

REPORT ON JUNE 13, 2003 HEARING

The court appearance on June 13th was very well attended. We had a slightly larger court room and about 25 people could not get in. These loyal souls decided to wait in the hallway in case they could get in but Judge Koeltl didn't want people going in and out during the proceedings because it would be distracting.

The proceedings lasted from 9:30 am to approximately 1 pm.

Michael Tigar addressed the First Amendment issues in the indictment, also the indictment's vagueness and over broadness, the broken contract which refers to the agreement reached on the SAMs with then AUSA Pat Fitzgerald. Also addressed were FISA wiretaps and discovery issues by Ahmed Sattar's attorney.

Judge Koeltl aimed many of his questions at the standard for providing material assistance to terrorism under 18 U.S.C. §§2339, a statute Michael Tigar argued was vague and overbroad. The Judge several times asked AUSA Christopher Morvillo why the statute was not vague as to criminalize ordinary legal advice given to a terror group or its members. Mr. Morvillo (who along with AUSA Robin Baker appeared woefully unprepared for the Judge's inquiries and for the proceeding as a whole) stumbled and conferred with his co-AUSA's and said "bona fide legal advice" would not be subject to the statutes. The US Attorneys office only chose to address the First Amendment issue and the FISA search warrant issues. Once you have access to the transcript you will see the dialogue between the Judge and the AUSA with regard to judicial review issues and the problems with the indictment. The AUSA's seem to think they could go back to a grand jury to have the problems with the indictment "fixed". The Judge has asked for additional briefings and made no decision from the bench.

SELECTED "HIGHPOINTS" OF THE HEARING FOLLOW:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

02 Cr. 395 (JGK)

AHMED ABDEL SATTAR,
a/k/a "Abu Omar,"
a/k/a "Dr. Ahmed,"
YASSIR AL-SIRRI,
a/k/a "Abu Ammar,"
LYNNE STEWART, and
MOHAMMED YOUSRY,

Defendants.

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New York, N.Y.
June 13, 2003
9:45 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

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United States Attorney for the
Southern District of New York
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BY: DAVID STERN
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BY: DAVID A. RUHNKE

(Case called)

THE COURT: The first order of business is defense motions. And as I indicated in the prior orders, I will listen to defendants, government and then any rebuttal by the defendants. You can reserve any part of your 90 minutes for rebuttal.

MR. TIGAR: Good morning, again, your Honor.

May it please the Court, counsel, Ms. Stewart, Mr. Yousry, Mr. Sattar.

I am going to reserve 15 minutes, and Mr. Fallick will reserve five. Mr. Fallick and I will alternate back and forth issue by issue as we present these arguments, beginning with the First Amendment, then the secrecy, judicial review issue, FISA and the searches, Count 5 and the broken bargain.

Your Honor, turning then to the First Amendment issues that are before the Court, those relate to the FTO or foreign terrorist organization designation and to the SAMs.

Our constitutional disagreement with the government may be conveniently divided into two parts. The government and we agree on what is speech as protected by the First Amendment as distinct from what is conduct.

Second, the government and we disagree about the process of line-drawing that the First Amendment requires to assure that, when speech is being regulated, that it be done narrowly and precisely.

However, there is a narrower ground available to the Court than the constitutional one. And it is suggested at page

55 of the government's response to our motion. The government quotes from the judicial committee report on the foreign terrorist designation statute, House Report 104-383.

The ban, the Congress says, 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 the philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups or their subsidiary groups overseas.

When one lays that legislative history alongside the broad allegations of this indictment, attacking as it does press releases issued in the United States and other First Amendment protected conduct, it is clear that this statute cannot, was not intended by the Congress to reach that far and, if it does, it raises First Amendment issues.

With respect to the SAMs, the narrower ground is, as some courts have recognized, the lack of administrative authorization for so sweeping an incursion into the lawyer/client relationship based, after all, upon a supposed Bureau of Prisons' power to regulate inmate activity.

Two key paragraphs of the indictment for purposes of this analysis are paragraphs 11 and 16. Paragraph 11, the Court may recall, is the one that says that the lawyers were going to handle matters legally. The legal defense was going to be different from whatever else is going on.

In paragraph 16, which is the one that talks about the press release, the lawyers are in a special circumstance.

THE COURT: The government says that the SAMs and whether the SAMs were violated or not is not an element of Counts 1 and 2.

MR. TIGAR: That's correct. It is, however, an element of Counts 4 and 5.

THE COURT: Correct.

My question with respect to the SAMS on Counts 4 and 5 is, the government argues that under Dennis and Bryson, the constitutionality of the SAMs cannot be argued because there are a long line of cases that say you cannot conspire to violate a statute. You challenge the statute. You cannot submit a false statement, even if the statute pursuant to which you made the false statement was itself unconstitutional. And, I didn't see a response to Dennis or Bryson in the briefs.

MR. TIGAR: In our reply brief, we did answer the Dennis and Bryson points, and I will find the reference before the day is out.

In Dennis against the United States, which is not the old Communist Party Dennis; it is the 384 U.S. 855 Dennis. After ruling on the grand jury proceedings -- and we will talk about that part -- the court then said that those defendants could not raise the constitutionality of Taft-Hartley because the Congress had passed a statute that required them to make an oath of non-Communist affiliation as a condition of representing the union. No case has ever held that the agreement to obey an

executive branch order, which is what this is, SAMs are, is a bar to judicial review for someone who is said to have violated it.

That is to say, if the police come and say, All right, you are required to disperse because there are three or more of you -- the standard reading the riot act of common law thing.

Is say, OK, we are going, but then I continue demonstrating, I can still raise the First Amendment issue.

The line of cases upon which Dennis relies relate to valid Congressional -- to ostensibly valid Congressional enactments.

As we point out in our analysis, no court has ever gone so far as to preclude judicial review under circumstances like this.

Moreover, your Honor, as we will say when I get to the argument about Count 5, the so-called false statement turns out not to be a false statement at all, that is to say, the government now admits that Count 5 is a sham because, if you look at the Exhibit A to our motions, you will see that it refers to a nonexistent special administrative measure.

I can address that now or I can address it later.

THE COURT: I don't want to interrupt the flow of your argument.

MR. TIGAR: The point of our discussion, and I do recognize that Counts 4 and 5 are separate for analytical purposes from Counts 1 and 2, is that now is the time to decide those issues with respect to Lynne Stewart.

The government relies on its general allegations of conspiracy to try to save what is clearly a group of overbroad pleadings that interfere with First Amendment rights.

We say that the general allegations must be interpreted in light of the specific provisions to which we have pointed because a mango can't grow from an apple seed. The government's flawed First Amendment theory is all the way through the indictment as a whole, if one interprets the general allegations in light of the specific.

Another way to look at this would be for your Honor to order, as Judge Duffy did in the Kearney case, a bill of particulars or, alternatively, to take the government's statements about what it intends its case to be as binding upon the government under GAF and Salerno.

In short, your Honor, we are filing these motions because we believe that the First Amendment issue should be confronted now and Lynne Stewart not left to drift around and bob about on some sea of calumny until she fetches off on some far shore, vindicated but exhausted.

THE COURT: Let me go back to what you said about Dennis and Bryson.

The government says that the thrust of the violations of the SAMs are the SAMs that apply to the sheikh who was in prison.

There are ways of challenging those, and you cite Judge Young's opinion in Reeves. That was a challenge. You cite the decision in Hale. That was a challenge by a lawyer as

to whether the SAMs would apply to the lawyer. And the judge in Hale went on to say in the final paragraph that the judge was not reaching at all the situation where the lawyer was being charged in a case with a criminal effort to violate the SAMs as they apply to the prison.

So there was a possibility of challenging the SAMs rather than, allegedly, engaging in a conspiracy to violate the SAMs.

MR. TIGAR: Yes, your Honor, that was an option that someone had. The question is whether -- and this has been ruled on by courts over and over again -- the First Amendment rights must be the subject of litigation before you can go on and engage in First Amendment protected conduct.

Let's assume for the moment, because I think that the Court's question does, that Lynne Stewart's conduct is protected by the First Amendment and that she knows it. Why is she different from Dominick Gentile who has taken an oath to obey all the bar rules and then, instead of seeking judicial clarification of Rule 3.6 goes and holds an unauthorized press conference?

That is, why is she different from someone who decides to disobey an executive branch order to disperse?

We understand that there are two routes available. The courts of many states permit you to violate an injunction that poses First Amendment problems as an alternative to seeking judicial review.

THE COURT: What case is there like Dennis or Bryson that authorizes an alleged line?

MR. TIGAR: I don't know of a single case, your Honor, that precisely decides the issue that you have.

Our point is, the question is where the burden of proof lies. That is to say, how far does the Dennis case go? The Dennis case does not authorize the course of action that the government suggests. It simply doesn't go that far.

Even though I had intended to address this later, let's look at it now. Let's look at the affirmation.

Lynne Stewart, pursuant to 28, U.S.C., Section 1746 affirms. The affirmation addresses a nonexistent SAM. It is made under penalty of perjury. The courts have held that a 1746 declaration can be prosecuted under 18, United States Code, Section 1621.

Does your Honor remember the case of Ben Reinakey, the lieutenant governor of California who lied to the Watergate committee and his conviction was reversed? Why? Because the Senate committee was not authorized to administer an oath.

We all remember him. He said, Oh, my goodness, I have been vindicated. I lied to someone who was not authorized to administer an oath, so I take back what I said earlier.

I think that the case squarely holds that a person can go ahead and lie and get judicial review of the validity of the governmental proceeding. And it rests on a Supreme Court decision, *Cristofal v. United States*.

So if I may be permitted to correct myself, those cases which reverse convictions for someone who may be assumed to have told a falsehood under oath stand for the proposition that judicial review of the validity of the underlying proceeding is available.

THE COURT: Go ahead.

MR. TIGAR: Turning back then to the First Amendment argument, your Honor, assuming that the Court is able to reach it, the SAMs are a prior restraint on speech. If the SAMs are a prior restraint on speech, they are fundamentally different from the Taft-Hartley oath at issue in Dennis. If I am subjected to an invalid executive branch prior restraint on speech, what license does the Court have to say that I have to go litigate the validity of the prior restraint before I engage in the protected First Amendment conduct?

The Dennis case doesn't reach that far. The Dennis challenge was to Section 908 of Taft-Harley. It was a narrow challenge. It did not involve a prior restraint on speech, the most suspect of all First Amendment incursions.

Moreover, your Honor, the speech here, the regulation of speech here is content based. It is a content-based prior restraint on speech.

The President of the United States' emissary, Mr. Fleischer, under the government's view, can stand up and say the cost of a one-way ticket is substantially less than that, the cost of one bullet. If the Iraqi people take it on themselves, it is substantially less than that. He can stand on a public

platform and call for the murder of a leader of a foreign state with whom the United States was then at peace, and yet Lynne Stewart, under a prior restraint is forbidden to say that somebody ought to reconsider a cease fire in Egypt.

The government says, first of all, it is not speech, it is conduct. We have answered that. Gibney and O'Brien had nothing to do with this. O'Brien tore his card and that wasn't speech. Spock allegedly urged him to do it, and that was speech. And in Cox against Louisiana, Justice Potter Stewart said that classic speech is a press release.

The importance, your Honor, of the First Amendment rights that we assert is made obvious when we read the newspapers every day. That is to say, the government seeks to overcome the presumption of innocence with these suggestions of complicity. Today, as we read the reports of the office of inspector general, it is Muslim, Islam, South Asian. In earlier times it was African-Americans, native Americans, Orientals. There was the Palmer raid. That is the historical background against which the Court is asked to rule.

It was important, your Honor, to resist this prior restraint on speech. It was important for Lynne Stewart to keep alive the debate about what was going on under the regime of state sponsored terrorism in Egypt, precisely because this is an area in which public debate is absolutely essential.

Some historical parallels --

THE COURT: Before you go to historical parallels, from what you said before, you believe that I should simply

construe the statute as it relates to the first two counts narrowly and say that this indictment charges conduct that is not covered and, therefore, I should not reach the constitutional questions, right? Is that fair?

MR. TIGAR: I would not dare to tell your Honor what your Honor should do. I have said what your Honor is able to do.

THE COURT: I really want input as to the fair order of the arguments because that, it seems is the first argument. If I reach the constitutional questions, the second argument then becomes how narrowly or broadly I read the statute and whether I should reach both the vagueness issue and the overbreadth issue, and is there any case law that tells me the order that I should consider those arguments as between, for example, vagueness and overbreadth or do I just have to consider both?

MR. TIGAR: Your Honor, there is, of course, the canon of statutory construction of constitutional adjudication should be avoided, but I think it is more honored in the breach. That is, if a court feels that the constitutional issue cries out for a determination, if it springs obviously from the face of the statute as interpreted by the government, then that's the Court's obligation. It is the court's view of its obligation.

Thomas Jefferson was angry at John Marshal for deciding that unnecessary part of the Marbury case.

