

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

02 CR 395 (JGK)

V.

AHMED ABDEL SATTAR,
MOHAMMED YOUSRY
and LYNNE STEWART,

Defendants.

NOTICE OF MOTION

-----X

**LYNNE STEWART'S NOTICE OF OMNIBUS MOTION
TO DISMISS THE INDICTMENT AND FOR OTHER RELIEF**

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PLEASE TAKE NOTICE that upon the annexed affirmation of Michael E. Tigar, the annexed affirmation of Steven P. Ragland, the MEMORANDUM IN SUPPORT OF LYNNE STEWART’S OMNIBUS MOTION TO DISMISS THE INDICTMENT AND FOR OTHER RELIEF, filed herewith, and all pleadings and proceedings herein, the undersigned will move this Court at the United States Courthouse, 500 Pearl Street, New York, New York 10007, for an order:

1. Dismissing all counts of the Indictment on the ground that the underlying statutes and regulations are unconstitutional on their face and as applied, representing an attack on freedom of expression and the right to counsel;
2. Dismissing each count of the Indictment for failure to state an offense against the United States within the meaning of FED. R. CRIM. P 7(c)(1) and the Sixth Amendment;
3. Ordering an evidentiary hearing on the legality of designating IG as a foreign terrorist organization, and directing that if the Court rejects the administrative determination, Counts I and II will be dismissed, and if the Court sustains the administrative

- determination, the issue will be tried to the petit jury should the case proceed to trial, such hearing being required by due process of law and the jury trial guaranty;
4. In order to make possible the relief in the preceding paragraph, ordering production of the entire administrative record concerning designation of IG as a terrorist organization;
 5. Ordering an evidentiary hearing on the legality of the Special Administrative Measure (“SAMs”) at issue in this case, and directing that if the Court rejects the administrative determination, Counts IV and V will be dismissed and if the Court sustains the administrative determination, the issue will be tried to the petit jury should the case proceed to trial, such hearing being required by the due process clause and the jury trial guaranty;
 6. In order to make possible the relief in the preceding paragraph, ordering production of the entire administrative record concerning all relevant SAMs;
 7. In the alternative to dismissal of the indictment, and as a means of assessing the legality of any count not dismissed as prayed above, ordering a bill of particulars, as set forth in the annexed memorandum of law;
 8. In the alternative, as to any counts not dismissed, ordering a severance and separate trial for Lynne Stewart, pursuant to FED. R. CRIM. P. 8(b) and 14, and *Bruton v. United States*, 391 U.S. 123 (1968), and in order to determine that motion, requiring the government to produce for inspection all statements of any defendant that it intends to use at trial;

9. Suppressing the fruits of all searches done under the purported authority of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et. seq., and setting an evidentiary hearing on that issue;
10. For such other relief as may be proper.

We ask for a setting for oral argument on the legal issues, with a later setting for the requested evidentiary hearing as to any counts not dismissed on the law.

Counsel are also filing this day a motion to dismiss based on the government's failure to honor an agreement made with Lynne Stewart concerning her conduct as counsel for Sheikh Abdel Rahman.

Counsel will at a later time file motions that require analysis of the massive discovery in this case, and that address the government's failures to make pertinent discovery. Such motions will include discovery, suppression of evidence other than as noted above, and other matters that cannot now be addressed due to the state of proceedings.

We are not filing a motion to strike surplusage at this time, for that motion must await rulings on the other motions and analysis of the discovery and other factual materials. The Indictment suffers from prolixity and rhetorical excess, and we will address those issues at the appropriate time.

Dated: Washington, D.C.

January 10, 2003

Respectfully submitted:

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We acknowledge with thanks the assistance of the following law students: Stela Maria Chincisan (Columbia); Jennifer Laurin (Columbia), Erin Gerstenzang (Emory), Brittany Benowitz (American), Daniel Habib (American), Joanna Hall (American), and Tina Karkera (American).

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Defendants.

AFFIRMATION

-----X

AFFIRMATION OF MICHAEL E. TIGAR

Michael E. Tigar declares under penalty of perjury:

1. I am counsel to Lynne Stewart. I make this declaration in support of Lynne Stewart's Omnibus Motion to Dismiss The Indictment And For Other Relief.
2. I hereby certify that all statements in the Motion to Dismiss and its accompanying Memorandum of Law that are not otherwise supported by cited authority are true and correct within my personal knowledge and belief.
3. The exhibit attached to our moving papers is a copy of material provided to us by the government.

Dated: Washington, D.C.

January 10, 2003

Michael E. Tigar

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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and LYNNE STEWART,
Defendants.

AFFIRMATION

-----X

LOCAL CRIMINAL RULE 16.1 AFFIRMATION OF CONFERENCE OF COUNSEL

Steven P. Ragland declares under penalty of perjury:

1. I am counsel to Lynne Stewart. I make this declaration pursuant to Local Criminal Rule 16.1, and in support of Lynne Stewart's request for a bill of particulars in her Omnibus Motion to Dismiss The Indictment And For Other Relief.
2. I hereby certify that on Tuesday, December 31, 2002, I contacted Assistant United States Attorney Christopher J. Morvillo via facsimile letter in an effort in good faith to resolve by agreement the bill of particulars issue raised in the Omnibus Motion without the intervention of the Court.
3. On Tuesday, January 7, 2003, Mr. Morvillo informed us by letter that the government will not voluntarily provide any of the particulars we seek.
4. We, therefore, have been unable to reach such an agreement.

Dated: Washington, D.C.
January 10, 2003

Steven P. Ragland

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Notice of Omnibus Motion to Dismiss the Indictment and for Other Relief, and the related Affirmations was delivered on January 10, 2003,

BY HAND DELIVERY to:

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STEVEN P. RAGLAND

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

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V.

AHMED ABDEL SATTAR,
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and LYNNE STEWART,
Defendants.

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

02 CR 395 (JGK)

V.

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

-----X

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

INTRODUCTION

A salient analysis of the charges against Lynne Stewart was written by Hon. William Young, Chief United States District Judge for the District of Massachusetts:

Whatever the merits of this indictment, its chilling effect on those courageous attorneys who represent society’s most despised outcasts cannot be gainsaid. It is worth remembering that John Adams represented the British soldiers who allegedly committed the Boston Massacre. David McCullough, *John Adams* 66 (2001) (noting that, upon learning that no one else would represent the soldiers, John Adams took the case, saying “no man in a free country should be denied the right to counsel and a fair trial”).

United States v. Reid, 214 F. Supp.2d 84, 95 (D. Mass. 2002).

On behalf of Lynne Stewart, and pursuant to FED R. CRIM. P. 12, LOCAL CRIM. R. 12.1, and, in the alternative, FED. R. CRIM. P. 8, 14, and 7(f), we present this Omnibus Motion to Dismiss the Indictment and for Other Relief and supporting Memorandum of Law. We have organized this Memorandum both by issues related to individual Counts and by broad themes that touch upon various aspects of the Indictment. As such, this Motion Memorandum addresses all relevant issues except, that of the negotiations regarding the “Attorney Affirmations” that are

the subject of a separate Motion and Memorandum in Support filed this day with the Court and motions that cannot be addressed until discovery has been completed.

We begin here in Part I with a brief statement about the defendant, Lynne Stewart. This background is of special importance given the unique aspects of this prosecution of a criminal defense attorney for alleged conduct arising during the course of her service to an imprisoned client. Next, this section provides an overview of the Indictment, specifying each reference to Ms. Stewart.

Part II first addresses the standards by which we submit Lynne Stewart's speech and expressive conduct should be judged. Next, we present a constitutional challenge to 18 U.S.C. § 2339, the statute underlying Counts I and II, as applied to the alleged conduct of Lynne Stewart. This section continues with a facial challenge to two subsections of 18 U.S.C. § 2339 on vagueness and overbreadth grounds. Finally, we submit, in the alternative, that the same result can be obtained without reaching the constitutional question.

In Part III, we address the designation of the Islamic Group (IG) as a terrorist organization pursuant to 8 U.S.C. § 1189. We demonstrate that the designation is unconstitutional in concept and application, flawed in execution, and subject to judicial review.

While Parts I through III primarily relate to Counts I and II of the Indictment, Part IV focuses on issues concerning Counts IV and V. In this section, we address the Special Administrative Measures (SAMs). We first analyze the constitutional problems with the government's attempt here to use the SAMs to prohibit constitutionally-protected conduct. Next, we highlight the fact that no statute or regulation authorizes imposition of the SAMs upon anyone but a person within the custody of the Bureau of Prisons and discuss the flaws in the

government's attempt to control Ms. Stewart, an attorney, through SAMs imposed upon her client.

Part V addresses the illegitimate use of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq., in this case to monitor communications by and among Lynne Stewart and other United States persons. While we cannot at this stage fully brief the FISA issues, as we discuss more fully below, it appears even now that illegal surveillance demands suppression of all evidence seized pursuant to FISA that the government wishes to use against Ms. Stewart.

In Part VI, we discuss the role of the attorney in our adversarial system of justice and present a historical context which we believe necessary in the consideration of the charges against Lynne Stewart. This theme is touched upon earlier in this Memorandum, but this section addresses the issues more fully to pull themes together as we move from constitutional and other broad challenges to rule-based, but nonetheless fundamental, objections to the sufficiency of the Indictment.

Part VII explains why the Indictment is fatally deficient on all Counts applicable to Lynne Stewart. Part VIII discusses why, in the alternative to dismissal, a severance must be granted for Ms. Stewart. Finally, Part IX moves, also in the alternative, for a bill of particulars.

I. BACKGROUND

A. Who Is Lynne Stewart?

Lynne Stewart is a lawyer. She attended Hope and Wagner colleges, and obtained a Bachelor of Arts degree in 1961. In 1964, she obtained a Masters degree in Library Science from Pratt University. She worked in the New York public education system, and was active in community movements to improve education for all children, but particularly for poor people and people of color. She attended Rutgers (Newark) Law School, and received her Juris Doctor

in 1975. Since law school days, she has concentrated on representing people accused of crime, and most of her clients have been those of limited means. Given the nature of our criminal law system, her clients are predominantly people of color. Ms. Stewart has three children, four stepchildren, and seven grandchildren. She is a familiar figure in New York area courts. *See, e.g., S. Arena, New York's 10 Best Criminal Defense Attorneys*, NEW YORK DAILY NEWS, March 12, 1995 at 38-9 (Ms. Stewart is the only woman on the list).

Many of Lynne Stewart's cases involve issues of great public concern. In her legal work, she has confronted matters of police brutality, black liberation, secret evidence, bias crime, terrorism, and apartheid. *See, e.g., People v. Yuwnas Mohammed*, Ind. No. 2053/92 (New York, N.Y. 1992); *United States v. Shakur*, 82 Cr. 312 (KTD) (S.D.N.Y. 1982); *United States v. Nasser Kadi Ahmed Ali El Momnosany*, 99 Cr. 42 (JBW) (E.D.N.Y. 1999); *People v. Mazen Assi*, Ind. No. 4848/2000 (New York, N.Y. 2000); *United States v. Abdel Rahman*, 93 Cr. 181 (MBM) (S.D.N.Y. 1993); *People v. Larry Davis*, Ind. No. 6315/86 (Bronx, N.Y. 1986); *United States v. Levasseur*, 85 Crim. 143 (E.D.N.Y. 1985). Thus, her work vindicates the First Amendment as well as the Sixth. That is, the issues she litigates are part of the controversies in society at large. She is expressing her First Amendment rights when she works on such cases, as are her clients. She is also protecting the public's First Amendment "right to know," which she has standing to assert. A hallmark of Ms. Stewart's professional life is that she shows special concern for the well-being of her clients.

Nonlawyers, of course, need help to navigate the shoals and rapids of the legal system. We discuss these issues at some length below. We note here, however, that it is very difficult to explain to a concerned public the need for competent and zealous legal representation, particularly for unpopular clients. Many members of the public identify lawyers with their

clients to a degree that makes it hard to defend the idea of legal representation. This rather myopic view is now shared by the Department of Justice, which opposes legal representation for persons facing serious deprivations on the flimsy and unsupported pretext that lawyers might pass harmful messages for their clients. As Ms. Stewart has said, “we are defending the right to defend.”

As we discuss *infra* Part VIII, if this prosecution survives the instant motions, Lynne Stewart will need a separate trial in this case because of the historically-based and pandemic spillover from client to lawyer in the minds of public and prosecutors alike.

B. Overview of the Indictment

Specific references in the indictment to Lynne Stewart are sparse. The following table summarizes relevant passages, and the Court can see how few times her name appears:

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment (emphasis added)
1-Role of Sheikh Abdel Rahman	4,5	6	More specifically, as of April 7, 1999, the restrictions provided that “[t]he inmate will not be permitted to talk with, meet with, correspond with, or otherwise communicate with any member, or representative, of the news media, in person, by telephone, by furnishing a recorded message, through the mails, through his attorney(s) or otherwise.”
	5	7	All counsel for Sheikh Abdel Rahman were obliged to sign an affirmation, acknowledging that they and their staff would abide fully by the SAM, before being allowed access to Sheikh Abdel Rahman.
	5	7	Counsel agreed in these affirmations, among other things, to “only be accompanied by translators for the purpose of communicating with inmate Abdel Rahman concerning legal matters.”

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
	5	7	Moreover, since at least in or about May of 1998, counsel also agreed not to “use my meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman.”
2-IG Efforts to Secure [Abdel] Rahman’s Release	6	11	On or about April 24, 2001, an IG representative in Egypt stated in a press conference that the Islamic world “will not accept the continuation of insult” to Sheikh Abdel Rahman and “[w]hile the Sheikh’s lawyers want to deal with his case legally , and Islamic Group leaders are displaying self-restraint, it is not ruled out that one or more of the Sheikh’s followers may resort to carrying out operations against U.S. interests in the world to avenge what is happening to this revered scholar.”
3-The Defendants Sattar, Stewart , Yousry	9	16	Defendant, LYNNE STEWART was Sheikh Abdel Rahman’s attorney during his 1995 criminal trial in New York and, following the conviction, has continued to act as one of his attorneys.
	9	16	Over the past several years, STEWART , in violation of the SAM in place to limit Sheikh Abdel Rahman’s communications in jail, has facilitated and concealed communications between Sheikh Abdel Rahman and IG leaders around the world.

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
	9,10	16	For example, during her May 2000 visit to Sheikh Abdel Rahman at the Federal Medical Center in Rochester, Minnesota, STEWART allowed YOUSRY to read letters from SATTAR and others regarding IG matters and to conduct a discussion with Sheikh Abdel Rahman regarding whether IG should continue to comply with a cease-fire that had been supported by factions within IG since in or about 1998. Moreover, because these discussions violated the SAM, STEWART took affirmative steps to conceal those discussions from the prison guards. Following this meeting, STEWART announced to the media, in violation of the SAM, that Sheikh Abdel Rahman had withdrawn his support for the cease-fire.
COUNT ONE: Conspiracy to Provide Material Support			Title 18, United States Code, Section 2339B.
	10	17	The allegations in Paragraphs 1 through 16 of this Indictment are realleged and incorporated by reference as though fully set forth herein.
	10,11	19	From on or about October 8, 1997, through the date of the filing of this Indictment, in the Southern District of New York and elsewhere, 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, the defendants, together with others known and unknown, within the United States and subject to the jurisdiction of the United States, unlawfully, willfully, and knowingly combined, conspired, confederated and agreed together and with each other to knowingly provide material support and resources, as that term is defined in Title 18, United States Code, Section 2339A(b), to a foreign terrorist organization, to wit, IG.

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
1-Means and Methods of Conspiracy	11	20a	The defendants and the unindicted coconspirators provided communications equipment and other physical assets, including telephones, computers and telefax machines, owned, operated and possessed by themselves and others, to the IG, in order to transmit, pass and disseminate messages, communications and information between and among IG leaders and members in the United States and elsewhere around the world;
	11	20b	The defendants and the unindicted coconspirators provided personnel, including themselves, to IG, in order to assist IG leaders and members in the United States and elsewhere around the world, in communicating with each other;
	11,12	20c	The defendants and the unindicted coconspirators provided currency, financial securities and financial services to IG, so that IG leaders and members could pursue and attain IG's objectives; and
	12	20d	The defendants and the unindicted coconspirators provided transportation to IG, in order to pass and disseminate oral and written communications and information between and among IG leaders and members in the United States and elsewhere around the world.
2-Overt Acts			
-Sheikh Abdel Rahman's March 1999 Message Regarding the Cease Fire	12	21b	In or about March 1999, with the assistance of SATTAR, STEWART , and YOUSRY, Sheikh Abdel Rahman issued a statement from jail, directed to IG leader Musa, who is a coconspirator not named as a defendant herein, in which Sheikh Abdel Rahman advised adherence to the cease-fire, and warned "[n]o new agreement (or charter), and nothing should be done without my consultation, or without my knowledge."

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
-Sheikh's March 1999 Message Regarding Formation of a Political Party	13	21c	In or about March 1999, with the assistance of SATTAR, STEWART , and YOUSRY, Sheikh Abdel Rahman issued a statement from jail to IG members rejecting a proposal that IG form a political party in Egypt.
-The June 2000 Public Statement Regarding Withdrawal of Support for Cease-Fire	14	21h	On or about May 19, 2000, during a prison visit to Sheikh Abdel Rahman in Minnesota by STEWART and YOUSRY, YOUSRY read letters to Sheikh Abdel Rahman from SATTAR and Musa addressing, among other things, the issue of the cease-fire, while STEWART actively concealed the conversation between YOUSRY and Sheikh Abdel Rahman from prison guards by, among other things, making extraneous comments in English to mask the Arabic conversation between Sheikh Abdel Rahman and YOUSRY.
	14	21i	On or about May 20, 2000, the second day of the prison visit, Sheikh Abdel Rahman dictated letters to YOUSRY and issued his decision to withdraw support for the cease-fire, while STEWART actively concealed the conversation between YOUSRY and Sheikh Abdel Rahman from the prison guards.
	15	21k	On or about June 14, 2000, STEWART released Sheikh Abdel Rahman's statement to the press and quoted the Sheikh as stating that he "is withdrawing his support for the cease-fire that currently exists."

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
	15,16	21n	On or about June 20, 2000, SATTAR spoke by telephone with Mohammed Abdel Rahman and advised him that a conference call had taken place that morning between Sheikh Abdel Rahman and some of his attorneys and that Sheikh Abdel Rahman had issued a new statement containing additional points which made clear, among other things, that Sheikh Abdel Rahman was not unilaterally ending the cease-fire, but rather, was withdrawing <u>his</u> support of it and stating that it was up to the brothers in the Group to now reconsider the issue.
-October 2000 Ghost-Written Fatwah from Sheikh Abdel Rahman	16	21r	On or about, October 11, 2000, during a telephone conversation, YOUSRY told STEWART that SATTAR did not want Sheikh Abdel Rahman's attorneys to deny that Sheikh Abdel Rahman had issued the <u>fatwah</u> urging the killing of Jews around the world.
	16	21s	On or about, October 20, 2000, during an attorney telephone call from Manhattan to Sheikh Abdel Rahman, YOUSRY was told by Sheikh Abdel Rahman, that he did not issue the <u>fatwah</u> , but did not want anyone to deny he had made it because "it is good."

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
-Dissemination of False Claim Regarding Sheikh Abdel Rahman's Prison Conditions	18	21aa	On or about January 8, 2001, SATTAR spoke by telephone with STEWART . During this call SATTAR informed STEWART that the prison administrator where Sheikh Abdel Rahman was incarcerated had pleaded with Sheikh Abdel Rahman's wife to tell Sheikh Abdel Rahman to take his medicine. SATTAR and STEWART agreed that, although they knew that Sheikh Abdel Rahman was voluntarily refusing to take insulin for his diabetes rather than be denied medical treatment at the prison, SATTAR should issue a public statement falsely claiming that the Bureau of Prisons was denying medical treatment to Sheikh Abdel Rahman. To this end, STEWART conveyed that this misrepresentation was "safe" because no one on the "outside" would know the truth.
COUNT TWO -Providing material Support to IG	20		Title 18, United States Code, Section 2339B and 2.
	20	22	The allegations in Paragraphs 1 through 16, 18 and 20-21 of this Indictment are realleged and incorporated by reference as though fully set forth herein.
	20	23	From on or about October 8, 1997, through the date of the filing of this Indictment, in the Southern District of New York and elsewhere, 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, the defendants, and others known and unknown, within the United States and subject to the jurisdiction of the United States, unlawfully, willfully and knowingly provided and attempted to provide, material support and resources, as that term is defined in Title 18, United States Code, Section 2339A(b), to a foreign terrorist organization, to wit, IG.

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
COUNT THREE- Solicitation of Violent Crimes	21		STEWART not named in Count Three.
COUNT FOUR- Conspiracy to Defraud the United States	22		Title 18, United States Code, Section 371.
	22	26	The allegations in Paragraphs 1 through 13, 15, and 16 of this Indictment are realleged and incorporated by reference as though fully set forth herein.
	22	27	From in or about February 1999 through the date of the filing of this Indictment, in the Southern District of New York and elsewhere, AHMED ABDEL SATTAR, a/k/a “Abu Omar,” a/k/a/ “Dr. Ahmed,” LYNNE STEWART and MOHAMMED YOUSRY, the defendants, unlawfully, willfully and knowingly combined, conspired, confederated and agreed together and with each other to defraud the United States and an agency thereof, to wit, to hamper, hinder, impede, and obstruct by trickery, deceit and dishonest means, the lawful and legitimate functions of the United States Department of Justice and its agency, the Bureau of Prisons, in the administration and enforcement of Special Administrative Measures for inmate Sheikh Abdel Rahman.
-Overt Acts	22	28a	The allegations contained in Overt Acts (b) through (n), (r), and (s) in Paragraph 20 of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein. ¹

¹ There are, in fact, no subparagraphs (e) - (n), (r), or (s) in Indictment ¶20. Count IV, therefore, fails to allege requisite overt acts due to insufficient pleading. *See infra* Part VII.F.

Items in Indictment	Page No.	Paragraph No.	Statements from Indictment
COUNT FIVE-False Statements	23		Title 18, United States Code, Section 1001 and 2.
	23	29	The allegations in Paragraph 1 through 9, 12 and 16 of this Indictment are realleged and incorporated by reference as though fully set forth herein.
	23,24	30	In or about May 2000, in the Southern District of New York and elsewhere, LYNNE STEWART , the defendant, in a matter within the jurisdiction of the executive branch of government, to wit, the United States Department of Justice and its agency, the Bureau of Prisons, unlawfully, willfully, and knowingly did make materially false, fictitious, and fraudulent statements and representations, and did make and use a false writing and document knowing the same to contain materially false, fictitious, and fraudulent statements and entries, to wit, STEWART submitted an affirmation to the United States Attorney's Office for the Southern District of New York falsely stating, among other things, the following: (1) that STEWART "agree[s] to abide by [the] terms" of the Special Administrative Measures applicable to Sheikh Abdel Rahman; (2) that STEWART "shall only be accompanied by translators for the purpose of communicating with inmate Abdel Rahman concerning legal matters"; and (3) that STEWART shall not "use [her] meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman."

The Indictment, in Counts I and II, uses October 8, 1997 as the opening date of the alleged conspiracy. The alleged Count IV conspiracy is said to have begun in February 1999.

However, the indictment does not allege any acts by Lynne Stewart before May 2000. In his press conference, according to a media report, the Attorney General stated that Lynne Stewart joined the conspiracy in May 2000. We will furnish this statement, which is admissible against the government, *United States v. GAF Corp.*, 928 F.2d 1253, 1259 (2d Cir. 1991); *United States v. Salerno*, 505 U.S. 317, 323 (1992), at the hearing of these motions. It is relevant to the fact-finding that the Court must do in order to rule on the First and Sixth Amendment issues, and on severance.

