants' respective telephone conversations were overheard, and her prison visits to her client, Sheikh Abdel Rahman, were recorded.

The District Court denied Ms. Stewart's (and her co-defendants') motion, *see United States v. Sattar*, 2003 WL 22137012 (S.D.N.Y. September 15, 2003) (hereinafter "*Sattar FISA I*"), and denied a subsequent motion challenging the government's minimization procedures and spoliation of FISA-generated

evidence. *See United States v. Sattar*, 2003 WL 22510435 (S.D.N.Y. November 5, 2003) (hereinafter “*Sattar FISA IP*”).

The District Court erred in denying those motions. As detailed below, the District Court’s decisions suffered from three principal and fatal flaws:

- (1) the FISA electronic surveillance was instituted for the purpose of pursuing a criminal investigation rather than for intelligence-gathering purposes;
- (2) to the extent the purported basis for the FISA electronic surveillance meets the statutory standard, FISA is unconstitutional as applied in this case. The amendments to FISA contained in the USA PATRIOT Act (hereinafter “PATRIOT Act”),⁸⁸ which govern portions of the FISA surveillance in this case, do not pass Fourth Amendment muster, and the prior standard (which controls the initial FISA applications) also, in the context of this case, violates the Fourth Amendment as well; and
- (3) the District Court refused to order the FISA orders and applications to defense counsel, and the resulting *ex parte* nature of the FISA

⁸⁸ Pub. L. 107-56 (2001).

litigation irreparably impaired the District Court’s ability to render an accurate and fair decision.

As a result, the evidence obtained pursuant to and derived from the FISA electronic surveillance should have been suppressed, or, at the very least, the FISA orders and applications produced to the defense.

A. *FISA: The Statute and Applicable Standards*

1. *FISA’s Background and Purpose*

FISA was enacted in 1978 in the wake of domestic surveillance abuses by federal law enforcement agencies, as catalogued in Congressional Committee and Presidential Commission Reports.⁸⁹ The statute was designed to provide a codified framework for *foreign* intelligence gathering within the confines of the United States in response to civil liberties concerns and the gap in the law noted

⁸⁹ See, e.g., FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976); *Commission on CIA Activities Within the United States*, Report to the President (1975) (commonly referred to as the “Rockefeller Commission Report”). See also *United States v. Belfield*, 692 F.2d 141, 145 (D.C. Cir. 1982) (“[r]esponding to post-Watergate concerns about the Executive’s use of warrantless electronic surveillance, Congress, with the support of the Justice Department, acted in 1978 to establish a regularized procedure for use in the foreign intelligence and counterintelligence field”).

by the Supreme Court in *United States v. United States District Court (Keith, J.)*, 407 U.S. 297, 308-09 (1972).⁹⁰

FISA's provisions represented a compromise between civil libertarians seeking preservation of Fourth Amendment and privacy rights, and law enforcement agencies citing the need for monitoring agents of a foreign power operating in the United States. *See In re Kevork*, 788 F.2d 566, 569 (9th Cir. 1986) (FISA "was enacted in 1978 to establish procedures for the use of electronic surveillance in gathering foreign intelligence information. . . . The Act was intended to strike a sound balance between the need for such surveillance and the protection of civil liberties") (quotation omitted). *See also* Elizabeth B. Bazan & Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, Congressional Research Service, January 5, 2006, at 12-14 (available at http://www.epic.org/privacy/terrorism/fisa/crs_analysis.pdf).

2. *FISA's Structure and Operational Framework*

The District Court's decision denying Ms. Stewart's suppression motion with respect to FISA sets forth in detail the statute's structure and mechanisms.

⁹⁰ The Court in *Keith* had expressly left open the question of warrantless *foreign* intelligence surveillance. 407 U.S. at 308. *See also United States v. Smith*, 321 F. Supp. 424, 428-29 (C.D. Calif. 1971).

See Sattar FISA I, 2003 WL 22137012, at *4-6. For purposes of this appeal, the following facets of FISA are pertinent:

a. *Limitations On Targeting “U.S. Persons”*

FISA explicitly limits the targeting of “U.S. persons,” which includes U.S. citizens such as Ms. Stewart. 50 U.S.C. §1801(i).⁹¹ Among other constraints (not pertinent herein) imposed by FISA, §1801(a)(3)(A) provides that a “U.S. person” may not be considered an agent of a foreign power “solely upon the basis of activities protected by the first amendment to the Constitution of the United States. . .” Also, as discussed **post**, at 246-247, FISA also provides specific minimization procedures with respect to U.S. persons.” *See, e.g.*, §1805(a)(4).

b. *Standards for Reviewing Government Certifications*

Once FISA surveillance is challenged, the government must provide the reviewing Court with the orders and applications, as well as with statutorily required certifications. As the District Court noted below, “[o]nce it appears that an authorized member of the executive branch has certified that the FISA surveillance was conducted for an appropriate purpose, that the certification is

⁹¹ Because her conversations were intercepted, Ms. Stewart also qualifies as an “aggrieved person,” under FISA, §1801(k), which provides her standing to move to suppress. §1806(e). *See also Sattar FISA I*, 2003 WL 22137012, at *5 & n. 8.

supported by probable cause, and it appears that the application is not clearly erroneous as it applies to a United States person, a reviewing court, whether a FISA judge or this Court, is not to ‘second guess’ the certification.” *Sattar FISA I*, 2003 WL 22137012, at *7, *citing United States v. Duggan*, 743 F.2d 59, 73-74, 77 (2d Cir. 1984), and *United States v. Rahman*, 861 F.Supp. 247, 251 (S.D.N.Y. 1994), *aff’d* 189 F.3d 88 (2d Cir. 1999).

c. *The Evolution of FISA Review from the “Primary Purpose” to the “Significant Purpose” Standard*

As the District Court pointed out below, in *United States v. Duggan* this Court held that in order for FISA to satisfy constitutional standards, the “primary purpose” of the FISA surveillance had to be for intelligence-gathering rather than a criminal investigation:

“[t]he Second Circuit . . . interpreted this use of ‘the purpose’ to mean that the ‘primary purpose’ of the FISA surveillance was the interception of foreign intelligence information rather than simply the collection of evidence for a criminal prosecution.”

2003 WL 22137012, at *11, *citing Duggan*, 743 F.2d at 77 (“[t]he requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of § 1802(b) but also from the requirements in § 1804 as to what the application must contain.”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir.1992) (“[a]lthough evidence obtained under FISA

subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance.”) (internal citations omitted); *In re Sealed Case*, 310 F.3d 717, 725-26 (FISCR 2002) (tracing the history of the primary purpose test).

That standard prevailed for nearly twenty years until the PATRIOT Act amended FISA and, in §§1804(a)(7)(B) and 1823(a)(7)(B), “expanded the requirement that ‘the purpose’ of the surveillance be to obtain foreign intelligence information to a requirement that ‘a significant purpose of the surveillance’ is to obtain foreign intelligence information.” *Sattar FISA I*, 2003 WL 22137012, at *3-4 n. 3, 12.

Subsequently, in *In re Sealed Case*, in *dicta*, the Foreign Intelligence Surveillance Court of Review (hereinafter “FISCR”), adopted the government’s contention that there existed a “false dichotomy between foreign intelligence information that is evidence of foreign intelligence crimes and that which is not. . .” 310 F.3d at 725.⁹²

The FISCR replaced the “primary purpose” test with the “significant purpose” test, whereby “[s]o long as the government entertains a realistic option of

⁹² The fatal flaws in the FISCR’s analysis – both procedurally and substantively – are discussed, respectively, **post**, at 248-252.

dealing with the agent [of a foreign power] other than through criminal prosecution,” the test is satisfied. *Id.* at 735. *See also Sattar FISA I*, 2003 WL 22137012, at *12.

Since *In re Sealed Case*, no Circuit Court of Appeals has had occasion to address the FISC’s interpretation of the “significant purpose” standard, or whether the PATRIOT Act amendment meets constitutional muster.

d. *The Standards for Disclosure of FISA Orders and Applications*

Section 1806(f) of FISA provides that if the Attorney General files an affidavit that “disclosure or an adversary hearing would harm the national security of the United States,” the court deciding the motion must consider the application and order for electronic surveillance *in camera* to determine whether the surveillance was conducted lawfully.

The statute adds that “[i]n making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.” *Id.* *See also Sattar FISA II*, 2003 WL 22110435, at *5.