Today, the government has declared war on public debate in the name of antiterrorism. The government's

constitutional arguments are so deeply flawed that an Article 3 judge may well feel an obligation to address them directly even though a narrower ground of decision lies before you.

Certainly Judge Young decided to say some words that were not strictly necessary to his decision.

The government's interpretation of its statute, which is binding on the government, does call for some First Amendment analysis, we would respectfully suggest.

I think this does point up the relevance of the historical parallels.

Ali Benflis was the leader of the FLN in Algeria. He was jailed for seven years. Finally, President de Gaulle had to negotiate with him. During that time people were killing each other in the streets, the Army, the FLN forces. So history asks, who were the terrorists?

When Jomo Kenyatta was jailed in the Mao Mao movement as the British named it, and went into the hills, 10,000 Africans died. Jomo Kenyatta later became president of Kenya, and so who were the terrorists and who were the forces of order?

And Nelson Mandela was in prison for 30 years, all the time the group was doing its armed actions. Who were the terrorists and who were the forces of order?

We filed in our declaration and do not apologize for it, information that our own State Department regards the government of Egypt is engaged in systematic, gross human rights abuses. The question of what to do about that, the question of

how we debate that, how we understand what our policy should be is core First Amendment protected discussion.

And that then brings me to the question of the role of the lawyer. What is Lynne Stewart supposed to do, representing a highly visible political figure?

The government doesn't seem to understand it but it is not theirs to say. What she is supposed to do is to keep her client's face alive and visible because that can affect conditions of confinement.

What she is suppose to do or at least has the right to do is to talk about her client's potential role in constructive social change in Egypt.

THE COURT: Let me just ask you a question.

We have an indictment that alleges a violation of the statute for material support for a foreign terrorist organization, and we have two other counts that deal with conspiracy and alleged false statement.

There's no case, is there, which says that a lawyer has a license or an exemption to violate the law which would generally be applicable?

A lawyer could not, for example, in the zealous representation of the lawyer's client, carry a message back and forth which was part of a scheme to obstruct justice, a scheme to release the prisoner from jail by breaking out.

So the fact that the defendant is a lawyer provides no exemption from the criminal charge, does it? Or if it does, tell me what the case is that suggests that there is an

exemption out there for the lawyer from the general application of the criminal law.

MR. TIGAR: There is no broad-based exemption of lawyers from the general application of the criminal law.

What there is, is a consistent line of authority that lawyers and not government determine the lawyer's role in the first instance and that lawyers have First Amendment rights that they may and must vigorously exercise on behalf of their clients.

Gentile recognizes that if you are going to draw lines about lawyers' speech, you've got to follow the same rules as drawing lines about somebody else's speech.

The vice of this indictment, your Honor, the first vice of it is not that it singles out a lawyer but that it singles out protected speech.

When we talk about Lynne Stewart's speech, however, we are talking about lawyer's speech as having a special value in constitutional adjudication and in the legal process.

And that we cited in the historical discussion. What did John Adams say, Then and there was the child Independence born. He said it in James Otis's speech on the Boston Common in 1761.

What did Morris, the signer of the Declaration of Independence say about the defense of John Peter Sanger in this town? It was the morning light that lighted the way to liberation.

What does Amnesty International say more prosaically and recently? The lawyers build a country like Egypt that practices state-sponsored terrorism and they first try to see the prisoners in jail so that they can address the conditions of their confinement and publicize the prisoners' views and potential role in social change in Egypt.

That, your Honor, is what lawyers do. If in the process of doing it, a lawyer carries a message, helps somebody to break out -- if a lawyer obstructs justice, of course, the lawyer is subject to prosecution.

The reason we talk about Lynne Stewart's role as a lawyer is that the government says what she was doing had nothing to do with what lawyers do because he is not entitled to a lawyer under the Sixth Amendment, that's nonsense. We are entitled to point out that nonsense. We are entitled to point out the value of what lawyers do as public citizens.

I think, although, it was only for four Justices, Justice Kennedy's opinion in *Gentile* does point out the important role of lawyers as public citizens, taking the platform to talk about potential invasions of rights.

After all, your Honor, we have to ask ourselves, what is Lynne Stewart supposed to do under these circumstances? That is, she signs this SAMS order. The government now interprets it as saying, once you have done that, you are forbidden to exercise your rights as a lawyer or your view of what a lawyer ought to do. That is a catch-22, your Honor.

And if you don't do it, we are going to prosecute you.

It is the same catch-22 as in Lefkowitz against Cunningham. Oops, and here I am with another case that doubts the rationale in Dennis. That is to say, the government imposes an unconstitutional condition on her exercise of her profession. She is not required to litigate the validity of it before she goes and does something.

If your Honor will recall, what Pat Cunningham went down and did, he said, No, I am not talking to you and I am not waiving the Fifth.

Bang, you are out of a job. You are not the leader of the Democratic Party anymore.

The three-judge court said that is invalid. The Supreme Court said 7 to 2 or 8 to 1, whatever it was, that the underlying provisions of New York Election Law 22 was invalid, even though Cunningham had violated New York Election Law Section 22 by refusing to testify before the grand jury.

THE COURT: I was going to ask whether you or Mr. Fallick was going to address the classification of the Islamic group as the foreign group.

MR. TIGAR: That is going to be next, after we do the First Amendment. I am going to do that under the rubric of judicial review. I know that we are limited with respect to time.

Lawyers, your Honor, are special. They are. They have a special responsibility, this profession of ours. We took an oath.

Did you read in the office of inspector general report, it was the lawyer in the DOJ who objected to what the Executive Branch was doing to these people.

We take an oath, your Honor, not just to represent clients but to be public citizens in a particular way.

That is not a reason to say that the First Amendment carved out a special place for lawyers. It is simply a recognition of the role of lawyers' speech in maintaining the system that calls itself justice.

Now, Mr. Fallick will talk about this First Amendment issue and then we will address the classification.

MR. FALLICK: Good morning, your Honor.

Mr. Tigar enumerated several issues that we intend to argue.

We also, on behalf of Mr. Sattar, intend to argue other issues, one being, very briefly, a bill of particulars on Count 3, and the two discovery issues that we characterize as the prison tapes and Moussaoui-type issues that we have alerted the Court to this week. We intend to argue those this morning.

THE COURT: I actually had not included the discovery issues as part of the 90 minutes, so I am happy to take those up at the end because I think there hasn't even been a response on those issues. Maybe it could be worked out at the end of the argument, maybe not. Otherwise, I need a government response.

MR. FALLICK: Very quickly, I believe what the government's response is to our Moussaoui-type argument,

frankly, it is that we should set a briefing schedule, and we can certainly do that.

The argument is in our papers that we want him to be a witness. We think he is in Guantanamo, and we would like access to him. We think his testimony is material. The government suggested to me yesterday on a phone call that we set a briefing schedule. We can do that.

THE COURT: I just don't want to be --

MR. FALLICK: The same response is for a briefing schedule for the prison tapes issue, the same response is that a briefing schedule should be set on the waiver of privilege.

THE COURT: Right.

MR. MORVILLO: That is absolutely, right, your Honor.

MR. FALLICK: On behalf of Mr. Sattar, we have argued on Counts 1 and 2 that, on vagueness and overbreadth ground that the language in the statute, "knowingly provided communications equipment" does not fairly inform a person of ordinary intelligence what is prohibited.

The word "provided," the dictionary definition means "to use, to send, to furnish, to supply."

In this indictment, Counts 1 and 2 principally charge Mr. Sattar with being a communications center for alleged members of the Islamic group. And principally how he would be doing that, they say, is by using his three-way telephone apparatus to connect Mr. Sattar and others who were around the world.

The question then becomes: What is prohibited by the statute? What would a person understand is prohibited? Is it the use of one's own equipment or is it actually the sending of that equipment.

Now, Congress in the Congressional history which we cite in our brief uses the word "send." However, here, we suggest, that the statute, as applied to Mr. Sattar, is impermissibly vague because it prohibits one who advocates the cause of the Islamic group over his or her own telephone, fax or computer, and that person can conceivably be prosecuted for providing the Islamic group with communications equipment, even though that person is using their own equipment.

And certainly advocacy is protected First Amendment speech.

THE COURT: Correct me if I am wrong, your argument is not that on the issue of unconstitutional based on vagueness, that is, it is unconstitutional as applied to Mr. Sattar; it is that the statute is unconstitutionally vague because it could be and is being used by the government in this case in a way that didn't give fair notice to someone that it could be used?

MR. FALLICK: That's correct.

I think that the language in the Humanitarian Project case, a Ninth Circuit at 205 F.3d 1130, in that case, the Ninth Circuit was talking about the term "personnel."

THE COURT: It deals with personnel.

MR. FALLICK: They say it is easy to see how someone could be unsure about what the act prohibits with the use of the

term "personnel" as it blurred the line between protected speech and unprotected conduct.

Here, that same argument applies. The analogy is the same.

THE COURT: Before you follow up that thought. If I accept Judge Grisinski's decision, you prevail on the first two counts in any event, right, because the first two counts charge personnel, communications equipment and financing?

MR. TIGAR: And transportation.

THE COURT: Transportation.

Correct me if I am wrong, if the indictment was wrong to charge any of those four things, we don't know the degree to which the grand jury rested the indictment on any of the four.

MR. FALLICK: That's correct.

THE COURT: So if I accept Humanitarian Law Project with respect to "personnel," I would have to dismiss Counts 1 and 2; communications equipment is a separate issue.

I was just wondering how you turn to Humanitarian to communications equipment which doesn't deal with --

MR. FALLICK: We are not necessarily talking about how the Court determines use of the term "personnel" is vague. It is not the use of the term "communications equipment" as such. It is "knowingly providing" communications equipment because the word "provided" seems to suggest to someone of ordinary intelligence that you have to send the equipment, you have to supply the equipment.

But the use of one's own equipment to advocate for the cause of the Islamic group can be considered, under this statute, a violation of providing the Islamic group with communications equipment.

And that is why it is vague, your Honor. It is not the term itself "communications equipment." It is "knowingly providing." It is the word "providing" communications equipment, that someone has to know that by using their own equipment, they would be violating that statute. We suggest, no one of ordinary intelligence would ever understand that to be a violation of the statute.

MR. TIGAR: We want to now turn to the FTO designation and to the related issues. We will not discuss today the Moussaoui issue that Mr. Fallick discussed. I understand that is to be briefed.

However, the government has a very consistent position here, and that is that they haven't produced the FTO record. They haven't produced for us the FISA affidavits. They won't give us a bill of particulars. The answer is no. And that's because they say no judicial review.

We say that their obduracy is at war with the Sixth Amendment.

It is interesting, your Honor, because this is not the first time that a district court has, a trial court has confronted this issue. Luther Martin told John Marshall in 1807, All we want is the copies of some papers and the original of another. This is a peculiar case, sir. The President has

undertaken to prejudge my client. He has assumed to himself the knowledge of the Supreme being himself and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of that country that has rewarded him. He has let slip the dogs of war, the hell hounds of persecution, to hunt down my friend. And would this President of the United States who has raised all of this absurd clamour pretend to keep back the papers that are wanted for this trial.

That was Luther Martin in defense of Aaron Burr and, of course, John Marshall's opinion has become the watch word when people seeking information from the government.

THE COURT: Judge Tagoshubi cited this in Rahmani, right? Where does Rahmani stand? Has the Ninth Circuit decided it? Is it up for argument?

MR. TIGAR: I don't know the procedural posture of Rahmani.

We have cited also Reynolds against United States in the discussion, 345 U.S. 1. The interesting thing about Reynolds, as we said in a subsequent paper, it now turns out that there were no state secrets. Chief Justice Stevens spoke more truly than he knew when he said that judicial control over the evidence should not be abandoned to the caprice of executive officers.

And, of course, there is Handelsic on that issue in this circuit 142 F.2d, and that is cited with approval in the 384 U.S. Dennis.

So, your Honor, yes, we are challenging the regime of secrecy the government seeks to impose. Justice Frank Carter said in *Watts v. Indiana*, judges should not forget as judges that which they knew as men -- and he would say -- and women he would say today, I would assume. So we read today in the *New York Times* of the forged documents that were the basis for intelligences about Iraq's nuclear program. We read the OIG report of what happened behind the veil of secrecy, and we wonder whether, behind that veil -- again here, as in the past . . . your Honor is about to ask me something.

THE COURT: The Islamic group could have challenged the designation by the Secretary of State in the D.C. circuit.

MR. TIGAR: Presumably, it could, your Honor, although the government's papers suggest that it might not have had constitutional standing because it is not localized in the United States. The government's papers do not go so far as to say that they had the unconditional right for such review.

And I'm glad that your Honor asked the question because the government sent us all a letter with the D.C. Circuit's latest views on this. And that letter is exactly our position. We don't seek judicial review of the executive branch decisions about foreign policy. President Bush is free to prefer the state-sponsored terrorism of Hosni Mubarak to some other form of government within, of course, the broad limits set by preemptory norms of international law, we hasten to say.