It is also a fact, subject to judicial notice, that Lynne Stewart became counsel to Sheikh Abdel Rahman in November 1994. Her actions must of course be seen in the entire context of legal representation.

Additionally, the government may claim that parts of the indictment that do not name Ms. Stewart in fact refer to her. As we show below, that claim would not avail the government, because such implicit references flunk the appraisal requirement. In addition, in a conspiracy case involving constitutionally-protected conduct, the normal conspiracy rules for attributing the behavior of one individual to another do not apply. “Guilt is personal,” as Justice Harlan has said, *Scales v. United States*, 367 U.S. 203, 224 (1961), and as the court held in *United States v. Spock*, 416 F.2d 165, 179 (1st Cir. 1969) (“expressing ones views in broad areas is not foreclosed by knowledge of the consequences . . . one may belong to a group, knowing of its illegal aspects, and still not be found to adhere thereto.”). *Spock* was cited with approval by the Second Circuit in *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999); *see also United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) (“court . . . may not impute the illegal intent of alleged co-conspirators to the actions of the defendant”) (citing *Spock*, *Scales*, and *Noto v. United States*, 367 U.S. 290, 298-300 (1961)). We develop these points below.

The Indictment as to Lynne Stewart has two basic parts. Counts I and II deal with the alleged aid to an organization designated as “terrorist” pursuant to 8 U.S.C. § 1189. Such aid is prohibited by 18 U.S.C. § 2339. Counts IV and V relate directly to the Special Administrative Measures (SAMs) and charge violations of 18 U.S.C. § 371 and 18 U.S.C. § 1001, respectively.

II. MATERIAL AID STATUTE, 18 U.S.C. § 2339, UNCONSTITUTIONAL AS APPLIED TO MS. STEWART AND ON ITS FACE

A. Background

Lynne Stewart is a lawyer. She is not alleged to have given money, arms or any similar thing to a terrorist organization. The Indictment alleges that the lawyers “want to deal with [Sheikh Rahman’s] case legally.” Indictment ¶11. Such a statement is evidence that the lawyers’ expressed intention was in fact carried out. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892); cf. *United States v. Mangan*, 575 F.2d 32, 43 n.12 (2d Cir.), cert. denied, 439 U.S. 931 (1978) (Friendly, J.) (wondering if *Hillmon* rule survives adoption of FEDERAL RULES OF EVIDENCE, noting government view that it does). That is, the government has by its own indictment admitted that Lynne Stewart intended to act “legally” and in fact did so. This concession alone is reason enough to dismiss this prosecution.

The indictment alleges that the defendants made communication facilities available to Sheikh Abdel Rahman, but the use of such facilities to service a client is not only normal but necessary.

The question, therefore, is whether this statute can withstand constitutional scrutiny as it vaguely sweeps into the prohibited realm all manner of normal and lawful activity. This is not a new issue in the law. An organization may have unlawful objectives and activities as well as constitutionally-protected ones. When seeking to punish an individual for participating in such a

bifarious organization, the First Amendment requires precision of analysis. *See generally Spock*, 416 F.2d at 172-73, 179.

Moreover, we rely upon Judge John Brown's wise counsel that "where [an indictment] is subject equally to one of two interpretations one of which states an offense and the other which does not, the indictment is insufficient since there is no assurance that the Grand Jury would have returned the indictment had the words been employed in the sense necessary to sustain the conviction." *Standard Oil Co. v. United States*, 307 F.2d 120, 130 (5th Cir. 1962).

We are hampered because the indictment is so vague, but let us focus upon the core allegation that the lawyers were going to do things legally. That is most logically a reference to the 18 U.S.C. §2339A language that includes "expert advice and assistance" as a prohibited kind of material assistance. So we have here a case very different from one alleging that somebody became an armed agent or funneled money to a designated terrorist group to purchase weapons. Ms. Stewart's alleged conduct consists entirely of speech activity, and the government must therefore shoulder that heavy burden.

The acts Lynne Stewart is accused of undertaking in pursuit of both conspiratorially and individually materially assisting IG are entitled to core First Amendment protection as pure speech acts. Because the government has failed to allege or show the requisite intent or imminent threat required to criminalize such speech under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny, Lynne Stewart's indictment under § 2339 for such acts cannot stand. Even under the intermediate level of scrutiny given to mixed speech-nonspeech acts under *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny, § 2339 overreaches by targeting speech content and failing to be sufficiently narrowly tailored to avoid unconstitutionally burdening speech. Because the government is required, but fails, to show individual intent on

the part of Lynne Stewart to materially assist IG, the Indictment also fails because it impinges on Ms. Stewart's First Amendment freedom of association.²

Finally, the terms of § 2339 under which Lynne Stewart is indicted are unconstitutionally overbroad to the extent that they burden a significant amount of constitutionally-protected activity, and cannot stand to render Lynne Stewart criminally liable for her alleged acts. The government attempts to impose an overbroad definition of "material aid" that sweeps in rendering legal services. Therefore, this puts the lawyer/defendant and her colleagues to the difficult task of defending herself by seeking to invade the attorney-client privilege of her client. This point is conceded by the government by its withholding of the prison audio tapes of Sheikh Abdel Rahman's attorney meetings and Mr. Yousry's diaries from codefendant Mr. Sattar and by erecting a supposed firewall between the trial AUSAs and the AUSAs producing these materials to Lynne Stewart and Mr. Yousry.

1. Pure Speech Is Entitled To The Highest Level Of First Amendment Protection

Government restrictions on private expression are subject to differing levels of judicial scrutiny depending, in part, on how closely the restriction affects "pure" speech. Thus, in reviewing a defendant's conviction for burning his draft card, the Supreme Court in *O'Brien*, 391 U.S. at 376, held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Cf. Buckley v. Valeo*, 424 U.S. 1, 20-22 (1976) (distinguishing between the regulation of political candidate expenditures and

² The Indictment does not allege that Lynne Stewart was a member of or associated with the Islamic Group in any way other than as the lawyer of a purported IG leader, Sheikh Abdel Rahman. Discussion in this Memorandum regarding Ms. Stewart's First Amendment freedom of association refers to her right to represent her client and take such legal and ethical steps as necessary to further his defense, improve the conditions of his confinement, or obtain his early release.

supporter contributions on the basis of the fact that contributions, if limited but not eliminated, would still serve the symbolic function assigned to it as a proxy for substantive speech and associational party activities). By contrast, “where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon *speech or press as evidence of the violation* may be sustained only when the speech or publication created a ‘*clear and present danger*’ of attempting or accomplishing the prohibited crime.” *Dennis v. United States*, 341 US. 494, 505 (1951) (emphasis added); *see also Rahman*, 189 F.3d at 115 (citing *Dennis*, *Yates v. United States*, 354 U.S. 298 (1957), and *Brandenburg*, 395 U.S. 444, for the proposition that “the state may not criminalize the expression of views – even including the view that violent overthrow of the government is desirable”). In short, the State may not curtail the expression of individuals, even those who advocate the use of violent means to effect their political ends, unless the advocacy is specifically motivated to bring to fruition such violent conduct, and is likely to do so in the imminent future.

2. *Mens Rea And Speech*

The Supreme Court has held that to criminalize speech, the government must prove both *mens rea* -- the defendant’s personal intent to incite or produce lawlessness -- and temporal proximity -- the defendant’s likelihood of producing the intended lawless result. *See Brandenburg*, 395 U.S. at 447 (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *see also Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (the state may not criminalize advocacy of the use of force or law-breaking unless the charged conduct is

“intended to produce, and likely to produce, imminent disorder”) (emphasis in original). Thus, in *Noto*, the Court rejected a lower court view

that mere doctrinal justification of forcible overthrow, if engaged in *with the intent* to accomplish overthrow, is punishable per se under the Smith Act. That sort of advocacy, *even though uttered with the hope that it may ultimately lead to violent revolution*, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*.

367 U.S. at 297 (emphasis added).

The intent element must be judged with scrupulous attention to personal, rather than collective guilt; personal motivation to bring forth violent or otherwise illegal ends cannot be conspiratorially imputed merely from the aims of the organization a defendant is accused of abetting. *Yates*, 354 U.S. at 329 (rejecting government argument that “the Communist Party of California, constituted the conspiratorial group, and that membership in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party’s affairs and thus inferentially parties to its tenets”). The Court has been scrupulous, as well, in emphasizing that the presence of either of these two elements is insufficient without the other. *See id.* at 321 (explaining that the “mere doctrinal justification of forcible overthrow, [even] *if engaged in with the intent to accomplish the overthrow*,” is not punishable absent evidence . . . that action will occur”) (emphasis added).

3. *Strictissimi Juris*

When the government seeks to prosecute a conspiracy to advocate imminent lawless action, courts have emphasized that special caution must be exercised in evaluating the necessary elements of a “speech crime” in such a case. This is necessary to ensure that both *mens rea* and causation remain individual, not imputed, elements. Courts apply the doctrine of *strictissimi*

juris to ensure that “one in sympathy with the legitimate aims of an organization, but not specifically intending to accomplish them by resort to violence [is not] punished for [her] adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which [she] does not necessarily share.” *Noto*, 367 U.S. at 299-300. As the Second Circuit framed the standard, “Under *strictissimi juris*, a court must satisfy itself that there is sufficient direct or circumstantial evidence of the defendant's own advocacy of and participation in the illegal goals of the conspiracy and may not impute the illegal intent of alleged co-conspirators to the actions of the defendant.” *Montour*, 944 F.2d at 1024; *see Spock*, 416 F.2d at 173 (“The specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof. . . . The metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*.” (internal citations omitted); *see also United States v. Dellinger*, 472 F.2d 340, 392-393 (7th Cir. 1970), *cert. denied*, 410 U.S. 970 (1973) (applying *Spock strictissimi juris* principle to evaluate individual counts against defendants who had also been charged with a conspiracy where the group’s goals were both legal and illegal); *People v. Biltsted*, 574 N.Y.S.2d 272, 278 (N.Y.C. Crim. Ct. 1991) (holding *Spock* standard applicable in unlawful assembly prosecutions). In such cases,

[a]n individual’s specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant’s prior or subsequent unambiguous statements; by the individual defendant’s subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant’s subsequent legal act if that act is “clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.”

Spock, 416 F.2d at 173 (quoting *Scales*, 367 U.S. at 234).

Thus, in *Spock*, “the ultimate objective of defendants’ alleged agreement, viz., the expression of opposition to the war and the draft, was legal, but . . . the means or intermediate

objectives encompassed both legal and illegal activity.” *Spock*, 416 F.2d at 165. Similarly in *Noto*, the defendant’s indictment under the membership clause of the Smith Act was judged by *strictissimi juris*, to ensure that one in agreement with the legitimate aims of the Communist party was not punished without specific proof of her intent to accomplish its violent, and criminal, aims. *See Noto*, 367 U.S. at 299-300.

There are many possible alternative, lawful goals being pursued by those indicted for conspiring to materially assist IG.³ For example, it is not a crime to support the legitimate aims of IG. Sheikh Abdel Rahman is, by some accounts, a respected cleric whose widely distributed sermons arguably do not deal with “waging” war against the United States. Congress, however, chose to give blanket designations to “terrorist organizations,” rather than sorting out particular activities performed by organizations that may qualify as “terrorist” in nature. *See* 8 U.S.C. § 1189 (designating “terrorist organizations”). We recognize that the court in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), found that:

Congress explicitly incorporated a finding into the 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.”... It follows that all material support given to such organizations aids their unlawful goals.

(internal citations omitted and emphasis added)

However, providing funds to a designated organization is far different from the conduct alleged here -- provision of legal services and speech and expressive conduct on behalf of a client who is somehow associated with a designated organization. *Humanitarian Law Project’s* holding that monetary contributions directly to a designated terrorist organization necessarily aids its unlawful goals, therefore, is readily distinguished from the instant prosecution of Lynne Stewart.

³ Of course, the government bears the burden of demonstrating the bases for all charges. At this stage, it must charge with sufficient particularity. It does not. *See infra* Part VII.

Another of the possible alternative goals for the named “conspiracy” is simply providing legal assistance to Sheikh Abdel Rahman. By this view, Lynne Stewart was not seeking to aid and abet the activities of IG, but rather simply to further the legal interests of the Sheikh by, for example, improving conditions of confinement. *See, e.g.*, Indictment, Count I ¶21(aa), and climate for high-level government discussions. The government’s own elaboration of the purported goals of IG itself adds support to this view of a bifarious conspiracy, to the extent that the release of Sheikh Abdel Rahman is highlighted by the government as a significant goal of the IG. *See* Indictment ¶¶8-11. Vindication of the rights of an accused and imprisoned individual is, in itself, an entirely legitimate goal, no doubt shared, legally, by that individual’s attorney. To the extent that Lynne Stewart may be pursuing that goal through legal means, while at the same time her codefendants or “unindicted coconspirators” may or may not be pursuing other, illegal ends desired by IG, the resultant “conspiracy” must be understood to be bifarious.

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

However, such an argument cannot prevail here. The instant Indictment, on its face, implicates the First Amendment, and the Court must therefore consider the very legitimacy of the effort to criminalize the alleged acts by which Ms. Stewart is charged. This Indictment seeks to punish her for a “statement” and for being a lawyer and acting “legally.” *See* Indictment ¶11. By contrast, in *Montour*, the defendant did not dispute the power of the government to

criminalize acts that blocked the execution of search warrants or the possession of firearms, but rather the government's imputation of his coconspirators *mens rea* to his individual charges. Because the doctrine of *strictissimi juris* concerns not only assuring the due process right of individual culpability, but also, in the First Amendment context, with preserving rights of speech and association, the doctrine necessarily applies here, where the very government's very contention that the whole of the conduct charged is illegal is bound up in enforcement principles that may offend First Amendment freedoms.

A reading of *Montour* implying that *strictissimi juris* is appropriate only where the ultimate aims of the group are solely legal, but both legal and illegal *means* are used, 944 F.2d at 1919, would be inaccurate given Supreme Court and lower court use of the doctrine. In *Noto*, for example, the defendants were accused of pursuing solely illegal ends -- advocacy through an organization of illegal activities; but the Court concluded that the ends were entirely legal -- mere membership in and sympathy with such an organization. *Noto*, 367 U.S. at 299. As such, the Court determined that *strictissimi juris* applied. *Id*; see also *Spock*, 416 F.2d at 172-73 (applying *strictissimi juris* where both legal and illegal ends existed, namely forcible advocacy of and incitement to resist the draft, and the expression of support and sympathy with such aims). Thus, *strictissimi juris* has less to do with the statutory decisions made by Congress in *seeking* to criminalize certain sets of acts, and more to do with examining whether Congressional prohibitions may, in given scenarios, be applied to the activities of a given defendant. The fact that Congress has purportedly attempted to render wholly illegal any "assistance" give to IG or its affiliates, then, itself has no bearing on whether evidence of individual intent must be strictly scrutinized. As a matter of constitutional law, it must.

Further, the government, by refusing to produce the prison audio tapes and Yousry diaries to Mr. Sattar and erecting a supposed firewall with the U.S. Attorney's Office, has conceded that a number of statements are within FED. R. EVID. 801(a), are not in furtherance of a conspiracy, and are regarding matters of legal representation.

In sum, for the government to prosecute speech acts alleged to create a danger contemplated by Congress, individual intent to cause the danger contemplated, as well as a reasonable likelihood of success, must be alleged and proved with respect to each defendant. In cases where conspiracy is alleged, courts must scrupulously ensure that intent to create an unlawful outcome -- the critical element in distinguishing between the permissible expression of political views and the impermissible practice of disguising criminal actions within speech acts -- is personal rather than imputed.

B. Lynne Stewart Is Accused of Acts That Are “Pure Speech”

The specific acts of Ms. Stewart alleged by the government as material assistance, or conspiracy to provide such assistance, to IG, are as follows: Providing “assistance” to Sheikh Abdel Rahman in issuing a cease-fire statement from jail, Indictment, Count I ¶¶21(b) & (c); “making extraneous comments in English” in the course of an attorney-client privileged conversation during a prison visit to Sheikh Abdel Rahman with her co-defendant and “actively conceal[ing]” a conversation among them on two occasions, *id.* ¶¶21(h) & (i); releasing to the press a statement by Sheikh Abdel Rahman, and quoting his personal withdrawal of support for a cease fire, *id.* ¶21(k); and engaging in two attorney-work-product privileged and attorney-client privileged telephone conversations with a co-defendant, making statements in one conveying that a “misrepresentation” regarding Sheikh Abdel Rahman’s prison treatment was “safe,” *id.*

¶21(aa). Counts IV and V also charge protected conduct, and we address those in later sections of this Memorandum.

1. *O'Brien Intermediate Scrutiny Does Not Apply*

Some courts confronted with “antiterrorism” provisions have retreated to intermediate scrutiny, relying on *O'Brien, supra*. Such a retreat is inappropriate here, as the alleged conduct is pure speech, not mixed speech and action. This case is not about a fundraiser for IG’s overall program (although funds for legal assistance would raise core First Amendment concerns), nor about someone who bore arms. In *Humanitarian Law Project*, 205 F.3d at 1134-35, the court concluded that because the plaintiff’s contributions to Hamas constituted expressive, but not exclusively speech-related, conduct, their regulation was entitled to intermediate scrutiny. *Cf. Buckley*, 242 U.S. at 20. The Ninth Circuit asked whether a substantial governmental interest unrelated to the content of expression was being promoted in a manner that restricted First Amendment freedoms no more than was necessary. According to the court, because the government had a substantial and legitimate interest in preventing international terrorism, and it restricted only those individuals “providing material support” to such groups, rather than those who merely express sympathy with them, the regulation could be upheld as applied. Additionally, the court concluded that “wide latitude” should be given to the political branches in determining the proper scope of the regulation, and that Congress may have rationally concluded that the difficulty of sorting out legitimate from illegitimate contributions was too great to justify limiting the regulations. *Id.* at 1136; *see also Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp.2d 57, 82 (D.D.C. 2002) (holding that plaintiff’s humanitarian contributions clearly implicated speech and nonspeech elements, and that pursuant to *O'Brien*, “a

sufficiently important government interest can justify incidental limitations on First Amendment freedoms”).

Humanitarian Law Project, however, is readily distinguished from the prosecution of Lynne Stewart. First, the *Humanitarian Law Project* court drew on a large body of precedent distinguishing between pure speech and expression effected through political contributions to conclude that restricting such contributions is not regulation that touches upon core First Amendment protections. *See id.* at 1134. By contrast, none of the “material support” alleged to have been given by Lynne Stewart falls within the rubric of the contributions at issue in *Humanitarian Law Project*. *Cf. Texas v. Johnson*, 491 U.S. 397, 406 (1989) (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”). All but two of the acts described in Count I of the indictment refer explicitly to words spoken or written by Lynne Stewart in connection with visits to and representation of Sheikh Abdel Rahman. Each of these acts falls within the rubric of *Brandenburg*, *Hess*, *Yates*, and other cases applying the strictest scrutiny to government attempts to attach criminal liability to the speech acts of a defendant for alleged nonspeech-related harms. Such a linkage is prohibited except under the narrowest circumstances, and has never been sustained in a case involving legal representation alleged to have been performed “legally.”

2. *O’Brien Intermediate Scrutiny Is Inappropriate Even For Acts Not Specified As Being Performed In a Communicative Fashion*

The two allegations against Lynne Stewart that do not explicitly implicate her written or spoken communication are contained in Count I, ¶¶21(b) and (c). These paragraphs allege that Lynne Stewart “assist[ed]” Sheikh Abdel Rahman in issuing two statements from jail regarding a ceasefire and the formation of a political party. Although the face of the indictment does not

reveal whether the assistance came in the form of speech, these acts, too, should fall within the core protection of the First Amendment.

First, the government should not receive the benefit of lenient constitutional scrutiny simply as a result of constructing an exceedingly vague indictment. To the extent that we cannot determine whether Lynne Stewart's "assistance" came in the form of attorney advice, the provision of a fax machine, the use of her car to drive the speech to a newspaper office, or any other imaginable form of "assistance" that might possibly fall under § 2339A(b), the government should be essentially estopped from claiming that their allegations in these counts do not impinge on the expressive rights of Lynne Stewart. *See Standard Oil*, 307 F.2d at 130.

Regardless of how the allegation is read, it essentially claims that Lynne Stewart through some action "gave voice" to the opinions of the Sheikh as expressed in his statement. Thus, Lynne Stewart's actions are pure speech no less than the activities of a publisher who is sued for libel or prosecuted for obscenity. In both cases, through, whatever personal or technological labor may be necessary, the allegation is that an individual has aided the amplification of the speech of another, and courts have long considered that "enabler" to be afforded First Amendment protection where he or she serves a special role in societal discourse. The publisher of the NEW YORK TIMES has First Amendment rights, and exercises them through assembling and transmitting news, using facilities of communication, having a printing press, and running a business called a newspaper.

Put another way, the government may (arguably) have the right to limit the speech rights of a prisoner such as Sheikh Abdel Rahman. Matters are quite different, however when a lawyer such as Ms. Stewart -- or a newspaper reporter or anyone else -- finds out her client's political views on any given subject and truthfully reports those views to the world. Even if the truthful

report involves driving, faxing, telephoning or other collateral activities, all of those things are within the core protection of the First Amendment. We deal with this issue at greater length in discussing the SAMs, noting the centuries-long list of great literary works and of important social history that have originated in communications from those in jail. *See infra* Part IV.

With respect to lawyers, and as we argue at length later, the Court recognized in *Gentile v. State Bar of Nevada*:

Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. “Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion.” To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.

501 U.S. 1030, 1056-57 (1991) (quoting *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (1975)).

Finally, in the alternative, these allegations must be viewed at a minimum as implicating speech and nonspeech activity, the former being the continuing expressive act of assisting in the criminal defense of Sheikh Abdel Rahman, and the latter being in the form of whatever noncommunicative “assistance” was given. As reviewed below, even under an intermediate standard of review that these acts would receive if understood in such a manner, their criminalization under 18 U.S.C. § 2339 is unconstitutionally burdensome of speech.

C. 18 U.S.C. § 2339 As Applied to Lynne Stewart Unconstitutionally Punishes First Amendment-Protected Speech

Applying the “clear and present” danger standard formulated in *Brandenburg* and the *strictissimi juris* construction of intent to the acts alleged in Counts I and II reveals that § 2339 unconstitutionally restricts freedom of speech as applied to Lynne Stewart. The government has argued in other cases that by the terms of the statute, certain acts were undertaken with the requisite intent to further the illegal aims of the terrorist organization, because, unlike the membership clause cases under the Smith Act, the statute specifies that only provision of “material support and resources” is punishable. *See Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F.3d 1000, 1022 (7th Cir. 2002) (stating that the arguments that the material aid laws potentially penalize individuals for political association absent a showing of specific intent “beg the question . . . because section 2333 [the civil remedy arm of the material aid statutes] does not seek to impose liability for association alone but rather for involvement in acts of international terrorism”); *Humanitarian Law Project*, 205 F.3d at 1133 (holding that prohibition of financial contributions to terrorist groups did not itself prohibit membership in and association with those groups). We may as well dispose of this argument at the outset.

First, the Indictment is impermissibly vague. It would therefore authorize the government to introduce evidence of protected conduct in support of its allegations. We make this point at greater length below. Second, the statutory term “material assistance” expressly includes core speech, and attorney representation. The government cannot make the word “material” mean anything it wishes, as the Red Queen was wont to do. *See M. Tigar, The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1466 (1984) (writer parodying Prussian

legislative provisions on pilfering of wood suggests that “a box on the ear” would be more effectively punished if you called it murder).