Even if a court declines to find that disclosure of FISA-related materials to the defense is appropriate under §1806(f) in this case, the defense would still be entitled to disclosure of the FISA applications, orders, and related materials under §1806(g), which expressly incorporates the Fifth Amendment Due Process Clause, and provides that “[i]f the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person *except to the extent that due process requires discovery or disclosure.*” 50 U.S.C. §1806(g) (emphasis added). *See also United States v. Spanjol*, 720 F. Supp. 55, 57 (E.D. Pa. 1989) (“[u]nder FISA, defendants are permitted discovery of materials only to the extent required by due process. That has been interpreted as requiring production of materials mandated by [*Brady*], essentially exculpatory materials.”).

B. *The Extent of the Evidence Generated By FISA Electronic Surveillance*

As the District Court recounted in *Sattar FISA I*, in “presenting an overview of the discovery in the case,” the government informed the defendants that it had

“conducted a series of court-authorized electronic surveillance over a period of several years authorized under the Foreign Intelligence Surveillance Act, consisting of the electronic surveillance . . .” of selected telephones and locations. 2003 WL 22137012, at *2, *quoting* Transcript April 9, 2002, at 16.

The government also acknowledged that “its case against the defendants was built, in part, on evidence obtained through court-authorized electronic surveillance obtained pursuant to FISA.” *Id.*, citing *United States v. Sattar*, 2002 WL 1836755, at *1 (S.D.N.Y. August 12, 2002) (hereinafter “*Sattar FISA III*”).

The volume of FISA-generated materials was massive in this case. As the District Court recited in *Sattar FISA I*, the government produced

over 85,000 audio recordings of voice calls, fax-machine sounds, and computer-modem sounds obtained through audio surveillance of telephone numbers used by Sattar and Yousry; the FBI's written summaries (“tech cuts”) of approximately 5,300 voice calls that the FBI deemed to contain foreign intelligence information and therefore did not minimize; approximately 150 draft transcripts of voice calls; and approximately 10,000 pages of e-mails obtained through electronic surveillance of an e-mail account used by Sattar. The Government has also disclosed certain evidence solely to Stewart and Yousry, including audiotapes of 63 telephone conversations between the imprisoned Sheikh Abdel Rahman and his attorneys and Yousry, and audio and video recordings of three prison visits to Sheikh Abdel Rahman by his attorneys and Yousry on February 19, 2000, May 19 and 20, 2000, and July 13 and 14, 2001.

Id., at *2.

C. *The FISA Electronic Surveillance Should Have Been Suppressed Because It Was Instituted for Purposes of a Criminal Investigation, and Not Intelligence Gathering*

1. ***The Evidence Established That the Government's Purpose In Instituting FISA Surveillance Was to Pursue a Criminal Investigation Against Ms. Stewart***

As noted *ante*, the standards for implementation of FISA electronic surveillance changed during the course of the investigation of this case, and during the course of the full range of FISA monitoring. *Id.*, at 12. Regardless of the proper standard for implementation of FISA electronic surveillance (“primary” or “significant” purpose, or the FISCR’s interpretation of the latter), such eavesdropping is not permitted when it is conducted for the purpose of pursuing a criminal investigation rather than gathering intelligence. *Id.* (“[o]f course, if the court concluded that the government’s sole objective was merely to gain evidence of past criminal conduct—even foreign intelligence crimes – to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied”).

Here, as detailed below, the record is clear that the FISA electronic surveillance was conducted for that improper – criminal investigatory – purpose. As a result, the FISA-generated evidence should have been suppressed, and the District Court’s decision to the contrary was erroneous.

For example, the evidence of a criminal investigation into Ms. Stewart’s activities is manifest from a July 28, 2000, letter from then-AUSA Fitzgerald (GX

8), attached to that letter was a revised version of the S.A.M.'s along with various media articles indicating the ill will that various groups harbored toward the United States. J.A. 226-247. AUSA Fitzgerald sent a second letter August 3, 2000 (GX 9), in which the text was the same, but which included articles specifically quoting comments Ms. Stewart had made to the media.

Internally within DoJ, AUSA Fitzgerald was clearly concerned about Ms. Stewart's conduct, and authored three memoranda setting forth his position. The first, dated June 5, 2000 – even before he wrote to Ms. Stewart and offered her a revised set of S.A.M.'s – urged the recipient (whose name is redacted) to authorize a criminal prosecution of Ms. Stewart. J.A. 2302-2323.

As he testified at a September 29, 1993, pretrial evidentiary hearing, AUSA Fitzgerald memorializes his legal theory of prosecution of Ms. Stewart in July 2000. J.A. 2267. Sealed documents entered in evidence as GX 20, 21, and 22 further demonstrate that Ms. Stewart was the target of a domestic criminal investigation as early as June 2000.

Subsequently, AUSA Fitzgerald wrote that “[o]n June 19, 2000 [redacted] received oral approval from the Attorney General to brief this Office as to pertinent intercepts from the FISA coverage which revealed apparent criminal activity in violation of the SAM's in order to: (I) advise this Office of apparent

criminal activity. . .” J.A. 2302-2323. In fact, AUSA Fitzgerald admitted that he and his office, in its initial assessment, considered charging Ms. Stewart with a violation of 18 U.S.C. §2339A in the Summer of 2000, nearly two years before the initial Indictment was returned. J.A. 2365.

The manner in which the FBI processed the FISA intercepts also demonstrates that although the government claimed that Ms. Stewart was never the target of any particular FISA application, *see Sattar FISA I*, 2003 WL 22137012, at *8 n. 10, the FBI certainly treated her as such. For instance, three FBI summaries (“tech cuts”) of FISA intercepts, reflecting communications intercepted August 28, 2000, September 24, 2000, and November 8, 2000, list the “subject name” as “Lynne.” Yousry Tel. 209, 227, 278.⁹³

Thus, plainly, Ms. Stewart was considered the target of the FISA wiretapping. The District Court’s decision finding that the government possessed a sufficient intelligence-gathering purpose, *see Sattar FISA I*, 2003 WL 22137012, at *13, simply cannot be reconciled with the record.

⁹³ Also, post-trial, the government revealed, only upon the District Court’s Order, that Mr. Sattar had been the subject of Title III monitoring as far back as 1994, when he was operating as the paralegal assisting Ms. Stewart in the defense of Sheikh Abdel Rahman in preparation for the latter’s trial. J.A. 2257-2259. Thus, collecting evidence for a criminal prosecution was always the government’s priority.

2. *The Entire FISA Electronic Surveillance In This Case Should Have Been Analyzed Pursuant to the “Primary Purpose” Standard*

As discussed *ante*, the FISA monitoring in this case straddled the amendments to FISA that altered the standard applicable to institution of FISA electronic surveillance from foreign intelligence gathering constitutes a “primary purpose” to “significant purpose.” The District Court stated that it analyzed each of the applications by the standard in place at the time of the application, and concluded that “all of the surveillance at issue was conducted with the appropriate purpose.” *Id.*⁹⁴

That analysis was erroneous because, as set forth below, the “significant purpose” test contravenes the Fourth Amendment’s prohibition on unreasonable searches and seizures. In examining whether the “significant purpose” test passes constitutional muster, the environment in which the “primary purpose” standard was created, and was applied for decades, is important. The “primary purpose” standard, which predated FISA and was adopted by the courts, including this Court in *Duggan*, for the statute’s first 25 years, was not simply judicial gloss.

⁹⁴ While the District Court noted that the government insisted it had adhered to the “primary purpose” standard throughout the FISA electronic surveillance in this case, the District Court’s opinion indicates that the District Court applied the “significant purpose” standard to those applications made after the PATRIOT Act amendments were effective. *Sattar FISA I*, 2003 WL 22137012, at *13.

Rather, it was essential to FISA's constitutionality since, as the courts recognized, otherwise FISA failed to meet the Fourth Amendment's warrant and/or reasonableness requirements.

a. *The "Primary Purpose" Standard Was Necessary to Preserve FISA's Constitutionality*

The "primary purpose" standard that the USA PATRIOT Act and the FISCR superseded was not superfluous, or adopted as a matter of judicial discretion. Rather, that standard was judicially imposed to preserve FISA's constitutionality, because otherwise it would violate Title III's and the Fourth Amendment's proscription on electronic surveillance and searches, respectively, conducted without a warrant based on the traditional probable cause standard that a crime had been, was being, or was about to be, committed. *See, e.g., United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (cautioning that FISA may "not be used as an end-run around the Fourth Amendment's prohibition of warrantless searches"); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984). *See also United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980); *see also generally* Gregory E. Birkenstock, *The Foreign Intelligence Surveillance Act and Standards of*

Probable Cause: An Alternative Analysis, 80 GEO. L.J. 843, 863-70 (1992)

(noting importance of noncriminal purpose to constitutionality of FISA).