But that is what the D.C. circuit is talking about. The statute to designate foreign terrorist organizations could

be used to interdict the sale of arms to such organizations. It could be used for all sorts of foreign policy purposes. The right to judicial review arises when the statute is turned against an individual in a criminal case. Lynne Stewart, who had no opportunity until this indictment was returned, to seek any judicial review. That is what sets this case apart from the World War II price cases that are a part of the great Hart Wexler dialogue and the discussion of judicial review.

Not one case supports the government's position on this subject.

THE COURT: Could Lynne Stewart have intervened or brought an action in the D.C. circuit saying that she was an interested person in the issue of whether the Islamic group was a foreign terrorist organization?

MR. TIGAR: The statute does not provide for it, your Honor. The statute, as I say, provides for the organization to seek it. And it provides that, in that civil proceeding, the government can use secret evidence.

THE COURT: I know that. Could she have intervened as an interested party in the D.C. circuit without allegedly violating 2339 as the way to test whether the Islamic group is properly classified as a foreign terrorist organization?

MR. TIGAR: 8, U.S.C., Section 1179A does not provide for intervention. The federal rules of appellate rules of procedure do not provide for intervention. Intervention in a court of appeals review procedure is unusual, put it that way.

THE COURT: And intervention provides that the Islamic group would have brought its own proceeding?

MR. TIGAR: That's right.

THE COURT: Could she have simply brought a proceeding as a person who was affected because --

MR. TIGAR: Bystander?

THE COURT: -- you say if she was considered to be some form of representative for Islamic group, they could have gone after her bank accounts. Could she have brought a proceeding under the D.C. circuit?

MR. TIGAR: Not under the statute. The statute provides that the organization is the litigant. Could she have brought it under the Administrative Procedure Act?

THE COURT: The limitation to the organization alone was unconstitutional because the designation affected her.

The statute plainly sets out that review is to be in the D.C. circuit. So the question is could she have brought any action in the D.C. circuit?

MR. TIGAR: Not, your Honor, if the Court believes in the presumption of innocence. She is presumed innocent, your Honor, of having aided this organization in any criminal way.

Your Honor's proposed question, which I think is an important question, requires somebody who thinks that someday, some prosecutor in the exercise of some discretion that is being exercised after invading your lawyer/client privilege and in the present atmosphere of hostility towards people who care a whit about the plight of folks who are South Asian, Islamic and

Arabic, in order to avoid prosecution, would have to hide themselves down at the district of Columbia and, at their own expense, bring a prosecution.

Your Honor, the consequences of such a rule for the presumption of innocence are formidable -- talk about chilling effect. So I would rather say that, although she might have had a right to do it, to insist that she do it, to make it a condition that she do it is simply to add to the issue of fear --

THE COURT: Assume that I agree with you that the designation of the Islamic group as a foreign terrorist organization is an issue that can be challenged in this court on some basis, what would the basis be?

MR. TIGAR: First, may we turn to the statute.

1189(a) forecloses judicial review of the validity of issuance of an FTO order.

Other parts of 1189(a) speak of the validity of the order. Validity of issuance could easily relate to the technical business of notifying Congress or publication of Federal Register. So 1189(a)(8) should not be interpreted as a bar to judicial review. That is simply a canon of statutory construction that the cases that we have cited urge upon the Court.

At the very least, turning now to the constitutionally based discussion, Article 3, and the Court's obligation as an Article 3 judge, Webster v. Doe and the other cases we cite, tell us that the constitutionality of the statute as applied,

that is to say, the vagueness and overbreadth of which I have spoken --

THE COURT: No.

MR. TIGAR: Have I jumped over your Honor's point?

THE COURT: You may have misunderstood the question.

Assume for a moment that I agreed with you that the designation of the Islamic group as a FTO could be challenged in a criminal prosecution. There are lots of cases that say that the nature of such challenges are limited. There are specific kinds of challenges that can be raised and others that cannot be.

The most recent decision by the D.C. Circuit said that, even in the D.C. Circuit which is granted the right of review under the statute, not all of the provisions of the designation are subject to judicial review because they are political questions, what Judge Tagoshubi said also.

So my question is a very simple question. If you have the right in this prosecution to challenge the classification, what do you say was the defect in the classification that provides a defense in the case?

MR. TIGAR: The defect in the classification is the failure of the classifier to observe and respect First Amendment standards in the classification process. That First Amendment issue arises:

1) Because the statute should not be interpreted to classify an entire organization as an FTO when only portions of its people are adhering to alleged impermissible goals.

2) That if the statute does permit such classifications it is vague and overbroad for the reasons that we have given.

3) That the statute, that the classification itself is based upon lies and blunders and crimes and constitutes a content-based discrimination against speech, that is to say, a group in Egypt that under Amnesty International's view has not been responsible for violent activity since 1997 is being completely barred from public discourse while the Mubarak government that the same Amnesty International and State Department says engages in state-sponsored terrorism goes on about its merry way, that is a content-based discrimination. You can think it was a good or bad one, but the First Amendment prohibits it.

Moreover, your Honor, the very process by which these classifications happen requires judicial review. And I don't know what else we are going to find. That is, suppose the classification is fraudulent. Suppose it is. We don't know, unless the government gives us the information, right? They haven't told us anything. They haven't told the Court anything. They refuse.

Why would I think it might be fraudulent?

Well, if I read The New York Times on May 10, I read Capitol Hill comment that the classification of the people's Mojahedin was a "gesture" to Iran, that the Pentagon urged that they be re-armed, that now there is going to be a cease fire with them, that 3,000 of their members carry arms and 7,000 do

not. The choice of whether to classify, for purposes of cease fire and surrender and arms is, of course, an executive branch choice subject to the political question doctrine, at least arguably.

There are two reasons why it is not subject to the political question doctrine here in this case, and those are in the final paragraph of the government's letter that quotes from the D.C. circuit.

It is that the statute could not, is not intended to apply to First Amendment protected conduct.

And then, of course, there is the other one. This is a criminal defendant, the right of state secrecy, the right to be free from judicial review in this circuit terminates when the liberty of a person like Lynne Stewart is at stake. That is the teaching of Andrew Check in Copelin. It is law from which the circuit has never retreated. So the political question doctrine simply is not in the case for that purpose.

THE COURT: Issues of designation as a defined terrorist organization are simply not raised in Humanitarian Law Project and Boim. I read the decisions and there is no discussion at all of the issue.

MR. TIGAR: I don't know what the lawyers did there.

THE COURT: The only decision on this issue is Judge Tagoshubi's decision in Rahmani?

MR. TIGAR: As far as I know that is correct, but it isn't hard, because this is a criminal prosecution. These other cases are not, in the main, criminal prosecutions. This circuit

has held very clearly that the rules are different when it is a criminal case.

Moreover, it is an element of the offense. We are therefore, like the defendants in Esta and all of the other selective service cases.

And as I say, the government can't cite a single case that completely forecloses judicial review under circumstances like this. And, of course, the more we find out about the so-called basis on which foreign policy decisions are made, the more essential it becomes.

The executive branch is free to rely on forged documents and lousy intelligence. If the President has the power to lead an Army, there it is. But when the liberty of a person is at stake, as we say, the rules become different.

I guess that is the interesting thing about Rahmani was Judge Tagoshubi's decision. He grew up in an internment camp.

The failure of Article 3 judges to address these issues of human liberties in times when war and terrorism and public danger are being talked about is the severest reproach to the constitutional system.

Patrick Henry was opposed to the Constitution because he didn't think that the judges had the gumption to do it.

I don't want to lecture your Honor. It is not my place to do it.

This was a lesson that we learned early on.

Justice Chase got impeached for blurring the line.

Thomas Jefferson learned his lesson in Marbury and Burr.

In the embargo case where Justice Johnson, his own appointee said that he had acted illegally, whereupon Jefferson had his Attorney General, the forerunner to John Ashcroft, to write a memo accusing Justice Johnson of suffering from the leprosy of the bench.

The trouble, of course, your Honor is, unlike the Japanese relocation, actuarially, Lynne Stewart doesn't have 50 years to get vindicated. We wish her well and she is in good health, but we are looking for it now.

Finally, your Honor, broad-gauged classification such as this statute authorizes are very fine for foreign policy purposes. You have to deal in categories. But if, as my declaration seems to suggest and as Amnesty suggests, even the Islamic group is a bifarious organization.

The classification, when used as a basis for a criminal prosecution, implicates the values in Spock. Yesterday the government delivered to us a letter which purported to give some discovery, some transcript of an Arab media program and there are people calling for blood and so on in terms not quite as harsh as those of the defendants in Hess v. Indiana and Brandenburg v. Ohio.

But then the transcript that we have, someone turns to the lawyers for the Islamic group. Oh, yes, we are the lawyers. We are working. We recognize the organization has not done any violent acts and that is the line upon which we are moving.

The point, your Honor, is that these papers reflect a debate. And it is the failure to separate out what is and is not protected speech that judicial review is necessary.

MR. FALLICK: Your Honor, while we certainly adopt everything that Mr. Tigar has said, our concern is somewhat more limited.

The statute apparently prevents an organization from challenging the designation, but also impacts upon an individual who is a defendant in a criminal case 1189(a)(8) precludes a defendant such as Mr. Sattar from raising any question at a criminal trial concerning the validity of the designation as a defense or an objection.

The statute has three elements -- jurisdictional element, citizen within or without the United States, providing material support to a foreign terrorist organization. That is an element of the crime that the government has an obligation to prove beyond a reasonable doubt, which we should have the absolute right to present evidence for the jury to consider, whether or not the Islamic group is a foreign terrorist organization. The statute seems to preclude us from doing so.

The government cannot conclusively say that, because a designation has been upheld, that they don't have to prove the element beyond a reasonable doubt, and you have no right to challenge it.

This is a criminal trial. There is an element of that charge. They have to prove it beyond a reasonable doubt, and we have every right to put in evidence to show that the Islamic

group is not a foreign terrorist organization. And that is our concern, and that is what this statute seems to preclude.

THE COURT: The government would read that element as saying that it provides material support to an organization that has been designated a foreign terrorist organization. And so the element is proven when there is a designation as a foreign terrorist organization, and the government would also concede that it would have to show notice. So the question is then, is that the element of the offense?

MR. FALLICK: The statute says, 2339(b), whoever within the United States knowingly provides material support to a foreign terrorist organization. Foreign terrorist organization is the element. It is an element that they must prove, and we have the right to present evidence to the jury to consider whether or not the Islamic group is a foreign terrorist organization. This statute seems to preclude that.

THE COURT: But isn't "foreign terrorist organization" defined?

MR. FALLICK: 2339(b), Subsection 8, prohibited acts, unlawful conduct.

THE COURT: But under (G) "Definitions," the term "terrorist organization" means an organization designated as a terrorist organization -

MR. FALLICK: I understand that, your Honor. But Mr. Sattar has the right, because this is an element of the crime, to present evidence challenging whether or not the Islamic group is a foreign terrorist organization. The statute seems to

preclude that. Like any other element, the government has the burden. We have the right to challenge that. We have the right to challenge through our own examination and through evidence, and the statute seems to preclude that.

Thank you.

THE COURT: All right. I think there is ten more minutes.

MR. TIGAR: Before Mr. Fallick and I address the FISA issues, I wanted to return to the point that your Honor made citing the Dennis case at the beginning of today and also then to the broken bargain.

Count 5, we have dealt with at great length.

In Dennis, of course, the Congress has the plenary authority to regulate labor. They passed a statute.

Here, the question is, does the Attorney General have any authority at all to regulate lawyer behavior under the statute, under the regulations or whatever.

For example, in *Good Connect against United States*, the court held that someone could not be validly prosecuted for refusing induction having turned in his draft card and been accelerated for induction. Arguably, that person could have litigated the validity of the selective service order accelerating him for induction, but he didn't. And the court held that there is no authority to make that kind of a regulation.

Let's turn back to Exhibit A.

28, United States Code, Section 1746. This is a declaration under penalty of perjury which the government has chosen to prosecute under 1001. Why? Presumably, because they wanted to deprive us of the benefits of the Reinakey-Cristofal defense. They want to deprive us of the benefits of the no-literal falsity teaching of Bryson.

Count 5, the government now admits in what may be taken as the equivalent of a bill of particulars refers to a special administrative measure.

And when we look at Exhibit A to our pleadings, you see what it is that she signed that said that. The special administrative measure that was dated seven months after the date she agreed to respect it, i.e., it was a special administrative measure not in existence.

The government says, That is all right because at trial we are going to prove something different than what we allege. We are going to prove an unalleged lie about something that is not the document she signed.

In short, your Honor, Count 5 is hopeless.

THE COURT: Well, hold on.

The government says there was a typo in the document, that the specific SAM that was being referred to plainly was not a SAM dated seven months later. There was no question as between the parties as to what the SAM was that is referred to as an eight-page SAM. It has a date of, they say, that there was a typo in the date.