In short, the government cannot avoid First Amendment scrutiny by simply using Congress’s choice of phrase -- “material assistance” -- to define away the issue. Where Congress has condemned nonspeech activity -- materially assisting the aims of terrorists -- and an individual is accused of doing this through speech, the individual acts that are alleged to be criminal must be scrutinized to avoid unconstitutional overreaching into First Amendment protected activity. *Dennis*, 341 U.S. at 505. As the Court explained in *Yates*:

In other words, the Court of Appeals thought that the requirement of proving an overt act was an adequate substitute for the linking of the advocacy to action which would otherwise have been necessary. This, of course, is a mistaken notion, for the overt act will not necessarily evidence the character of the advocacy engaged in, nor, indeed, is an agreement to advocate forcible overthrow itself an unlawful conspiracy if it does not call for advocacy of action.

354 U.S. at 322-23.

Yes, these are perilous times, or so it is believed. The constitution was written by those who had been through peril and it was written for all time. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), written in time of war, Justice Jackson said:

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

1. *An Examination of Each Alleged Act That Is Constitutionally Protected Speech*

a. Count I ¶¶21(b) and (c): Assisting Sheikh Abdel Rahman in Releasing a Statement

As an initial matter, it is difficult to discern what is demonstrated by these specific acts, given that the role played by Lynne Stewart is rendered relatively inscrutable by the

government's description. Taken in its most generous light, it alleges with respect to Lynne Stewart only that she "assisted" her codefendants and her client in issuing "a statement" from jail. This was not a threat, or an order, or a command. It was a "statement," not alleged to have been false, or seditious, or inciting, or a harbinger of danger, either remote or proximate.

Even if the statutory scienter element is imputed to these paragraphs (that Lynne Stewart "knowingly" provided such "material support"), there is no allegation that in "assisting" Sheikh Abdel Rahman she intended that the statement support the illegal goals of the Sheikh's organization. This illustrates a problem with the mental element. The statute says "knowingly," and the government has said this does not mean intentionally. Yet, the indictment alleged "willfully," which means an intentional violation of a known legal duty. *See generally Cheek v. United States*, 498 U.S. 192, 201 (1991) ("willfulness ... requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty"). Even the word "knowingly" can be read to require a specific intent to violate a known legal duty, when the statute includes (as this one does) a regulatory aspect. *See generally Liparota v. United States*, 471 U.S. 419, 433-34 (1985) (requiring government to prove that defendant knew his conduct was unauthorized or illegal); M. Tigar, "Willfulness" and "Ignorance" in *Federal Criminal Law*, 37 CLEV. ST. L. REV. 525 (1990).

The act of assisting in releasing the Sheikh's statement, even *if* Lynne Stewart knew of its contents, cannot constitutionally be punished without a showing that Ms. Stewart herself sought to advance whatever illegal goal may have been furthered by such a statement. In reversing a conviction for conspiring to aid and abet draft resistance, the court in *Spock* concluded that although one of the defendants drafted a call to action against the draft, and stated that "he was

willing to ‘do anything’ asked to further opposition to the war,” such actions did not establish specific intent. *Spock*, 416 F.2d at 178. In contrast, the court upheld convictions of codefendants who made specific public statements that they wished to “encourage [draft resisters] and aid and abet and counsel them in every way we know how.” *Id.* at 177 (quoting defendant’s remarks). The distinction, according to the court, was that “expressing one’s views in broad areas is not foreclosed by knowledge of the consequences,” and that “one may belong to a group, knowing of its illegal aspects, and still not be found to adhere thereto.” *Id.* at 179. As the Court in *Yates* framed it, citing Justice Frankfurter’s concurrence, “Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.” 354 U.S. at 322 (quoting *Dennis*, 341 U.S. at 545 (Frankfurter, J., concurring)).

Here, the government has not alleged prior unambiguous statements on the part of Lynne Stewart that she sought to further the aims of IG in her actions. Nor can it be reasonably maintained that the government has shown that Lynne Stewart indeed committed “the very illegal act contemplated by the agreement,” or that any “subsequent legal act” was clearly taken for the specific purpose of rendering effective the later illegal activity.” *Spock*, 216 F.2d at 173. The indictment cannot fulfill a showing of intent under the second prong of this test, the commission of the “very illegal act contemplated,” simply by alleging activities that the government claims have been defined by a broad statute as “material assistance.” Where the nature of the alleged agreement may be simultaneously legal and illegal -- thus bifarious -- the government must allege and prove that Lynne Stewart’s intent was to engage in something *other than* the legal activity. Even if the government argues that Lynne Stewart was pursuing the legal goal of representing Sheikh Abdel Rahman simultaneous with nefarious purposes

transpiring, her “overt act” itself cannot be sufficient to ascertain “the character of the advocacy engaged in.” *Yates*, 354 U.S. at 322-23. As the Ninth Circuit recently explained:

A doctor's anticipation of patient conduct, however, does not translate into aiding and abetting, or conspiracy. A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana. Holding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting.

Conant v. Walters, 309 F.3d 629, 635-36 (9th Cir. 2002) (internal citations omitted).

Finally, the very statement that Lynne Stewart is accused of helping to disseminate itself falls short of the level of incitement to lawless action required to permit its criminalization. A statement by Sheikh Abdel Rahman regarding political issues and withdrawal of support for a ceasefire goes not even as far toward advocacy “directed to inciting or producing imminent or lawless action,” as defendant Spock’s assertions that he would do “anything” to further the cause of draft resistance. *See Spock*, 416 F.2d at 178; *Hess*, 414 U.S. at 108 (government may not prosecute advocacy of use of force unless that advocacy is directed at inciting and likely to incite imminent lawless action -- a version of the clear and present danger test); *Brandenburg*, 395 U.S. at 447; *see also Yates*, 354 U.S. at 322 (quoting *Dennis* concurrence distinction between statements that “may prompt its hearers to take unlawful action, and advocacy that such action be taken”). If the words of Sheikh Abdel Rahman himself cannot be taken to be advocacy or incitement, surely the alleged act of Lynne Stewart of disseminating such words cannot be curtailed.

Not only has the government failed to allege that Ms. Stewart had any intent to incite violence by Sheikh Abdel Rahman’s supporters by publicizing his words, the government has

also failed to allege any circumstances that may lead one to believe that there was any imminent threat posed by the publication. In other words, even if the statement itself could be understood to be advocacy rather than a mere opinion, punishing Lynne Stewart for its release would amount to punishing “persons who . . . publish any book or paper containing such advocacy; or who ‘justify’ the commission of violent acts ‘with intent to exemplify, spread or advocate the propriety’” of their doctrines. The Supreme Court finally forbade such government action in *Brandenburg*, 395 U.S. at 448 (quoting and striking down Ohio’s Criminal Syndicalism Act for lack of specificity of “incitement to imminent lawless action”; departing from prior decisions upholding criminal syndicalism laws).

Similarly, the court in *Holy Land Foundation* emphasized that government blocks on funds to Hamas had “not restricted HLF’s ability to express its viewpoints, even if these views include *endorsement* of Hamas.” 219 F. Supp.2d at 82 (emphasis added). And in *Boim*, the court articulated a clear distinction between affiliation with the goals -- even the violent goals -- of a designated organization, which cannot constitutionally be proscribed, and material support of those goals:

Under section 2339B, and indeed under section 2333, HLF and QLI may, with impunity, become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas. Section 2339B prohibits only the provision of material support (as the term is defined) to a terrorist organization.

Boim, 291 F.3d at 1026. Further, an intent to further terrorist goals cannot be imputed to an individual accused of materially supporting IG through specified speech acts without a personalized, specific showing:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that

relationship must be sufficiently substantial to satisfy the concept of personal guilt....

Scales, 367 U.S. at 224-25.

Even under the lesser *O'Brien* standard of intermediate scrutiny, which we contend is not appropriate here, these allegations fail. The *O'Brien* test requires: (1) The speech regulation must be in the government's constitutional power, (2) the governmental interest must be substantial and unrelated to the suppression of free expression, and (3) the burdening of First Amendment freedoms must be no greater than is essential to the vindicate the interest. *O'Brien*, 391 U.S. at 377; *see also Holy Land Foundation*, 219 F. Supp.2d at 82 (applying *O'Brien* test to contributions to designated terrorist groups made allegedly in violation of executive blocking orders).

It is not clear, however, that the governmental interest, as manifest in § 2339, is unrelated to the suppression of free expression, at least as to the portion of the statute at issue here. Among the activities that fall within the definition of "material assistance" under § 2339A(b) are "expert advice and assistance," a phrase which sweeps into its scope a potentially broad range of communication activities that have no direct bearing on terrorist operations or activities. Once again, the indictment's vagueness must be counted against the government.

Thus, the allegations that Lynne Stewart had something to do with the alleged dissemination of misinformation regarding Sheikh Abdel Rahman's medical treatment in prison may fall under this provision to the extent that she was acting in her capacity as an attorney giving advice as to the likely consequences of a false statement. *See* Indictment ¶¶21(r) & (aa).

Indeed, our review of the relevant phone call shows that this is exactly what was happening.⁴

The indictment does not allege any conduct on her part that would bring her conduct outside the range of protected expression. Adequacy of medical treatment is a matter of opinion, and medical treatment of prisoners is a matter of public concern.

Moreover, § 2339 is not the “least restrictive means” by which Congress could regulate the harm contemplated by the criminalization of an act such as this, that harm being the assistance to terrorist organizations in furthering their illegal goals. First, Congress clearly has other, more specific, means of dealing with those who assist others in carrying out criminal activity, namely “aiding and abetting” criminal statutes, which require proof of knowledge *and* specific intent. In contrast to the difficulties that the court in *Holy Land Foundation* attributed to such means, namely that where money is at issue it is exceedingly burdensome to trace its precise distribution within an organization, *see Holy Land Foundation*, 219 F. Supp.2d at 82, here we deal only with physical assistance provided by individuals. Courts routinely review such conduct to locate a level of *mens rea* that would render such a regulation significantly less burdensome upon speech.

⁴ The draft transcript of the alleged January 1, 2001 conversation presents a quite different picture from that claimed in Indictment ¶ 21(aa). While the government’s draft is inadmissible, we will prepare our own transcript as soon as possible and provide it to the Court *in camera*.

Paragraph 21(aa) alleges that Ms. Stewart and a codefendant conspired to falsely claim that Sheikh Rahman was being denied medical treatment. The transcript reveals that Ms. Stewart did no such thing.

This “artful pleading” in the Indictment is of special concern given that the government here alleges speech crimes. *See Lamont*, 236 F.2d at 314-16 (closely scrutinizing an indictment implicating First Amendment freedoms and holding indictments “fatally defective” without reaching the constitutional issues). To employ the words of the *Seeger* court, “instead of a clear, accurate and unambiguous allegation of the essential facts ... the indictment contained a wholly misleading and incorrect statement.” *Seeger*, 303 F.2d 478, 484 (2d Cir. 1962) (internal citations and quotations omitted) (discussing insufficient pleading of the authority of the subcommittee before which the crime was allegedly committed).

Section 2339 sweeps substantially more broadly than the parameters set forth in *O'Brien*, where the Court considered it important that the defendant had not been convicted for his communicative conduct, but rather only for the act of “render[ing] unavailable his registration certificate.” *O'Brien*, 391 U.S. at 382. Here, putting aside the specific act in question, Lynne Stewart is being prosecuted under § 2339 for acts that are clearly communicative, e.g., the words she allegedly uttered to “cover” a conversation, and her alleged discussions with a codefendant regarding the Sheikh’s medical treatment in prison.⁵

b. Count I ¶21(k): Releasing Sheikh Abdel Rahman’s Statement and Quoting His Ceasefire Stance

The arguments above can equally be applied to this allegation, which, interpreted in a manner most generous toward the government, accuses Lynne Stewart simply of releasing Sheikh Abdel Rahman’s statement and quoting him regarding his ceasefire stance. Again, the government still fails to allege that Lynne Stewart’s act of publicizing the statement was done with intent to advocate the content of the statement itself, as distinct from simply reporting, truthfully, the Sheikh’s views.⁶ Further, the very statement she allegedly publicized, for the reasons given above, falls short of the level of incitement required to permit prosecution. Finally, even under the *O'Brien* intermediate scrutiny standard, prosecuting Lynne Stewart for these acts unconstitutionally overreaches in light of the close tie between the regulation and speech acts, and the failure of Congress to tailor the regulation to avoid impinging on speech.

⁵ Note that Ms. Stewart does not, and cannot, waive her client’s attorney-client and work product privileges. She is, by the government’s actions, forced to discuss what the government has revealed.

⁶ It is a distressing, but true, aspect of modern life that political leaders of every hue and in almost every land are perennially advocating violence against somebody. That advocacy includes use of all manner of weapons, against civilians and military targets, and in support of the widest possible array of political, religious and social goals. The road down which the government beckons the court leads to making criminals out of all truthful reporters of such opinion.

c. Count I ¶¶21(r) and (aa): Lynne Stewart's Conversations With Sattar and Yousry

The Indictment also alleges a codefendant told Lynne Stewart not to “deny” that Sheikh Abdel Rahman had issued a fatwah, and that Lynne Stewart and a codefendant agreed that the codefendant would state publicly that Sheikh Abdel Rahman was being denied medication -- a plan that Lynne Stewart knew to be “‘safe’ because no one on the ‘outside’ world would know the truth.” Indictment ¶21(aa).⁷ Again, however, the government has not only failed to allege any particular acts by Lynne Stewart or any intent to assist IG in its illegal activities through these actions or the imminent threat posed by such statements, but has also failed to allege sufficient mens rea to justify criminalization of public criticism of government officials.

The government's allegations fail with regard to the *Brandenburg* intent element at two levels of remove. Lynne Stewart's acts of engaging in a conversation initiated by codefendant Yousry regarding the authorship of a fatwah, Indictment ¶21(r), and stating that an alleged misrepresentation regarding his medical treatment was “safe,” Indictment ¶21(aa), do not evidence the specific intent required to show that she herself solicited or advocated making the alleged misrepresentations, much less that specific intent required to show that she spoke with an aim toward providing material assistance to the IG. In a similar vein, the alleged statements made by Lynne Stewart and the circumstances surrounding them fail to evidence that her “assistance” created any *imminent* threat that either the fatwah or medical care “misrepresentations” would ultimately be made, *or*, more importantly, that the aims of IG would be furthered. “[W]here an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech of publication created a ‘clear and present danger’ of attempting or accomplishing the

⁷ See supra Note 4.

prohibited crime.” *Dennis*, 341 U.S. at 505. Alleging only that Lynne Stewart was a party to a conversation regarding an IG-related fatwah, and that she advised her codefendant as to a probable outcome of an alleged misrepresentation he planned to make, is insufficient to establish *any* criminal liability for such speech.

Finally, the arguments made above with respect to the content of the speech allegedly facilitated by Lynne Stewart can be applied with equal force here as well. The statements that Ms. Stewart is accused of hearing and facilitating – alleged misrepresentations about the authorship of the fatwah and Sheikh Abdel Rahman’s medical treatment – are themselves protected speech, falling well short of the intentional incitement required under *Brandenburg* to establish liability. Even if one of Lynne Stewart’s codefendants knew that their statements might lead to the strengthening of IG’s hand in some way, they cannot be criminally liable for their speech merely because of its consequences. “[T]he defendants were not to be prevented from vigorous criticism of the government’s program merely because the natural consequences might be to interfere with it, or even to lead to unlawful action.” *Spock*, 416 F.2d at 170. Again, as argued above, Lynne Stewart cannot be liable for the facilitation of speech that is not itself criminal.

There is also the issue of official criticism. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court upheld against libel charges the publication by the New York Times of admittedly incorrect statements regarding the conduct of state officials, holding that “[t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or reckless disregard of whether it was false or not.” *New York Times*, 376 U.S. at 279-80. The

Court carved out a special place in First Amendment jurisprudence for criticism of the acts of public officials, declaring that the “right of free public discussion of the stewardship of public officials was . . . in Madison’s view, a fundamental principle of the American form of government.” *Id.* at 275. In so doing, the Court all but ruled on the constitutionality of the Sedition Act of 1798, finding that there was a “broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” *Id.* at 276. We discuss this issue below also, in connection with lawyer speech.

The *New York Times* Court’s conclusion that an individual may not be held criminally or civilly liable based upon their criticism of public officials, however erroneous the criticism may be, without an affirmative showing of “actual malice,” strongly counsels that § 2339 may not be applied to prosecute Lynne Stewart’s alleged participation in the criticism of Sheikh Abdel Rahman’s medical treatment. Note that, due to the indictment’s excessive vagueness, Lynne Stewart may be charged here for the alleged speech either because of the statements she herself allegedly made (regarding the “safe[ty]” of the “misrepresentation”), or because of her alleged role in facilitating statements by her codefendant as to Sheikh Abdel Rahman’s medical treatment. Regardless of which theory the government intends by these vague allegations to present, *New York Times* bars the way. On a theory of personal liability, Lynne Stewart’s alleged statement that a “misrepresentation” would be “safe,” absent a showing that she knew for a fact of its falsity, could be construed as no more than negligence, a level of *mens rea* “constitutionally insufficient to show the recklessness that is required for a finding of actual malice.” *Id.* at 288. Although the Indictment alleges that Lynne Stewart “knew that Rahman was voluntarily refusing to take insulin,” that does not preclude her simultaneous belief that or

lack of knowledge as to whether as a general matter the Bureau of Prisons was rendering sufficient treatment to her client. Under *New York Times*, the burden of showing actual malice falls on the party seeking liability, and it is not for the accused to disprove. See *New York Times*, 376 U.S. at 279-80. On a “facilitation” theory, the arguments made above regarding the content of the speech that Lynne Stewart allegedly facilitated are also relevant. The statement that Lynne Stewart’s codefendant allegedly proposed to make was classic public criticism, and just as there is no affirmative showing of actual malice on the part of Lynne Stewart, Mr. Sattar’s proposed statement is not alleged to arise from willful disregard of the truth. As argued above, to the extent that the speech of Lynne Stewart’s codefendant is protected, her facilitation of its expression cannot itself be criminalized. To hold otherwise is to revive the idea of libel on government.

Moreover, as we have made clear in footnote 4, the government’s artful pleading of Ms. Stewart’s alleged views is designed to conceal that it doesn’t have a factual basis for its purported concern. Lynne Stewart advocated truth, not falsehood.

The government cannot sweep all this law aside by invoking its shotgun conspiracy doctrine. The indictment’s allegations do not support such a maneuver and the law we cite would not permit it. Again, where the government seeks to create liability for a harm stated in nonspeech terms, and does so through an individual’s communicative acts, a threshold question of whether such acts *may* be criminalized in furtherance of regulating the nonspeech-related harm must be answered. Although *New York Times* speaks to libel in particular, it does so in reference to the history of political dissent and attempts to criminalize it, and thus stands for the proposition that where one’s speech constitutes criticism of public officials, it must be protected to the utmost degree. Thus, regardless of whether an “actual malice” standard constitutes the

government's burden under § 2339, *New York Times* demands an affirmative showing of *intent* to further the illegal aims contemplated by the prosecution -- here, the furtherance of IG's illegal goals. The Indictment fails to set forth facts that put Ms. Stewart's alleged conduct outside the First Amendment. It must, therefore, be dismissed.

d. Count I ¶¶21(h) and (i): Covering a Conversation

Indictment ¶16 states that “Stewart allowed [a codefendant] to read letters . . . and to conduct a conversation with Sheikh Abdel Rahman,” and that “*because these discussions violated SAM*, Stewart took affirmative steps to conceal those discussions from prison guards.” (emphasis added).

This theory of liability under § 2339 is untenable. While an allegation that Lynne Stewart, through her speech acts, knowingly thwarted the SAMs, may attempt to allege liability under Count IV of the Indictment, which we address below, it still fails to allege a sufficient link between the actions of Lynne Stewart and the goals of IG to establish a specific intent to “materially assist” a terrorist organization within the scope of § 2339.

One must remember that Sheikh Abdel Rahman speaks Arabic, and has an interpreter. Lynne Stewart is not alleged to speak or understand Arabic, and she in fact does not. It is difficult to see how she can be alleged to have “allowed” something to happen when she could not possibly have known what that thing was. The indictment's vagueness undercuts any argument of a prosecutable nexus between her conduct and any unlawful objective. This is aside from the basic principle of criminal law that allowing harmful things to occur is not generally criminal. In the words of Judge, later Justice Cardozo, “Words that sound in bare permission make not an accessory.” *People v. Swersky*, 216 N.Y. 471, 476 (N.Y. 1916).

Suppose Ms. Stewart did seek to conceal conversations with her client. Any listener thereby thwarted had no right to hear the conversation; prison guards are not supposed to eavesdrop on attorney-client communication. The SAMs regulations themselves proclaim a right to confidentiality.

Counsel has had long experience representing people in prison. It is routine practice, where possible, to bring in a tape recorder or radio to mask the attorney-client consultation, in the hope of frustrating eavesdroppers. For sensitive items, we often write messages to the client rather than say them. We do have a legitimate expectation of privacy, but we want to be careful.

It is legally impossible for Ms. Stewart to have committed a crime or an element of a crime consisting of actively concealing a conversation: (a) to which the prison guards should not have been listening, and (b) which she reasonably expected was private, as the SAMs and the government had provided assurances that confidentiality would be respected. How can one conceal that which is not being observed? How can one conceal that which the observer would at that time deny was being observed? Indeed, technically, even the prosecutors should not and could not have known that there were FISA surveillances of the very conversations the SAMs addressed.

The notion of *strictissimi juris* is important here again: Although violation of the SAMs may, *arguendo*, have been within the interest and aims of both IG and Lynne Stewart, the fact that some of Lynne Stewart's codefendants are alleged to have engaged in SAM violations toward the end of materially assisting IG cannot be imputed to Lynne Stewart without specific allegations and proof. The Indictment fails to make such allegations.

Moreover, the arguments raised above regarding the content of the speech Lynne Stewart allegedly facilitated and carried out personally apply with equal force here, and are incorporated.

Regardless of whether the communications with Sheikh Abdel Rahman and the reading of letters regarding an IG ceasefire violate the SAMs imposed upon him, none of the alleged communications or statements constitute speech “directed to inciting or producing imminent lawless action.” *See Brandenburg*, 395 U.S. at 447; *see also Yates*, 354 U.S. at 322 (quoting *Dennis* concurrence distinction between statements that “may prompt its hearers to take unlawful action, and advocacy that such action be taken”). Further, as above, even if the conversations of one or more of Lynne Stewart’s codefendants may be understood to be in fact *intended* to incite *imminent* lawless action (as opposed to merely expressing opinions about the righteousness of such action, *see Spock*, 416 F.2d at 178-79), the Indictment does not allege that Lynne Stewart, in allowing such words to be spoken, crossed beyond the *Brandenburg* line. Her alleged actions can again be likened to those of “persons who . . . publish any book or paper containing such advocacy; or who ‘justify’ the commission of violent acts ‘with intent to exemplify, spread or advocate the propriety’” of their doctrines. *See Brandenburg*, 395 U.S. at 448 (quoting and striking down Ohio’s Criminal Syndicalism Act for lack of specificity of “incitement to imminent lawless action”). Again, even allowing for the possibility that Lynne Stewart’s words and actions in allegedly facilitating speech between Sheikh Abdel Rahman and the some of her codefendants were undertaken to violate the SAMs, such actions cannot automatically subject her to criminal liability under § 2339 without a showing that they were undertaken with the specific intent and in imminent contemplation of materially assisting the aims of IG.

D. 18 U.S.C. § 2339 As Applied To Lynne Stewart Unconstitutionally Criminalizes Her Freedom of Association

It is by now a bedrock First Amendment principle that individuals may not be punished by their mere affiliation with organizations or enterprises -- even those with avowedly illegal aims -- unless the individual’s specific and individual desire to accomplish those aims is alleged

and proved. *See, e.g., Scales*, 367 U.S. at 203; *Yates*, 354 U.S. at 298. “The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982). We note at the outset of this discussion that nowhere does the government allege that Lynne Stewart at any time directly associated with the Islamic Group.