Indeed, the “primary purpose” standard existed as a constitutional necessity *before* FISA was enacted. Following the Supreme Court’s landmark decision in *United States v. United States District Court (Keith, J.)*, 407 U.S. 297 (1972), in which the Court rejected the government’s assertion that it could conduct warrantless *domestic* electronic surveillance pursuant to a purported “national security” exception to the Fourth Amendment, several Circuit Courts recognized a foreign intelligence exception to ordinary Fourth Amendment requirements.

Critically, however, these courts emphasized that the exception was limited to *intelligence* surveillance, and could not be relied on as a justification for disregarding ordinary Fourth Amendment requirements in *criminal* investigations. Thus, in *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir., 1980), the Fourth Circuit recognized a foreign intelligence exception to ordinary Fourth Amendment requirements but strictly limited the exception to cases in which “the surveillance is conducted primarily for foreign intelligence reasons.”⁹⁵

⁹⁵ While *Truong* was not decided until 1980, it involved surveillance that took place before FISA’s enactment in 1978. *See Truong*, 629 F.2d at 915 n.4.

Other Circuits that acknowledged a foreign intelligence exception before FISA's enactment adopted similar reasoning. *See, e.g., United States v. Butenko*, 494 F.2d 593, 606 (3d Cir. 1974) (“[s]ince the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental.”); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *id.* at 427 (Goldberg, J., concurring). *See also Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

Importantly, each of these cases involved surveillance conducted *before* FISA was enacted – that is, before there was any statutory basis for a “primary purpose” restriction. Thus the basis for the restriction was found not in the statute but in the Constitution. The Fourth Circuit made this abundantly clear:

the executive can proceed without a warrant only if it is attempting primarily to obtain foreign intelligence from foreign powers and their assistants. We think that the unique role of the executive in foreign affairs and the separation of powers will not permit this court to allow the executive less on the facts of this case, *but we are also convinced that the Fourth Amendment will not permit us to grant the executive branch more.*

Truong, 629 F.2d at 916 (emphasis added).

In addition, since FISA's enactment the “primary purpose” standard has been employed in closely related Fourth Amendment contexts, *see United States v.*

El-Hage, 126 F. Supp.2d 264, 278 (S.D.N.Y. 2000) (using “primary purpose” standard to determine whether warrantless wiretapping of U.S. citizen overseas was reasonable under the Fourth Amendment),⁹⁶ and analogous evidentiary issues. See *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 2273-74 (2006) [statements made on 911 police emergency recordings are nontestimonial pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), as long as the “primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency” and not “to establish or prove past events potentially relevant to later criminal prosecution”] (footnote omitted).

Thus, the “primary purpose” was not imposed upon FISA as a luxury; instead, it was a precondition of FISA’s constitutionality. As a result, the PATRIOT Act’s jettisoning of the standard violates the Fourth Amendment.

b. *The FISC’s 2002 Decision*

As yet, no reported decision has decided the constitutionality of the USA PATRIOT Act amendment in the context of a criminal case in which a defendant has challenged the admissibility of FISA-generated evidence. However, in the government’s appeal from the FISC’s decision maintaining certain self-imposed

⁹⁶ FISA did not apply in that situation because the statute governs electronic surveillance of communications within (sent from or received in) the United States. See 50 U.S.C. §§1801(f)(1)-(3); *El-Hage*, 126 F. Supp.2d at 271 n.8.

DoJ minimization standards for FISA electronic surveillance, *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 621 (FISC 2002), the FISCR upheld the constitutionality of FISA surveillance if the primary purpose of the surveillance is criminal investigation, and obtaining foreign intelligence information is merely a “significant purpose.” *In re Sealed Case*, 310 F.3d 717 (FISCR 2002).

In a proceeding to which only the government was a party (and in which only the government had access to any factual record), 310 F.3d at 722 n.6 , the FISCR upheld the “significant purpose” amendment to FISA. While the FISCR permitted *amici* to submit briefs, only the government attended and participated at the oral “argument,” and the FISCR permitted the government to submit more elaborate briefing than *amici*.

The FISCR, which had never before convened, reversed the decision of the FISC (which was composed of the seven district court judges who were responsible for entertaining all FISA applications). Nevertheless the FISCR did acknowledge that “the constitutional question presented by this case – whether Congress’s disapproval of the primary purpose test is consistent with the Fourth Amendment – as no definitive jurisprudential answer.” *Id.* at 746.

The FISCR nonetheless sought to resolve the question – even though it was not necessary to its elimination of the administratively imposed minimization protocols⁹⁷ – and found the amendments valid. That conclusion has been the subject of withering scholarly criticism, and has yet to be applied in any subsequent cases.⁹⁸

⁹⁷ The precise issue before the FISCR was the propriety of the 2002 internal DoJ minimization procedures, and not FISA’s constitutionality. The FISCR could have easily decided that question – an internal Department of Justice administrative protocol matter – without addressing FISA’s post-PATRIOT Act constitutionality. However, the FISCR chose to confront the constitutional issue in a portion of its opinion that certainly constitutes *dicta*. That section’s status I as *dicta* is reinforced by the fact that neither the target of the particular surveillance orders that gave rise to the FISCR’s ruling, nor anyone arguing that FISA was unconstitutional, was allowed to participate as a party (although the FISCR did accept an *amici* brief from the American Civil Liberties Union and civil rights groups, and another *amicus* brief from the National Association of Criminal Defense Lawyers). Oral argument on appeal was closed to the public and conducted *ex parte*. Because *amici* were not parties to the FISCR proceeding, and because FISA authorizes only the government to seek Supreme Court review of a FISCR decision, *see* 50 U.S.C. §1803(b), the Supreme Court denied the *amici*’s motion to intervene for the purpose of filing a petition for a writ of certiorari. 538 U.S. 920 (2003). Thus, the FISCR’s decision, unlike the decisions of other federal courts, was unreviewable by the Supreme Court.

⁹⁸ *See, e.g.*, Michael P. O’Connor & Celia Rumann, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 FORDHAM INT’L L.J. 1234 (2003); Jeremy C. Smith, *Comment: The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C.L. REV. 412, 423-35 (2003); George P. Varghese, *Comment: A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence Surveillance*, 152 U. PA. L. REV. 385 (2003). In addition, the American Bar Association resolved February 10, 2003, that Congress consider amendments to FISA to “ensure that FISA is used when the

In the course of its analysis, the FISCR first addressed the question whether FISA orders are warrants within the meaning of the Fourth Amendment. The FISCR acknowledged the significant differences between FISA’s procedural requirements and those of Title III. The FISCR conceded, “to the extent the two statutes diverge in constitutionally relevant areas . . . a FISA order may not be a ‘warrant’ contemplated by the Fourth Amendment.” *Id* at 741.

The FISCR declined to decide the issue, however, and instead proceeded directly to the question whether FISA electronic surveillance and searches are reasonable, concluding that

we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore[] believe firmly . . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable.

Id. at 746.

Construing the PATRIOT Act amendments, the FISCR stated that

[t]he addition of the word “significant” to section 1804(a)(7)(B) imposed a requirement that the government have a *measurable foreign intelligence purpose*, other than just criminal prosecution of even foreign intelligence crimes.

government has a significant (*i.e.* not insubstantial) foreign intelligence purpose, as contemplated by the Act, and not to circumvent the Fourth Amendment.”

Id., at 735 (emphasis). *See also id.* (“significant purpose” test “excludes from the purpose of gaining foreign intelligence information a sole objective of criminal prosecution”).

In finding the “significant purpose” standard sufficient, the FISCR adopted the government’s claim that the “primary purpose” test had created a “false dichotomy between foreign intelligence information that is evidence of foreign intelligence crimes and that which is not. . . .” *Id.* at 725. *See also id.* at 735 (“[t]he important point is . . . [that] the Patriot Act amendment, by using the word ‘significant,’ eliminated any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses”). *See also Sattar FISA I*, 2003 WL 22137012, at *12.

As a result, as the District Court pointed out below, “[i]n place of the ‘primary purpose’ test, the [FISCR] announced the ‘significant purpose’ test whereby ‘[s]o long as the government entertains a realistic option of dealing with the agent [of a foreign power] other than through criminal prosecution,’ the test is satisfied.” *Id.*, quoting *In re Sealed Case*, 310 F.3d at 735.