This is not a case where the statement was literally true that Ms. Stewart would comply with the SAM. Your argument was that it was so clear that she couldn't comply with a SAM that wasn't yet in existence that the charge makes no sense.

But why isn't it a jury question? What you have here is the statement. Here is what the parties discussed. Here is the SAM. Was this an agreement to comply with that SAM or was that a typo? It is not a case of little truth. It is a case you present of so false it couldn't be believed. Isn't that right?

MR.TIGAR: No, your Honor, it is not right.

The problem here is that, given the government's decision to quote from the terms of the document that is not in existence, there is a literal falsehood question and that is, of course, in addition to the fact that she falsely stated among other things, the following -- the count doesn't even tell us, your Honor, what the interesting jury theory on which the government intends to proceed might be. It is hopelessly vague.

That is our first argument.

Whether I have convinced the Court on that or not, we have another one. That is, what in the world is the government doing using 1001 to enforce this SAMs authority?

I understand the Court's argument about Dennis, but what is the consequence of not obeying a SAMs?

THE COURT: It is not an argument; it is just a question.

MR. TIGAR: I apologize if I overstepped, your Honor.

1001 is a part of a statute that dates to the Civil War. It is part and parcel of something that is now codified in the False Claims Act as well as in 1001.

As the Fifth Circuit has just held, 326 F.3d 669, you have to be careful not to overcriminalize in the arena of bargaining with the government.

It is pretty unusual, your Honor, and here perhaps it comes back to both the earlier point I made in this one. The idea is that I promise to do an act in the future. It is highly unusual to prosecute a later violation of that promise as a present day falsehood. It is thousands of people who promise to keep myself only onto you, to love, honor and obey and later on didn't do it. Some of them in quite high places, but no one would suggest that they had perjured themselves at the altar.

The confusion in this count then, your Honor, must be weighed against the common sense understanding of what it means to make a promise that you later don't happen to carry out for one reason or another.

And the historic view of 1001 in contract negotiations -- this also relates to our broken bargain argument, that Mr. Fitzgerald recognized that this was a contractual matter because he gets in touch with Ms. Stewart, and said, Let's renegotiate the SAMS.

After the hearing today, I am going to present a diskette to the Court of a conversation clear in 2001 where Mr. Fitzgerald is still negotiating with Ms. Stewart about maybe

getting another SAM and so on, showing that the government had regarded this as a contractual matter.

We need a hearing on that, your Honor, because we say if this was a broken bargain, it was dealt with.

The rest of it I can say in my papers, your Honor.

THE COURT: Let me ask you one question about the alleged broken bargain.

When I compare Mr. Cohen's affidavit to your affidavit, and you can correct me if I am wrong, but he changed paragraph 23 from the paragraph that you had submitted in a way that appears to be somewhat significant.

In his affidavit and revised paragraph 23, he describes the alleged bargain as it was agreed, that Ms. Stewart would be provided a single visit with her client, Sheikh Abdel Rahman, under the new affirmation, his review of the changes and that the conclusion of this visit, if the proposal was acceptable to the parties, the new affirmation became permanent, thus allowing Ms. Stewart to continue her visits with her client and thereby bring a close to the entire episode.

After the single visit, Ms. Stewart signed off on a revised proposal. Case closed.

That does not refer at all to the bargain as you have described it in the affirmation which was, the language that is taken out is, Ms. Stewart gets a limited right of access to the client, demonstrates that she had kept the bargain of which this access would be a part and the parties thereafter would refrain from charging each other with wrongdoing in connection with the

entire episode. Mr. Fitzgerald agreed and revised the offending language.

MR. TIGAR: I interpret Mr. Cohen's words "case closed" as embodying that language that I had used.

Remember, your Honor, we are only seeking a hearing here. If that becomes a basis for the Court's decision, I will swear Ms. Stewart right now and we will clarify this.

In addition, your Honor, I am going to provide to you a conversation that Ms. Stewart had with Mr. Yousry in June 16, 2001. She had not yet seen the sheikh. She couldn't get out there to see him. She wanted to have a phone conversation with him instead, and Mr. Fitzgerald said, there isn't time to get a SAM together. We are going to have to work out something else.

So the parties were still engaged with each other along the lines I suggested.

What I put in my affirmation, because Mr. Cohen was out of the country, is what I had understood based on my investigation. In my conversation with Mr. Cohen, "case closed" embodies her idea. Those were her reasonable expectations, based on what Mr. Cohen did.

And as I say, if there is a moment's doubt, Ms. Stewart is prepared now or, at your Honor's convenience, to take the stand and be sworn and describe it, because we are seeking a hearing and we think that we are entitled to it.

THE COURT: OK. Thank you.

MR. TIGAR: That is our combined attack on Count 5 and the bargain issue.

I know the Court wanted us to address the FISA and then we will conclude.

May I have a moment, your Honor?

MR. FALLICK: Your Honor, Count 3 charges Mr. Sattar with solicitation of violence.

The government has already stated in its memorandum of opposition that there were no acts of violence that occurred as a result of Mr. Sattar's activity, but they refer to other parts of the indictment for those acts to which he might have solicited, including the issuance of a fatwah.

Our only concern, your Honor, is whether or not there are other acts not incorporated by reference in the indictment which the government will try to prove at trial that constitutes solicitation of violence.

And we ask for a bill of particulars on that or a statement from the government that the acts are just those contained in the indictment. We are just waiting for that memorandum.

Thank you, your Honor.

THE COURT: All right.

MR. TIGAR: I know that my top side has come, and I would like to cut into my rebuttal to make two brief observations.

The first is with respect to FISA and the target issue and so on. We briefed that.

But, your Honor, I am mystified. The government says that it engaged in minimization of lawyer/client communications.

This minimization apparently consisted of putting them in an FBI affidavit, the affidavit that was released to the press -- putting them into the affidavit, all the time saying that the prosecutors in the case are walled off from the lawyer/client communications.

I don't understand what minimization means here and, therefore, we raise our concerns about our right to some kind of a hearing.

We have all of recent days found that there is just too much going on behind the veil of secrecy that requires inquiry.

The material of the conversation about Mr. Fitzgerald I also refer to as an example of it. The FBI tech cut looks like it is inculpatory. And the FBI tech cuts are what are shared with prosecutors. You listen to the whole tape and it is not in fact; it is exculpatory.

The basis upon which these warrants are issued is of concern to us and the question how in the world you can call it minimization is quite beyond us.

Three minutes, perhaps four for severance. We need it.

Your Honor wonders, why are lawyers different?

Well, we are different because we are already an agent of our client. We are already an agent, and we have a high hill to climb to explain to people what that means and doesn't mean.

I was appointed by the Sixth Circuit to represent a man named John Dimenya. We had supporters of Mr. Dimenya coming out of the woodwork. We had Holocaust deniers. We had crypto-Nazis. We had old guys that I could imagine were shuffling around being guards in concentration camps.

We tried to keep our distance from them, but inevitably we, as the lawyers for him, trying to get a job done, had to wear that.

And I got slammed by Allan Dershowitz and Monroe Friedman and so on. We kept on doing our job, but it was very hard to explain to the world how a lawyer is a special purpose kind of agent.

And, of course, I would not have any immunity from committing crimes, but I certainly did have a powerful lot of explaining to do to a large number of people.

Yet, when I was out there -- and I don't talk to the press a lot, but I did some, talking about Mr. Dimenya's situation -- guess what? The secret Justice Department memorandum that showed how the fraud had been committed was because somebody read about a press conference and came forward and said, I left the department and I kept that memo and here it is.

So we are sensitive to this issue, your Honor. We are defending the right to defend.

Yes, the government says we overstepped and committed crimes, but we are attempting in this case to make an argument, that is, the papers that we filed show is very, very hard to

make. And it is because of the underappreciated role of lawyers in being a link between prisoners and the system that calls itself justice.

THE COURT: All right. I will listen to the government.

MS. BAKER: Your Honor, if we might have a few minutes to confer with each other and organize, we would appreciate it.

THE COURT: See your shortly.

(Recess)

MR. MORVILLO: May I proceed, your Honor?

THE COURT: Yes.

MR. MORVILLO: Your Honor, as a preliminary matter, the government trial team here has split up the issues that we are going to address here today.

In fact, unless the Court has any questions with respect to certain issues, we are just going to reserve. All we are going to argue today here is the First Amendment issue, the FISA issue and the 1189 designation issue.

I am going to be arguing the First Amendment issue with respect to Section 2339(b), and Ms. Baker is going to be arguing the 1189 issue and the FISA issue. Mr. Barkow is also prepared to answer questions on certain other issues that we are not planning on raising affirmatively unless your Honor has any questions about it.

Is that acceptable to your Honor?

THE COURT: I will probably have some questions after some of the other issues.

MR. MORVILLO: With respect to the constitutionality of Section 2339(b), your Honor, I think that it makes sense to start by saying that this case is about conduct violative of a criminal statute that has little if any infringement on the defendant's First Amendment rights.

One way to view the allegations in the indictment is as a conspiracy to construct and maintain a pipeline for information essential to the existence and operation of a designated foreign organization, Gama'a al-Islamiyya. The Secretary of State has determined that this organization is a threat to the security of the United States three times.

On one end of this pipeline is the imprisoned and otherwise isolated Sheikh Omar Abdel Rahman. He is subject to special administrative measures in prison that are designed to restrict the flow of terrorist information into and out of his cell.

On the other end of the pipeline is the splinter and very high level counsel of the Islamic group who are scattered around the world and who desperately need to talk to Sheikh Rahman about certain issues that are important to the existence of the Islamic group.

In the middle of the pipeline are these defendants. They constructed and maintained this pipeline through their use of telephones, fax machines, computers, transportation,

personnel and money on behalf of the Islamic group. That's what the indictment alleged.

Specifically, Mr. Sattar constructed and maintained this pipeline by receiving sensitive and important information and questions that Islamic group leaders needed Sheikh Rahman to consider and respond to.

The pipeline was constructed and maintained by Ms. Stewart and Mr. Yousry when they traveled to visit Sheikh Rahman in prison or when they spoke with him on the telephone in New York City. It was constructed and maintained by Yousry when he physically received and passed information to Sheikh Rahman in prison related to instructions, directions and other information about the Islamic group, from the leaders of the Islamic group, on behalf of the Islamic group.

It was constructed and maintained by Ms. Stewart when she distracted guards from overhearing the passage of this crucial terrorist information to Rahman by Yousry. It was constructed and maintained by Stewart when she issued a press release on behalf of Sheikh Rahman and the Islamic group, essentially calling for renewed terrorist attacks by the Islamic group. And it was constructed and maintained by Mr. Sattar when he related information back to the scattered leaders of the Islamic group.

In constructing and maintaining this pipeline, the defendants broke the law by providing the Islamic group with money, communications equipment, transportation and personnel.

The statute that they violated, among others, is Title 18, United States Code, Section 2339(b) which makes it a crime to knowingly provide, money, communications equipment, transportation and personnel to the designated FTO.

The conduct they engaged in to violate the statute is not protected by the First Amendment. It is not speech because the content of the speech at issue here is only of evidential value to demonstrate the knowledge that the support was being provided to the Islamic group.

It is not association because the defendants are not being prosecuted for mere association alone. They are being prosecuted for providing the Islamic group with material support or resources. They remain free to independently agitate on behalf of the group, however, they are not free to act as the agent of a foreign terrorist group and then claim they are merely associated.

If there is any impact on the First Amendment by this statute, it is entirely incidental to the purpose of the statute which is to protect the national security of the United States and its citizens from terrorists.

As a result, this statute is content neutral. It does not single out for regulation disfavored views. It does not discriminate between viewpoints. Rather, it is designed to promote what is, in the words of the Supreme Court, obviously and unarguably, the most compelling interest of the government, the national security.

Indeed, courts that have reviewed the national security concerns frequently hold and have held that the discretion afforded to the political branches of the government is practically unreviewable.

If any scrutiny applies here at all, therefore, your Honor, intermediate scrutiny applies. This point is conceded by the defendant Sattar and is supported by the Ninth Circuit and the district court in Humanitarian Law Project and also by the district court in Lindh, Judge Ellis, in the Eastern District of Virginia.

Under intermediate security, the ultimate question is whether the statute at issue burdens substantially more protected activity than is necessary to further the government's unrelated interests.

In other words, the First Amendment tolerates some burdens from content-neutral statutes, even more of a burden than is necessary to accomplish the government's interest. The burden only cannot be substantially more than is necessary.

Application of this statute to these defendants does not implicate the First Amendment, if at all, substantially more than the government's interest in protecting the national security of the United States.

As I mentioned a moment ago, the First Amendment rights of these defendants are really not implicated at all. Neither mere speech or mere association is chilled. To the extent that any incidental impingement on those rights exist, so long as they are not burdened substantially more than is

necessary to further the government's goal in fighting terrorism, the statute is constitutional.