In cases like *Claiborne Hardware* and *Spock*, 416 F.2d 165, where individuals have been indicted for the illegal aims of a group that was simultaneously pursuing legitimate and legal goals, “it is necessary to establish that the group itself possessed unlawful goals *and* that the individual held a specific intent to further those illegal aims.” *Claiborne Hardware*, 458 U.S. at 920 (emphasis added). Because of the profound interest in not burdening protected political expression by inadvertently sweeping it into the purview of a criminal sanction, these cases raise uniquely important First Amendment issues: “[The] intertwining of legal and illegal aspects, the public setting of the agreement and its political purposes, and the loose confederation of possibly innocent and possibly guilty participants raise the most serious First Amendment problems.” *Spock*, 416 F.2d at 169.

As discussed above, courts apply the doctrine of *strictissimi juris* in order to ensure that “one in sympathy with the legitimate aims of an organization, but not specifically intending to accomplish them by resort to violence [is not] punished for [her] adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which [she] does not necessarily share.” *Noto*, 367 U.S. at 299-300. “[Constitutional scrutiny is satisfied] when [a] statute is found to reach only ‘active’ members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an

expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.” *Scales*, 367 U.S. at 228. As argued above, however, whatever the aims of Lynne Stewart’s alleged coconspirators, the government fails to allege anything that may be construed as specific intent on her part to advance the illegal aims of IG. By thereby attempting to derive Lynne Stewart’s guilt from her mere association with IG, through her client and her codefendants, the government seeks to hold Lynne Stewart criminally liable for association alone, in violation of the First Amendment.

Cases forbidding organization solicitation of money, or criminalizing armed action, do not control the outcome here. This indictment does not deal with such things, at least so far as Lynne Stewart is concerned. And, as we noted above, a sweeping definition of material assistance cannot substitute constitutional analysis.

The present case parts company from the civil cases dealing with alleged terrorist organizations by seeking prosecution under § 2339 for specific speech acts -- as differentiated from lesser-protected monetary contributions -- undertaken in the course of a project of arguably mixed aims -- the simultaneous representation of a criminal client by his attorney, as well as an alleged operative criminal conspiracy – and articulated with no alleged intent to specifically further the aims of the identified terrorist organization. The prosecution thus sweeps farther than any precedent that may be cited by the government, and is uniquely situated within the *Claiborne* line of cases to be entitled to the strictest First Amendment associational scrutiny.

E. Count II Of The Indictment Is So Vague That It Unconstitutionally Burdens Lynne Stewart’s Freedom Of Association And Freedom Of Speech

In a later section, we look at this issue from the standpoint of criminal pleading. *See infra* Part VII. The analysis here focuses on the constitutional issue. Count II alleges that Lynne Stewart, in her individual capacity, “unlawfully, willingly, and knowingly” provided material

support to IG. Although Count II incorporates earlier paragraphs, it fails to specify which of the alleged events constituted material support, or by whom. Thus, all the breadth and vagueness of the incorporated paragraphs expands § 2339 and these charges beyond all recognition.

Moreover, the government has attempted to derive the *mens rea* required for individual culpability purely from the alleged conspiracy, i.e., from the alleged overall illegal goals of the group charged.

Acts alleged here, however, are arguably taken for both legal and illegal aims: While the government alleges that the acts in which Lynne Stewart participated were orchestrated to materially assist the activities of a terrorist organization, the protected acts of providing legal representation were simultaneously going on throughout the alleged conspiracy. Thus, as argued above, the court must apply the standard of *strictissimi juris* in order to ensure that “one in sympathy with the legitimate aims of an organization, but not specifically intending to accomplish them by resort to violence [is not] punished for [her] adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which [she] does not necessarily share.” *Noto*, 367 U.S. at 299-300; *see also Montour*, 944 F.2d at 1024 (setting forth requirement for use of *strictissimi juris*).

Application of *strictissimi juris* here requires dismissal because no individual specific intent to further the illegal aims of IG has been alleged with respect to Lynne Stewart. Again, we recall Justice Harlan’s words:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt....

Scales, 367 U.S. at 224-25.

In holding that for liability to attach under the Smith Act membership clause the government must make a showing of specific intent to further the illegal aims of the organization in question, the Court distinguished “the member [of an organization] for whom the organization is a vehicle for the advancement of legitimate aims and policies” from the one who possesses the “specific intent ‘to bring about [the illegal aims contemplated by its prohibition].” The government elides this distinction in Count II by attempting to derive individual liability for providing material assistance to IG based on its conspiracy charge in Count I. In so doing, the government unconstitutionally attempts to criminalize Lynne Stewart’s association with her codefendants, undertaken in the course of the constitutionally-protected aim of providing legal representation to Sheikh Abdel Rahman.

F. 18 U.S.C. §§ 2339A(b) and B(g)(4) Are Unconstitutionally Overbroad And Vague

Courts have long recognized by courts that speech may not be burdened by the government’s pursuit of unrelated crime-prevention goals. Therefore, a criminal statute that burdens a substantial amount of First Amendment-protected conduct carried out by the defendant or other parties may be found unconstitutionally overbroad on its face. *See, e.g., Board of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (discussing overbreadth doctrine and impermissible burdens on speech and unanimously finding resolution at issue overbroad in violation of the First Amendment). Absent such a showing, the statute may still be unconstitutionally vague if it violates due process in *all* of its applications. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-95 (1982). A statute will be held unconstitutionally vague where it fails to: (1) provide a citizen of ordinary intelligence sufficient standards to choose *ex ante* between legal and illegal conduct, and (2) provide explicit standards to guide the discretion of law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Nadi*, 996

F.2d 548, 550 (2d Cir. 1993); *United States v. Spy Factory*, 951 F. Supp. 450, 466-67 (S.D.N.Y. 1997). “[W]hen the charge in an indictment is in the area of the First Amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the Court will uphold it only after subjecting its legal sufficiency to exacting scrutiny.” *United States v. Lattimore*, 127 F. Supp. 405, 407 (D.D.C.), *aff’d*, 232 F.2d 334 (D.C. Cir. 1955) (citing *Rumely v. United States*, 197 F.2d 166 (D.C. Cir. 1952), *aff’d*, 345 U.S. 41 (1953)).⁸

As an initial matter, as the arguments challenging the sufficiency of the indictment itself will elaborate, it is difficult if not impossible to determine from the face of the Indictment under which terms of “material support” defined in § 2339A(b) the government alleges Lynne Stewart’s conduct falls. This in itself renders the Indictment fatally deficient. This fact aside for the moment, we here examine those provisions that seem plausibly relevant to Lynne Stewart’s indictment through the lens of the *Hoffman Estates* test.

I. Expert Advice

Although not alleged in Indictment ¶20, it is conceivable that the vast majority of Ms. Stewart’s alleged conduct may fall under the “expert advice and assistance” aspect of “material support or resources.” *See* 18 U.S.C. § 2339A(b). A further complication in untangling the Indictment is that the “expert advice and assistance” language was added to § 2339 in October 2001, as part of the USA PATRIOT Act. *See* Pub. L. 107-56 § 805(a)(2); 115 Stat. 272 (October 26, 2001). The latest date of any reference to Lynne Stewart in the Indictment is the indirect April 2001 reference in ¶ 11 to “the Sheikh’s lawyers” who “want to deal with the case legally.” Indictment ¶11. If the government is attempting to punish Ms. Stewart for pre-October 26, 2001

⁸ Judge Youngdahl’s discussion in *Lattimore*, a perjury case, was prescient. It foreshadowed the perjury/vagueness cases that we discuss below in our attack on Count V.

acts of providing “expert advice and assistance” pursuant to § 2339, the charges violate the centuries-old prohibition on *ex post facto* laws. See U.S. CONST. art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed”); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (explaining that an *ex post facto* law is “[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.”). This again demonstrates the fatal deficiencies of this Indictment, which leaves open multitude interpretations of what, exactly, was allegedly done and when events supposedly occurred.

In addition to these concerns, offering legal advice and assistance is what Lynne Stewart does for a living. No other part of § 2339 could possibly relate to what she allegedly did, expect potentially the “communications equipment” provision, which we deal with below. The term “expert advice and assistance,” however, is unconstitutionally overbroad because it burdens a significant amount of First Amendment protected conduct, placing a significant and undue burden on constitutionally-protected attorney speech. To the extent that the allegations in the Indictment reach communications between Lynne Stewart and her client or his agents (including Mr. Sattar), particularly the conversation alleged in ¶21(aa) and the dissemination alleged in ¶21(k), the term “expert advice or assistance” reaches communications between attorney and client, as well as communications by an attorney with others regarding legal strategy and representation. While § 2339A(b) seems to limit the extent to which the terms there enumerated can be applied to conduct related to medical or religious services, no such limitation exists with respect to legal service. In her capacity as Sheikh Abdel Rahman’s attorney, Lynne Stewart has undoubtedly given “expert advice” and “assistance” in any number of matters pertaining to his

fate.⁹ To the extent that the government seems to identify Sheikh Abdel Rahman fully and coextensively with IG itself, see Indictment ¶¶2 and 4, the government’s definition of “material assistance” to further the interests of IG this assistance seems inevitably to sweep into it any attorney assistance, advice, or representation. This, despite the fact that “representing a client does not constitute approval of the client’s view or activities.” MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. (2002).

Further, the structure of the attorney-client relationship is such that it is impossible for an attorney to distinguish between simply giving expert legal advice, and “materially assisting” the individual or organization she is representing. An attorney is an agent of her client, and is charged with acting “with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” MODEL RULES OF PROF’L CONDUCT R. 1.3, cmt. (2002). In many cases, including the relationship between Lynne Stewart, Sheikh Abdel Rahman, and IG, the unity of interest in the representation relationship will be identical to certain goals of the outlawed organization. Thus, just as Lynne Stewart may, indeed must, pursue vigorously the goal of Sheikh Abdel Rahman’s freedom from incarceration in her capacity as his attorney, the government states that a major goal of IG, pursued through various means, is Sheikh Abdel Rahman’s release. *See* Indictment, ¶8-11.

As noted by the Court in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001), and *Gentile*, 501 U.S. at 1034, a lawyer’s speech on behalf of her client constitutes protected, private speech under the First Amendment. The Court in *Gentile* explicitly rejected a “balancing test” with respect to noncommercial attorney speech, 501 U.S. at 1051-52, finding instead that attorney speech may only be restricted to the extent it creates “a danger of imminent

⁹ We doubt that any lawyer charged under this provision would defend by saying that he or she had rendered ineffective assistance of counsel that was not “expert.”

and substantial harm.” *Id.* at 1036. Further, to the extent that the “expert advice or assistance” provision of § 2339 may be understood to prohibit attorneys from advising defendants who have been accused of being or determined to be members of designated terrorist groups, it constitutes a prior restraint on constitutionally protected speech. Prior restraints, of course, receive the utmost scrutiny under First Amendment jurisprudence. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (citing, *inter alia*, *Near v. Minnesota*, 283 U.S. 697 (1931); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *Kunz v. New York*, 340 U.S. 290, 293 (1951)). In *United States v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993), the Second Circuit determined that an order barring defense counsel from making public statements regarding a pending case constituted a prior restraint, and carried “a heavy presumption against its constitutional validity.” Additionally, the court noted that any “limitations on attorney speech should be no broader than necessary to *protect the integrity of the judicial system and the defendant’s right to a fair trial.*” *Id.* at 447 (emphasis added). To the extent that the “expert advice and assistance” provision sweeps far broader than any provision limiting attorney speech that threatens to prejudice the outcome of a judicial proceeding, it far exceeds the boundaries of permissible restriction on attorney communication.

Aside from protecting the First Amendment liberties of attorneys to speak on behalf of their clients, there are important instrumental goals served by ensuring that attorney speech is not subject to censorship or other government intrusion. As the Court noted in *Velazquez*, regulating the scope of attorney speech in the course of representation threatens to cast doubt over the legitimacy of legal proceedings. *See Velazquez*, 531 U.S. at 546-49. There, as under § 2339,

there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper

representation to the court. The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority.

Id. at 546.

While the statute in question here does not explicitly ban advocacy with respect to a given legal question, as did the provision in question in *Velazquez*, an attorney representing a client such as Sheikh Abdel Rahman still faces serious questions as to whether her advice may “materially assist” the illegal goals of the organization with which her client is affiliated. Further, such an attorney may question not only what legal positions she may advocate, but also with whom she may speak, and the extent to which she can gather and use information about the potentially illegal activities of her client without running the risk of indictment. Such a gag and straitjacket seriously undermines faith in the quality of representation being given to “people . . . whose cause is controversial or the subject of popular disapproval.” MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt.

Finally, even if the “expert advice and assistance” provision does not criminalize an impermissible amount of constitutionally protected conduct, the provision is unconstitutionally vague for providing insufficient notice to a citizen of average intelligence, and no guidance to prevent arbitrary and ad hoc enforcement. That is, the harder the government tries to justify the standard, the more it seems to be rewriting the statute. *See Gentile*, 501 U.S. at 1048-51 (discussing the vagueness problems with a Nevada Supreme Court rule restraining attorney speech).

2. “Communications equipment and other physical assets”

Lynne Stewart and her codefendants are alleged, in Indictment ¶20(a), to have “provided communications equipment and other physical assets” to IG in furtherance of their material support. The application of this terminology in the instant Indictment -- applying apparently to all speech conducted over a telephone -- evidences that it sweeps a substantial amount of constitutionally protected conduct into its scope, and is therefore unconstitutionally overbroad.

Section 2339A(a) prohibits the “provi[sion]” of material resources, those resources including, per § 2339A(b), “communications equipment and other physical assets.” A fair reading of the Indictment reveals multiple allegations that a telephone -- which undoubtedly seems commonly regarded as “communications equipment” -- was used in the course of the “conspiracy.” Yet the acts involving *use* of a telephone cannot be fairly interpreted to be equivalent to *providing* a telephone to IG without implicating a substantial amount of First Amendment-protected conduct. Setting aside for the moment whether the conspiratorial conversations in which Lynne Stewart is alleged to have participated are constitutionally protected -- which we contend they certainly are -- the government’s interpretation of “provided” would create liability any time an individual, with or without intent to further the aims of IG, spoke on the telephone to any of its members, or, presumably, emailed its members, faxed its members, or in any way *utilized* “communications equipment” in a manner that facilitated reciprocal benefits flowing to IG.

Such a definition sweeps within its ambit a vast amount of protected associational conduct. The Court in *Scales* specifically rejected the notion that “mere” association with organizations known to engage in illegal activity could constitutionally be criminalized:

There must be clear proof that a defendant “specifically intend(s) to accomplish (the aims of the organization) by resort to violence.” . . . Thus the

member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent “to bring about the overthrow of the government as speedily as circumstances would permit.”

367 U.S. at 229-30 (quoting *Noto*, 367 U.S. at 299). And in *Humanitarian Law Project*, the court recognized the endurance of associational rights vis-à-vis designated terrorist groups for individuals whose membership did not entail provision of material support. 205 F.3d at 1133. If such a line is to be maintained, the term “provision” cannot constitute “use” with respect to instrumentalities of communication, as it does in the present indictment.

Even if the “communications equipment and other physical assets” provision does not sweep too broadly, however, it is unconstitutionally vague because it does not provide sufficient notice to citizens, nor does it provide standards to adequately circumscribe enforcement of the provision. Here again, we elaborate only to make the point that the vagueness of the definition of this conduct is illustrated by the fact that, although Lynne Stewart is alleged to have provided these means of material assistance, the only piece of “equipment” or “other physical asset” she allegedly used is a telephone. Given that § 2339A(b) elsewhere includes the terms “personnel” and “expert assistance or advice” to describe alternate types of material assistance, the government’s attempt to indict Lynne Stewart under the “communications equipment and other physical assets” provision solely on the basis of a telephone conversation renders this phrase entirely redundant. Lynne Stewart’s *use* of a telephone to speak to individuals affiliated with her client cannot reasonably be taken to imply that she thereby *provided* a telephone to IG, and the indictment’s allegations (as to her) are fully consistent with her use of the telephone in the course of her law practice.

3. “Personnel”

Indictment ¶ 20(b) alleges that the defendants, including Lynne Stewart, “provided personnel, including themselves, to IG.” To the extent that “personnel” applies to Lynne Stewart’s role as attorney to Sheikh Abdel Rahman and her resultant relationship to her codefendants, the provision is unconstitutionally overbroad for reasons identical to those enumerated above in relation to “expert advice and assistance.” Providing oneself as “personnel” and communicating with “IG leaders and members around the world,” presumably including Sheikh Abdel Rahman himself, is a role practically inseparable from zealous defense of Sheikh Abdel Rahman, or any other client who is or is accused of being a member of a designated terrorist organization.

The government, in a burst of exuberance that outruns reason, may point to caselaw construing the term “personnel” as defined in § 2339A(b) as constitutionally sufficient. In *United States v. Lindh*, 212 F. Supp. 2d 541, 572 (E.D. Va. 2002), the court rejected the defendant’s challenge that “providing ‘personnel’ . . . could in certain instances amount to nothing more than the mere act of being physically present among members of a designated organization,” and thus “presents a constitutionally unacceptable risk that a mere bystander, sympathizer, or passive member will be convicted on the basis of association alone.” *Lindh*, 212 F. Supp. 2d at 572. However, the court analyzed the “plain meaning” of “personnel,” concluding that the term was sufficiently circumscribed to include only “individuals who function as employees or quasi-employees -- those who serve under the foreign entity’s direction or control” -- and finding that, when “‘judged in relation to the statute’s plainly legitimate sweep’” the statute was not overbroad. *Id.* at 573 (quoting *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000)).

The *Lindh* court's analysis in fact weighs in favor of the overbreadth argument offered in this case. In fact, whether or not Lynne Stewart or another attorney did anything resembling illegal conduct, or otherwise legal conduct that "materially assists" a terrorist organization, an attorney retained by an organization or a high-ranking member of that organization, is very arguably functioning as an "employee or quasi-employee," and is taking "direction or control" from her client. The court's definition would sweep within the scope of § 2339 any lawyer who performs what is recognized as a professional *duty*, the representation of "people . . . whose cause is controversial or the subject of popular disapproval," MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt., where those people have been classified as part of a "terrorist organization." Such a construction sweeps in substantially more constitutionally-protected conduct than the *Lindh* court considered in its analysis, treating as it did only the hypothetical "bystander" who might be prosecuted as "personnel."

Finally, even if "personnel" is not unconstitutionally broad in its sweep, it is unconstitutionally vague for failing to provide citizens of average intelligence with notice of potential criminal activity, and failing to prevent arbitrary and ad hoc enforcement. On this point, we note that *Humanitarian Law Project*, while not ruling on the merits of a vagueness challenge to "personnel," concluded that plaintiffs had a reasonable probability of succeeding on a claim challenging the term, and thus enjoined government enforcement of the provision with respect to plaintiffs:

Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits under the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the first amendment.

Humanitarian Law Project, 205 F.3d at 1137.

The government's failure, throughout this Indictment, to distinguish between lawful and unlawful means of affiliating with a suspect organization falls afoul of the most basic First Amendment principles. If a Communist may work in a defense plant, *United States v. Robel*, 389 U.S. 258 (1967), then all sorts of folks can work in all sorts of ways with almost any organization devoted at least in part to protected activity.

4. *Other Activities*

The Indictment alleges other activities, but not with respect to Lynne Stewart. *See, e.g.*, Indictment ¶¶20(a) – (d). Given the absence of specifics, each of these allegations suffers from the same vices of vagueness and overbreadth as noted above.

G. A Non-Constitutional Approach Reaches the Same Result

A provider of services to an illegal organization or group, even if the group's activities are not constitutionally protected, does not thereby become a conspirator. This indictment, read most favorably to Lynne Stewart, invokes that principle. *See United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (suppliers of sugar, yeast and cans to illegal distillers); *Milam v. United States*, 322 F.2d 104 (5th Cir. 1963), *cert. denied sub nom., Kimball v. United States*, 377 U.S. 911 (1964) (reversing mail fraud conviction of one defendant).

Those cases arose after conviction, but when one applies the *Standard Oil*, 307 F.2d at 130, test to this indictment, the matter may be addressed at this stage. As we have noted above, and argue extensively in the severance portion of this Memorandum, *see infra* Part VIII, the Indictment alleges that the lawyers were going to have a very different role from others.

We are accustomed to using “chilling effect” to describe overdeterrence in the First Amendment context. We must not forget that conspiracy prosecutions always carry a risk of overreaching. For example, in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978),

the defendants were charged with Sherman Act conspiracy for exchanging pricing information. The Court noted that such exchanges might not be harmful competition, and in fact could promote competition by encouraging parties to set prices lower. In a remarkable (for our purposes) passage, Chief Justice Burger said for the Court:

The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in [exchange of price information] which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

United States Gypsum, 438 U.S. at 441 (footnote omitted).

This Indictment poses dangers to every lawyer, and to every person engaged in concerted activity.

III. DESIGNATION AS TERRORIST ORGANIZATION: UNCONSTITUTIONAL IN CONCEPTION AND APPLICATION, FLAWED IN EXECUTION, SUBJECT TO JUDICIAL REVIEW

The entire indictment is based, to greater or less extent, on the designation of IG as a “foreign terrorist organization.” The Indictment recites the designation and redesignations, which may be found at 62 Fed. Reg. 52650 (1997), 64 Fed. Reg. 55112 (1999), and 66 Fed. Reg. 51088 (2001). *See also* the blocking order at 67 Fed. Reg. 12633 (2002). We have cited much of the law on designation in the previous section.

The statutory basis for designation is 8 U.S.C. § 1189. This statute provides that the Secretary of State may make a designation by classified communication to the Congress, based upon an administrative record that is not open to inspection, and after a procedure that is similarly secret. Judicial review of such designations, which has been the subject of cases cited

earlier, is available to the designated organization under § 1189(b), if undertaken within thirty days. The scope of review is set forth at § 1189(b)(2). The government is entitled to present classified evidence to the reviewing court. The scope of judicial review is comparatively ample under § 1189(b)(3), although that section falters in a double sense, keeping the word of promise only to the ear, because the government has the right to present *ex parte* and secret evidence.

This administrative process has features that remind one of other registration and designation laws enacted to combat other presumed dangers to national security. For our purposes, the clearest analogy is to the Subversive Activities Control Act of 1950 (“SACA”), which provided an administrative mechanism for requiring “subversive” organizations to register. Once the Subversive Activities Control Board (“SACB”) had issued its orders, the organization faced a series of consequences rather like those visited upon “terrorist” organizations under § 1189 and its implementing legislative and administrative provisions. *See Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (providing an overview of the SACB process).

The SACA had the advantage that the administrative procedures were relatively open, the evidence subject to challenge, and extensive judicial review available. The history of the Communist Party case shows this. For example, in *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956), the Supreme Court remanded the matter to the Board because three major Board witnesses were shown to have perjured themselves. The perjury of these professional witnesses, who testified in case after case, was part of a pattern of falsehood. The Supreme Court said that the Board needed to act on untainted evidence.

The judicial review procedures under § 1189 need not detain this Court for long. IG is not before the Court, seeking review. Rather, the government is seeking to punish Lynne

Stewart for an alleged relationship with IG. If IG is not validly designated a terrorist organization, Ms. Stewart is not guilty of any offense under Counts I and II.

A. What Kind Of Judicial Review Shall She Have?

Judicial review must come in two stages, and be plenary – in the sense that the entire administrative process must be laid before the parties and the Court. The first stage is at a pretrial evidentiary hearing. We have asked the government to produce the administrative record for the various designations. The prosecutors first told us that “everything” is in the public record. This is not correct; only the Federal Register provisions cited above are public. Then, on December 19, 2002, the prosecutors wrote us as follows:

Similarly, the Government will not produce the administrative records relating to either the designation of IG as a foreign terrorist organization or Special Administrative Measures. This material does not fall within the scope of the Government’s Rule 16 obligations.