That simply does not conform with constitutional requirements. The distinction this Court drew in *Duggan* between a criminal investigatory purpose

and a foreign intelligence-gathering objective was not a “false dichotomy.” Rather, it was, and remains, a *necessary* dichotomy developed by the courts, including principally *this* Court, in order to preserve the constitutionality of FISA in the face of challenges to its dilution of the Fourth Amendment’s warrant requirement.⁹⁹

The FISCR’s construction of the “significant purpose” standard – regardless whether phrased as “measurable foreign intelligence purpose,” or excluding “a sole objective of criminal prosecution” – effectively eviscerates the protections this Court applied in *Duggan* in order to harmonize FISA with the requirements of the Fourth Amendment. Indeed, the FISCR’s reading eliminates the standard altogether, and leaves the government free to employ FISA surveillance for criminal investigatory purposes at will.

c. *Without the “Primary Purpose” Standard, FISA Is Unconstitutional As Applied to Ms. Stewart In This Case*

⁹⁹ Viewed in this context, the District Court’s reliance on this and other Courts’ decisions rejecting Fourth Amendment challenges to FISA, particularly with respect to the rights of non-targeted defendants whose communications have been intercepted, *see Sattar FISA I*, 2003 WL 22137012, at *14, is misplaced because those decisions were premised on the presence of the “primary purpose” standard as a brake on Fourth Amendment violations. Without that standard, there is no longer an “adequate balancing” of the government’s national security and the individual’s Fourth Amendment privacy interests, and the issue whether FISA intrudes on a non-target’s constitutional privacy interests unlawfully, must be re-evaluated.

Without the “primary purpose” standard that for 25 years insulated FISA from attack via the Fourth Amendment, and if FISA is construed to permit the electronic surveillance conducted here against Ms. Stewart, the statute is unconstitutional as applied to Ms. Stewart in this case.¹⁰⁰

In *Sattar FISA I*, at *13, the District Court noted that “[i]n each of the pre-Patriot Act applications [to a FISA Judge], an appropriate executive branch official certified that ‘the purpose’ of the surveillance was to obtain foreign intelligence information, and in each of the post-Patriot Act application an appropriate executive branch official certified that ‘a significant purpose’ of the surveillance was to obtain foreign intelligence information.”

However, unmoored from the saving construction supplied by the “primary purpose” standard, FISA’s irreconcilable conflicts with the Fourth Amendment’s requirements become glaring and incapable of correction, rendering the statute unconstitutional as applied here.

i. *FISA Warrants Are Not Warrants Under the Fourth Amendment*

¹⁰⁰ Once again, the doctrine of constitutional avoidance is relevant and appropriate with respect to the construction and application of FISA in a manner that avoids conflict with constitutional provisions. *See ante*, at 113-114.

FISA surveillance orders are not warrants within the meaning of the Fourth Amendment. The Supreme Court has held that a warrant must be issued by a neutral, disinterested magistrate; must be based on a demonstration of probable cause to believe that the evidence sought will aid in a particular apprehension for a particular offense; and must particularly describe the things to be seized as well as the place to be searched. *See Dalia v. United States*, 441 U.S. 238, 255 (1979).

FISA court orders do not satisfy these requirements., FISA instead empowers the government to conduct the most intrusive kinds of surveillance without meaningful prior judicial review, without showing criminal probable cause, and without meeting particularity requirements. Because FISA court orders are not warrants, searches conducted under FISA are presumptively unreasonable. *See, e.g., Payton v. New York*, 445 U.S. 573, 586 (1980); *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

**ii. *FISA Warrants Do Not Meet
Traditional Probable Cause Standards***

The Fourth Amendment ordinarily prohibits the government from conducting intrusive surveillance without first demonstrating criminal probable cause – probable cause to believe that “the evidence sought will aid in a particular apprehension or conviction for a particular offense.” *See Dalia*, 441 U.S. at 255. FISA warrants do not conform to that standard of probable cause.

Although the government’s primary purpose in this case was to obtain evidence of criminal activity, it failed to satisfy the criminal probable cause requirement. In fact, no traditional probable cause determination was made. FISA authorizes the government to conduct intrusive surveillance if it can show what is known as “foreign intelligence probable cause” – probable cause to believe that the surveillance target is a foreign power or agent of a foreign power. *See* 50 U.S.C. § 1805(a)(3)(A). Thus, the statute does not require the government to advance any reason whatsoever – let alone probable cause – to believe that its surveillance will yield information about a particular criminal offense.

iii. *FISA Warrants Do Not Satisfy the Fourth Amendment’s Particularity Requirement*

FISA electronic surveillance does not involve Title III or traditional Fourth Amendment minimization standards, safeguards, or procedures. Indeed, the FISCR’s decision was directed at DoJ’s self-imposed minimization standards. As a result, the nature and duration of the intercepts of Ms. Stewart were not strictly limited, and the surveillance violated the Fourth Amendment’s particularity requirement.

The Fourth Amendment ordinarily prohibits the government from conducting intrusive surveillance unless it first obtains a warrant describing with particularity the things to be seized as well as the place to be searched. *See Berger*

v. New York, 388 U.S. 41, 58 (1967) (noting that Fourth Amendment particularity requirement was intended to prevent the government’s reliance on “general warrants” that allow “the seizure of one thing under a warrant describing another”).

In *Berger*, the Court noted that the importance of the particularity requirement “is especially great in the case of eavesdropping.” *Berger*, 388 U.S. at 56. The Court explained: “[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope.” *Id.*; *see also id.* at 63 (internal quotation marks omitted) (“[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices.”).

With respect to eavesdropping devices and wiretaps, the particularity requirement demands not simply that the government describe in detail the communications it intends to intercept but also that the duration of the intercept be strictly limited. *See Berger*, 388 U.S. at 58-60.¹⁰¹ In *Berger*, the Supreme Court

¹⁰¹ The Ninth Circuit’s decision in *United States v. Cavanaugh*, 807 F.2d 787, 791 (9th Cir. 1987), is not to the contrary. The Court in *Cavanaugh* considered only the contention that FISA violates the particularity clause by allowing a general description of the information sought; it did not consider, and apparently was not asked to consider, whether the *duration* of FISA surveillance orders renders FISA unconstitutional. Second, *Cavanaugh* addressed the particularity issue in the context of a statute whose ambit was limited to foreign intelligence investigations. The question whether FISA meets the particularity requirement in the context of *criminal* investigations has never arisen (and was not

struck down New York's eavesdropping statute in part because the statute authorized surveillance orders with terms of up to two months. *See Berger*, 388 U.S. at 44 n.1.

Title III, which Congress enacted shortly after *Berger* was decided, limits the term of surveillance orders to 30 days. *See* 18 U.S.C. § 2518(5). FISA, by contrast, authorizes surveillance terms of up to 120 days. *See* 18 U.S.C. § 1805(e)(1)(B). Consequently, in light of *Berger*, it is indisputable that FISA's provisions relating to the duration of surveillance orders fail to meet Fourth Amendment requirements for criminal investigations.

iv. *The FISA Process Lacks Meaningful Judicial Review*

While Fourth Amendment and Title III require the government to obtain the prior authorization of a neutral, disinterested magistrate who has the authority to determine whether the requirements of Rule 41 or Title III have been satisfied, *see* Fed. R. Crim. P. 41 (governing physical searches in criminal investigations); 18 U.S.C. §§2518(1)(b), (2) & (3) (governing electronic surveillance in criminal investigations); *see also Johnson v. United States*, 333 U.S. 10, 13-14 (1948), the government satisfies most of FISA's requirements simply by certifying that the

addressed in *Cavanagh*), because until recently the FBI could rely on FISA only when its primary purpose was to gather foreign intelligence.

requirements are met. *See* 50 U.S.C. § 1804(a)(7) (enumerating necessary certifications).

As the FISA Court of Review has acknowledged, “this standard of review is not, of course, comparable to a probable cause finding by the judge.” *In re Sealed Case* at 739; *see also United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984).

Since the electronic surveillance conducted pursuant to FISA here was conducted without meaningful prior judicial review, it was unreasonable under the Fourth Amendment.

Accordingly, if FISA is deemed to permit the electronic surveillance of Ms. Stewart under the factual circumstances present herein, it is irreconcilable with the Fourth Amendment, and unconstitutional as applied.

D. *The District Court Erred, and Denied Ms. Stewart Due Process, By Not Disclosing the FISA Applications and Warrants to Her Counsel*

As noted *ante*, at 238, §§1806(f) & (g) authorize a court to disclose FISA applications and orders to defense counsel. The District Court’s decision not to do so in this case constituted error. *See Sattar FISA I*, 2003 WL 22137012, at *5-6 (“[t]he materials submitted *ex parte* and *in camera* are sufficient for the Court to determine without such disclosure whether the FISA surveillance was lawfully authorized and conducted . . . [T]he Court conducted a careful independent review of the FISA materials contained in the voluminous classified materials submitted

to this Court . . . [and] the Court is satisfied that all of the requirements of FISA were satisfied and that each of the FISA surveillances was authorized by a FISA Court order that complied with the statutory requirements for such orders and was supported by the statements and certifications required by the statute”).