In this regard, your Honor should keep in mind Congress's conclusion when enacting this statute, that foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct. Thus, this statute, as applied to these defendants, based on the allegations in the indictment does not burden the limited First Amendment rights of the defendants substantially more than is necessary to further the government's paramount interest in fighting terrorism and stopping its spread.

THE COURT: The argument that you have just given me is an argument directed to whether the statute is unconstitutional as applied to these defendants under the First Amendment because it would allegedly unconstitutionally burden their rights of speech and association, correct?

MR. MORVILLO: Correct.

THE COURT: It doesn't deal with the vagueness or overbreadth issues.

MR. MORVILLO: I was just about to turn to those.

THE COURT: It doesn't deal with the issue of whether the conduct that is alleged in the indictment is conduct that is prohibited by the statute. Fair?

MR. MORVILLO: I think that is fair. I did not go element by element through the statute.

THE COURT: Because in your description of what the indictment says, I take it that I can take the allegations in your brief as the same as a bill of particulars, to understand what the indictment is charging?

MR. MORVILLO: That is the government's position, yes.

THE COURT: And also the arguments that you make?

MR. MORVILLO: Yes, your Honor, and also those contained in the search warrant applications.

THE COURT: You have just told me, correct me if I am wrong, that the defendants were in the middle of a pipeline and that they violated the statute by, among other things, their use of communications equipment, right?

MR. MORVILLO: Your Honor, the government would contend that use equals provision, yes.

THE COURT: So we will get back to that later.

But how would you answer the question that I gave to Mr. Tigar earlier about the order that I ought to analyze the questions that are before me?

MR. MORVILLO: I would refer your Honor's attention to *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, which holds that constitutional attacks to statutes should be resolved on an as-applied basis first. And if the Court finds the statute unconstitutional as applied to the defendants, it should go no further and strike down the statute as a whole.

So the government's position is that you can do the as-applied and then move on to the overbreadth and vagueness challenges.

THE COURT: As between overbreadth and vagueness?

MR. MORVILLO: I think that they are interchangeable. I think vagueness, to a certain extent, is a subset of overbreadth.

THE COURT: Correct me if I am wrong, but there are a series of challenges to the first two counts. They include the general constitutional attack under the First Amendment, as well as an as-applied challenge and vagueness and overbreadth and a designation of a foreign terrorist organization. If I were to agree with any of those challenges, I would dismiss the first two counts of the indictment. The government would have the opportunity, I take it, to appeal that.

MR. MORVILLO: Or re-present the indictment to the grand jury, depending on the basis for the Court's dismissal.

THE COURT: So we have the unusual case in which there is a certain desire for expedition, and it would hardly be, correct me if I am wrong, a reasonable resolution to leave some of these arguments out there only to face a situation where, if you decided to appeal that, on appeal, the Court of Appeals says, Well, not right on that, but you didn't reach two and three, and before we reach two and three we would like your opinion.

MR. MORVILLO: I think that the Supreme Court has held that courts should not reach out to address constitutional

issues and find constitutional problems with statutes. And that is what this situation calls for. If the Court finds that this statute violated the defendants' First Amendment rights, it should not go forward and consider further whether it does so on substantial overbreadth grounds or vagueness grounds.

THE COURT: Where does the designation of the IG as an FTO fit into that calculation?

MR. MORVILLO: In other words, your Honor, if I understand you correctly, if you find that 1189 does not provide sufficient due process --

THE COURT: No. If I were to reach any of the applied arguments or First Amendment arguments, should I go on to consider the designation, the arguments with respect to the IG, Islamic group, as a foreign terrorist organization?

MR. MORVILLO: I would submit that you should not because you would be answering constitutional questions with respect to statutes that you don't need to reach in order to resolve the issue squarely presented to you.

THE COURT: Do you know the answer to the question - and maybe it is one of your colleagues that has the point - whether in Boim or in Humanitarian Law Project, the issue of the designation of the organization as a foreign terrorist organization was argued on appeal?

MR. MORVILLO: I don't think that it was argued in Boim, and I am fairly confident it was not argued in Humanitarian Law Project, but let me confer with my colleagues.

THE COURT: They can tell me when they come up.

MR. MORVILLO: I can tell you the status of Rahmani.

THE COURT: Sure.

MR. MORVILLO: That has been briefed by the government. They are awaiting defense response and it is not yet docketed, but it is anticipated that it will be argued sometime this fall in the circuit.

THE COURT: You agree with the defendants that, if I were to agree that any aspect of 2339 was either inapplicable to this case or unconstitutional on vagueness or overbreadth grounds, that I would have to dismiss Counts 1 and 2 on those aspects - personnel, provided communications equipment?

MR. MORVILLO: I would hope to convince you that it is properly charged and not unconstitutional.

In the event that you do agree with defendants however, your Honor, yes, I think that you are probably right that you would have to dismiss both Counts 1 and 2. However, if you were going to do that, the government would like the opportunity to further brief the issue and consider it before your Honor dismisses the indictments.

THE COURT: We have had a lot of that.

MR. MORVILLO: But not on this particular issue, on the parsing of the special verdict before the grand jury issue.

THE COURT: I understand.

You were going to turn to vagueness, and you have already relied on Humanitarian Law Project, so I will wait for your argument on vagueness before I address the questions on vagueness.

MR. MORVILLO: In that case, I will address overbreadth first.

Your Honor, 2339(b) is not overbroad. And that doctrine is one that the Supreme Court has held is to be applied sparingly and only as a last resort, particularly where conduct and not pure speech or mere association is involved.

A statute is not overbroad unless it is swept within its scope a substantial amount of constitutional protected conduct that is real. The hypotheticals posed by the defendants, if they even fall within the scope of the statute are not plausible, nor are they substantial in number when compared to the number of possible constitutional applications of the statute.

THE COURT: Do you read the statute as prohibiting membership in a foreign terrorist organization?

MR. MORVILLO: No.

THE COURT: How do you distinguish membership from being a quasi-employee?

MR. MORVILLO: You know it when you see it, your Honor.

If you are an agent of an FTO, you are doing things on behalf of the organization. If you are a member, you are not necessarily doing things on behalf of the organization; you just happen to adhere to their philosophies.

There are certain circumstances, I should say, in which membership could be a violation of the statute which is, of course, designed to prevent the provision of material,

support and resources, so if you are a member and you are providing material support and resources to the organization, you violated the statute.

THE COURT: But you wouldn't be violating the statute because you were a member?

MR. MORVILLO: That's correct.

THE COURT: What does it mean to be a quasi-employee?

MR. MORVILLO: I guess that we are now turning to the vagueness point. I would say that it means to be subject to the direction and control of the foreign terrorist organization.

THE COURT: I'm sorry. If you wanted to say something else.

MR. MORVILLO: No. I was actually just about to move to vagueness.

THE COURT: I will certainly wait for what you wanted to start to tell me on vagueness before pursuing those issues.

MR. MORVILLO: As the Court is aware, the Ninth Circuit and the district court in Humanitarian Law concluded that the term "personnel" is vague. The court in Lindh disagreed and came to a different conclusion.

We submit to your Honor that the court in Lindh has the better position. A vague statute is one that -- this statute is not vague because it is sufficiently defines the elements of the offense so as to preclude arbitrary and discriminatory enforcement.

Personnel means individuals who are engaged in employment or quasi-employment relationship with the FTO. They

don't have to be paid by the FTO to be personnel. They simply have to be subject to the direction and control of the group itself.

THE COURT: Where did you get that?

I realize that the judge in Lindh said employee or quasi-employee, but the statute doesn't define personnel, and it is not a generally used term "quasi-employee."

MR. MORVILLO: I think personnel is a generally used term. And when it is generally used, it is used to mean the staff or the employees of a particular organization. You can be on the personnel of an organization that also has members and not be a member. You can be a staff member. You are not a member of the club. So the statute, the term personnel is a very specific word. They could have defined it to say "member." They didn't. "Personnel" is more narrowly tailored than "member."

THE COURT: But on the other hand, to provide personnel provides particularly with the legislative history that the person who is being prosecuted takes something and sends it, gives it to another, isn't that right?

MR. MORVILLO: Yes.

THE COURT: How does it make sense from a fair reading of the statute to say, as you do in your brief that, for example, Ms. Stewart provided herself and Mr. Yousry?

MR. MORVILLO: Because she allowed herself to become subject to the direction and control of the organization.

THE COURT: But then you are not using it in the sense of a person giving away, shipping, sending, particularly to a foreign place something else. The person is providing himself or herself.

MR. MORVILLO: I don't think that there has to be a physical transfer to come within the scope of the statute. Providing oneself as personnel is not unlike providing expert advice to an FTO which, although it is not charged here -

THE COURT: And wasn't in the statute at the time?

MR. MORVILLO: Correct. In other words, what the statute prohibits is the provision of material support and resources and one of those, the way that term is defined, includes personnel, includes now expert advice. So it was contemplated that it could be something that is subject to provision.

THE COURT: Why isn't a lawyer a quasi-employee if the lawyer represents a foreign terrorist organization? The lawyer has, as a lawyer, is an agent of the client, acts on behalf of the client. How would a person know whether a lawyer was a quasi-employee and covered by the statute?

MR. MORVILLO: I think what you have to look at is the nature of the services that the lawyer would be providing. The statute certainly is not intended, nor would it be applied to reach a lawyer doing what a lawyer does providing bona fide legal advice to an FTO.

THE COURT: Why not?

MR. MORVILLO: I think that would probably be an unconstitutional application of the statute.

THE COURT: How do we know whether, as written, applying the vagueness standards, the statute covers that?

MR. MORVILLO: Can you give me a minute, your Honor?

THE COURT: Sure.

(Pause)

MR. MORVILLO: Thank you, your Honor.

I think the statute provides sufficient notice as to what is prohibited. And the line with respect to where you become personnel of the organization and where you are merely associating with the organization as applied to a lawyer representing the organization would probably turn on the distinction between when someone becomes house counsel to that organization as opposed to an independent representative who is available for hire.

THE COURT: Why?

There are surely cases in our courts that raise the very difficult questions about what the role of the lawyer is, and charges against lawyers as to whether they are acting as lawyers or whether they are violating the law by what they are doing. But those cases don't turn on whether the lawyer is "inside counsel" or "outside counsel."

MR. MORVILLO: It 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.

THE COURT: That was the argument that was made to Judge Casinski in the Ninth Circuit and he said that it is not there and he is not going to redraft the statute.

MR. MORVILLO: I think that courts have an obligation to construe statutes to be constitutional.

I don't see a problem with reading a high-end level of scienter into the statute --

THE COURT: You are asking the Court to create an element of the offense that is not in the statute.

MR. MORVILLO: We are not asking the Court to graft in an additional element. We are asking the Court to read the knowingly element to include that your provision of material support is designed to further the illegal objectives of the foreign terrorist organization. And that would save it from a constitutional problem if in fact there were one to begin with.

THE COURT: That's not what the statute says because 2339(a) has a specific intent provision, and 2339(b) simply says "knowingly provide." And so it is not what Congress did in 2339(b).

MR. MORVILLO: What Congress did was say that this statute should be enforced, to the extent that it is consistent with the Constitution.

THE COURT: But that is plainly not in the statute because we wouldn't instruct the jury on the elements of the

offense, that the first element of the offense is to determine whether this is consistent with constitutional guarantees.

MR. MORVILLO: What you would do is to conclude that to be consistent with the Constitution, we need to have a high ended level of scienter with respect to the personnel prong here, so when I instruct the jury on what "personnel" means is that, anyone who is personnel has to have the intent to further the illegal objectives of the terrorist organization.

THE COURT: With respect to notice, the test is what a reasonable person would understand from reading the statute is so that that person can govern the person's conduct in accordance with the law, correct?

MR. MORVILLO: Correct.

THE COURT: Given that standard, when Judge Casinski and two other judges of the Ninth Circuit agree unanimously that personnel is so vague that that provision of the statute is unconstitutionally vague, isn't it an uphill battle to say that reasonable -- that it provides a reasonable standard for people to govern their activities?

MR. MORVILLO: It may be an uphill battle, your Honor. It is one that Judge Ellis has decided to fight, and it is one that we certainly are fighting here. We think that the term "personnel" is capable of a ready and every day understanding of what is prohibited. And the fact that there may be one or two instances where the lines get a little fuzzy does not render the statute, on its face, unconstitutional.

THE COURT: But that blurs, I think, the lines between, between as applied and on its face, the situation that was dealt with in Lindh was personnel in a very classic sense of person acting as a soldier as compared to people being part of a communications pipeline and using -- different subject -- using their own communications equipment.

But go ahead, I interrupted you.

MR. MORVILLO: I was actually winding down a little bit.

THE COURT: By the way before we leave that, you have told me now that providing communications equipment means, in this case, using the person's own communications equipment because that's the same as provision.

MR. MORVILLO: Yes. Providing it to the organization so that they can use it as well.

In other words, when you set up a conference call between two terrorist leaders, one in Egypt and one in Afghanistan who otherwise does not speak to each other, you are providing their conference call technology. That is something that they are receiving that they wouldn't otherwise have.