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The government has drawn the line. It refuses to produce the materials on the basis of which judicial review may be obtained. It should be directed to do so and if it does not, Counts I, II, IV and V must be dismissed. *Dennis*, 384 U.S. at 873-74, (citing, *inter alia*, *United States v. Coplon*, 185 F.2d 629, 636-39 (2d Cir. 1950) (Learned Hand, J.), *cert. denied*, 342 U.S. 920 (1952)).

However, if the Court should find that the administrative process was properly conducted and the result properly reached, the propriety of designation would remain an element of the offense for the jury to decide. *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (“the constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (same); *Ring v. Arizona*, --- U.S. ---, 122 S.Ct. 2428, 2443 (2002) (reaffirming *Apprendi*

and discussing constitutional requirement that every element be submitted to a jury). This two-stage process is analogous to that for confessions under *Jackson v. Denno*, 378 U.S. 368, 377-78 (1964). Cf. LaFare, CRIMINAL LAW §1.8 (h), at 63 (3d ed. 2000) (discussing the prohibition on directed verdicts of guilty as to any element, and citing *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395 (1947)).

Let us now analyze this issue more fully. It would be untenable to argue that there is no judicial review for Ms. Stewart. To make the designation final in that way would result in a nonjudicial determination of guilt. Such a thing is forbidden by two separate provisions of the constitution: the bill of attainder clause and the Sixth Amendment.

The bill of attainder clause was construed in *United States v. Brown*, 381 U.S. 437 (1965). It could not be a crime for Archie Brown to be union officer and a member of the Communist Party, for attaching criminal penalties to that affiliation short-circuited the judicial branch role in criminal justice. Therefore, it cannot be a crime for all “supporters” of IG to be criminals.

The Sixth Amendment point is the one made above -- an element that determines guilt or punishment is for the jury under *Apprendi* and its progeny.

Behind this analysis lies an entire theory of Article Three judging, one which the government has been inclined to ignore of late. The most famous discussion of federal court power to review official action is H. Hart, *The Power Of Congress To Limit The Jurisdiction Of Federal Courts: An Exercise In Dialectic*, 66 HARV. L. REV. 1362 (1953). In that dialogue is an exchange, one among many such, that illuminates our issue. The discussants note the case of *Falbo v. United States*, 320 U.S. 549 (1944), which denied a draft registrant judicial review of his draft board classification as eligible for service. Then, a year later, the Court explained *Falbo*

and held in *Estep v. United States*, 327 U.S. 114 (1945), that “final” in the Military Selective Service Act of 1940 meant only that draft board decisions would get limited judicial review and not that such review was denied altogether. Later on, the Supreme Court held in *Cox v. United States*, 332 U.S. 442 (1947), that the administrative classification decision would be reviewed by the trial judge in a prosecution for refusing induction, and not by a jury. This holding probably does not survive *Apprendi*.

The Supreme Court, while paying lip service to limited judicial review, expanded it to include draft board denial of procedural rights and draft board errors of law. *See generally* M. Tigar, PRACTICE MANUAL, SELECTIVE SERVICE LAW REPORTER §2252, at 1115 n.1 (1968); *Sicurella v. United States*, 348 U.S. 385 (1955) (errors of law affecting First Amendment rights); *Dickinson v. United States*, 346 U.S. 389 (1953) (record must show that board had basis for disbelieving registrant); *United States v. Seeger*, 380 U.S. 163 (1965) (board must not interpret law in a way hostile to unorthodox religious belief); *Gutknecht v. United States*, 396 U.S. 295 (1970) (Selective Service System has no right to use system to punish dissent); M. Tigar, *The Rights Of The Selective Service Registrant*, in THE RIGHTS OF AMERICANS (N. Dorsen ed. 1970).

In sum, draft law came to include a well-developed system of judicial review, even in times of national emergency when it was necessary to raise an army. National security did not trump the judiciary’s role. An analogy is to *Russell v. United States*, 369 U.S. 749 (1962). *Russell* is a leading case on the sufficiency of an indictment, yet it involved a misdemeanor prosecution. Congress chose to require an indictment, and the Court held that this decision carried with it all the protection that the indictment clause was designed to give. If the government wants to insulate itself from judicial review, it should stop doing things to people that implicate their due process rights.

This is a good time to pause and reflect on the importance of judicial review. Times of national crisis tempt majoritarian institutions to invade individual rights. The Framers were led, therefore, to write Article Three and the Bill of Rights. More recently, the horrors of the Japanese relocation, and the improper imposition of Hawaii martial law, *see Duncan v. Kahanamoku*, 327 U.S. 304 (1946), come to mind. In the current setting, there is substantial risk that the terrorist designations are tainted. That taint might come, as in the SACB cases, from false testimony presented by people with a motive to falsify.

There is also the disturbing spectacle of apparent discrimination based on religion, ethnicity and national origin. *See, e.g.,* S. Gross & D. Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1412 (2002) (“it is appropriate and important that racial profiling keep its ugly name”); J. Elijah, *The Reality of Political Prisoners in the United States*, 18 HARV. BLACKLETTER L.J. 129 (2002) (“after September 11 hundreds of immigrants, mostly of Middle Eastern descent, were rounded up and interned in a manner reminiscent of American treatment of Japanese people during World War II.”). One need only look at the list of organizations and individuals targeted to gain a sense of the disproportionate emphasis on Muslim groups and individuals. One purpose of judicial review is to reveal bias in the administrative process, and we will explore that issue more fully at the appropriate time.

We do not say with certainty that the classification of IG is tainted. Saying that would make our position as unfounded as the government’s, as being based on evidence we cannot present to the Court. Rather, we note the risks and the interests at stake, and invoke a due process right to have the issue examined.

This issue of review may also be approached in the context of judicial power generally. The Hart dialogue points us that way. For example, in *United States v. Klein*, 80 U.S. 128

(1872), Congress had purported to make inadmissible in court any pardon issued a rebel adherent, and to deny effect to certain judicial judgments. *Klein* was parsed by Justice Scalia in *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995). We submit that the *Klein-Plaut* teaching is this: Congress cannot give the federal courts enforcement jurisdiction and then limit the scope of judicial action so that the judge is simply a rubber stamp. For that reason, the government's reliance on the designation of IG must be judicially reviewed.

In addition, one may approach the issue from the domain of judicial review of administrative action. *See generally* L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 651 (1965), to which several generations of law students have turned for guidance. The legal issues are ably summarized in a student Note, J. Shechter, *De Novo Judicial Review Of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483 (1988).

Review must encompass not only the entire administrative record by which IG is designated, but also extend to a detailed consideration of IG's activities. We are prepared to present evidence that at least some IG activities are lawful, protected religious and political expression and association. Only a full hearing will permit the Court to determine the many ways in which a person could be affiliated to IG, or provide "advice" to it or its members or leaders, consistent with the First Amendment. Only judicial review permits intelligible decision of our as-applied challenge to § 2339. Absent such review, § 1889 is itself unconstitutional, as violating due process, the attainder clause and the First Amendment.

IV. SPECIAL ADMINISTRATIVE MEASURES AND THE CONSTITUTION

The Bureau of Prisons, like any agency with custody of persons, has broad discretion to control the activities of those subject to its jurisdiction. However, the Attorney General has

chosen to create an administrative structure to exercise whatever power he may possess in this regard. The administrative structure for Special Administrative Measures (SAMs) relevant to this case is provided by 28 C.F.R. § 501 (1997).¹⁰

Having chosen to exercise his power through administrative regulations, the Attorney General must follow the dictates of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. Failure to adhere to a proper administrative framework violates due process of law. As the Second Circuit has stated:

It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program ... would be an intolerable invitation to abuse. For this reason alone, due process requires [that decisions be made] with “ascertainable standards”...

Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1968)

The Attorney General is also bound to follow the regulations that his office promulgates. *See Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) (“[T]he Secretary here ... was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily”); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (“While it is of course true that ... the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards ... having done so he could not ... proceed without regard to them.”); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (“as long as the regulations remain operative, the Attorney General denies

¹⁰ We note that on October 26, 2001, Attorney General John Ashcroft issued an interim rule amending section 501.3. As we discussed earlier, the Indictment’s vagueness frustrates attempts to discern exact dates of alleged criminal conduct. However, the discussion here refers to section 501.3 as it existed from October 1997 - January 2001, the apparent time frame of most, if not all of the acts alleged in the Indictment. The 1997 SAMs rule finalized the 1996 interim rule and made no amendments to 501.3. *Compare* 61 Fed. Reg. 25120-25121 *with* 62 Fed. Reg. 33730-33732. Therefore, this analysis also pertains to the April 1997 “Attorney Affirmation” in this case.

himself the right to sidestep [their requirements]”); *see also Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) (holding that had there been no applicable regulations previously issued, the Attorney General would have the authority to dismiss Watergate Special Prosecutor Archibald Cox “at any time and for any reason”, but that he was in fact prohibited from firing Cox because “[h]e chose to limit his own authority in this regard by promulgating the ... regulation” and therefore “[i]t is settled beyond dispute that under such circumstances an agency regulation had the force and effect of law and is binding upon the body that issues it”).

The Indictment’s attempt to apply the SAMs to an attorney is particularly troublesome given the attorney’s role in our judicial system. As discussed *infra* Part VI, that includes broadcasting her client’s prison conditions to the world; publicizing her client’s political and other views that could lead to a release; and giving a voice to clients who are unable to speak for themselves. And, as a public citizen, the attorney has a right, if not an obligation, to share her views of the situations confronting her client, her profession, and her government.

The Indictment here states that “[a]ll counsel for Sheikh Rahman were obliged to sign an affirmation” regarding the SAMs placed upon their client. Indictment ¶7. It further alleges violations of this “affirmation” by Ms. Stewart and seeks to attach criminal liability to such conduct. The Indictment does not, however, cite any statute, regulation, or other authority for the imposition of an “affirmation” upon Sheikh Abdel Rahman’s counsel. In fact, as discussed below, no authority exists to either impose an “attorney affirmation” of the SAMs placed on a client, or to attach criminal liability to purported violations of such an affirmation. As we note below, and in our other motion, the affirmations at issue sweep broadly with their “among other things” language. *See, e.g.*, EXHIBIT A, ¶4.

The charges based upon the SAMs violate Ms. Stewart's constitutional rights in that they predicate her right to represent her client and practice her profession upon relinquishing her freedom of speech and expression. The government may not constitutionally require a person to relinquish one right in order to exercise another. *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (citing *Simmons v. United States*, 390 U.S. 377, 394 (1968)). In *Cunningham*, New York Election Law § 22 required a political party officer to sign a statement waiving immunity before a grand jury. Failing to do so, he or she forfeited the position of leadership. The Court held that one could not force the officer to give up a Fifth Amendment right in order to exercise a First Amendment right. Here, the government would require Lynne Stewart to give up her freedom of speech and expression in order to practice her profession. Therefore any such "affirmation" is unduly coercive and invalid. Further, Ms. Stewart did not waive her First Amendment rights by signing the "Attorney's Affirmation" regarding the SAMs placed upon her client. *See Ferguson v. Charleston*, 532 U.S. 67 (2002) (no consent for search established where women voluntarily gave urine samples which were tested for drugs without their knowledge and consent). In this case, the government secretly monitored lawyer-client meetings and conversations, despite assurances of confidentiality.

Additionally, Ms. Stewart may assert the rights of her client, Sheikh Abdel Rahman. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990) (granting attorney right to challenge restrictions implicating client's due process rights); *see also Singleton v. Wulff*, 428 U.S. 106 (1976) (physicians may raise rights of their patients); *Peirce v. Society of Sisters*, 268 U.S. 510 (1925) (parents may assert their childrens' rights); *see generally*, Robert A. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982). The government's attempt to limit Ms. Stewart's ability to advocate zealously on her client's

behalf, violates Sheikh Abdel Rahman's Sixth Amendment right to counsel. In the only case thus far to address an attempt to require an "attorney affirmation" of SAMs placed upon a prisoner, Chief Judge Young held, "[t]he [SAMs attorney] affirmation here unilaterally imposed by the Marshals Service as a condition of the free exercise of Reid's Sixth Amendment right to consult with his attorneys fundamentally and impermissibly intrudes on the proper role of defense counsel. They are zealously to defend [their client] to the best of their professional skill without the necessity of affirming their bona fides to the government." *Reid*, 214 F. Supp.2d at 94.

Indeed, the right of a federal defendant to the counsel of his choice is so fundamental that it overrides local court rules, state bar rules, and other practices that restrict the lawyer's right to practice in a particular jurisdiction. *See, e.g., United States v. Walters*, 309 F.3d 589, 591 (9th Cir. 2002) (citing *Muñoz v. Hawk*, 439 F.2d 1176, 1179 (9th Cir. 1971)); *Lefton v. Hattiesburg*, 333 F.2d 280, 285 (5th Cir. 1964) (cited in *Muñoz*).

Placing limits on Ms. Stewart's ability zealously to represent her client also amounts to a due process violation of her protected liberty and property interest to practice her profession. *See, e.g., In re: Ruffalo*, 390 U.S. 544 (1968) (*per curiam*). In *Ex parte Garland*, 71 U.S. 333, 379 (1866), the Supreme Court struck down a law requiring attorneys to swear a loyalty oath before being admitted to practice in federal court. Justice Field, for the Court, emphasized the right of an attorney to practice his or her profession:

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

Id. at 379.

That same year, *Cummings v. Missouri*, 71 U.S. 277 (1866), invalidated a test oath scheme enacted by Missouri in the shadow of the civil war. The Court, per Justice Field, analyzed the Missouri oath as a bill of attainder and cited Justice Story's prescient commentary:

Bills of this sort ... have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.

Id. at 323.

Even if the Attorney General could impose such regulations and *sua sponte* criminalize attorney speech and expression, which we maintain he may not, the SAMs regulations are vague and overbroad as applied to attorney conduct. In *Gentile*, 501 U.S. at 1075, the Supreme Court established that the state may only limit attorney speech regarding pending cases if the speech has "a substantial likelihood of materially prejudicing" the case. In the instant case, there was no danger of Ms. Stewart's statements materially prejudicing "the State's interest in fair trials." *Id.* Sheikh Abdel Rahman's trial and direct appeals had concluded. The Attorney General's use of the SAMs regulations, therefore, impermissibly attempts to erect a broad prohibition on attorney conduct that offends the holding in *Gentile*.

Additionally, the SAMs as used in this case burden substantially more speech than is necessary to achieve its legitimate government purpose of reasonably restricting some conduct by certain inmates. More narrowly drawn SAMs may achieve that end without the unconstitutional burden on Ms. Stewart's, and even Sheikh Abdel Rahman's, speech. *See generally Board of Airport Comm'rs*, 482 U.S. at 574 (discussing overbreadth doctrine and impermissible burdens on speech and unanimously finding resolution at issue overbroad in violation of the First Amendment).

In *Erznoznik v. Jacksonville*, 422 U.S. 205, 216-17 (1975), the Supreme Court found an ordinance restricting films with nudity in drive-in theaters overbroad and emphasized:

Moreover, the deterrent effect of this ordinance is both real and substantial. Since it applies specifically to all persons employed by or connected with drive-in theaters, the owners and operators of these theaters are faced with an unwelcome choice: to avoid prosecution of themselves and their employee they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.

In the instant case, the deterrent effect of the SAMs is similarly real and substantial, requiring an attorney to forgo her First Amendment rights to exercise her right to practice her profession, and requiring the prisoner to forgo his Sixth Amendment right to counsel to exercise his First Amendment rights of speech and expression.

It is also important to consider the relevant historical context of prison writings from social and political critics. Nearly four decades ago, in perhaps the most well-known communiqué of its kind, Martin Luther King, Jr., wrote from a Birmingham, Alabama jail that “[w]e must come to see, as the federal courts have consistently affirmed, that it is immoral to urge an individual to withdraw his efforts to gain his basic constitutional rights because the quest precipitates violence.” M.L. King, *Letter from a Birmingham Jail* (April 16, 1963). Dr. King’s letter not only justifies the actions that led to his arrest, but in fact encourages others to commit similar acts of resistance, writing “there are two types of laws: There are *just* laws and there are *unjust* laws. I would agree with Saint Augustine that ‘An unjust law is no law at all.’” *Id.* He also spoke eloquently of “staying in jail to arouse the conscience of the community.” *Id.*

Dr. King’s letter is part of a long history of jailhouse writings by social critics, reformers, and radicals. Plato long ago detailed the last days of Socrates, celebrating his post-conviction teachings. *See* Plato, *APOLOGY* (358 B.C.). Barrister Sir Thomas More, later canonized, wrote extensively and spoke publicly about his prison conditions leading up to his May 7, 1535 trial.

In 1665, religious reformer and PILGRIM'S PROGRESS author John Bunyan issued his "Prison Meditations" while imprisoned by Charles II. His prison writings and preaching are widely celebrated and commemorated in stained glass at the Bunyan Meeting Free Church in Bedford, England. Winston Churchill's political career began with his 1899 escape from a Boer prison camp in South Africa -- from which confinement he managed to send many messages. Mohandas K. Gandhi began his autobiography, chronicling his life's work as a passive resister, while in prison. See M.K. Gandhi, AN AUTOBIOGRAPHY OR THE STORY OF MY EXPERIMENTS WITH TRUTH (1927). In part as a result of his writings while imprisoned at Robben Island in South Africa, Nelson Mandela became the leading voice against apartheid and, following his release, the country's first Black president.

Henry David Thoreau's 1849 essay "Civil Disobedience," which influenced both Gandhi and Mandela, arose from his being jailed as a result of his protest against slavery and the United States war with Mexico. See H.D. Thoreau, *Civil Disobedience*, (1849). In February 1928, *The Atlantic Monthly* published Bartolomeo Vanzetti's last statement from prison. Some years later, Woody Guthrie received a federal grant to set the case to music in *The Ballads of Sacco & Vanzetti*. Later still, Pete Seeger recorded a musical rendition of Nicola Sacco's prison letter to his son in *Sacco's Letter to his Son*. Alice Paul, while jailed for suffragist demonstrations, went on a hunger strike and was subjected to brutal treatment in jail. Her lawyer, Dudley Field Malone, obtained her release on habeas corpus from the federal court in Virginia. Even though she was in jail, she continued to direct the affairs of the National Women's Party through messages smuggled out of jail through her legal team and published in THE SUFFRAGIST. (She later married Dudley Field Malone, who was an early adherent of the ACLU, and she obtained a law degree from Washington College of Law, one of relatively few law schools that welcomed

women at that time). See M. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 665 n.297 (1998); see also Suffragist Oral History Project, available at <http://sunsite.berkeley.edu:2020/dynaweb/teiproj/oh/suffragists/paul/>. And, in 1920, Eugene v. Debs ran for President from his cell at FCI Atlanta -- and received 3.5 percent of the popular vote.

This history demonstrates the danger of attempts to broadly outlaw prison writing, particularly in politically-charged situations such as the one here. Indeed, jailhouse writings and communications about the conditions of confinement and political views of prisoners are important sources of historical information.

A. Applying SAMs to Attorney Speech and Conduct Is Not Authorized By Regulation or Statute

The SAMs regulations do not address limitations on attorney speech, or authorize its control. The regulations do not contemplate applicability to non-prisoners. 28 C.F.R. § 501.3 provides that the Bureau of Prisons, upon direction of the Attorney General, “may authorize the Warden to implement special administrative measures” upon a prisoner over whom the Warden has jurisdiction. 62 Fed. Reg. 33730, 33732 (June 20, 1997) (codified at 28 C.F.R. pt. 501). The regulation explains “[t]hese special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges” and requires that “[d]esignated staff shall provide to the affected inmate ... written notification of the restrictions.” *Id.* Section 501.3(d) provides the method by which “[t]he affected inmate” may obtain administrative review of the restrictions imposed upon him or her. *Id.*

The Federal Register notice announcing the 1997 final rule specifies the “list of subjects in 28 CFR Part 501” includes only “prisoners.” As the United States stated in its October 31, 2001 Federal Register notice announcing changes in 28 C.F.R. § 501, “[t]he existing §§ 501.2

and 501.3 cover only inmates in the custody of the Bureau of Prisons.” 66 Fed. Reg. 55062, 55065 (Oct. 31, 2001). The regulations in effect for the time period of this case make no reference to attorneys, attorney affirmations, or invasion of the attorney-client privilege. *See* Fed. Reg. 33730.¹¹ Further, the section 501.3(d) administrative review mechanism does not contemplate or provide a means for an attorney to seek review of the SAMs. *See Id.* at 33732. This further demonstrates that the regulation is simply inapplicable to attorneys and other non-prisoners.

B. “Attorney’s Affirmations” Not Within the Jurisdiction of Bureau of Prisons or Department of Justice

Absent statutory or regulatory authority to do so, the United States Attorney’s issuance of an “Attorney’s Affirmation” as a *de facto* regulation of attorney conduct is an impermissible and stunning abrogation of power. In this instance, an Assistant United States Attorney, Patrick Fitzgerald, presented the “Affirmations” to Lynne Stewart and co-counsel for Sheikh Abdel Rahman, and negotiated various aspects of their wording.¹² As the government would have it, then, an AUSA can, upon his own initiative, dictate the bounds of attorney speech and expressive conduct. This simply cannot be the case.

¹¹ Indeed, the United States’ October 31, 2001 notice of changes in section 501 recognizes, “the Bureau’s existing regulations relating to special mail, visits, and telephone calls contemplate that communication between and inmate and his or her attorney are not subject to the usual rules for monitoring of inmate communications. ... The existing regulations, of course, recognize the existence of the attorney-client privilege and an inmate’s right to counsel.” 66 Fed. Reg. at 55063-064 (internal citations omitted). Regarding the proposed changes, the notice explains, “[t]his [new] rule provides specific authority for the monitoring of communications between an inmate and his or her attorneys or their agents ... upon a specific notification to the inmate and the attorneys involved.” *Id.* at 44064. The United States, therefore, recognized in October 2001 that the SAMs that had been imposed upon Ms. Stewart’s client provided no authority for monitoring attorney-client communications. To whatever extent the United States may claim authority for invading attorney-client communications, it is clear that the Special Administrative Measures did not provide such authority.

¹² We address this sequence of events in our companion Motion filed today with the Court.

Congress has not enacted any legislation authorizing restrictions on attorney speech such as those contemplated by the instant Indictment. Absent Congressional authority, the Attorney General cannot take it upon himself -- or delegate it to junior members of his staff -- to criminalize the attorney speech and expressive conduct complained of in the indictment. *Kent v. Dulles*, 357 U.S. 116, 130 (1958); *Gutknecht*, 396 U.S. at 306-08.¹³

The government's attempt here to transform the power to control the conduct of prisoners and pre-trial detainees into a broad power to regulate the conduct of attorneys and others not within the Bureau of Prisons' jurisdiction cannot be permitted. In the instant case, the United States Attorney for the Southern District of New York, in the personage of AUSA Patrick Fitzgerald, sought to impose progressively more significant restrictions on lawyer speech as discussed in our companion Motion For An Evidentiary Hearing, For Specific Performance, And For Dismissal, and related pleadings, filed today with the Court.

Where "the liberties of the citizen are involved," as with the First Amendment freedoms in the instant case, the judiciary "will construe narrowly all delegated powers that curtail or dilute them." *Gutknecht*, 396 U.S. at 307 (quoting *Kent*, 357 U.S. at 129). As Chief Judge Young recently observed in reference to the indictment of Lynne Stewart, "serious constitutional issues might arise in that the Attorney General would himself be criminalizing a variety of conduct by imposing the SAMs and then seeking indictments for their violation. It is constitutional bedrock that only the Congress can enact federal criminal statutes." *Reid*, 214 F. Supp.2d at 96 n.8. Moreover, the underlying regulations do not authorize attorney affirmations.

¹³ The Supreme Court long ago explained the bounds of an executive agency's authority to issue regulations: "when Congress has legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations...." *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 10 Wheat. 1, 42 (1825) (Marshall, C.J.)).