According to FISA’s legislative history, disclosure may be “necessary” under §1806(f) “where the court’s initial review of the application, order, and fruits of the surveillance indicates that the question of legality may be complicated by factors such as ‘indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order.’” *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) [quoting S. Rep. No. 701, 95th Cong., 2d Sess. 64 (1979)]; see also *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987)(same).

Similarly, in *United States v. Duggan*, this Court explained that the need for disclosure

might arise if the judge’s initial review revealed potential irregularities such as possible misrepresentations of fact, vague identification of the persons to be surveilled, or surveillance records which include[] a significant amount of nonforeign intelligence information, calling

into question compliance with the minimization standards contained in the order[.]

743 F.2d at 79. *See also Sattar FISA I*, 2003 WL 22137012, at *6.

Here, for the reasons set forth **ante**, and **post**., this case falls squarely within the type in which the legislative history compels disclosure pursuant to §1806(f). Certainly there is a compelling issue with respect to whether the “surveillance records [] include a significant amount of nonforeign intelligence information[.]” given that Ms. Stewart was the target of a nascent criminal investigation in 2000.

Also, during the period of monitoring she was a practicing lawyer representing clients in New York State and federal courts, that the overwhelming majority of her conversations (and meetings at the prison facility) relevant to this case were limited to her representation of Sheikh Abdel Rahman with respect to his prison conditions and U.S. federal criminal conviction.

Although no court in the nearly thirty-year history of FISA has ordered disclosure of FISA applications, orders, or related materials, the circumstances presented here are unprecedented, and dovetail precisely with those Congress envisioned would merit disclosure under §1806(f). *See, e.g., In re Grand Jury Proceedings*, 347 F.3d 197, 203 (7th Cir. 2003) (citing cases). *See also Sattar FISA I*, 2003 WL 22137012, at *6.

Indeed, the existence of §1806(f) is an unambiguous declaration that Congress intended courts to grant disclosure in appropriate cases. If this case did not meet the necessary criteria, no case would qualify. If §1806(f) is to be rendered meaningful, not superfluous and entirely inert, it should be applied in this case.

Even if the Court were to decline to find that disclosure of FISA-related materials to the defense was appropriate under §1806(f) in this case, the defense should have still been entitled to disclosure of the FISA applications, orders, and related materials under §1806(g), which expressly incorporates the Fifth Amendment Due Process Clause, and provides that “[i]f the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person *except to the extent that due process requires discovery or disclosure.*” 50 U.S.C. §1806(g) (emphasis added). *See also United States v. Spanjol*, 720 F. Supp. 55, 57 (E.D. Pa. 1989) (“[u]nder FISA, defendants are permitted discovery of materials only to the extent required by due process. That has been interpreted as requiring production of materials mandated by [*Brady*], essentially exculpatory materials”).

The District Court’s confidence in its ability to act as judge and defense counsel was misplaced. *See Dennis v. United States*, 384 U.S. 855, 875 (1966)

("[i]n our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate"). It was not in a position to gauge the accuracy or completeness of the FISA applications. The Court was not privy to all of the discovery and other information that were relevant and material to this issue, or the defense.

The essential contribution that the adversary process makes to accurate fact-finding, to fairness – and to the appearance of fairness – is set forth in detail **ante**, in POINT VII, and applies with equal force in this context as well. Otherwise, as the *ex parte* proceedings accumulate, as they did in this case, the Sixth Amendment guarantees of effective assistance of counsel and public trial devolve into mere platitudes honored more in the breach.

Thus, the circumstances herein, and the state of the record, are easily distinguishable from those in which disclosure was denied. In *Duggan*, this Court found that the defendants had “made no showing of misrepresented facts.” 743 F.2d at 78. In this case, the government misrepresented the nature of the investigation: by AUSA Fitzgerald’s admissions, by summer 2000 the government was considering pursuing a criminal investigation against Ms. Stewart, yet continued to intercept her communications pursuant to FISA under the guise of foreign intelligence collection.

Similarly, in *United States v. Johnson*, the First Circuit court found “no evidence of an end-run [around the Fourth Amendment].” 952 F.2d at 572. Nonetheless, the Court emphasized that “[a]t no point [in the FISA warrants or the post-arrest questioning] was there reference to any criminal liability or prosecution.” *Id.* Here, obviously, the situation is diametrically different.

In addition, the government’s failure to preserve important FISA materials justified disclosure under §§1806(f) or (g). The government acknowledged that it had destroyed a substantial number of audio files, including 114 for which the government had created summaries (“tech cuts”), as well as an unknown number that the government considered “non-pertinent,” but which, of course, neither the defense nor District Court had any opportunity to review in any form. *See United States v. Sattar*, 2003 WL 22510435, at *4-5 (S.D.N.Y. November 5, 2003) (hereinafter “*Sattar FISA II*”) (“[t]he FBI has been unable to retrieve the audio files for an unknown number of non-pertinent calls”). Indeed, in contravention of 50 U.S.C. §1801(h)(3), sometime after July 2000, the government destroyed an entire system for capturing electronic surveillance and disposing of a number of its components.

While the District Court denied defendants’ suppression motion, and circumscribed the hearing on the issue, *id.*, at *1, and found insufficient evidence

to suggest the percentage of irretrievable audio files was greater than that applicable to the 114 unpreserved files for which “tech cuts” had been created, that was pure speculation that the defense was not afforded an opportunity to probe sufficiently at the hearing.

Moreover, in the FISA context, the historical record has demonstrated that disclosure in cases such as this is necessary to prevent abuse. As the Foreign Intelligence Surveillance Court (the District Court judges that, in secret, *ex parte*, proceedings, review and act upon the government’s FISA applications) itself has acknowledged, systematic executive branch misconduct – including submission of FISA applications with “erroneous statements” and “omissions of material facts” – went entirely undetected by the courts until the FISC directed that the Department of Justice review FISA applications and submit a report to the FISC. *See In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620-21 (FISC), *rev’d on other grounds sub nom. In re Sealed Case*, 310 F.3d 717 (FISCR 2002). *See also United States Senate Select Committee on Intelligence and the United States House Permanent Select Committee on Intelligence’s Report of the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001* (hereinafter the

“*Joint Inquiry Report*”), at 96-97, 367 (available on line at <<http://news.findlaw.com/hdocs/docs/911rpt/>>).

In its opinion, the FISC summarized the plethora of abuses cited in the Report (which has never been publicly released):

- “75 FISA applications related to major terrorist attacks directed against the United States” contained “misstatements and omissions of material facts.” 218 F. Supp. 2d at 620-21;
- the government’s failure to apprise the FISC of the existence and/or status of criminal investigations of the target(s) of FISA surveillance. *Id.*;¹⁰² and
- improper contacts between criminal and intelligence investigators with respect to certain FISA applications. *Id.*

Nor did those revelations cure the problem of abuse in the FISA context. Just last year, an October 24, 2005, *Washington Post* article by Dan Eggen, entitled “FBI Papers Indicate Intelligence Violations,” reported that “[t]he FBI has

¹⁰² Subsequent investigations have also shed light on how the intelligence apparatus, including FISA and other electronic surveillance, acted, in effect, as “stalking horses” for criminal investigations. See *Joint Inquiry Report*, at 4-5; see also *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (W.W. Norton 2004) (hereinafter “*9/11 Commission Report*”), at 537 n. 71.

conducted clandestine surveillance on some U.S. residents for as long as 18 months at a time without proper paperwork or oversight, according to previously classified documents to be released today.” (Available at www.washingtonpost.com/wp-dyn/content/article/2005/10/23/AR2005102301352_pf.html).

The unlawful surveillance included five-year surveillance on a subject – including 15 months without notifying DOJ lawyers after the subject had moved from New York to Detroit. The article added, “In other cases, agents obtained e-mails after warrants expired, seized bank records without proper authority and conducted an improper ‘unconsented physical search,’ according to the documents.” *Id*

In addition, a report issued March 8, 2006 by the DoJ Inspector General stated that the FBI found apparent violations of its own wiretapping and other intelligence-gathering procedures more than 100 times in the preceding two years, and problems appear to have grown more frequent in some crucial respects. *See* Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act, March 8, 2006 (hereinafter “DoJ IG Report”), available at <http://www.usdoj.gov/oig/special/s0603/final.pdf>.

The report characterized some violations as “significant,” including wiretaps that were much broader in scope than authorized by a court (“over-collection”), and others that continued for weeks and months longer than authorized (“overruns”). *Id.*, at 24-25. The FBI also conducted physical searches that had not been properly approved. *See* “Justice Dept. Report Cites F.B.I. Violations,” *The New York Times*, March 9, 2006 (Exhibit 79 to Ms. Stewart’s Initial Motion papers).