THE COURT: But that is also the same as simply using your telephone, and the conference call feature and the call in furtherance of the support of the foreign terrorist organization.

MR. MORVILLO: At bottom, yes, your Honor.

THE COURT: But then I don't understand why in your brief you make as much as you do about the distinction between

simply using the telephone and providing communications equipment because, in the context of this case, it appears that much use is involved in your interpretation of provision.

MR. MORVILLO: I think that is fair to say.

I think whether something was provided is a question of proof. I think what it comes down to at the end of the day is, did the government prove that, by using their telephone, their communications equipment, they were providing something to a foreign terrorist organization.

In this case, you have Sheikh Rahman who is entirely cut off from any outside contact, other than through a limited window that existed for his lawyers to visit and, also, to a certain extent, for him to speak with his family. By giving his message voice, they provided him with communications equipment. He didn't have it, but for what these individuals gave him. Neither did the terrorist leaders who were abroad. They did not have the ability to contact Rahman or each other, but for the provision by these defendants of their communications equipment.

THE COURT: All right.

MR. MORVILLO: You Honor, I have nothing else to add on this issue.

If you have any specific questions, I am happy to address them.

THE COURT: No, thank you.

MR. MORVILLO: Let me yield the floor to my colleague, Ms. Baker.

THE COURT: Ms. Baker.

MS. BAKER: Your Honor, I am going to briefly address 1189. I hope to try to answer a couple of questions that your Honor posed earlier to Mr. Tigar, in the course of doing that. And then I am going to turn even more briefly to a couple of points relating to the FISA.

First, on 1189, your Honor asked Mr. Tigar if he knew the status of the Rahmani case in the appellate process and, according to other DOJ personnel who are involved with that case, the case is awaiting an argument date, and it was estimated to me that the argument would probably not be until the fall.

Ms. Stewart, through counsel, is arguing that the statutory structure of 1189 through 1189(a)(8) and its other provisions deprives her of judicial review. And she labors to persuade your Honor that there is some type of meaningful deprivation going on here that your Honor should remedy by finding the statutory scheme unconstitutional.

Let me pause to say, if you accept 1189(a)(8) on its face, there should be no question but that the plain language of that section deprives Ms. Stewart of the relief she seeks which is for your Honor to second-guess the Secretary of State's determination that IG is a terrorist organization that threatens the national security of the United States.

And when 1189(a)(8) says is that a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issue of such designation, that is precisely the issue that Congress had in mind.

You asked Mr. Tigar at one point during his argument, what is the review that he is asking the Court to do ultimately. What are the claims that he is trying to have reviewed here if he could persuade you not to take 1189(a)(8) at its face value.

I understood him to say, on the one hand, that he has the First Amendment concerns, his client's First Amendment right to speak and to associate.

And on the other hand, he has these concerns about the propriety of the designation of IG, and he references repeatedly the contrast or, I guess, perhaps he would call it, the similarity between IG on the one hand and the despotic state-supported terrorist regime of the Mubarak Egyptian government on the other hand. And he asks the Court to somehow find that there is some unfairness there that rises to a constitutional level, that needs to be righted.

We respectfully submit that 1189 (a)(8) is constitutional, should be enforced on its face and that perhaps more directly, at bottom, in the context of this case, and with Mr. Tigar's answers to that question, there is no deprivation of any judicial review, any meaningful review on any issue that is available to her that is occurring to Ms. Stewart under this statutory scheme.

As far as her First Amendment rights to speak and associate, she is making those challenges under the rubric of 2339(b). She is claiming that the charges in this case are unconstitutional and that 2339(b) is unconstitutional on its face because of the interference with the right of speech and

association. So she is able to raise those issues before your Honor within the context of the criminal charge.

As far as the other side of that coin or the sort of related issue of, was IG appropriately put on the list of designated organizations such that then a person has less rights, less First Amendment rights to associate with it.

That question is the ultimate application of the political question doctrine. You are getting at the heart of the job of the executive branch of our government versus the judiciary. And it is the job of the executive branch to determine, OK, IG poses a threat to national security, but some other foreign group that engages in violent activity does not.

Let me pause to say that I think that there is not any dispute here that IG is a foreign organization and that it engages or has engaged in terrorist activity. So, really, what this boils down to is the third part of the three-part definition of "foreign terrorist organization." And that is the part that the courts have explicitly, repeatedly held is the political question.

Most recently, the D.C. Circuit reiterated that view in the decision that we wrote the letter which we refer to as PMOI2.

Again, this is the ultimate type of political question. It is no different than the question of whether it is appropriate for the executive branch to ban travel to Cuba but not to some other country or whether it is appropriate for the executive branch to prohibit transactions with Libya or with the

Taliban but not with other regimes in other parts of the world or, under 18, U.S.C., Section 2332(d) which is a statute that prohibits, makes criminal engaging in transactions with state supporters of terrorism -- again, it is for the executive branch to determine which countries meet that definition of being "state supporters of terrorism."

So to the extent that Ms. Stewart's judicial review that she is seeking here is to get ultimately to the point that she should have been able to associate more with IG, her association rights should have been greater because IG shouldn't have been on the list, ultimately, that is an issue that this Court cannot reach.

Indeed, we submit that 1189(a)(8) is a piece of a constitutional scheme that makes that point clear through the specific language that bars the judicial review.

THE COURT: The issue becomes, there are some aspects of the designation of an organization as a foreign terrorist organization and other courts such as the D.C. Circuit have held and, indeed, Judge Tagoshubi, that there are political questions that cannot be answered by the courts.

There is also part of the statute that the D.C. Circuit said does require judicial supervision, and that is why it was sent back to the Secretary of State, right?

MS. BAKER: Your Honor, is referring to NCRI which was the second of the series of decisions by the D.C. Circuit. And in that case, the decision to remand to the Secretary of State for additional procedures to be afforded to the

organization was dependent upon the court's determination that, by that time, that organization and it was one organization known by two different aliases, by that time it had a constitutional presence in the United States.

That is not the case with IG. And the government respectfully submits that the fact that there should be additional procedures for the few organizations -- let's step back and look again at the bigger picture of the statutory scheme.

It is a statutory scheme, the designation scheme, directed at foreign terrorist organizations. Generally speaking, those organizations are not going to have constitutional presences in the United States. And I say that because constitutional presence, as it has been construed by the D.C. Circuit, deriving from Supreme Court precedent, constitutional presence is an overt presence. It is not constitutional presence of a terrorist organization to have some members secretly sneaking around inside the United States planning for some criminal activity or raising funds and sending them back to the group overseas.

If that were constitutional presence, Al Qaeda would have a constitutional presence in this country by virtue of the fact that Mohammed Attar and the other September 11 hijackers hid here while preparing for the heinous crimes that they carried out on September 11. So you have a statutory scheme that is directed at a group of organizations that, generally

speaking, are not going to have that kind of constitutional presence.

So in the unusual case, in the unusual organization where there is that kind of presence, the fact that there has to be, in the opinion of the D.C. Circuit -- the government hasn't had to take issue with that in a particular case yet, but that is not to say that the government wouldn't, but even if you take it at face value, the NCRI decision and assume for purposes of argument that the D.C. Circuit was right and certain organizations should get more procedure because of their presence, that isn't a reason to say that the statutory scheme as a whole is facially invalid.

This is an unusual situation because usually we measure our statutes against the Constitution and whether they afford constitutional rights. It doesn't make sense, really, to do that with this statute because, with the majority of cases, as I said, the organization is not going to be entitled to the constitutional presence.

THE COURT: My question really goes to the issue of not whether the statutory scheme is unconstitutional on its face or overbroad. It goes to the question of whether, in interpreting the statute as applied in a criminal case and looking at the no-judicial review provision, there is any aspect of judicial review that is authorized or required under the statute in a criminal case, or is the only element, as you say at the first part of your brief, the designation itself.

Just to explain to you the reason that I ask, in the cases that go back and forth, in the briefs, like Bazzarat and Twohey, there are some aspects of a statute that otherwise doesn't provide judicial review which the courts have said, There are some issues even in that context that a defendant in a criminal case can raise.

And then I look at PMI2, as well as the predecessor, that the D.C. Circuit has said that there are vast parts of the statute. They believe they are simply political questions not subject to review. And so the question then becomes whether from those two lines of cases, there is anything in a criminal case that is subject to review under the statute and the cases? Do you follow my question?

MS. BAKER: I do follow your question. And the short answer to your question is that we respectfully submit that the answer is no. There is nothing relating to the validity of the issuance of the designation of an organization that this Court has jurisdiction to review, and that's what 1189(a)(8) plainly says.

I would take issue with the broader context in which you ask the question which was that there is very little judicial review even available to the organizations themselves under the procedure set forth in 1189(b) in the D.C. Circuit.

I think that that review is not nearly as narrow as your Honor has construed it. The court has said that looking specifically at the three-part definition of foreign terrorist organization, the one part is foreclosed from review by the

political question doctrine. But as to the other two parts, the court looks at whether there was substantial support in the administrative record for the finding that the organization was foreign and that it engaged in terrorist activity. But that is only a piece of the review that is available to the organization in the D.C. Circuit within the specified time.

The organization can otherwise raise a constitutional challenge to 1189 on its face that it deprives the organization of due process. And that was the argument that was made in the NCRI case, or any other constitutional challenge that it could come up with.

And then there is an additional provision. If you will allow me to find my copy of 1189.

THE COURT: Sure.

MS. BAKER: I am looking now at 1189(b)(2) -- sorry (b)(3), scope of review, and this is referring to the review by the D.C. Circuit at the behest of the organization.

"The court shall hold unlawful and set aside a designation, the court finds to be: A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; B) contrary to constitutional right, power, privilege or immunity; C) in excess of statutory jurisdiction, authority or limitation or short of statutory right; D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court; or, E) not in accord with the procedures required by law.

So the three-part definition falls under D, that is, where the Court looks for substantial support in the record, can only look at two out of the three prongs. But there are all of those others --A, B, C and E -- issues of review that are available in the D.C. Circuit at the behest of the organization. So the government respectfully submits that, when you look at the statutory scheme as a whole, that review that is available in that manner, that is, that is it is consistent with the Constitution to foreclose review of any issues relating to the designation to a defendant in a criminal case.

And in our brief we spelled out the public policy reasons why we believe that it is important for the judicial review to be done in the manner that the statute permits and not done in the manner that the statute permits.

THE COURT: What do you think are the most persuasive cases?

You would argue that no judicial review as a first position is allowed in a criminal case because under the statute it says "no judicial review"?

MS. BAKER: Correct.

THE COURT: Some cases like Twohey have recognized at least some judicial review.

MS. BAKER: Yes. In other cases with slightly different worded statutes, the courts have said, We are going to construe this statute to foreclose only certain types of judicial review and not other types -- most commonly to foreclose review of the sort of correctness of the agency

action, the discretionary action of the Executive Branch, but not to foreclose constitutional questions.

We submit, however, that the language of 1189(a)(8) is more clear than the language that was involved in those other cases and should be construed to foreclose all issues here.

THE COURT: You do have alternative arguments that even if I consider the issue, that there are no issues?

MS. BAKER: Correct.

THE COURT: What case do you think is most persuasive that, in a criminal prosecution and aspect, an element such as this can be foreclosed from any judicial review?

MS. BAKER: I don't know that I would cite to one individual case, or perhaps I would cite to Mendoza-Lopez in reverse. Mendoza-Lopez is itself a criminal case. And in that case, I think that the Supreme Court makes clear that it is creating an exception to a general rule of no review. And it creates the exception, and it says that the exception applies there, in that case. But as we explained in our brief, the circumstances that make that exception appropriate there don't apply here.

THE COURT: Right.

MS. BAKER: I would say, secondarily, there are the Export Control Act cases which say that you don't have the judicial review of the decision to place the controlled commodity onto the export control list.

THE COURT: But that is Bozarov.

MS. BAKER: Bozarov is one of those cases, and also Mandel and Spawr Optical is the name of another case.

THE COURT: Bozarov recognizes that there was still some judicial review.

MS. BAKER: I do recall that what your Honor is saying is correct. I don't recall the specific circumstance of what the area of review that was available was, I don't remember now whether it was review -- I don't think that it was review in the criminal case. I would have to find the particular case, but there are other cases that say, where there is no review available in the criminal proceeding, there may be review available through some other channel.

THE COURT: It came up on the dismissal of an indictment.

That's OK. Go ahead.

MS. BAKER: The only other thing that I wanted to say in connection with 1189 and, of course, I would answer any other questions that your Honor has, is to again address the question that you had posed to Mr. Tigar and then tried to pose again to my colleague, Mr. Morvillo, about whether 1189 had come up in Humanitarian Law Project. And the answer to that question is yes, in a way.

Humanitarian Law, as you know, is a civil action. But the plaintiffs seeking to enjoin enforcement of the statutory scheme did not take issue -- this is just going by what is in the reported opinion -- with the application of the three-part definition of "foreign terrorist organization."