C. Counts Premised Upon SAMs Fail to Allege a Crime Against the United States

Finally, for the foregoing reasons, the indictment fails to allege a crime against the United States in all counts premised upon alleged violations of the SAMs imposed upon Sheikh Abdel Rahman or the “affirmations” Ms. Stewart was forced to sign as a condition of having access to her client. As discussed below, a purported violation of the SAMs or the attorney “affirmation” is a central allegation in all of the counts of the Indictment.

Re: All Counts

Paragraph 16 of the Indictment, which is incorporated by reference into Counts One, Two, Four, and Five, claims:

- “In violation of the Sheikh’s SAM, [Stewart] has facilitated and concealed communications between the Sheikh and IG leaders around the world.”
- “Because these discussions violated the SAM, Stewart took affirmative steps to conceal those discussions from the prison guards.”

Re: Count One

- Paragraphs 21b and 21c allege that Ms. Stewart assisted Sheikh Abdel Rahman’s issuance of a statement from jail that violated the SAMs conditions.
- Paragraphs 21h and 21i allege that Ms. Stewart helped Sheikh Abdel Rahman discuss non-legal matters during a jailhouse visit. Such discussions by Sheikh Abdel Rahman allegedly to violate the SAMs imposed upon him.
- Paragraph 21k alleges that Ms. Stewart quoted Sheikh Abdel Rahman to the press. The SAMs allegedly sought to forbid Sheikh Abdel Rahman from talking with the media.

Re: Count Two

- Paragraph 23 incorporates by reference the entirety of paragraphs 16 and 21, discussed above.

Re: Count Four

- Paragraph 26 incorporates by reference paragraph 16, discussed above.
- Paragraph 27 charges Ms. Stewart with interfering with the SAMs imposed upon her client.

Re: Count Five

- Paragraph 30 bases criminal liability upon the “attorney affirmations” regarding the SAMs imposed upon Sheikh Abdel Rahman.

Each count, therefore, is at least in part premised upon the purported authority of the Attorney General to subject Ms. Stewart to criminal liability based upon the SAMs imposed upon her client. As discussed above, no such authority existed, or could have existed, and therefore the Indictment fails to state a crime against the United States and is fatally deficient on all counts.

D. We Are Entitled To Judicial Review of Relevant SAMs

For the same reasons discussed *supra* Part III (relating to the designation of IG as a terrorist organization), we are entitled to judicial review of the SAMs. SAMs represent administrative adjudications of the Bureau of Prisons, in order to control inmate behavior and in the interest of prison security. However, it appears that there was no administrative process to speak of. The “adjudications” appear to have been ad hoc determinations by prosecutors, based on no personal knowledge of prison conditions. These prosecutors were in turn in an adversary relationship to the inmate over which the Bureau of Prisons had jurisdiction, and the lawyers over which the prosecutors claimed power.

As a leading treatise says,

The most alarming combination of functions is that of adjudication and prosecution in the same decisionmaker. Closely related to this is the communication of information, off-the-record, from one involved with prosecution to an adjudicatory decisionmaker.

A. Aman & W. Mayton, ADMINISTRATIVE LAW §8.5.4, at 248 (1993).

As is clear from a companion motion filed this day, prosecutors claimed and exercised the right to draft SAM-related documents. Here, as with the foreign terrorist organization decisions, production of the administrative record is an essential prerequisite to judicial review.

Because the SAMs directly affect the exercise of First Amendment rights, and even if the government has the right to use them for the purpose of repressing lawyer speech, the determination of how much speech to suppress must be the subject of judicial review. In that review process, the government has the burden of proof. *See generally Freedman v. Maryland*, 380 U.S. 51, 60, 58-59 (1965).

V. USE OF FISA SURVEILLANCE AGAINST LYNNE STEWART

A. Background

The surveillance in this case is apparently premised to a great extent upon the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 et seq. As this Motion is directed to the face of the Indictment, it is premature to fully address FISA issues at this time. However, in the record so far, two major violations of the government's purported surveillance authority emerge. We discuss these below.

Initially, it is important to emphasize that FISA provides for judicial supervision of electronic surveillance. 50 U.S.C. § 1806(c) provides:

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, office, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of

this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to do so disclose or use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

This language is clear and broad and echoes that of 18 U.S.C. § 3504(a), the statute addressing litigation concerning sources of evidence. The FISA statute applies as soon as the government wishes to “otherwise use” surveillance results in any “proceeding.” Additionally, § 1806(g) of FISA mandates that the district court “suppress the evidence which was unlawfully obtained or derived from electronic surveillance.” Section 1806(g) further notes that even if a motion to suppress FISA surveillance is denied, conditions may be such that “due process requires discovery or disclosure” of the evidence to the aggrieved person. Despite the scope of FISA and its provisions for *in camera* review of materials, the statute recognizes the substantial due process rights of government targets and the appropriateness of discovery and disclosure of FISA applications, warrants, orders, and other materials.

In *Gelbard v. United States*, 408 U.S. 41, 52-3 (1972), grand jury witnesses claimed that the questions the government wished to ask were the fruit of unlawful surveillance. The Supreme Court held that the government would have to disclose the surveillance and permit the witnesses to litigate their claims. While *Gelbard* concerned Title III surveillance rather than FISA, it demonstrates that even a rather trivial “use” of surveillance triggers disclosure and raises due process concerns of the target. In the FISA context, the D.C. Circuit has emphasized that “federal judges other than those on the FISA Court or the FISA court of review” may consider the legality of FISA surveillance. *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (D.C. Cir. 1992). The court also explained that

FISA recognizes two private remedies. Both are after-the-fact, rather than prospective: evidence obtained in violation of FISA may be suppressed (50

U.S.C. § 1806(g)); and damages may be imposed for surveillance unlawfully conducted (50 U.S.C. § 1810).

Id.

The Supreme Court has highlighted the importance discovery and disclosure, and of respect for the adversary system, in the context of electronic surveillance litigation:

Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant.

Alderman v. United States, 394 U.S. 165, 183-84 (1969).

And, as Judge Learned Hand said in *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952), “Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens.”

B. The Government’s Apparent Violations

First, it appears that the United States made this purported FISA investigation into a criminal investigation of United States persons very early in its genesis. As the FISA review court’s recent opinion demonstrates, the FISA statute does not fulfill the requirements of the Fourth Amendment. *See In re: Sealed Case No. 02-001*, United States Foreign Intelligence Surveillance Court of Review, Nov. 18, 2002, at 56 (stating that “the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.”). In holding FISA constitutional, the Court underscored that

separate procedures must be followed in FISA surveillance as opposed to domestic surveillance of United States persons. *See also United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987) (finding that “FISA’s numerous safeguards provide sufficient protection for the rights guaranteed by the Fourth Amendment within the context of foreign intelligence activities.”). It appears in the instant case, however, that these “safeguards” and procedures may have been disregarded and the case improperly handed over to the United States Attorney’s office for domestic criminal prosecution, thus rendering the surveillance of Ms. Stewart improper and in violation of her Fourth Amendment protections.

Second, Lynne Stewart is a United States citizen and, therefore, an inappropriate target of FISA surveillance. FISA section 1804(a) specifies numerous safeguards to ensure, *inter alia*: “the target of the electronic surveillance is a foreign power or an agent of a foreign power” 1804(a)(4)(A); “that the certifying official deems the information sought to be foreign intelligence information” 1804(a)(7)(A); and “that the purpose of the surveillance is to obtain foreign intelligence information.” 1804(a)(7)(B).¹⁴ FISA minimization requirements may have been disregarded. *See* 50 U.S.C. § 1801(h) (requiring procedures to minimize surveillance of non-targets and, in particular, United States persons). Additionally, FISA provides that a United States person may not be deemed an agent of a foreign power “solely upon the basis of activities protected by the first amendment to the Constitution of the United States.” 50 U.S.C. § 1805(a)(3)(A). *See Pelton*, 835 F.2d at 1075 (affirming denial of defendant U.S. citizen’s motion to suppress FISA surveillance “where there was probable cause to believe that [the

¹⁴ Note that Pub. L. 107-56, § 218 (October 26, 2001) amended this subsection, striking “the purpose” and inserting “a significant purpose.” However, the FISA law in effect for the vast majority of the surveillance in this case was the pre-amended version cited above.

defendant] was the *agent of a foreign power*”) (emphasis added). We emphasize that there is no allegation presented that Ms. Stewart was ever “an agent of a foreign power.”

Again, we will brief this issue in full once we have received and reviewed the necessary discovery, administrative record, and FISA warrants. However, it appears even at this early juncture that the surveillance the government seeks to introduce against Ms. Stewart was unlawfully acquired and/or not performed in conformity with an order of authorization or approval.

The only way to resolve this issue is for the court to demand that the government file an affidavit addressing two issues:

- 1) When it claims to have first focused on the conduct charged in this indictment, by FBI investigation, Grand Jury time, or other means, in the context of a criminal investigation.
- 2) At what point it identified Lynne Stewart and/or other United States persons as active participants in the conduct herein alleged.

Then, we can request a hearing. This was the procedure followed with respect to the search warrant leak and is mandated by the caselaw on which we relied in that context. *United States v. Coplon*, 185 F.2d 629, is particularly relevant in this regard.

VI. THE ROLE OF LAWYERS

Throughout this Memorandum, we have emphasized that the government has indicted an attorney for alleged conduct during her representation of a controversial client. This fact is critical in analyzing the Indictment and determining whether and how the case should proceed. Why has the law been, and why should it be, solicitous of lawyers’ rights to defend controversial causes and clients? Why does the law insist on procedural protection for lawyers?

The speech involved in this case -- speech of an attorney about the views and conditions of a client whose liberty might well depend on the political climate -- must be viewed in the broader context of the public's persistent and legitimate interest in the conduct of its business in the nation's courts. Time out of mind, political defendants have been released or had their conditions improved due to the glare of international publicity. Those of us who stood shoulder to shoulder with the Black lawyers of South Africa knew that all of Nelson Mandela's strictly legal avenues of appeal were long exhausted. Yet his lawyers continued to visit him, and a supporting movement continued to lobby for his release. This is just one example. To fulfill their duty, and particularly in cases that challenge the way we see fundamental issues, lawyers must be free to do their job.

When considered alongside the history and jurisprudence of the First Amendment, Lynne Stewart's alleged conduct falls squarely within the area sheltered from government prohibition and punishment.

Five Justices of the Supreme Court, in *Gentile*, struck down a restraint on lawyer speech that was impermissibly vague and broad. *Gentile* was decided against a long historical background.

The Framers of the Bill of Rights rejected the British system of press restraint, and our early history as a nation reinforced that view. We invoke that history by referring to the Supreme Court's exposition of it in *Bridges v. California*, 314 U.S. 252, 263-68 (1941). The years since 1941 have added to our knowledge of the First Amendment's historical underpinning. The lawyer has been for all our history a public citizen, with as much a right and duty to speak out against injustice as to represent its victims in particular cases. And lawyer and litigant do not, by virtue of their status, forfeit their rights to comment and to truthful speech.

Leonard Levy, in *THE LEGACY OF SUPPRESSION* (1960) (“Levy I”), criticized the view of history taken in *Bridges* and other cases. In his second edition, retitled more neutrally (and accurately) *EMERGENCE OF A FREE PRESS* (1985) (“Levy II”), Professor Levy revisited the sources and conformed his view of the purpose of the First Amendment more closely to that relied on by the Court in *Bridges*. See Levy II, at ix-xix.

We contend that the Court was right in *Bridges* about the central lesson to be drawn from the colonial and post-Revolutionary experience. A brief review of that experience is relevant here.

When James Otis litigated about the writs of assistance, he was not shy about speaking in public of the injustices he saw in those cases. See J. Quincy, *REPORT OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURTS OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY* 51-57, 469-82 (1865); see also 2 *LEGAL PAPERS OF JOHN ADAMS* 106-47 (L. Wroth & H. Zobel eds. 1965). When John Adams was retained to represent John Hancock in a forfeiture proceeding, his contentions and later a text of his undelivered argument were thoroughly aired in the press of the time, along with running commentaries on the legal issues. *Id.* at 173-210. These court cases were “the Commencement of the Controversy, between Great Britain and America,” according to an Adams letter of July 3, 1776. *Id.* at 107 n.2.

While the records available do not always identify the authors of contentious comments on pending cases, the concepts and vocabulary point clearly to lawyers as the source. The *Zenger* case of 1735, that most famous colonial seditious libel prosecution, put the wrong man in the dock. *Zenger* did not write the material for which he was prosecuted. The strident attacks on the administration of New York Governor Cosby, including pointed references to his manipulation of the judicial process, were written by lawyers. One of the authors was a former

judge, Lewis Morris. See L. Powe, THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 8 (1991); Levy II 37-45; see also M. Tigar, THE TRIAL OF JOHN PETER ZENGER (1986) (revived at New York Historical Society 1989).

Although Eleazer Oswald was a printer and perennial litigant and not a lawyer, his pointed and even gleeful attacks on the administration of justice in Pennsylvania are well-documented. See, e.g., Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 JOURNALISM Q. 232 (1968); Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 JOURNALISM Q. 539-44 (1968). See also Levy II at 370. Oswald not only mocked Chief Justice McKean, but published “A Hint to Grand Juries” on the eve of that body's consideration of politically-motivated charges against him. Oswald also warned “every lawyer” not to appear in court against a printer, lest:

His name should, like his carcass, rot
In sickness spurn'd, in death, forgot.

Teeter, *The Printer and the Chief Justice* at 240.

Levy II contains dozens of examples, though mostly more polite, of contentious, robust, and wide-open debate by lawyers about the justice system. See generally Levy II at 173-219.

The colonial and post-Revolutionary history tells us more than that the press clause has independent significance, although it surely tells us that. See D. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983). The criminal process, and related types of actions such as forfeitures, were essential means of social control by an increasingly unpopular and beleaguered British colonial authority. The press response to these judicial proceedings was a tocsin to the polity. Colonial and post-Revolutionary history establishes the tradition of lawyers challenging the existing order by their comments in and out of court, on their own behalf and that of their clients.

Colonial courts attempted to suppress criticism directed at courts and their proceedings, as had been the practice in England. A broad power of the prosecution authorities to limit attorney speech, which the government seems to be espousing, appears derived from these repudiated efforts to limit speech and is indeed of illegitimate lineage. It was part of the English offense of seditious libel. *See* G. Stone, "Sedition" 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1425 (S. Kadish ed. 1983). Professor Stone aptly summarizes the law:

The trial was structured so as to leave most of the critical decisions in the hands of government officials. In prosecutions for seditious libel, the common-law jury was permitted to decide only whether the defendant had actually published the words in question. The judges reserved to themselves the central issues of malicious intent and bad tendency. Although the intent and tendency concepts had the potential to limit significantly the doctrine of seditious libel, in the hands of judges they were of no appreciable consequence. The judges simply inferred bad intent and bad tendency from the very fact of the libel. In practical effect, then, the criticism itself became criminal. And, of course, truth was no defense.

Id. at 1426.

The fate of seditious libel in the colonies is well-known. After the *Zenger* case, the British and their surrogates did not dare attack colonial printers in this way. *See* Anderson, 30 U.C.L.A. L. REV. at 510. Even in England, attempts to enforce the libel laws met with repeated rebuke. *See* M. Tigar, *Crime Talk, Rights Talk and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101, 113-27 (1986).

The epitaph of seditious libel was written by the First Amendment. Madison thought, in his 1789 Report on the Virginia Resolutions, it had been written long before:

In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands....

Quoted in Anderson, 30 U.C.L.A. L. REV. at 510 n.307.

In the modern context, *NAACP v. Button*, 371 U.S. 415 (1963), illustrates the role of lawyers, and underscores the First Amendment aspect of what lawyers do. *See also Brotherhood of Ry. Trainmen v. Virginia*, 377 U.S. 1 (1964); *Velazquez*, 531 U.S. 533. Without courageous and undeterred lawyers, the right of access to courts is meaningless. The Supreme Court has wisely recognized that court access is bound up with the right of petition. *See generally Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In our country, great social struggles have historically been waged in court. Unfettered access to those courts, and the right to have counsel argue one's case, is a precondition to the very legitimacy of governmental institutions. A roll call of issues in court would include:

- Press freedom, from the *Zenger* case forward.
- Slavery, including *The Antelope*, 23 U.S. 66 (1825) (upholding legality of slavery because some nations were still practicing it); *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (1841) (finding a way to free a cargo of slaves; this is the case about which the motion picture AMISTAD was made).
- Rights of Native Americans, from *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (a defeat for Native Americans) and *Worcester v. Georgia*, 31 U.S. 515 (1832) (a partial retreat from *Cherokee Nation*).
- Rights of aliens. *See generally* ten Broek, Barnhart & Matson, PREJUDICE, WAR & THE CONSTITUTION (1954).
- International law as binding governmental conduct, even in time of war, and the right of access to courts to vindicate rights under international law. *The Paquete Habana*, 175 U.S. 677, 500 (1900).

- Workers' rights, as documented in, for example, the work of Clarence Darrow. *See, e.g.*, ATTORNEY FOR THE DAMNED (Weinberg ed. 1957).
- Female suffrage and related issues. *See, e.g.*, *United States v. [Susan B.] Anthony*, 24 F. Cas. 829, 11 Blatchf. 200 (1873); *Nation v. District of Columbia*, 34 App. D.C. 453 (1910) (reversing conviction of temperance crusader Carrie Nation due to insufficiency of indictment); *Hunter v. District of Columbia*, 47 App. D.C. 406 (1918) (a case that also deals with sufficiency of a criminal pleading and which should be read in that context as well); Woodrow Wilson's Collector Customs, Dudley Field Malone, resigned his post to represent the suffragettes, and thereafter assisted Darrow in the *Scopes* trial, *see* K. McCarthy & M. Tigar, WARRIOR BARDS (1989). It is an irony to note that women who led early movements would often have their convictions reversed for First Amendment defects in the charging papers.

The last item in our list has particular relevance. Lynne Stewart is a tough, compassionate litigator in what used to be -- and according to some, still is -- a man's world. She stands in the tradition of the great leaders, some of whose cases are cited above. Indeed, as we discussed earlier, Women's Party leader Alice Paul, while in jail for demonstrating, sent messages through her legal team.

Norman Dorsen's book THE RIGHTS OF AMERICANS (1970) is a chronicle of other issues tried in courts. *See also* T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (1970). In this case, the government has sounded the trumpet of national security. We are reminded of *Queen Caroline's Case*, 129 Eng. Rep. 976 (1820). King William charged his wife with adultery. She was tried in the House of Lords on a bill of pains and penalties. Her lead counsel was Lord

Brougham. As the case went on, Brougham was reprimanded for his boldness, and told that his vigorous defense of his client might imperil the monarchy. He replied:

I once again remind your lordships, though there are some who do not need reminding, that an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 8 (1821).

When we assume the duty to protect a client’s life, liberty, reputation, or property, we must fulfill that duty by all lawful means. If we cannot accept the moral responsibility for that representation and its consequences, we should decline the case.

The allegations of this Indictment are entirely consistent with Lynne Stewart having provided competent legal representation, as the Indictment itself concedes, “legally.” The indictment is consistent with Lynne Stewart having spoken truthfully about matters of public concern. Her conduct is thus within a tradition of legal representation entitled to constitutional protection.

VII. THE INDICTMENT IS INSUFFICIENT

Under the Sixth Amendment, “the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.” FED. R. CRIM. P. 7(c)(1) requires that an indictment be a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” Even in a disciplinary proceeding, a lawyer is entitled to notice of specific misconduct. *Ruffalo*, 390 U.S. at 550.

In many cases, an indictment that tracks the statutory language, with appropriate dates, persons and acts, is sufficient. *Russell*, 369 U.S. at 763-64. Even judged by this liberal standard, however, this Indictment fails. However, as we show below, when the statutory language does not sufficiently inform, the indictment must descend to specifics.

A. An Easy One: Count Two

In addition to the Sixth Amendment and Rule 7, FED. R. CRIM. P. 8(a) requires that separate offenses be placed in separate counts. A violation of this principle is known as duplicity.

Count Two is silent as to the dates and places and acts on which the government purports to rely. It does incorporate an earlier paragraph, but those are a jumble of people and events. One cannot tell which of the alleged events are supposed to have been “acts” of material support.

Surely, though, the government has lumped more than *one* act into this Count. 18 U.S.C. §2339B is not a continuing offense. Thus, Count II must be dismissed because it aggregates multiple criminal acts into one count. *United States v. Kearney*, 451 F. Supp. 33, 35 (S.D.N.Y. 1978) (Duffy, J.). Count I, to which one may turn for reference, contains many allegations, over a substantial time, any of which might be said to be a part of Count II.

Thus, and as we show at greater length below, Count II also flunks the appraisal requirement, quite independent of whether it is duplicitous.

B. Lynne Stewart Is Presumed Innocent. The Indictment Must Be Tested On That Presumption

Russell, 369 U.S. at 755-56, emphasized that due to the presumption of innocence, “it is incumbent upon the United States to plead and show” the facts necessary to make the conduct criminal. *See also id.* at 760-64 (listing general requirements of an indictment, including

appraisal, testing validity of a conviction if one should be had, ensuring respect for the constitution).

As the court said in *United States v. King*, 1995 WL 146252, *1, No. 94 Cr. 455 (LMM) (S.D.N.Y. April 4, 1995):

Further, a defendant “[b]eing presumed to be innocent, it must be assumed ‘that he is ignorant of the facts on which the pleader founds his charges.’” *United States v. Smith*, 16 F.R.D. 372, 375 (W.D.Mo.1954) (Whittaker, J.) (quoting *Fontana v. United States*, 262 F. 283, 286 (8th Cir.1919)).

C. The First Amendment, The Second Circuit And Political Cases

While general allegations may sometimes suffice in an indictment, the prosecutor may not lapse into what Charles Clark termed the “formalism of generality.” *United States v. Lamont*, 236 F.2d 312, 317 (2d Cir. 1956); *see also Russell*, 369 U.S. at 766 n.13 (citing *Lamont* with approval). Judge Weinfeld had a similar view, and was affirmed by the court of appeals in *Seeger*, 303 F.2d 478, 48 (2d Cir. 1962).

Lamont and *Seeger* were political cases. Their teaching, though from a time before now, teaches important lessons for today and for this case. This indictment charges a politically-active lawyer with conduct related to a highly controversial political case, and specifically with conduct resulting from providing legal services. Where substantial rights are involved, “[t]he traditional canon of construction ... calls for the strict interpretation of criminal statutes and rules in favor of defendants.” *Smith v. United States*, 360 U.S. 1, 9 (1959).

Russell was also a political case. The key issue was the lawful authority of a controversial investigating committee. If the committee was pressing beyond its authority, it would be invading territory protected by the First Amendment. Since the *Russell* defendants were convicted for failure to answer questions, it was relevant to know the subject matter about which they refused to answer questions, in order to determine the validity of their conviction.

The failure of the indictment to identify the subject under inquiry was thus the violation of the basic principle “that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him.” *Russell*, 369 U.S. at 766. The Court noted that “a cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.” *Id.*

Russell also set out that an important corollary purpose to be served by the requirement that an indictment set out the specific offence with which the defendant is charged is “to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.” *Id.* at 768. Viewed in this context, the court held that “the rule is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task.” *Id.*

Under *Russell*, the indictment must state a constitutionally cognizable offense. *Id.* at 771-72. *Russell* expanded and relied upon a long line of cases dealing with the legitimacy of Congressional hearings into alleged disloyalty and subversion, including: *Deutch v. United States*, 367 U.S. 456, 467-471 (1961); *Braden v. United States*, 365 U.S. 431, 435-436 (1961); *Wilkinson v. United States*, 365 U.S. 399, 407-409, 413, *reh’g denied*, 365 U.S. 890 (1961); *Barenblatt v. United States*, 360 U.S. 109, 123-125, *reh’g denied*, 361 U.S. 854 (1959); *Watkins v. United States*, 354 U.S. 178, 208 (1957).