FISA-related overcollection violations constituted 69% of the reported violations in 2005, an increase from 48% in 2004. *See* DoJ IG Report, at 29. The total percentage of FISA-related violations rose from 71% to 78% from 2004 to 2005, *id.*, at 29, although the amount of time “over-collection” and “overruns” were permitted to continue before the violations were recognized or corrected decreased from 2004 to 2005. *Id.*, at 25.

These ongoing abuses have only been aggravated by the intrusion of information gleaned from the NSA Program (discussed **ante**, in POINT VII) into the FISA warrant authorization process.¹⁰³

¹⁰³ Further, continued, and otherwise unmonitored and unknown abuses of national security procedures have been detailed by the DoJ IG with respect to National Security Letters. *See* <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

FISA violations as a percentage of total intelligence violations	2004	2005
Overcollection violations	47.7%	68.8%
Total Percentage of Violations FISA comprises of the total violations reported to the Intelligence Oversight Board	71.4%	77.8%
Percentage of the above violations that concern electronic surveillance	47.7%	68.8%

It is not surprising that such abuse would occur, and go unchecked for so long, and then resume, considering that the protection afforded FISA targets is particularly weak as a result of the limited scope of review performed by the FISC and (if the target is charged with a crime) by the district court.

The FISC’s *ex parte* review of a FISA application is highly deferential to the executive branch. In particular, as the District Court pointed out below, *see Sattar FISA I*, 2003 WL 22137012, at *13, the executive’s certification concerning the purpose of the surveillance or search – which has critical constitutional significance – “is, under FISA, subjected to only minimal scrutiny by the courts. . . . The FISA Judge, in reviewing the application, is not to second-guess the executive branch official’s certification that the objective of the surveillance is foreign intelligence information.” *Duggan*, 743 F.2d at 77; *see, e.g., In re Grand Jury Proceedings*, 347 F.3d at 204-05.

In addition, a district court’s subsequent *ex parte* review (assuming a criminal defendant challenges the legality of the surveillance) adds little additional

protection. According to *Duggan*, “when a person affected by a FISA surveillance challenges the FISA Court's order, a reviewing court is to have no greater authority to second-guess the executive branch’s certifications than has a FISA Judge.” *Duggan*, 743 F.2d at 77; *see, e.g., In re Grand Jury Proceedings*, 347 F.3d at 204-05.

Thus, not only is judicial review of FISA surveillance and searches invariably *ex parte* and *in camera*, and, therefore, without the benefit of adversarial testing, but the substantive review itself provides “only minimal scrutiny.” Given the one-sided proceedings under FISA and the highly deferential standard of review, it is hardly surprising that, according to the Attorney General’s annual reports from 1979 to 2006 (available at <http://fas.org/irp/agency/doj/fisa>), between 1979 and 2004, the FISC approved 20,923 of 20,930 FISA applications, while modifying just over one percent (251), which also were eventually approved.¹⁰⁴

Year	Number of FISA Applications	Number Modified	Number Rejected	Percentage Rejected or Modified
1979 – 2002	15,264	4	0	00.00026%
2003	1,727	79	4	04.8%

¹⁰⁴ In 2006, the government withdrew five applications before the FISC had acted on the request. Thus, of 2,181 applications submitted, 2,176 were granted. One application was denied in part.

2004	1,754	94	0	05.4%
2005	2,072	61	0	02.9%
2006	2,181	73	1 (in part)	03.4%

The number and proportion of FISA warrants obtained annually has also increased dramatically since 2001. The 2,181 applications for FISA warrants in 2005 represented an 20% increase in applications from the 2004 total, and, within the past six years (with 1,012 applications in 2000), a more than *doubling* of the number of FISA applications submitted annually.¹⁰⁵

The district courts' subsequent review of FISA warrants has not proven any more effective in monitoring FISA. Counsel is unaware of any district court suppressing the results of FISA surveillance or a FISA search, and no court of appeals has ever reversed a district court's denial of a motion to suppress FISA information.

In light of the nearly perfect success rate of FISA applications (including those 75 that contained false and misleading statements, yet were approved, as noted in the 2002 FISC opinion), the complete exclusion of the defense from the FISA review process, and the correspondingly low risk that misconduct will be

¹⁰⁵ FISA applications have exceeded Title III requests since the 1980's, and, in 2003, for the first time eclipsed the number of federal and state court-authorized criminal wiretaps, a result that has been repeated in the three years since. The Center on Law and Security, "The NSA Wiretapping Program," For the Record, vol. 1, January 2007.

detected, it is understandable, even if inexcusable, that law enforcement officials “engaged in the often competitive enterprise of ferreting out crime,” *Johnson v. United States*, 333 U.S. 10, 14 (1948), may have developed the attitude that FISA offers a convenient means of circumventing the traditional Title III and Fourth Amendment search warrant processes.

As a result, §§1806(f) & (g), and the disclosure they authorize assume significantly greater meaning and importance in evaluating the validity and impact of any relevant electronic surveillance conducted pursuant to FISA.

POINT IX

**MS. STEWART’S CONVICTIONS SHOULD BE
VACATED, AND THE CHARGES DISMISSED,
BECAUSE THEY WERE THE RESULT OF A
SELECTIVE PROSECUTION AGAINST HER**

In three opinions,¹⁰⁶ the District Court denied Ms. Stewart’s motion to dismiss the Indictment because the charges against her were the result of selective prosecution. However, in light of the record developed before, during, and after trial, it is respectfully submitted that the selective prosecution motion not only possessed renewed vitality, but should have been granted. At the very least, the

¹⁰⁶ *See*, respectively, J.A. 2329 (Order dated July 1, 2004); J.A. 2336 (Order dated September 1, 2004); and *Sattar 29/33*, 395 F. Supp.2d at 103.

District Court should have ordered discovery, and/or conducted an evidentiary hearing on the issue.

As detailed below, pretrial proceedings, as well as testimony at trial and subsequent information, combined to establish that Ms. Stewart was selected for prosecution based on the *content* of her speech, and her political views and profile, while others who admitted similar conduct were not prosecuted because the government viewed their speech as benign. As a result, Ms. Stewart has satisfied the standard for selective prosecution, and should have prevailed on her motion.

A. *The Salient Facts Establishing the Selective Prosecution of Ms. Stewart*

The dispositive evidence of selective prosecution included the testimony of Patrick J. Fitzgerald, the government's first witness at trial, and defense witness Ramsey Clark, Esq.. During his testimony, Mr. Fitzgerald, who during the pertinent period was an Assistant United States Attorney in the Southern District of New York,¹⁰⁷ acknowledged that another attorney who represented Sheikh Abdel Rahman, namely Mr. Clark, had also committed, in U.S. Attorney Fitzgerald's opinion, violations of the S.A.M.'s. T. 2581-82.

¹⁰⁷ Subsequently, Mr. Fitzgerald was appointed United States Attorney for the Northern District of Illinois, and later assumed the post of Special Prosecutor in the investigation that produced the prosecution in *United States v. Libby*, 475 F.Supp.2d 73 (D.D.C. 2007).

Similarly, Mr. Clark acknowledged during his testimony that he had also issued a statement to the media on Sheikh Abdel Rahman's behalf, and that he and Abdeen Jabara, Esq., another attorney for Sheikh Abdel Rahman, had regularly read newspapers articles to Sheikh Abdel Rahman, another violation of S.A.M.'s that the Indictment herein alleged was part of the conspiracies with which Ms. Stewart ultimately was charged. T. 8727-28, 8733, 8738, 8743-45. *See also* MY-516T, MY-517, MY-518.¹⁰⁸ *See also* J.A. 2331; 2204 (Letter from Ramsey Clark, Esq. submitted to the District Court in connection with Ms. Stewart's sentencing).

Yet, tellingly, neither Mr. Clark nor Mr. Jabara were prosecuted for their conduct. In fact, Mr. Clark's transgression (issuing the press release) went unpunished because, it was a "noble" violation. *See* August 26, 2004 Reply Memorandum of Law In Support of Lynne Stewart's Renewed Motion to Dismiss the Indictment Based on Selective Prosecution, at 3-4 & n. 3.

In contrast, a prosecution was instituted only against Ms. Stewart without any material distinction between her conduct and that of her co-counsel. The S.A.M's governing Mr. Clark at that point were no different from those applied to

¹⁰⁸ "MY" denotes Exhibits introduced at trial by co-defendant Mohammed Yousry.

Ms. Stewart in the context of issuing press releases, and Mr. Clark's and Ms. Stewart's *conduct* was nevertheless the *same*.

