

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: January 29, 2008 Decided: November 17, 2009
5 As Amended: December 23, 2009)*

6 Docket Nos. 06-5015-cr (L), 06-5031-cr (con), 06-5093-cr (con),
7 06-5131-cr (con), 06-5135-cr (con), 06-5143-cr (con)

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9 UNITED STATES OF AMERICA,

10 Appellee-Cross-Appellant,

11 - v. -

12 LYNNE STEWART, MOHAMMED YOUSRY, AHMED ABDEL SATTAR,

13 Defendants-Appellants-Cross-Appellees.
14 -----

15 Before: WALKER, CALABRESI, and SACK, Circuit Judges.

16
17 Appeal by the defendants from judgments of conviction
18 of the United States District Court for the Southern District of
19 New York (John G. Koeltl, Judge) on charges arising from their
20 unauthorized contacts with and behavior relating to Sheikh Omar
21 Ahmad Ali Abdel Rahman, a high-security federal prisoner. Abdel
22 Rahman, serving a life sentence for seditious conspiracy,
23 solicitation of murder, solicitation of an attack on American
24 military installations, conspiracy to murder, and conspiracy to
25 bomb, is subject to "Special Administrative Measures" designed to

* The panel withheld consideration of this appeal pending the Court's en banc decision in United States v. Cavera, 550 F.3d 180 (2d Cir. Dec. 4 2008).

1 restrict his communications with terrorist organizations and
2 their members. The defendants were convicted principally with
3 respect to their violations of those measures by which they had
4 agreed to abide. The government cross appeals, challenging the
5 reasonableness of the defendants' sentences. We affirm the
6 judgments except with respect to the sentencing of defendant
7 Lynne Stewart, and remand all three cases to the district court.
8 The district court is directed to revoke Stewart's and Yousry's
9 bail pending appeal and to order them to surrender to the United
10 States Marshal to begin serving their sentences forthwith as
11 directed by the district court.

12 Judge Calabresi concurs, and also files a separate
13 concurring opinion. Judge Walker concurs in part and dissents in
14 part in a separate opinion.

15 JOSHUA L. DRATEL (Meredith S. Heller,
16 Erik B. Levin, David B. Rankin, of
17 counsel), Law Offices of Joshua L.
18 Dratel, P.C., New York, NY, for
19 Defendant-Appellant-Cross-Appellee Lynne
20 Stewart.

21 ROBERT A. SOLOWAY (David Stern, David A.
22 Ruhnke, of counsel) Rothman Schneider
23 Soloway & Stern, LLP, New York, NY, and
24 Ruhnke & Barrett, Montclair, NJ, for
25 Defendant-Appellant-Cross-Appellee
26 Mohammed Yousry.

27 BARRY M. FALLICK (Jillian S. Harrington,
28 Kenneth A. Paul, of counsel) Rochman
29 Platzer Fallick Sternheim Luca & Pearl,
30 LLP, New York, NY, for Defendant-
31 Appellant-Cross-Appellee Ahmed Abdel
32 Sattar.

33 ANTHONY S. BARKOW, Assistant United
34 States Attorney (Michael J. Garcia,

1 United States Attorney for the Southern
2 District of New York, Andrew S. Dember,
3 Michael D. Maimin, Diane Gujarati,
4 Katherine Polk Failla, Celeste L.
5 Koeleveld, Assistant United States
6 Attorneys, of counsel), New York, NY,
7 for Appellee-Cross-Appellant.

8 SACK, Circuit Judge:

9 Defendants Lynne Stewart, Mohammed Yousry, and Ahmed
10 Abdel Sattar appeal from judgments of conviction of the United
11 States District Court for the Southern District of New York
12 (John G. Koeltl, Judge) for various crimes arising from their
13 contacts with and behavior relating to government restrictions on
14 communications and other contacts with Sheikh Omar Ahmad Ali
15 Abdel Rahman. Rahman is serving a life sentence in a maximum
16 security prison for terrorism-related crimes of seditious
17 conspiracy, solicitation of murder, solicitation of an attack on
18 American military installations, conspiracy to murder, and a
19 conspiracy to bomb. He is subject to "Special Administrative
20 Measures" ("SAMs") restricting his ability to communicate with
21 persons outside of the prison in which he is incarcerated so as
22 to prevent him from continuing to lead terrorist organizations
23 and their members. The government cross-appeals from the
24 defendants' sentences.

25 We would be remiss if we did not, at the outset,
26 commend the district court for its thoroughness, thoughtfulness,
27 and effectiveness in the conduct of these unusually lengthy,
28 difficult, and sensitive proceedings. Much of what follows
29 simply reports what it did and tracks what it said.