THE COURT: It was a delegation issue.

MS. BAKER: That's correct. It was essentially a constitutional issue relating to 1189, whether it delegated unfettered discretion to the Secretary of State.

Ultimately, and I am looking at pages 1136 to 1137 of the Ninth Circuit's opinion, the Ninth Circuit says that is rejects plaintiff's argument that the designation scheme is essentially unreviewable and therefore unconstitutional.

It says that there is judicial review in the D.C. Circuit and the, importantly, for this purpose, it says that plaintiff's complain that that review is ineffectual because of the deference afforded to the Secretary's decision. Again, that is sort of a political question issue.

Then the Ninth Circuit concludes, that challenge, meaning a complaint about some sort of the constitutionality of 1189 and how that scheme works, that challenge must be raised in an appeal from a decision to designate a particular organization, meaning must be raised by the organization in the D.C. Circuit.

THE COURT: Do individuals have any right to bring a petition in the D.C. Circuit? In this case we would say there is no presence, so the organization cannot seek review.

MS. BAKER: That is not correct. I will answer your underlying question. But just as a threshold matter, the fact that an organization lacks constitutional presence in the United States doesn't mean that they don't get review. It just means that they get the after the fact review.

THE COURT: Statutory rather than due process?

MS. BAKER: Correct.

THE COURT: Does an individual have any ability to participate in any way in a challenge to an FTO designation?

MS. BAKER: I certainly don't know the answer to that question as a procedural matter.

If your Honor is asking, as a constitutional matter, again, we submit that, when you read 1189(a)(8) together with 1189(b) that the statutory scheme as a whole is constitutional and the review afforded just to the organization is all the Constitution requires.

If your Honor were to disagree with that proposition and find that construing 1189 as a whole that way would make it unconstitutional, your Honor would have to construe it -- this is similar to what Mr. Morvillo was saying earlier -- your Honor would have an ability to construe as to have it comport with the Constitution so long as you could do that without running afoul of the statute itself.

The language of the statute itself is organizations can do it this way. Defendants in criminal cases cannot do it at all. It is possible that you could find in there that, since civil actions by individuals are not specifically mentioned, that is a right that exists as a constitutional matter.

Now, what procedure an individual would then bring, would it be intervening in the D.C. Circuit or some other type of civil claim, that I don't know.

But, again, we submit that your Honor should not do that because, on its face, interpreted as we offer the statute is constitutional.

THE COURT: Thank you.

MS. BAKER: Turning briefly to a couple of points related to the defendant's motion to suppress the FISA evidence, I want to address a couple of points that were raised in the defendant's reply papers, not necessarily to date here in oral argument and, also, I want to correct some factual information that appears in the government's argument in opposition to the suppression motions.

Ms. Stewart filed a main brief that addressed all of her various constitutional issues as well as a FISA suppression motion. And then she filed a separate set of papers, I believe, on March 19, which was a motion to suppress the audio and visual recordings of the visits to Rahman in prison and Rahman's calls from prison to his lawyers.

The government opposed that March 19 motion along with the earlier FISA suppression motion in a set of papers.

THE COURT: I appreciated those.

MS. BAKER: Later in the sort of trickling on of some of the briefing on that, there was an issue raised as to how much of that prison evidence Ms. Stewart can seek to suppress.

And she argues in her papers that she is entitled to suppression of all of the prison visits and calls, regardless of whether or not she personally participated in them.

The government respectfully submits that is wrong and that that request is precluded by FISA and that FISA is consistent with the Fourth Amendment as we have already argued and that this is consistent with Fourth Amendment standing doctrine.

Specifically, FISA in its definitional section which is 50 U.S.C., Section 1801, in Subsection K defines the term "aggrieved person." And it says that that is a person who is a target of an electronic surveillance or any other person whose communications and activities were subject to electronic surveillance.

The legislative history of FISA makes clear that that definition of aggrieved person was intended to be co-extensive with the definition of that same term that appears in Title 3. And that fact, the identical scope of those two definitions was noted by the Eastern District of New York in a case called, *In re Flannagan*, 533 F.Supp., 957 (E.D.N.Y. 1982).

That case ultimately was reversed by the Second Circuit but, on the grounds that have nothing to do with the point that I am making right now.

Again, I cite *Flannagan* for the proposition that the definition of "aggrieved person" in the two wiretap statutes are co-extensive. The way that it is worded in Title 3 perhaps makes it a little bit more clear that your right to seek suppression is limited to the conversations to which you are a party, because the Title 3 definition is "a person who was a

party to any intercepted wire or oral communication or a person against whom the interception was directed."

So, by using that other language, a person who was a party to a communication, I think perhaps that makes it a little bit more clear.

But we submit that Ms. Stewart has standing under that provision only to seek suppression as to the one attorney visit -- I believe it is one of the total of three -- for which she was present and however many attorney calls she was a participant in, which I think was probably a small number.

THE COURT: If I read the briefs correctly, and correct me if I am wrong, I thought it was two attorney visits and one telephone.

MS. BAKER: You are correct. Two visits. And Ms. Stewart said she had found so far in her review that there was one call. I think it may be more than one. I think it is two calls but it is a very small number of the calls, and it is two of the three visits and not the third one.

Another issue that I want to address is an issue that Ms. Stewart raises in her papers including, again, in her replies on this March 19 motion, which is, whether there was a requirement that she have been named as a target of the FISA surveillance. She was not named as a target. The targets of the surveillance that resulted in the prison evidence being intercepted were Yousry and Rahman.

The Second Circuit's opinion in Duggan says explicitly that FISA requires only identification of a target. And the

Second Circuit said that, in response to a request by the defendants who were not the targets -- yes -- I have it backwards. The defendants in that case were the targets, but they were saying that there was another person whose communications were intercepted which were being used. That other person was a United States person. And so they were trying to take advantage of the slight difference in the probable cause showing that would have for a non-U.S. person target versus U.S. person target. So they were saying that they were entitled to relief by virtue of the fact that this person had not been named as a target.

The Second Circuit said no. The statute clearly only requires one target. That's what the statute says. And the Fourth Amendment, says the Second Circuit, also does not require that any person who you expect to intercept be named as a target. There is not a Fourth Amendment problem there and the Second Circuit says that in reliance on a Supreme Court decision. I believe it is called Donovan.

The government submits that that decision by the Second Circuit is exclusive on this issue.

As a secondary argument, though, we would ask the Court that, even if this Court were now somehow to end up disagreeing that holdings in the Duggan case, that this Court, nonetheless, declined to suppress any of the prison evidence on the ground that Ms. Stewart was not named as a target because of the good faith exception.

When the government intercepted those communications, it did so pursuant to a facially valid order from the FISA. At the time that the interceptions were made, especially in light of the existence of the Second Circuit's opinion in Duggan, there was simply no reason for the FBI not to believe that it was acting on a valid order by the FISA court and so that the interceptions were made in good faith and should not, in any event, be suppressed.

I also want to address another point that Mr. Tigar makes in his reply papers, and that is, he has certain assertions, hypotheses about how the prison evidence was minimized and what the members of the trial team in the case have had access to up to this point and how that comports or in his view does not comport with the minimization. And some of this is set forth in the reply memorandum dated June 9 of 2003. The assertions or the hypotheses in that document simply are not correct.

What happened in this case, that was the full communications, the full visits or telephone calls were recorded which FISA expressly permits. FISA permits total recording and then post recording minimization so there was full recordings of those of these conversations and post recording or post recording minimization. And how that was done is detailed in the classified designation of Michael Arms which we have filed for your Honor's review and, obviously, I am not at liberty to get into it.

However, I will say that contrary to the hypothesis or assertion in the defendants' papers that post acquisition, minimization was not limited to shielding the prosecution team from conversations. That still had to be minimized. That was not how the minimization was done. There was much more than that, and your Honor will see that in the review of the papers.

Moreover, the defendants' papers go on to say that, you know, even that appears to us that that was what the minimization was, even that apparently didn't work because the trial team must have had access to the unminimized communication, otherwise, how could there be any allegations about what was in the prison visit or prison calls?

The answer to that is the trial team has not had access to any unminimized communications. The trial team has only had access to anything that has been set forth in any context in this case so far has been based on minimized summaries of the communications. Those were close in time to when the communications were intercepted. They were summarized, and then minimized by the FBI, in accordance with the minimization procedures.

Those minimized summaries later were made available to the prosecution team. And those minimized summaries are being provided for the Court's review as an exhibit to the classified Armes declaration.

The trial team has not had access to any unminimized communications. The only people who have access to unminimized communications are the people at FBI involved in the -- the

government personnel involved in the minimization, and a paralegal who was tasked in keeping it away from the trial team and simply disclosing it to the defendants so that it would be available to them in this case.

Next to last on the FISA point, I wanted to correct some information that we set forth in a footnote on page 54 of our memorandum of law in opposition to the FISA motion. We were arguing at that point in our memorandum that the fact that minimization was carried out in good faith, the calls intercepted on Sattar's telephones, the fact that there was good faith minimization was demonstrated by the fact that approximately 90 percent of the intercepted voice calls were minimized and only approximately 10 percent of the voice calls were not minimized.

We supported that 10 percent estimate with some more detailed figures in the footnote. Although we stand by the approximately 10 percent conclusion, I just want the record to be perfectly clear and as up-to-date as we can make it. We have been continuing our review of the TEC cuts and the audios so I need to just clarify.

We said in the footnote that there were about 45,000 audio recordings that resulted from a particular telephone number. And we essentially expressed the view in the footnote that those were all voice calls because that number had been used for voice calls.

In fact, we realized that that number was used not only for voice calls but also for faxes within the time period

1996 to 1999. So the total number of voice calls on that one particular phone is something less than 45,000, but we don't think that it is very much less.

So that would be the sort of denominator of the fraction. It goes down a little bit, but the numerator of the fraction goes down because we said in this footnote that we thought that there were approximately 4800 TEC cuts summaries, i.e., not minimized call from Sattar's phone. And we now know that there is an over estimate of number of not minimized calls on Sattar's phone because the approximately 4800 number was done by essentially counting the number of hard copy TEC cuts.

We realized more recently that that set of hard copy TEC cuts include a certain number of exact duplicates where there are two copies of the very same document and also a certain number of calls for which there was more than one version of the tech cut included in the set of documents. Presumably, the translator printed 1 out and then added a little more content and printed it out again and they both made it in, just to set the record on that.

Overall, unless your Honor has any other questions on the FISA evidence, we would rest on our brief on that, particularly, because we will require a brief review of the classified materials for your Honor to see that the surveillances were lawfully authorized and lawfully conducted and for that reason should not be suppressed.

THE COURT: I did have some other questions based on the papers and, since you are up, the government brief offers to

provide to the Court the special administrative measures. The brief indicates that they have already been produced to defendants, so they should be provided to the court so that I can look at them in the context of the motions that are before me.

MS. BAKER: We will do that.

THE COURT: The next fairly technical issue is, the government indicates that they will ask the grand jury to return a superseding indictment to include all of paragraph 21 in paragraph 24. Paragraph 21 is the overt acts. Paragraph 24 is Count 3 and realleging in paragraph 24 why it wasn't picked up. And the government intends to ask the grand jury to return a superseding indictment.

Let me put one other factor into account.

There is an argument raised in the defense papers that paragraph 28 in Count 4 realleges certain overt acts from paragraph 20, and I just don't recall now what the government said that is a plainly a typo because it should be paragraph 21 or not. It appears certainly to be a typo.

MS. BAKER: Yes. The reference in paragraph 28 should be a reference to paragraph 21. And I thought that we also had a footnote in our brief that we would also ask the grand jury to correct that typographical error.

THE COURT: You may have. My question is a technical one about, am I being asked to decide the motions to dismiss based on current indictment or on a superseding indictment that has not yet been returned by a grand jury?

Am I to decide the motions based on a hypothetical that the government intends to present the case to a grand jury which may or may not return the superseding indictment?

MS. BAKER: If I might have a minute to confer with my colleague, I am not sure that the two instances that your Honor referred are the same as each other.

THE COURT: And may not make a difference in the motion to dismiss.

MS. BAKER: Right. I think in Count 4, the fact that it is so obviously a typographical error, that may merit a different treatment than the other one.

I also don't recall as I stand here now the extent to which that truly bears on a motion to dismiss.

THE COURT: It is Mr. Fallick's point, also. It is whether he believes, and you can tell me shortly what I should do with respect to that. He says that it does affect him in some way because he says that Count 3 is insufficiently specific. And one of the responses is, look at all of the detailed allegations in paragraph 21, and then paragraph 21 is realleged in paragraph 24.

If Mr. Fallick didn't think that it was improper, I could consider it with paragraph 21 and ask if paragraph 21 is included in paragraph 24, what does that do to a motion to dismiss.

MR. FALLICK: I don't think it is proper.

THE COURT: So I take it that the government would not intend to ask for a superseding indictment until there was a decision on all of the motions to dismiss?