Indeed, as Mr. Clark pointed out in his subsequent letter to the Court in connection with Ms. Stewart's sentencing, it was *he* and his office that were the focal point for communications with Sheikh Abdel Rahman. For example, Mr. Clark pointed out that "[d]uring the twenty eight month period in which Ms. Stewart and Mr. Yousry are said to have 'repeatedly' delivered messages to Dr. Abdel Rahman there were only four contacts between them all cited by the government. There were three prison visits, March 1999, May 2000, July 2001 [] each separated by fourteen months, and one phone call on June 20, 2000. []" J.A. 2205.

Mr. Clark continued that "[i]n contrast lawyers in my office, Abdeen Jabara, Larry Schilling and I, had hundreds of phone calls usually scheduled for two a week and Mr. Jabara and I had more than twice as many visits as Ms. Stewart. *If there was a functioning communication hub for Dr. Abdel Rahman it was my office.*" *Id.* (emphasis added).

Nor did Mr. Clark permit the S.A.M.'s to deter him from speaking publicly on Sheikh Abdel Rahman's behalf:

[b]efore the SAMs, first imposed in 1997, and through their several generations of more severe restrictions, I

have spoken to the media and anyone interested in the Sheik about his health, prison life, legal issues and on occasion about his views on various subjects and events, if I knew them or, had an opinion about them.

J.A. 2212.

Also, Mr. Clark noted, the government “has never complained. It never occurred to me that my telephone interview concerning the Sheik’s views on a ceasefire published in an Arab newspaper might violated the SAMs. No one in the government ever suggested otherwise.” *Id.*¹⁰⁹

Mr. Jabara’s letter submitted with respect to Ms. Stewart’s sentencing reflected similar conduct, and a similar lack of consequences for him. For instance, Mr. Jabara explained that “these SAMS were difficult to interpret in the day to day situations that we were constantly called upon to deal with.” J.A. 2331-2335. He recalled the fluid nature of the SAM’s and their restrictions on communications with the outside world. In practice, as Mr. Jabara described them, they operated as a mine field fraught with uncertainty.

¹⁰⁹ Mr. Clark also recounted that “Ms. Stewart knew I had informed the press that I believed the Sheik approved the unilateral ceasefire about two years earlier. The U.S. never criticized my action.” J.A. 2224.

As an illustration, regarding the propriety of “conferencing-in” a paralegal on telephone calls between Sheikh Rahman and his attorneys, Mr. Jabara recalls that

[t]he SAMs were not clear as to whether this was prohibited. Moreover, we had operated in a situation where the Justice Department would issue revised SAMS from time-to-time to attempt to clear up what it perceived to be ambiguities or to add prohibitions. Thus, until they did so, we believed we were permitted to interpret the SAMs most favorably for our client. We conferenced in the paralegal to assist us. After a while, the Justice Department issued a revised SAM that did not allow for the attorneys to “conference in” the paralegals. This, of course, changed our practice.

Another example of the difficulty in interpreting the SAMs concerned the subject matter of our discussions. During the course of a meeting or phone conversation with the Sheikh, while attempting to be mindful of the various and sundry provisions and prohibitions of the SAMS, it was often a close call as to whether allowing a particular request to be undertaken was completely prohibited or partially prohibited by the SAMs. For example, when the translator would ask the sheikh to provide a religiously considered answer to a specific factual question about how an individual should resolve an issue, I had to make a judgment call as to whether the request was within or outside the letter and spirit of the SAM prohibitions. Similarly, I made judgment calls about which newspapers articles could be read to him. This would occur frequently.

J.A. 2334.

Mr. Jabara also explained in his letter that interpreting the SAM's required frequent judgment calls. J.A. 2334. Newspaper articles and letters from followers, while they were not "strictly 'legal issues,' were significant for keeping open lines of communication" with the client. *Id.* Ms. Stewart's conduct in July 2001 constituted nothing more and nothing less, yet it was she who faced criminal sanctions as a result.

Conversely, as documents filed pretrial demonstrated, the decision to prosecute Ms. Stewart was made *because of her political beliefs*, and not what she did. *See* June 21, 2004 Memo of Law in support of Ms. Stewart's Motion to Dismiss the Indictment Based on Unconstitutionally Selective Prosecution As Shown on June 18, 2004 (setting forth government's statements with respect to the rationale for subpoenaing Ms. Stewart's prior statements relating to her political philosophy).

During the June 18, 2004, oral argument in the District Court regarding government subpoenas on media reporters for the purpose of obtaining and introducing evidence of Ms. Stewart's political beliefs and statements, the government manifested its belief that anti-government rhetoric permissibly marks a person as a proper subject of criminal prosecution, and that, in Ms. Stewart's particular case, that her "world view," consisting entirely of protected speech and

action, was the primary and most significant element of this case. The views summarized by prosecutors during that session related to Ms. Stewart's long-held and publicly stated role as a political activist, as amply demonstrated by the government's reaching back to a 1995 *New York Times* profile for Ms. Stewart's purported motive and intent to join a conspiracy in 1999. Thus, Ms. Stewart was designated for criminal prosecution because of ideas and beliefs she had expressed during the course of her career – all protected, First Amendment political speech.

B. *The Applicable Legal Standard for Selective Prosecution Motions*

In *United States v. Wayte*, 470 U.S. 598 (1985), the Supreme Court set forth the standards controlling the determination whether there has been a selective prosecution. Under *Wayte*, a claim of selective prosecution requires proof of discriminatory effect and discriminatory intent. 470 U.S. at 608. In *Wayte*, the defendant had refused to register for the draft. He was prosecuted under a “passive enforcement” governmental policy that targeted those who self-identified themselves as draft refusers in communication with the government. *Id.* at 600.

The Court held that this policy did not violate equal protection of the laws or the First Amendment. Rather, the Court explained:

[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a

discriminatory effect and that it was motivated by a discriminatory purpose. All petitioner has shown here is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech.

Id. at 608-09 (internal citations omitted).

In *United States v. Fares*, 978 F.2d 52 (2d Cir. 1992), this Court explained that

in order to support a defense of selective prosecution, the defendant must make at least a prima facie showing both “(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [the defendant], he has been singled out for prosecution, and (2) that the government's discriminatory selection of [the defendant] for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.”

978 F.2d at 59, quoting *United States v. Moon*, 718 F.2d 1210, 1229 (2d Cir. 1983).

C. *The District Court's Decisions Below*

In denying Ms. Stewart's motions to dismiss on the basis of selective prosecution the District Court held that Ms. Stewart had failed to satisfy the two-pronged test set forth in *Fares*. J.A. 2336. The District Court also relied on its

initial pretrial ruling denying Ms. Stewart's previous motion to dismiss for vindictive prosecution. J.A. 2329, *citing Sattar II*, 314 F. Supp.2d at 311-14. In *Sattar II*, the District Court had pointed out that "prosecutorial decisions are supported by a presumption of regularity, and, absent clear evidence to the contrary, courts presume that the prosecutorial decisions are proper." *Sattar II*, 314 F. Supp.2d at 311, *citing United States v. Armstrong*, 517 U.S. 456, 464 (1996).

In its July 1, 2004, Order denying the initial selective prosecution motion, the District Court determined that, with respect to the government's concerted attempt to utilize examples of Ms. Stewart's "world view" (discussed *ante*, at 277), the government's "effort to obtain evidence" was "with respect to the defendant's motive and intent for the specific crimes that are charged in the Superseding Indictment, not an effort to prosecute the defendant for her views." J.A. 2337, *citing Fares*, 978 F.2d at 59.

In denying Ms. Stewart's renewed application in the context of her post-trial motions pursuant to Rule 33, Fed.R.Crim.P., the District Court decided that it found "no basis to reconsider [its earlier] ruling." Regarding the government's decision to prosecute Ms. Stewart, but not Mr. Clark, the District Court wrote that

[g]iven the seriousness and extent of the criminal acts found by the jury against Stewart compared with the evidence relating to Clark, Stewart has failed to make a prima facie showing that she is similarly situated to Clark and that she has been singled out for prosecution. She has also failed to make any showing that she has been singled out because of bad faith or because of her political views. Stewart has also failed to make the showing necessary for discovery or an evidentiary hearing.

395 F. Supp.2d at 103, *citing Sattar II*, 314 F.Supp.2d at 311-14 (denying vindictive prosecution claim); Order dated September 1, 2004 (denying selective prosecution claim).

D. *The Charges Against Ms. Stewart Are the Product of a Selective Prosecution*

Amplification of the record, however, has dramatically altered the landscape, and, in the context of the facts set forth *ante*, at 272-273, here Ms. Stewart does indeed satisfy both prongs of the *Fares* test. U.S. Attorney Fitzgerald's and Mr. Clark's testimony establishes that others "similarly situated have not generally been prosecuted" for the conduct at issue. Indeed, *no one but Ms. Stewart has ever been prosecuted for the conduct.*

The government's attempt to distinguish Mr. Clark's conduct from Ms. Stewart's, by comparing the *content* of the press release he issued with that in the

release issued by Ms. Stewart, further demonstrates that Ms. Stewart was singled out for an improper purpose: the content of her message.