Additionally, when an indictment raises potential First Amendment issues, it will be scrutinized with special care. *Lattimore*, 127 F. Supp. at 407 (“[W]hen the charge in an

indictment is in the area of the first amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the Court will uphold it only after subjecting its legal sufficiency to exacting scrutiny.”), *aff’d*, 232 F.2d 334; *cf. Lamont*, 236 F.2d at 314-16 (closely scrutinizing an indictment implicating First Amendment freedoms and holding indictments “fatally defective” without reaching the constitutional issues), *affirming* 18 F.R.D. 27 (S.D.N.Y. 1955) (Weinfeld, J.). As the Second Circuit has observed, “[i]t has been long recognized that ‘every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment.’” *Seeger*, 303 F.2d at 482. *See Lattimore*, 127 F. Supp. at 407. The earlier opinion in the same litigation also is worth examining. *United States v. Lattimore*, 215 F.2d 847 (D.C. Cir. 1954); *see also Nation*, 34 App. D.C. 453; *Hunter*, 47 App. D.C. 406.

In the Pete Seeger case, the Court of Appeals had strong words to characterize the indictment’s vagueness on the crucial issue of governmental authority:

[I]nstead of a “clear,” “accurate” and “unambiguous” allegation of the essential facts indicating the subcommittee’s authority, the indictment contained a wholly misleading and incorrect statement of the basis of that authority. This not only runs afoul of accepted notions of fair notice, but goes “to the very substance of whether or not any crime has been shown.”

Seeger, 303 F.2d at 484 (citing *Lamont*, 236 F.2d at 316).

Similarly here, the Indictment provides no clear, accurate, and unambiguous allegation of the basis of Bureau of Prisons and/or the Department of Justice authority to invade the attorney-client privilege or to seek to control the actions of attorney Lynne Stewart. The material support statute, 18 U.S.C. § 2339, and the SAMs regulations, 28 C.F.R. pt. 501, represent extraordinary assertions of government power, potentially at war with protected rights. Applying these provisions to a lawyer engaged in providing professional legal services, in a political case, raises

special concerns. In order to ensure that the government has not strayed into areas forbidden to it by the Bill of Rights, the Indictment must be scrutinized with special care. *Lattimore*, 127 F. Supp. at 407.

In addition to the vagueness and generality of the Indictment's allegations as to events, it also fails to say much about what Lynne Stewart purportedly did. We have briefed the law that says guilt is personal, and the *strictissimi juris* principle applicable to multi-defendant cases such as this one. Our motion to dismiss does more than echo the old common law demurrer procedure. Looking only at the well-pleaded allegations as to Lynne Stewart, and taking full note of the indictment's concession that she intended to act "legally," the government could prove all the well-pleaded facts and have nothing more than a consistent course of constitutionally-protected activity.

Cases like *Lamont* and *Seeger* are not outdated relics of another time; the judges who wrote them were among the wisest to sit in Foley Square. The principles set out in those cases were applied in a nonpolitical context by Judge Lumbard, speaking for the Court of Appeals (Lumbard, Friendly & Timbers, JJ) in *United States v. Zeehandelaar*, 498 F.2d 352, 356 (2d Cir. 1974) (footnote omitted):

[FED. R. CRIM. P. 7] reflects the oft-stated principle that an indictment is defective if it fails to apprise the accused "with reasonable certainty, of the nature of the accusation against him." *United States v. Simmons*, 96 U.S. 360, 362 (1877). See also *United States v. Cruikshank*, 92 U.S. 542 (1875); *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Lamont*, 18 F.R.D. 27 (S.D.N.Y.1955), *aff'd*, 236 F.2d 312 (2d Cir. 1956). The indictment here clearly failed to do this.

Indeed, the confusion regarding the offense charged resulted in the government and appellant trying their cases based on quite distinct theories of the crime charged. This confusion regarding the indictment, however, was not limited to the parties, but infected the court and jury as well. Thus, although the court generally interpreted the indictment along the lines urged by the government, at the pretrial hearing on a defense motion to dismiss the

indictment, the court endorsed defense counsel's characterization of the indictment as charging, in essence, that Zeehandelaar had misrepresented that he had a bona fide contract on January 17. Relying on this statement by the court, Zeehandelaar prepared and presented his defense accordingly. Moreover, in its charge to the jury, the court failed to define precisely the offense charged and even suggested that Zeehandelaar could be convicted simply for having back dated the letter and the check attached to his application.

The court's confusion carried over to the jury, which throughout its deliberations evidenced considerable uncertainty as to the issue before it.

Zeehandelaar, 498 F.2d at 356.

The present Indictment impermissibly courts the same risk. Prolix, rhetorical, general and strewn with “elsewheres” and “among other things”, it fails to provide notice to Ms. Stewart or a road map to the court and jury.

D. Behind The Curtain

When confronted with a facial challenge to the indictment, the government often says “wait for trial.” Like the Wizard of Oz, it tells the court not to look behind the curtain. Our motion to dismiss does not require going behind the indictment’s face. However, one must remember that in *Lamont*, 236 F.2d at 315, Chief Judge Clark approved going behind the indictment to determine if the government really had a case, and noted that the prosecution involved First Amendment issues.

One example is provided by Indictment ¶21aa, which fails to allege directly that Lynne Stewart did anything with the intent to violate a known legal duty. The paragraph, so far as it concerns Lynne Stewart, is ambiguous, and deliberately so because the truth of what she said is quite different from of the indictment’s implication.¹⁵

¹⁵ See *supra* Note 4.

In addition, when an indictment is susceptible of two readings, one that convicts and the other that liberates, the court must choose the interpretation that favors the accused. *Standard Oil*, 307 F.2d at 130. *Ornelas v. United States*, 236 F.2d 392 (9th Cir. 1956), is to the same effect, namely that an indictment susceptible to two readings must be read favorably to the defendant.

The cases we cite are echoed in more recent authority dealing with ordinary crimes. *See, e.g., United States v. Hoang van Tran*, 234 F.3d 798, 802 (2d Cir. 2000) (indictment charging violation of 18 U.S.C. § 924(c) insufficient because it did not allege type of firearm used), *overruled on other grounds by, United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001); *United States v. Foley*, 73 F.3d 484, 488 (2d Cir. 1996) (indictment charging offense of which one element is implicit insufficient because indictment tracked language of statute but failed to allege implicit element explicitly); *United States v. Yefsky*, 994 F.2d 885, 893-94 (1st Cir. 1993) (indictment repeating statutory language for mail fraud conspiracy insufficient because failed to allege plan to defraud as required by case law). Additionally, *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963) (John R. Brown, J.) is instructive. The *Van Liew* court held an indictment insufficient because it failed to identify the regulatory provisions allegedly violated. This principle applies to each count of the present indictment, devoid as they are of guiding information about what Lynne Stewart “did.” *Van Liew* is just one of many cases holding that an indictment may not simply track the statutory language when doing so fails to inform the defendant of exactly what she must meet. *See also United States v. Huff*, 512 F.2d 66 (5th Cir. 1975) (all elements must be alleged); *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976) (failure to detail scheme invalidates fraud indictment); *Carlson v. United States*, 296 F.2d 909 (9th Cir. 1961) (liberality in testing indictment applies to form, not substance); *United States v.*

Tornabene, 222 F.2d 875 (3d Cir. 1955) (semble); *United States v. Strauss*, 285 F.2d 953 (5th Cir. 1960) (indictment needed to identify particular acts constituting offense).

E. Counts I and IV – The Conspiracies

These conspiracy counts are duplicitous in that they each charge several different conspiracies. They therefore fail to inform Lynne Stewart of what she must meet at trial and are fatally deficient.

The fundamental problem with these counts is the government's inability to understand the defense function. This is not surprising from a government devoted to rounding up people and denying them access to counsel on a variety of stratagems.

As we have noted above, defense lawyers are required to share some of their client's objectives, including the objective of being free from custody. The client may harbor the desire to get free in order to commit criminal acts, but even that desire will not necessarily terminate the lawyer's obligation to fight for the client's rights. A lawyer may share the client's sense that custody, or punishment, or some other official action, is unfair, and may take that concern public.

The client, however, may well have a different agenda. By definition, by virtue of the lawyer being a special purpose agent, the lawyer and client must have different agendas. This Indictment, with its express recognition that the lawyer was going to act "legally," impermissibly lumps these things together. As a matter simply of appraisal, the Indictment does not do enough to show us what Lynne Stewart is charged with having done. *See, e.g., United States v. Rosenblatt*, 554 F.2d 36, 40 (2d Cir. 1977) (reversing conspiracy conviction on the basis that the indictment which charged a conspiracy to defraud the United States, without more, was insufficient to define the central nature of the conspiratorial plan where the defendants did not agree on the object of the conspiracy).

F. Count IV Pleading Problems

Paragraph 28 in Count IV re-alleged “[t]he allegations contained in Overt Acts (b) through (n), (r) and (s), in Paragraph 20 of Count One of this Indictment.” However, ¶20 of Count I does not include subparagraphs (e) through (n), (r), or (s). The attempted incorporation by reference, therefore, fails. “The requisite specificity [in an indictment] can be achieved by incorporation of another count, but this must be expressly done.” *Davis v. United States*, 357 F.2d 438, 440 n.2 (5th Cir.), *cert. denied*, 385 U.S. 927 (1966) (citing *Walker v. United States*, 176 F.2d 796 (9th Cir. 1949); *United States v. Gordon*, 253 F.2d 177 (7th Cir. 1958)).

The entirety of the Overt Acts allegations in Count IV of this Indictment are made by this failed incorporation by reference. Therefore, Count IV alleges no overt acts in furtherance of the conspiracy. As a result, Count IV must be dismissed.

G. The Special Problems of Count V

Count V alleges that Lynne Stewart made a false statement in or about May 2000, in that she submitted an affirmation agreeing to abide by certain SAMs, that she shall only be accompanied by translators on client prison visits for the purpose of communicating about legal matters, and that she would not use meetings and other contacts to pass messages between third parties (“including, but not limited to, the media”) and her client.

This alleged “false statement” is in fact an alleged dozen or more statements, as is clear from Count V itself and the attached document. *See* EXHIBIT A (“Attorney’s Affirmation” dated May 16, 2000). That document is the form to which Count V refers, as the government will concede. This is one of the those cases in which, as Judge Charles Clark said in *Lamont*, 236 F.2d at 315, a look behind the indictment’s generality reveals there is nothing of substance there.

We can also get to this point by obtaining a bill of particulars, for which we have moved in the alternative.

The SAMs notice to which Ms. Stewart promises obedience is dated December 10, 2000, more than 6 months *after* the May 16, 2000, affirmation itself. *See* EXHIBIT A, ¶1. The Indictment thus alleges an impossibility – that she promised to abide by something not yet in existence.

Equally significantly, the count alleges that she made a large number of promises, which she then broke in an unspecified number of ways. The count is, therefore, duplicitous, within the teaching of *Kearney*, 451 F. Supp. at 36.

Further, Count Five is impermissibly vague and therefore fails to state an offense against the United States. In considering this Count of the Indictment, we again note that when an indictment is susceptible of two readings, one that convicts and the other that liberates, the court must choose the interpretation that favors the accused. *Standard Oil*, 307 F.2d at 130. To the same effect, that an indictment susceptible of two readings must be read favorably to the defendant, is *Ornelas*, 236 F.2d 392.

Aside from the alleged making of the false statement itself “[i]n or about May 2000,” Indictment ¶30, the only conduct by Ms. Stewart pled in Count Five is that incorporated by reference to Indictment ¶16. Paragraph 16 claims that Ms. Stewart “during her May 2000 visit to Sheikh Rahman” allowed her codefendant to read letters to and discuss matters with Sheikh Abdel Rahman “regarding IG matters” by “[taking] affirmative steps to conceal those discussions from prison guards.” *Id.* It further claims that at some unspecified time “[f]ollowing this meeting,” Ms. Stewart “announced” one of her client’s political views to the press. *Id.* The

Indictment does not, therefore, state whether Ms. Stewart's "false statement" was made before or after these alleged prison discussions and media "announcement."

Indeed, it is possible from a plain reading of the Indictment to infer that Ms. Stewart's "affirmation" came later in May, or thereabouts, than the acts alleged in paragraph 16. If this is the case, Count Five alleges no crime, but only an after-the-fact affirmation. Again, when an indictment is susceptible of two readings, it must be read favorably to the defendant. *Ornelas*, 236 F.2d 392. This fact has not been lost on legal commentators.

United States v. Laut, 17 F.R.D. 31 (D.N.Y. 1955), is instructive. Laut was indicted for having sworn that all of his answers to questions at a naturalization hearing five years earlier were true. The Court held that this form of pleading fails to apprise the defendant and makes hash of the materiality requirement, for the most trivial departure is swept within the indictment's allegations. Take for example in the present case, the government's allegation regarding the topics of conversation during Ms. Stewart's meeting with her client in prison. A prison conversation with an inmate logically and permissibly may span a wide range of topics – beyond the narrow confines of what "legal steps" will next be taken. Clients not in prison dine with their lawyers, and may socialize with them in other ways. This is part of the process of building a relationship based on trust and confidence. This scattershot charge could make routine discussion of backgrounds, families and interests a criminal offense. It also empowers the prosecuting authority, rather than the client's own counsel, to determine the scope of the client's "legal matters."

In addition, Count V claims that Ms. Stewart's alleged false statements were "among other things," those listed. While the government need not always say wherein the falsity

consists, it must at least tell the defendant what the alleged false statements were. It must do so in terms that leave no doubt as to what she allegedly said.

As Judge Louis Pollak explained, upholding dismissal of an indictment in *United States v. Serafini*, 167 F.3d 812, 819 (3d Cir. 1999):

It is well-settled law that, in instances of some ambiguity as to the meaning of a question, “it is for the petit jury to decide which construction the defendant placed on the question.” *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir.1987); accord *United States v. Reilly*, 33 F.3d 1396, 1414 (3d Cir.1994). However, “these general rules are not without limit....” *Ryan*, 828 F.2d at 1015. One such limit is that an “excessively vague or fundamentally ambiguous” question may not form the predicate to a perjury or false statement prosecution. *Id.* (quotations and citations omitted). We have said that a question is “not amenable to jury interpretation,” *id.*, “when it is entirely unreasonable to expect that the defendant understood the question posed to him,” *id.* (quotations and citations omitted).

See also the thoughtful opinion of Judge Matt Byrne in *United States v. Cobert*, 227 F. Supp. 915, 917-18 (S.D. Calif. 1964) (citing *Lattimore* with approval). See also *United States v. Simplot*, 192 F. Supp. 734 (D. Utah 1961) (cited with approval in *Russell*).

There is also the common sense point that Count V alleges a promise to do an act in the future, which promise was later broken. If every broken promise could be prosecuted as a false statement, those people whose marriage ceremonies were performed by federal judges and who later violated one or another relevant promise are potential felons. See also *United States v. Vesaas*, 586 F.2d 101 (8th Cir. 1978) (false statement indictment cannot be based on statement which on its face is not false). In *Vesaas*, the defendant allegedly falsely denied being a joint tenant with his deceased mother. Because one cannot be a joint tenant with a deceased person, this statement could not be criminally false. By similar token, a promise to perform an act in the future is not, without some additional element, a present falsehood.

These problems, basically of vagueness and appraisal, are separate from what we may call the “demurrer” aspect of our motions. As we argue above, the SAMs are not lawfully within the jurisdiction of the Department of Justice and its agencies, insofar as they purport to regulate lawyer conduct, and insofar as they are being used to punish the flow of speech about public issues to the media and public.

VIII. A SEVERANCE MUST BE GRANTED

A severance is required under three separate principles: FED. R. CRIM. P. 8(b), FED. R. CRIM. P. 14, and *Bruton v. United States*, 391 U.S. 123 (1968). However, some factual background will be helpful.

The Indictment, in ¶¶13-16, describes “the defendants” from the government’s point of view. We say, though it should not be necessary to remind everyone, that the defendants are presumed innocent of all these charges. We are basing our motion on the government’s expressed theory, and not on some alternative and more rational reality.

In ¶13, Mr. Sattar is described as a “surrogate” for the convicted Sheikh Abdel Rahman, and a “communications center” for IG. He is allegedly in contact with IG leaders around the world. In short, he is alleged to be a key figure nationally and internationally in the political agenda of IG. In turn, that agenda is characterized in the indictment in harsh terms.

In ¶14, Mr. Al-Sirri is alleged to be a kind of London contact for IG worldwide. The government has told the Court that we may not see him at any trial, but the Indictment does contain allegations about him.

In ¶15, Mr. Yousry is described in fairly neutral terms as an interpreter who has access to Sheikh Abdel Rahman and who has certain legal duties in that connection.

Paragraph 16 describes Ms. Stewart. She is not alleged to be a member of or affiliated with IG, nor to play any role in its activities. She is the Sheikh's lawyer and the indictment alleges in sum that in many unspecified ways, and some generally alleged ones, she overstepped the bounds of legal representation and assisted the Sheikh in violating an unconstitutional limit on free expression. Unlike the paragraphs, ¶¶13-15, describing the other defendants, ¶16 does not allege that Ms. Stewart provided material support to IG.

In addition to the marked differences among the defendants' roles in ¶¶13-16, neither Ms. Stewart nor Mr. Yousry are named in Count III. This Count is sensitive because it alleges direct advocacy of violent terrorist activity. Only Messrs. Sattar and Al-Sirri are alleged to have done this.

Next, Mr. Al-Sirri is not named in Count IV, which deals with the SAMs. Finally, only Ms. Stewart is named in Count V, the false statement count.

Thus, the Indictment seems to fall into two parts. One part involves IG activities directly tied to violence and the advocacy of violence. The other part deals with legal representation of Sheikh Abdel Rahman, the (or an) alleged leader of IG. The Indictment, in Counts I, II, IV, and V, does not allege any nexus between the charged speech-conduct and any imminent lawless action. Nor does it allege that any of the speech was uttered under circumstances evincing a clear and present danger.

The other part, however, inevitably involves constitutional line-drawing of the most delicate sort. In a trial, this line drawing would include special jury instructions, limitations on evidence, instructions that the ordinary rules of conspirator non-hearsay and conspirator mutual agency may not apply, and so on. All of these principles appear in the cases we have cited, including *Spock*, 416 F.2d 165.

After all, it is also common ground (we hope) with the government that one has a constitutional right to believe and advocate that the present Egyptian government is corrupt and repressive, that persons accused of terrorism are entitled to counsel, that political defendants such as Sheikh Abdel Rahman should be afforded basic rights and humane treatment, that Islam is a worthy religion, or that the Koran contains guidance for those who study it.

The government, of course, would like to blur the lines. It has seized an extraordinary number of papers and other materials from Mr. Sattar. These prosecutors plan to spend weeks putting before the jury all the inflammatory ideas, utterances and actions of IG members, with special emphasis on Messrs. Sattar and Al-Sirri.

This trial plan raises the next issue. There is plenty of anti-lawyer bias, and there has been since the dawn of the Republic and before. Zenger got Andrew Hamilton as his lawyer because Judge Delancey struck his two New York lawyers from the bar – for filing a motion to recuse.

On this anti-lawyer sentiment, *see, e.g.*, L. Friedman, A HISTORY OF AMERICAN LAW 303-05 (2d ed. 1985) (lawyers were Tory, parasite, usurer, land speculator, corrupter of the legislature, note shaver, panderer to corporations; tool of the trusts, shyster, ambulance chaser, loan shark); Curtin, *Killing All The Lawyers*, ABA Journal 8 (September 1990); Zunker, *Public Perception of the Legal Profession*, TEXAS BAR JOURNAL 78 (January 1985).

In the contemporary situation, Chief Judge Young has written of the problem that lawyers have explaining why they would represent someone accused of odious acts. *United States v. Reid*, 214 F. Supp. 2d at 94-6, contains eloquent passages testifying to that difficulty, beginning with John Adams' defense of the British soldiers. Atticus Finch, in the fictional TO KILL A MOCKINGBIRD, endures public obloquy for representing an African-American accused of a

crime. *See* H. Lee, *TO KILL A MOCKINGBIRD* (1960). William O. Douglas said of Clarence Darrow, that he “always stood between the mob and the jury, pleading for sanity, reason and objectivity.” *Foreword*, *ATTORNEY FOR DAMNED* vii.

Representing Lynne Stewart, we have a high hill to climb. That it is so high is not her doing. She is among the finest and most courageous battlers for human liberty to be found among the bar. No, it is precisely because she has chosen to respect the tenets of our profession that she incurs the wrath of government and the hostility of those who feel threatened by vigorous enforcement of the constitution. In a joint trial with weeks of testimony focused on the acts of her client and an alleged surrogate, she will not be able to make her defense.

The Indictment time-line also poses difficulties. Counts I and II allege a conspiracy that began in October 1997. By that date, Lynne Stewart had been Sheikh Abdel Rahman’s lawyer for nearly three years, since November 1994. Yet, the Attorney General of the United States has said, according to a media report, that she did not join the conspiracy until May 2000. Under this indictment, the jury is to be given at least two and one-half years worth of evidence about defendants other than Ms. Stewart, and activities in which she concededly had no part.

Similarly, Count IV alleges a conspiracy that supposedly began in February 1999. Again, the actions of others before Ms. Stewart’s alleged “joining” are virtually irrelevant to her liability. The different time periods of the Count I/II and IV/V pairs are also relevant in assessing joinder under Fed. R. Crim.P. 8(b).

The May 2000 date is not a mystery to us. In that month, the government claims that Ms. Stewart made statements to the media. Whether she did that, and the first and sixth amendment issues raised by doing so, are the central issues as to her.

Conspiracy law, substantive and evidentiary, is based on a concept of agency, of partnership in criminal purposes. However, the concept of agency cannot be used to broaden liability; the Advisory Committee notes to the adoption of FEDERAL RULE OF EVIDENCE 801(d)(2)(E) says just that, citing J. Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954). There is enough difficulty with this concept in the “ordinary” conspiracy case, as Justice Jackson pointedly said. *See Krulewitch v. United States*, 336 U.S. 440, 447 n.4 (1949) (Jackson, J., concurring) (stating that “concert in criminal purposes, rather than concert in crime, establishes the conspiracy”).

However, in this case Lynne Stewart is concededly an agent for Sheikh Abdel Rahman, who in turn is allegedly the leader of IG and has been convicted of conspiracy to commit violent acts. To the extent that she is a special purpose agent – a lawyer – acting as such, her conduct is not only shielded from liability; it is constitutionally protected. This is another case in which the line between innocence and guilt is coterminous with the line between constitutional protection and nonprotection. Policing that line is impossible in a joint trial in which some defendants are charged with conduct not raising that issue.

A. Federal Rule of Criminal Procedure 8(b)

An indictment involving multiple counts or multiple defendants must satisfy Rule 8. Even if it does, severance may be sought under Rule 14. Rule 8(b) is the exclusive test for multi-defendant cases; that is, same or similar character joinder is not permitted.

In counsel’s experience, Rule 8(b) is usually satisfied by having an umbrella conspiracy count, under 18 U.S.C. §371, naming all defendants, followed by substantive counts that more or less track the alleged conspiratorial objects. This indictment does not follow that pattern. Count I broadly alleges a conspiracy to provide material support to IG, but the identification of

defendants and the allegations lead to one of two conclusions. Perhaps Count I is intended to lump together (a) direct support for violence and deep involvement in IG’s administration, and (b) support provided through aspects of legal representation together. Alternatively, perhaps Count I alleges broadly and with much surplusage, but is designed to prosecute only actions related to (b). If (a) is the government’s choice, Count I is duplicitous and violates Rule 8’s command of “a separate count for each offense.” *See Kearney*, 451 F. Supp. at 35.