MS. BAKER: The government's thinking was that because there were other motions that are addressed to the face of the pleading, for example, whether certain counts are duplicitous, that it seemed appropriate in terms of efficiency to wait to see all of the problems that need to be fixed. On the other hand, if your Honor believes that to have an indictment against which your Honor can truly test some of those other dismissal motions, we will do it in two phases.

THE COURT: The only issues that I saw currently with respect to all of the papers were the specific items that I raised with respect to other issues.

It is not for me to draft the indictment or to determine whether a grand jury does or does not return a superseding indictment. The motions to dismiss have raised questions, and I have to decide those questions. It seems to me that I should decided all of these motions, and then the parties can do what they wish to do moving on from that decision.

MS. BAKER: I don't recall as I stand here now, but if it is the case that there is a motion to dismiss that turns of the fact that Count 4 of the conspiracy to defraud count in paragraph 28 refers to paragraph 20 rather than paragraph 21, if your Honor were to dismiss that count on the ground that it referred to paragraph 20 which doesn't have the subparagraphs in it, we will still supersede to correct that. We would be

superseding after dismissal. So, as a practical matter, I don't see that there is any difference.

THE COURT: I had a couple of questions with respect to the separate motion for a hearing.

MS. BAKER: Regarding the alleged agreement not to prosecute?

THE COURT: Yes.

MS. BAKER: Mr. Morvillo will address those.

MR. MORVILLO: Your Honor, I was not going to make an affirmative presentation. If you have questions, I will be happy to answer them.

THE COURT: I do have questions.

And my question is where I am left, even putting aside the paragraph that has been changed from one affidavit to another, what was going on with respect to Mr. Cohen, I am left with certain other paragraphs. Mr. Tigar's affidavit that Mr. Cohen now swears to, including he, Mr. Cohen, came away from the negotiations with the good faith reasonable belief that he had foreclosed criminal prosecution of his client Lynne Stewart "while protecting her ability to serve her client."

Now, I have a specific factual affidavit, an affidavit from the lawyer.

The government hasn't put in an affidavit in response, to deny that. The government has put in a very thorough memo explaining both why no reasonable criminal defense attorney or client could consider these circumstances to have established an agreement. And the government also says that, if the defense

goes forward with this, the government will show not only that there was no agreement but that Ms. Stewart violated it, if there were an agreement by her conduct.

But under the Aleman affidavit on one side saying there was a good faith reasonable belief that there would be no criminal prosecution, under those circumstances I have to have a hearing.

MR. MORVILLO: I don't think you do, your Honor.

I think that the court specifically in Aleman specifically says that a hearing is not required every time a defendant accuses the government of failing to live up to an agreement.

And I think that if you just take the allegations set forth in the now adopted affirmation of Stanley Cohen, it does not give this Court a basis to conclude that there was a reasonable determination that a guarantee of non-prosecution had been extended to Ms. Stewart and accepted.

THE COURT: But one of the things that happened in Aleman was, the government also didn't submit an affidavit because, as the government told the court, look, if we submit an affidavit, then we are creating the issue that we don't think should occur, namely, the hearing.

Let me ask you another question.

Why, as I sometimes ask, does it make any sense from a very practical standpoint, if I have an affidavit from a criminal defense attorney who said that he had a good faith

reasonable belief that he had foreclosed criminal prosecution not to hear the witnesses to make that determination now?

This is expected to be a fairly long trial, and you are asking me to do what the Court of Appeals in Aleman certainly did not allow in Aleman because they said that the district court should have held a hearing and made determinations about whether there was an agreement, and if so what the details of the agreement were. And so it is before me now on the motion at this time, and with no counter affidavit from the government.

Do you say that Mr. Cohen is simply not telling the truth?

MR. MORVILLO: Absolutely not, your Honor.

I think that his conclusion that he had struck a non-prosecution agreement is just plainly unreasonable based on the facts and circumstances that are sworn to in connection with his affidavit. I am not at all saying that he is not being truthful.

THE COURT: But he says that he had a good faith reasonable belief that he had foreclosed criminal prosecution.

As I pointed out, he changes from what was the language in the prior affidavit to describe what was the "bargain." And certainly, if there were a hearing, one of the subjects would be why he was careful about setting out his understanding of "what the bargain was." But the next paragraph does talk about precisely what he came away from these

negotiations and what he describes as his good faith reasonable belief.

MR. MORVILLO: I think what the defendants also have to establish in order to warrant a hearing is that Mr. Fitzgerald also maintained that belief and that there was a meeting of the minds. There is no allegation here that I'm aware of that Mr. Fitzgerald --

THE COURT: How are they going to put in an affidavit from Mr. Fitzgerald saying what he came away from the meeting?

MR. MORVILLO: I am saying they cannot. But based upon the facts and circumstances, there is no statement from Mr. Fitzgerald anywhere that they can attribute any kind of intent to form a non-prosecution agreement. There is the letter and there is the affirmation, but those are in entirely different context. They are in context of one's continued access.

There is not context of whether there could or would be a prosecution for a criminal violation. And there is no allegation that he ever said that there could be or wouldn't be.

Absent that, it seems to me that the defendants failed to allege that there was a meeting of the minds. It may be that Mr. Cohen had a good faith reasonable belief. But they need to demonstrate more before they are entitled to a hearing.

THE COURT: Wouldn't I have to construe the absence of an affidavit from Mr. Fitzgerald as a witness in control of the government against the government?

MR. MORVILLO: I think what your Honor has to do is look at the affidavit submitted by the defense and make a determination as to whether they prima facie establish an entitlement to a hearing without any burden on the government to come forward and establish anything. And what they have failed to do is allege any statement from a government representative that demonstrates a meeting of the minds. So I don't think that you can make that.

THE COURT: All right. Thank you, Mr. Morvillo.

By my count, the defendants have reserved certain time. I think that you have about 15 minutes, 10 minutes for Mr. Tigar and about five minutes for Mr. Fallick.

MR. TIGAR: Judicial review, in the Akers case, the defendants sold products and was well aware, as everyone was, that they were subject to certain kinds of control. So the defendant was someone who can be expected to avail himself of the judicial review procedures plainly available. And not having done so, he didn't get review in his case.

The government says that IG has no constitutional presence. What that means, I'm not sure. But they certainly do not hold any idea that Ms. Stewart would have been able as a private citizen to go to Washington and file a suit, entirely aside from my earlier point that how would she know that she was supposed to do it?

The government then says it is the political question doctrine. You look in, I guess the fifth edition of Charles Allen Wright's book, Federal Courts, you will see the political

question doctrine section, and in there he cites an article that I wrote 32 years ago, and that's my story and I'm sticking to it with respect to the political question doctrine. I don't think that your Honor is foreclosed from judicial review.

And this question, should she have gone to D.C. to seek review is illuminated by Mr. Morvillo's attempt to describe what the statute means when it seems to proscribe activities by an agent of the association -- not a member, he is careful to say.

And then he says the lines get a little fuzzy when you start talking about lawyers as agents because lawyers are agents -- fuzzy, vague, overbreadth, all the same to me.

Of course, a lawyer is subject to the direction and control of the client. That's what a lawyer does.

A lawyer makes telephone calls, uses a fax machine, uses all of these facilities. It is the statute's failure to put the lawyer on notice. Not simply that she should go to the District of Columbia and seek judicial review.

And by the way, expert advice and assistance is not in here. That will be for the next defendant to say, Well, I was a lawyer for the association but I was not a very good lawyer and my advice was not expert.

But the government then says, Well, it is not really legal services. So as a lawyer, I've been doing this for more than three decades a long time. Suppose I was a lawyer for the leader of a political organization who was incarcerated in the United States. I know that the government under which that

person lived, let's say in Egypt, was busy releasing some members of my client's organization and modifying some of its stances in response to international pressure, most recently because the United States had threatened to cut off aid to Egypt.

Wouldn't I be justified in communicating with the association in Egypt to find out whether the political situation there was such that some arrangement might be made to result in my client's liberation?

If we don't like to put it in the context of Egypt, suppose I were a courageous Russian and represented somebody in the gulag who was a Soviet dissident. Would I not seek to keep that person's views alive and in the world? Would I not be monitoring the political situation? Would I not be building that pipeline?

I thought that that's what lawyers in cases of this kind do. And that, of course, is the heart of the prosecution's case.

Finally, your Honor, I want to apologize to the Court for a combination of a senior moment and the dog ate my homework. I had thought that in our reply brief we had said something about the Dennis case. And then I looked in there and, by golly, it is not there. I don't know what happened to that part.

The Barrow case in which the government relies on, the Second Circuit says expressly that, in order for that doctrine

to be applied, there must be colorable authority to ask the question -- no colorable authority.

The Dennis case itself in the paragraph that says what is and is not a defense cites three perjury cases as saying that it wouldn't be a defense to a perjury charge, that's such and such.

The government in its brief sites Mondahano that says that it was not a defense to a perjury charge that you were not Mirandized in front of the grand jury.

However, as I pointed out, there are many, many cases in which there are defenses to false statements based on the illegitimacy of the questioner's position.

The government chose to invoke 1746. It seems to me they are stuck with it, and that Reinakey and Cristofal will let us go.

And in addition cited is the old Acardi case, cited with approval, United States against Brown in the Eighth Circuit which is 245 F.2d. It is one of the perjury trap cases.

And, finally, your Honor, with respect to the hearing, we just put in enough of an affidavit thinking that we would get an evidentiary hearing.

I can say, your Honor, when Pat Fitzgerald was nominated to be the United States Attorney in Chicago, he put Lynne Stewart on his list as a reference. I don't think that is a person that thought that she was a bad person. He respected her enough to do that at the end of that process.

Also, your Honor, in addition to hearing from Mr. Fitzgerald, we suggest the government should be required to produce the notes.

I hope it is not untoward of me to think of the 3M case. I don't think 3M had the Koeltl memorandum at time that they filed their motion. I think that only surfaced at the hearing. I think that their lawyer filed an affidavit that simply described what their expectations were.

I said finally, your Honor, and I just want to leave with one thought. The thing that scares me almost the most about this is that all of the attorney/client communications in this case were minimized by the FBI. I think that recent history has told us the dangers of law enforcement, executive branch people making those kinds of determinations. I am not attacking anybody's good faith. I am simply saying what we would like to see.

MR. FALLICK: We are going to rest upon our briefs and the issues that have been raised, other than we would like to have certain discovery issues.

THE COURT: Let's deal with the discovery issues.

MR. FALLICK: The first issue is what we characterized as presentation issue. Obviously, we have had no access to any of that material because we have just learned recently that the Sheikh has not waived his attorney/client privilege. This afternoon for the first time, the government -- the problem, the Assistant had access to minimized summary. We have not been provided any access to those summaries either. We

are in the dark about any of the evidence on the tapes. I know from the government that the government has informed me that they may make a motion before the court about that, and I raise that issue.

Another issue, your Honor is that we have learned from the Court this week that in February we wrote a letter asking for access to the sheikh's son who we believe to in the custody of the United States in Guantanamo. He is named in Count 1 as receiving money from Mr. Sattar on June 9.

The government responded that they are not going to tell us anything about this issue. We believe that if we had access to the witness, that he would support Mr. Sattar's position that any money given to him had nothing to do with the Islamic group of terrorist activities and it had to do with all his own personal needs and charitable causes.

Again I note from the government that they would like to set a briefing schedule, so we make a formal motion to compel access under the clause of the Sixth Amendment, we would be happy to do so.

MR. TIGAR: Your Honor, we join Mr. Fallick's position with respect to the desire for access, and if there is to be a briefing schedule, we would file a very brief, brief on that subject.

With all respect, I think that the best summary of this law is Peter Weston's article from 30 years in 73 Michigan which the Supreme Court has cited with approval.

THE COURT: There are two issues. One is the prison tapes issue and the second is the Sheikh's son issue.

With respect to the prison tapes, the government had indicated that they were going to make a motion, so that motion should be made promptly.

How much time?

MR. MORVILLO: I think that we need about a week to make that motion, your Honor.

THE COURT: Government motion, June 20.
Defense response, 27th.

MR. MORVILLO: Your Honor, I am not sure that the defendants are going to respond necessarily to the government's motion. It is almost a joint motion. It may be that Mr. Clark on behalf of Sheikh Rahman would like to file a response, so it may be more prudent to include Mr. Clark in this conversation or at least allow me to confer with him to see what would be an appropriate response date for him. I think that you could set one date and I will confer --

THE COURT: By all means, the motion should be served on Mr. Clark also. I will still keep this time, and if Mr. Clark needs some more time, I will certainly consider that.

MR. MORVILLO: The date that you set was the 27th?

THE COURT: Yes. Defense response, June 27.
Government reply, July 3rd.

There's been the other motion with respect to access to the Sheikh's son, same schedule.

MR. FALLICK: Same schedule.

THE COURT: Defense motion, government response,
defense reply June 20. June 27, July 3.

Anything else?

All right. Good afternoon, all.

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