In fact, the government's response to Ms. Stewart's Rule 29 & 33 motions provides the answer to that prong of the selective prosecution analysis: the "desire to prevent [her] exercise of constitutional rights." Ironically, the government argued below that Ms. Stewart did not state an improper reason for the selective prosecution on the very page after providing the very reason: that the decision to prosecute Ms. Stewart was based not on the fact of the communication itself, but instead on the *content* of her message as opposed to Mr. Clark's, and because of her widely known political beliefs. *See* Government's Memo of Law in Opposition to Ms. Stewart's Rule 29 & 33 Motions, at 103-04.¹¹⁰

Thus, the government's assertion that "[i]t was Stewart's press release stating Abdel Rahman's withdrawal of support for the cease-fire – which compellingly demonstrated her commission of all of her crimes of conviction – that brought her to the prosecutor's attention, not her beliefs or her views[,]" is

¹¹⁰ That Ms. Stewart became a target is further demonstrated by the government's repeated focus, at trial and in its Memo of Law, on Ms. Stewart's political beliefs as evidence that she was not pursuing a legitimate legal strategy, but was instead furthering some personal political agenda.

only part of the equation, and proves too much. *See* Government's Memo of Law in Opposition to Ms. Stewart's Rule 29 & 33 Motions, at 103.

As a result, while that may have put Ms. Stewart on the government's radar, it was the *substance* of her speech that provided the impetus for her prosecution, since there is no other basis for drawing a distinction between her and Mr. Clark's issuing of the respective press releases.

Also, the statements by the government at the June 18, 2004, oral argument (*see ante*, at 277), in tandem with the distinction U.S. Attorney Fitzgerald made between Ms. Stewart and Mr. Clark because the latter's violation of the S.A.M.'s was "noble," demonstrates that Ms. Stewart has indeed been prosecuted "based on some impermissible considerations as . . . the desire to prevent [her] exercise of constitutional rights."

Nor was the import of U.S. Attorney Fitzgerald's testimony lost on the government. In an effort to distance itself from his testimony, during its rebuttal summation the government in effect disavowed U.S. Attorney Fitzgerald's testimony about Mr. Clark's violations of the S.A.M.'s. T. 12191, 12205-06. Later, the government dismissed U.S. Attorney Fitzgerald's conclusion (expressed during his trial testimony) that Mr. Clark did indeed violate the S.A.M.'s as U.S. Attorney Fitzgerald's "opinion," and/or "a mistake," even though U.S. Attorney

Fitzgerald was instrumental in devising the language in the S.A.M's, supervised and monitored their implementation with respect to Ms. Stewart and Mr. Clark, and conducted the investigation into Ms. Stewart's (and Mr. Clark's) violations of the S.A.M.'s.

Yet the arguments by the prosecutors cannot erase U.S. Attorney Fitzgerald's testimony, or diminish its importance. Indeed, U.S. Attorney Fitzgerald, as reflected in his testimony, was intimately involved in the development and implementation of the S.A.M.'s imposed on Sheikh Abdel Rahman, T. 2320-30, and assumed significant responsibility for monitoring compliance with them. T. 2345-50.

Moreover, he was active in the process (as Chief of the Organized Crime and Terrorism Unit in the Southern District at the time) at the time the alleged violations occurred. T. 2303. Thus, he was in a far better position to provide an accurate account of the decision-making process than any of the prosecutors crafting a *post hoc* strategy designed to explain away U.S. Attorney Fitzgerald's testimony and, in turn, of the decision to charge only Ms. Stewart and give Mr. Clark and Mr. Jabara the benefit of the doubt.

In addition, when confronted with Ms. Stewart's Rule 33 motion regarding selective prosecution, the government attempted to distinguish Mr. Clark's

situation (that he was not prosecuted for the same conduct) by claiming that *his conduct did not violate the S.A.M.'s*. See Government's Memo of Law in Opposition to Ms. Stewart's Rule 29 & 33 Motions, at 101-02.

Throughout this case, though, the government has resisted Ms. Stewart's position that her alleged violation of the S.A.M.'s lay at the heart of the government's case, and constituted a predicate for all of the counts charged against her.

The government cannot have it both ways. It cannot maintain that the violation of the S.A.M.'s did not drive the §2339A charges (as well as the other charges in the Superseding Indictment), while at the same time stating that Mr. Clark was not so charged because he did *not* violate the S.A.M.'s.

At the very least, further discovery is appropriate in this case, which presents circumstances and a record vastly different from that in *Fares*. In *Fares*, while the defendant claimed his prosecution was unique, the government pointed to 13 other prosecutions for the same offense within a reasonable time period. 978 F.2d at 58.

Here, obviously, that is not the case. Also, in *Fares*, the government provided a neutral and independent basis for the prosecution (dismissal of state court charges in contemplation of Fares's deportation), *id.*, while here the

government has not, and cannot, provide a legitimate basis for prosecuting Ms. Stewart and not her co-counsel.

Nor did the defendant in *Fares* present any evidence that his prosecution was motivated by some improper consideration; rather, his alleged connections to Hizbollah represented only an *additional* reason for the prosecution. 978 F.2d at 60. Here, in contrast, the government has made Ms. Stewart's political philosophy highly relevant not only in the charging decision, but also at the trial itself.

Thus, unlike the situation in *Fares*, Ms. Stewart's selective prosecution motion is neither "speculative nor unduly myopic." *Id.* Instead, it is based on incontrovertible facts: she, among three lawyers who performed the same conduct, is the only one to face prosecution, and the government focused its case, and the jury's attention, on her political beliefs and history of public statements. Consequently, Ms. Stewart meets the standard enunciated in *Wayte*, 470 U.S. at 609: she was "selected . . . on the basis of [her] speech."

Nor does any presumption of regularity continue to obtain at this stage in light of the abundant evidence to the contrary. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the Supreme Court considered whether prosecutors had misused the grand jury. On remand, the District Court held that "this presumption or regularity, being a mere presumption, is effective, like other

presumptions of fact, only in the absence of evidence to the contrary. Here what defendants seek is to ascertain if there is evidence to the contrary. They cannot be deprived of this right by that presumption.” *United States v. Procter & Gamble Co.*, 174 F. Supp. 233, 237 (D.N.J. 1959). As a result, the court authorized inquiry of DOJ officials.

Also, as the District Court noted below in the context of Ms. Stewart’s vindictive prosecution motion, *United States v. Sattar*, 314 F. Supp. 2d 279, 311-12 (S.D.N.Y. 2004), it is undisputed that prosecutors possess wide discretion in choosing whom to charge and for what. However, the Constitution places limits on this discretion.

One such historic limit is rooted in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, San Francisco used a facially neutral ordinance to target Chinese laundry owners. Nevertheless, the Court saw through the subterfuge:

[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

118 U.S. at 373-74.

Here, even if the showing made above was insufficient to demonstrate selective prosecution, certainly the evidence – such as the disparate treatment of Ms. Stewart compared with Messrs. Clark and Jabara – presented was adequate to warrant further discovery and an evidentiary hearing.

This is not the sort of case that would require a court to engage in judicial review of complex prosecution policies, a task that a court may not be competent to undertake. *See Armstrong*, 517 U.S. at 465. This is not a case involving statistical analysis or extrapolation. Instead, the unitary nature of this prosecution is striking.

Accordingly, it is respectfully submitted that Ms. Stewart’s convictions should be vacated, and the charges against her dismissed because they were the product of selective prosecution. In the alternative, it is respectfully submitted that because Ms. Stewart has made the requisite showing, the matter should be remanded for further discovery and an evidentiary hearing on the issue.

POINT X

**MS. STEWART JOINS IN THE BRIEFS FILED
BY HER CO-DEFENDANTS-APPELLANTS
TO THE EXTENT THEY BENEFIT HER**

Conclusion

Accordingly, for the reasons set forth above, it is respectfully submitted that Ms. Stewart's convictions should be reversed and the charges dismissed, and/or that the convictions should be vacated and a new trial ordered, and/or remanded for appropriate hearings..

Dated: June 29, 2007
New York, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

Docket No. 06 Cr. 5015

v.

LYNNE STEWART,

Defendant-Appellant.

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STATEMENT PURSUANT TO FRAP RULE 32 (a) (7) (C)

The undersigned hereby certifies that this brief, exclusive of the table of contents and table of authorities, uses a proportional typeface, 14 point font size and is 64,751 words.

DATED: New York, New York
 June 29, 2007

Joshua L. Dratel