Count II is similarly compromised. We have noted above that it is inherently duplicitous.

Count III charges solicitation of violence. Ms. Stewart is not named. Because Count I is brought under a single-purpose conspiracy statute, 18 U.S.C. § 2339B, Count III cannot be an object of the Count I conspiracy.

Count IV is another conspiracy count, but limited to the SAMs. That is, there is not a hint of action, or even of speech given under circumstances evincing a clear and present danger and with the intent to cause imminent lawless action. Significantly, Mr. Al-Sirri is not in that Count. Then, there is Lynne Stewart’s Count V.

This indictment does not, that is, bespeak a “series of acts or transactions” as required by Rule 8(b). Rather, there are at least two such series – one in the broader context of IG, and the other related to legal services for Sheikh Abdel Rahman.

Consider, for example, *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), *cert. denied sub nom.*, *Phillips v. United States*, 459 U.S. 1040 (1982): This case involved a complex and interlocking set of fraud schemes. However, even though all defendants may have been involved in fraud in some way, they were not all linked together in the way that Rule 8(b) requires. *Bledsoe* is helpful because it is, like this case, complex and multifarious. *Bledsoe* has been disapproved only to the extent that it held a Rule 8(b) violation to be prejudicial error *per se*, not

requiring a harmless error analysis on appeal; the Supreme Court held otherwise in *United States v. Lane*, 474 U.S. 438 (1986).

Similarly, in *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999), the court held that there was no “logical relationship” between the charged offenses. The court did find the error harmless, but that is irrelevant to determining what a trial judge should do. In this case, any assertedly “logical” relationship would simply be the government’s confusion about the lawyer’s role and duty, and its desire to blur the line between protected and unprotected expression.

In *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), the court found a Rule 8(b) violation when the government linked two sets of transactions involving shipment of allegedly obscene films. *Levine* has been overruled only to the extent that it held a Rule 8(b) violation to be prejudicial error *per se*, not requiring a harmless error analysis on appeal. *See Lane*, 474 U.S. at 450.

Therefore, the Court should begin by severing the groups of charges from one another. This might still leave some defendants in a joint trial, but only until the Court goes on to consider the Rule 14 issues. In the end, we argue, a separate trial for Lynne Stewart obviates the difficulties.

B. Federal Rule of Criminal Procedure 14

In *Zafiro v. United States*, 506 U.S. 534, 537 (1993), the Court noted a federal preference for joint trials. This benediction must not, however, be read too broadly. This federal preference does not justify every joinder; rather it is simply a policy decision that differs from the practice in many states of sharply limiting joint trial of indictments or defendants.

Zafiro cannot be read as saying that federal criminal law has always, or traditionally, elevated a joint trial preference over fundamental fairness and common sense. We know that the

ordinary severance motion in the ordinary case faces an uphill battle. *See generally* 1 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE; CRIMINAL 2d § 223 (1982) (discussing cases); *but see, e.g., United States v. Peveto*, 881 F.2d 844, 856-58 (10th Cir.), *cert. denied sub nom., Hines v. United States*, 493 U.S. 943 (1989) (reversing for failure to sever an alleged co-conspirator at trial).

Neither this case nor this motion are ordinary: first, because here severance is mandated as a matter of law, and second, because the case concerns the most fundamental constitutional principles. In this case, there is a serious risk that a joint trial would traduce the principles of *strictissimi juris* and personal guilt, and erode First Amendment guaranties.

With respect to another fundamental issue – capital punishment – early federal law recognized that a joint trial might well imperil basic rights. As one federal judge explained in 1843:

In a capital case, and in favor of life, I am disposed to secure every protection to the prisoner against the influence of testimony not strictly applicable to him, and shall therefore order trial of the [capital] prisoner Brown, on his plea, to be separated from that of his associates. This decision is to be limited in its effect to the particular case as presented, and is not to seem as a rule in respect to the other indictment, much less in regard to ordinary felonies and misdemeanors.

United States v. Matthews, 26 F.Cas. 1205, 1206 (C.C. S.D.N.Y. 1843) (Betts, J.).

Rule 14 respects the trial court’s “sound discretion,” as to the “risk of prejudice,” *Zafiro*, 506 U.S. at 541. In similar vein, see Justice Story’s opinion in *United States v. Marchant & Colson*, 25 U.S. 480, 485 (1827), that discretion is to be exercised “with all due regard and tenderness to the prisoners, according to the known humanity of our criminal jurisprudence.”

In any event, capital or noncapital, “[g]uilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.” *Kotteakos v. United States*, 328

U.S. 750, 772 (1946). In the present posture of this case, Ms. Stewart stands in serious risk of being found guilty by “mass application,” due to the persistent confusion between lawyer duty and responsibility to the client, and the inherently counter-majoritarian nature of First Amendment protected expression.

And, relevant here, the trial judge may require production of all defendant statements. *See Gray v. Maryland*, 523 U.S. 185, 204 (1998) (Scalia, J., dissenting but noting this rule). We have asked that the court require the government to make that production, for reasons to be discussed later.

Under Rule 14, as relevant here, severance must be granted when the defenses or charges are so inconsistent that jury instructions cannot guarantee fairness, when the degree and kind of involvement of the different defendants is markedly different, or when there are statements of one or more defendants that are not admissible in a joint trial. All three grounds are present here.

Many cases recognize that severance must be granted where there are inconsistent defenses. *See, e.g., United States v. Tootick*, 952 F.2d 1078 (9th Cir. 1991); *United States v. Rucker*, 915 F.2d 1511 (11th Cir. 1990); *United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984); *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978); *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973); *see also United States v. Odom*, 888 F.2d 1014, 1021 (4th Cir. 1989), *cert. denied*, 498 U.S. 810 (1990) (double jeopardy case; finding “manifest necessity” to sever a defendant because of mutually antagonistic defenses). *Zafiro* involved a claim of inconsistent defenses, but the Court held that the problem in that case could be solved with jury instructions.

Not so here. We hasten to say that Ms. Stewart has worked together with Mr. Yousry and with Mr. Sattar in providing professional legal services to Sheikh Abdel Rahman. She has also worked with a number of others, including Ramsey Clark and those in his law firm. So the issue

here is emphatically not that each defendant will blame the other. Rather, the inconsistency arises from two basic causes. The first, as noted above, is the fundamentally different role that each of these people play with respect to Sheikh Abdel Rahman and to IG. The second is the government's evident intention to spend weeks putting Mr. Sattar's (and by use of the Indictment term "surrogate") and Sheikh Abdel Rahman's alleged political views and alleged plans on trial.

While some of this government plan can be controlled by limits on evidence and by instructions, its inevitable effect is to blur the issues as to Ms. Stewart beyond all recognition, and to overwhelm the basic ideas that Judge Young so eloquently summarized in *United States v. Reid*, 214 F.2d at 94-6.

Judge Richard Matsch, in *United States v. McVeigh*, 169 F.R.D. 362 (D. Colo. 1996), drew upon his experience in presiding over complex cases, as well as upon the legal principles we have been discussing, to conclude that cautionary instructions could not overcome the risk of prejudice in that highly-publicized and intensely emotional case. A similar analysis commends itself here, where the Attorney General's media plan on the day of this Indictment dramatically included a visit to Ground Zero -- visibly linking these defendants and the events of September 11, 2001.

There is also the pervasive First Amendment concern:

The [intent] element of the membership [Smith Act] crime ... must be judged *strictissimi juri*, for otherwise there is a danger that one in sympathy with the legitimate aims of the organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other unprotected purposes which he does not necessarily share.

Noto, 367 U.S. at 299-300; *see also Scales*, 367 U.S. at 232 ("the Smith Act offenses, involving as they do subtler elements than are presented in most other crimes, call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy"); *Yates*, 354

U.S. at 326 (acknowledging that these distinctions “are often subtle and difficult to grasp”); *Spock*, 416 F.2d at 172-73 (discussing need for strict construction of the conspiracy laws where they overlap with conduct involving speech and association).

Justice Jackson’s famous statement that “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction,” strikes a responsive chord when one reads this indictment. *See Krulewitch*, 336 U.S. at 453 (Jackson, J., concurring) (internal citations omitted).

Yes, we practicing lawyers know that cautionary instructions, particularly in a long trial, are nearly worthless. Worse yet, they waste court, lawyer and jury time. In a joint trial, the parties will constantly be parsing every jot and crumb of evidence, each lawyer team working in its own way on redactions, cautions and objections. All of this would be necessary in the hope of preserving the rights of each defendant and “making a record.” The waste of jury time from this sort of procedure simply compounds the difficulties of juror comprehension of the trial as a whole story. Trial lawyers also know that jurors resent time-wasting more than almost any other part of the process. They resent the arrogance of it, calling to mind the poet Stevie Smith’s sardonic observation,

It is the privilege of the rich
To waste the time of the poor.

COLLECTED POEMS OF STEVIE SMITH (1972)

As to both Rule 14 points, social science research bears out our views. There is an extensive literature on the capacity of jurors to follow judges’ instructions to disregard prejudicial or inadmissible evidence, and it is unanimous in finding this capacity to be severely limited. *See, e.g.,* K. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUMAN BEHAVIOR 407 (1995); A. Reifman, et al., *Real Jurors’*

Understanding of the Law in Real Cases, 16 LAW & HUMAN BEHAVIOR 539 (1992); G. Kramer, et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUMAN BEHAVIOR 409, 430 (1990) (“Our results are completely consistent with prior research on the ineffectiveness of judicial cautionary instructions. An admonition from the judge to ignore all publicity had no effect on juror or jury verdicts.”)

Most of the empirical research has focussed on joinder of criminal charges and not defendants. Nevertheless, this literature strongly supports the notion that jurors are unable to cabin their consideration of evidence in accordance with judicial instructions, since there is a marked tilt toward conviction on charges that are joined as compared to conviction on the same charges when they are severed even where the appropriate limiting instructions are given. Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMPORARY PROBLEMS 325 (1989) (canvassing research and literature); Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 LAW & HUMAN BEHAVIOR 339, 340 (1985); Tanford & Penrod, *Social Inference Processes in Juror Judgments of Multiple Offense Trials*, 47 J. PERSONAL & SOCIAL PSYCHOLOGY 749 (1984); Bordens & Horowitz, *Information Processing in Joined and Severed Trials*, 13 J. APPLIED SOCIAL PSYCHOLOGY 351 (1983); Horowitz, Bordens & Feldman, *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. APPLIED SOCIAL PSYCHOLOGY 444 (1980).

Turning to differential involvement of the different defendants, of particular interest is *United States v. Sampol*, 636 F.2d 621, 643 (D.C. Cir. 1980) (“Even before trial had commenced, the joint trial of defendants on charges growing out of the same underlying event ... but premised upon entirely disparate levels and allegations of culpability, foreshadowed confusion of the

evidence and prejudice to [the defendant moving for severance]”). That case involved a terrorist attack in downtown Washington, D.C., by which the Chilean junta assassinated former Chilean Foreign Minister Orlando Letelier and his associate Ronni Karpen Moffitt. There can be little question of the defendants’ guilt and in fact they were later found civilly liable for the crime. However, the court of appeals held that a joint trial of those Cuban émigrés, who had been hired by the junta’s secret police to carry out the killing, was unfair.

Then, there is the Watergate case of *United States v. Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976) (endorsing “the rule ... requiring severance when the evidence against one or more defendants is ‘far more damaging’ than the evidence against the moving party”) (internal citation omitted). Mardian was Assistant Attorney General for Internal Security in the infamous COINTELPRO years of the Nixon administration. However, his asserted role in the cited case was different, and less, than that of the other defendants. The court of appeals reversed the conviction, noting that the trial judge has a continuing obligation to assess joinder prejudice as the trial continues. We would argue that in a case so dependent on electronic surveillance, there is no need to wait until trial for such a determination, and doing so risks wasting judicial (and party) resources.

Mardian is, in its turn, based upon *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). In a complex securities fraud scheme, Roy Kelly was a relatively minor player. He should, the court of appeals held, have had a separate trial.

The third ground of severance relates to the some 97,000 telephone intercepts, and to other such things as tapes of prison visits. We are also concerned with the post-indictment statements of one defendant that the government says it plans to use. There are even pre-

indictment statements that might be at issue, including the FBI interviews of at least one defendant after September 11, 2001, seeking assistance with aspects of that investigation.

The government plans to use hundreds, perhaps thousands, of recorded conversations. It plans to use faxes (some of the 97,000 intercepts are faxes), letters, documents and other communications. The total number of “statements,” as that term is used in FED. R. EVID. 801(a), is in the hundreds of thousands, if one counts (as one must) each utterance on its own.¹⁶ That number does not end the inquiry. When the government introduces a statement, each defendant will have the right under FED. R. EVID. 106 to invoke the rule of completeness and to require other parts of the same or a different utterance to be presented. Even if one takes the narrow view that Rule 106 does not apply to oral statements, the rule significantly augments the number of statements that must be considered.

If the Court makes a preliminary finding of conspiracy, the government may argue, statements during and in furtherance will come in. The first problem with this position is that the indictment alleges two different conspiracies, with different players and different objects. Confusion is inevitable and insurmountable.

The Court will see the second problem in bold relief when the government produces its planned evidence, as we suggest it must do now in order to illuminate this motion. For example, Lynne Stewart has been recorded talking to her client, in the presence of an interpreter, about his viable legal avenues. Those conversations could not conceivably be in furtherance of any conspiracy, although they are in the indictment period.¹⁷ Even if the government tries to use

¹⁶ That is, a given telephone conversation may contain dozens of “statements.”

¹⁷ The government has seized materials from one codefendant that contain details on the representation of Sheikh Rahman, presumptively not in furtherance of the alleged conspiracy. These journals discuss legal meetings and objectives, and are likely, at least in part, covered by

parts of communications arising from such a context, and limits itself to what it claims to be material in furtherance, the defense rights under FED. R. EVID. 106 will make such a venture impossible. *See generally United States v. Bolden*, 92 F.3d 686 (8th Cir. 1996) (stating rule).

In addition, there are thousands of calls back and forth among the parties and with others who may be named as unindicted conspirators. (And in this context, we have asked that the government provide the names of such persons, again as part of the deliberations on this motion.)

Instructions cannot cure such a problem, which arises from the law of hearsay. However, the hearsay rule itself is grounded in the Sixth Amendment confrontation requirement, so this aspect of severance has constitutional overtones. The Advisory Committee Notes to the 1972 FEDERAL RULES OF EVIDENCE adoption contain much discussion of this issue, and it is part of every evidence text and treatise. *See also Bruton*, 391 U.S. 123.

The Supreme Court has recognized that “[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant” may warrant severance. *Zafiro*, 506 U.S. at 539.

The root problem here, in sum, is that there are many statements between and among these defendants that are not admissible against all of them. Principal among these are statements during but not in furtherance of the alleged conspiracies. The “in furtherance” requirement is ““a limitation on the admissibility of co-conspirators’ statements that is meant to be taken seriously,”” *United States v. Perez*, 989 F.2d 1574, 1578 (10th Cir. 1993) (en banc) (quoting *United States v. Johnson*, 927 F.2d 999, 1001 (7th Cir.1991)), and that must be construed narrowly. *Id.* Coconspirator statements are only admissible against another coconspirator where the declarant-coconspirator made the statement with the intent of furthering

attorney-client and/or attorney work product privilege. Because of privilege concerns, the government has denied one codefendant in this case access to these materials.

the conspiratorial objective. *United States v. Gutierrez*, 48 F.3d 1134, 1137 (10th Cir.), *cert. denied*, 515 U.S. 1151 (1995). This requires a contextual analysis of the declarant's intent at the time of the making of the statement. *Id*; *see also United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1984) (“casual conversations” not in furtherance); *United States v. Blakey*, 960 F.2d 996 (11th Cir. 1992) (reversing conviction when statement was not in furtherance but blame-shifting). This problem is exacerbated because the great majority of the intercepted communications are in Arabic, which Ms. Stewart does not speak.

United States v. Posner, 594 F. Supp. 923 (S.D. Fla. 1984), *aff'd*, 764 F.2d 1535 (11th Cir. 1985), is a cautionary tale. Posner, a wealthy man, was charged with tax-related offenses, along with a codefendant named Sharrer. In the cited decision, Judge Spellman ruled that a letter written by a real estate appraiser to a college was inadmissible against Posner in a joint trial. The court of appeals affirmed this ruling, on the government’s appeal. This occasioned delay. The trial began. The government, during its case-in-chief, put the letter before the jury. Posner’s counsel, Edward Bennett Williams, then moved for mistrial and severance. Judge Spellman granted the motion, and the case continued to verdict against the codefendant. Later, the government tried Posner and convicted him. The court of appeals overruled Posner’s claim that the provoked mistrial motion implicated double jeopardy. *United States v. Posner*, 780 F.2d 1536 (11th Cir.), *cert. denied*, 476 U.S. 1182 (1986). Thus, Judge Spellman’s initial holding and later grant of the severance supports our view. More tellingly, the entire saga -- including trips to the appeals court by both parties -- illustrates that a government claim of “judicial economy” from a joint trial is wishful nonsense, based on a failure to analyze the issues before the trial. This is another reason we have asked for disclosure, and for limited particulars, in service of intelligible pretrial analysis of this issue.

IX. A BILL OF PARTICULARS

If the court does not dismiss all the counts, or if the Court wishes to emulate Judge Duffy's holding in *Kearney*, 451 F. Supp. 33, and require the government to provide detail in order to assess the viability of the prosecution, we ask for a bill of particulars. In addition, some particulars will be helpful in assessing the motion for severance, and should be granted in that connection.

We know the rule: granting the bill rests in the Court's discretion. However, that discretion should be exercised liberally and with an eye to sparing the parties, the jury and the Court the agony of an unmapped journey.

Our analysis thus far shows that the indictment is vague. The particulars we seek are modest. Discovery is not a substitute. There are 97,000 intercepted telephone calls, hundreds of thousands of pages of discovery. Most of this material is in Arabic. The volume of discovery argues for particulars, not against them. This would be the situation, for example, in a complex tax or antitrust case, where the number of transactions is high.

The particulars we seek are below.

With respect to Count I:

1. State the date on which Lynne Stewart became a member of the conspiracy.
2. State the names of all alleged conspirators.
3. State where is "elsewhere," as that term is used in this Count
4. State the date and location of each action performed by Lynne Stewart in furtherance of the conspiracy.

With respect to Count II:

5. State the date and place of each act of provision of material support and resources.
6. State the person or persons who directly committed each such act.
7. State what material support and resources were provided on each such occasion, and to whom.
8. State whether Lynne Stewart is charged as an aider and abettor under 18 U.S.C. § 2, and the manner in which she is said to have aided and abetted.
9. State where is “elsewhere,” as that term is used in this Count.

With respect to Count IV:

10. State the date and location of each action performed by Lynne Stewart in furtherance of the conspiracy.
11. State where is “elsewhere,” as that term is used in this Count.
12. State the date and place of each action alleged to have been performed by Lynne Stewart.

With respect to Count V:

13. State the date of each alleged false, fictitious and fraudulent statement and representation, and of each false writing and document.
14. State the contents of each such item.
15. State wherein the falsity, fictitiousness or fraud consisted in each such item.
16. State where is “elsewhere,” as that term is used in this Count
17. State what are the “other things.”

Caselaw concerning bills of particulars shows that each case seems to turn on its own facts. The original FED. R. CRIM. P. 7(f) was amended in 1966 to strike the language “for cause,” and the Advisory Committee notes say this was done “to encourage a more liberal attitude.” The Committee cited *United States v. Smith*, 16 F.R.D. 372, as an example of wise use of discretion.

Smith is a good case because it focuses on the presumption of innocence; it is no answer to a particular's request, nor indeed to a motion to dismiss the indictment, that "she knows what she did."

More recent caselaw is collected in L. Levenson, FEDERAL CRIMINAL RULES HANDBOOK 82-85 (2002). Charles Alan Wright collected all the good cases (and some bad ones) in FEDERAL PRACTICE & PROCEDURE §§121-31. The volumes of that set on the criminal rules were always the work of Charles Alan Wright alone. He would not have a co-author, and he did not use research assistants to do the work. He sat in his office and read every case. Some of the decided cases say that an open file discovery policy obviates the need for particulars, but that has not been so in cases like this one where the open file is, as noted above, unhelpful in providing guidance, and where secrecy seems to govern the prosecution.

Most of our requests are self-explanatory. The need for dates and places is acute because several lawyers were involved in representing Sheikh Abdel Rahman, and Lynne Stewart was not at every meeting, nor on every phone call. In order to prepare her defense, she needs this information.

Relevant caselaw includes: *United States v. Bortnovsky*, 820 F. 2d 572 (2d Cir. 1987); *United States v. Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974) (purpose of bill when indictment is not specific enough); *United States v. O'Connor*, 237 F.2d 466 (2d Cir. 1956) (liberal policy of granting bill); *United States v. Russo*, 260 F.2d 849 (2d Cir. 1958) (*per curiam* before Hand, Hincks, and Waterman, JJ) (recognizing trial court's discretion in granting particulars request, but emphasizing that the defendant "must know enough to be able to produce in season whatever evidence he may have in answer" and recognizing reviewability of denial of particulars request -- both by direct appeal and "conceivably" by collateral attack);

King v. United States, 402 F.2d 289 (10th Cir. 1968) (liberal policy in granting bill); *United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970) (bill to narrow and specify); *United States v. Spur Knitting Mills, Inc.*, 187 F. Supp. 653 (S.D.N.Y. 1960) (fact that defendant may have some or all the requested information does not defeat right to bill); *United States v. Dolan*, 113 F. Supp. 757 (D. Conn. 1953) (bill to save needless labor); *United States v. Bozza*, 234 F. Supp. 15 (E.D.N.Y. 1964) (bill must reveal whether persons mentioned in indictment were in employ of government or acting at its instance); *United States v. Roberts*, 264 F. Supp. 622 (S.D.N.Y. 1966) (times and dates); *United States v. White*, 753 F. Supp. 432 (D. Conn. 1990) (unnamed coconspirator names); *United States v. Mannino*, 480 F. Supp. 1182 (S.D.N.Y. 1979) (semble); *United States v. Rosenstein*, 303 F. Supp. 210 (S.D.N.Y. 1969), *aff'd*, 474 F.2d 705 (2d Cir. 1973) (semble); *United States v. King*, 49 F.R.D. 51 (D.N.Y. 1970) (semble); *United States v. Vasquez-Ruiz*, 136 F. Supp.2d 941 (N.D. Ill. 2001) (defendant not required to sift 17,000 pages of discovery to find answers; bill ordered)¹⁸; *United States v. Glen Alden Coal Co.*, 4 F.R.D. 211 (D.N.Y. 1943) (bill to identify of what “among other things” consisted); *United States v. Fischbach & Moore, Inc.*, 576 F. Supp. 1384 (W.D. Pa. 1983) (details of transactions in complex antitrust case); *United States v. Dean*, 266 F. Supp. 159 (S.D.N.Y. 1966) (details of dates and places and amounts and method of payment); *United States v. Lonzo*, 793 F. Supp. 57 (N.D.N.Y. 1992) (identification of “elsewhere”).

In tax cases, it is routine to require disclosure of the prosecution theory and the items upon which the government will rely. The analogy to the furnishing resources allegations is, we submit, obvious. *See, e.g., United States v. Klein*, 124 F. Supp. 476 (S.D.N.Y. 1954) (later

¹⁸ We note that the instant case contains many times as many pages of discovery to date.

history omitted); *United States v. Geller*, 163 F. Supp. 502 (S.D.N.Y. 1958); *Dolan*, 113 F. Supp. 757.

CONCLUSION

For the foregoing reasons, we respectfully request the relief outlined in the Notice of Motion.

Dated: Washington, D.C.
January 10, 2003

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EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Memorandum in Support of Lynne Stewart's Omnibus Motion to Dismiss the Indictment and for Other Relief was delivered on January 10, 2003,

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