1 We affirm the judgments of conviction. We also affirm
2 the sentences of Yousry and Sattar. We remand the case, however,
3 with respect to the sentence of Stewart, and also with respect to
4 the sentences of Yousry and Sattar in light of the resentencing
5 of Stewart.

6 In particular, we affirm the judgments as to each
7 defendant's conviction of conspiring to defraud the United
8 States, in violation of 18 U.S.C. § 371, by violating SAMs
9 imposed upon Abdel Rahman. Contrary to the defendants'
10 arguments, the evidence is sufficient to sustain these
11 convictions. Moreover, we reject both Stewart's argument that,
12 as a lawyer, she was not bound by the SAMs, and her belated
13 argument collaterally attacking their constitutionality.

14 We affirm as to Sattar's conviction of conspiring to
15 murder persons in a foreign country in violation of 18 U.S.C.
16 § 956, and his conviction of soliciting persons to commit crimes
17 of violence -- viz., murder and conspiracy to commit murder -- in
18 violation of 18 U.S.C. § 373. We conclude that the evidence is
19 sufficient to sustain these convictions, especially in light of
20 testimony establishing that Sattar attempted to undermine a
21 unilateral cease-fire by an Egyptian terrorist organization and
22 to draft a fatwa calling for, inter alia, the killing of "Jews
23 and Crusaders."

24 We affirm as to Stewart's and Yousry's convictions of
25 providing and concealing material support to the conspiracy to
26 murder persons in a foreign country in violation of 18 U.S.C.

1 § 2339A and 18 U.S.C. § 2, and of conspiring to provide and
2 conceal such support in violation of 18 U.S.C. § 371. We
3 conclude that the charges were valid -- that 18 U.S.C. § 2339A is
4 neither unconstitutionally vague as applied nor a "logical
5 absurdity," as Stewart asserts -- and that the evidence was
6 sufficient to sustain the convictions. We also reject Stewart's
7 claims that her purported attempt to serve as a "zealous
8 advocate" for her client provides her with immunity from the
9 convictions.

10 Finally, we affirm Stewart's convictions for knowingly
11 and willfully making false statements in violation of 18 U.S.C.
12 § 1001 when she affirmed that she intended to, and would, abide
13 by the SAMs. In light of her repeated and flagrant violation of
14 the SAMs, a reasonable factfinder could conclude that Stewart's
15 representations that she intended to and would abide by the SAMs
16 were knowingly false when made.

17 We reject the remaining challenges to the convictions.
18 We affirm the district court's rejection of Sattar's vindictive
19 prosecution claim because there is insufficient evidence to
20 support a finding that the government's pre-trial decision to add
21 new charges against Sattar amounted to an effort to punish him
22 for exercising his constitutional rights. And, because Stewart's
23 conduct was materially different from, and more serious than, the
24 conduct of other lawyers representing Abdel Rahman who may also
25 have violated the SAMs, we affirm the district court's rejection
26 of Stewart's claim that she was selectively prosecuted on account

1 of her gender or political beliefs. We also conclude that the
2 district court did not abuse its discretion in declining to sever
3 the trial of Stewart and Yousry from that of Sattar in light of
4 the general preference for joint trials, the specific charges at
5 issue here, and the district court's curative instructions. Nor
6 did the district court abuse its discretion by empaneling an
7 anonymous jury in light of the particular allegations of criminal
8 wrongdoing at issue, involving the corruption of the judicial
9 process, and the widespread publicity about the case. We find no
10 fault with the district court's resolution of allegations of
11 juror impropriety. We also agree with the district court's
12 treatment of confidential information, including its denial of
13 Stewart's motion to suppress evidence obtained pursuant to the
14 Foreign Intelligence Surveillance Act ("FISA"), its ex parte, in
15 camera examination of FISA wiretap applications, and its
16 rejection of Stewart's more general challenges to the
17 constitutionality of FISA. Finally, we find no fault with the
18 district court's treatment, in accordance with the Classified
19 Information Procedures Act ("CIPA"), of Stewart's motion to
20 compel disclosure of information related to potential
21 surveillance conducted by the National Security Agency.

22 We therefore affirm the convictions in their entirety.

23 We also affirm the sentences of Sattar and Yousry. We
24 conclude that the district court committed neither procedural
25 error in calculating the applicable Guidelines ranges, nor
26 substantive error in varying from those ranges pursuant to its

1 consideration of the factors set forth in 18 U.S.C. § 3553(a).
2 We nonetheless remand their cases to the district court to allow
3 it to reconsider their sentences should it choose to do so in
4 light of the resentencing of Stewart.

5 We cannot affirm Stewart's sentence on the basis of the
6 record before us. Because the district court declined to find
7 whether Stewart committed perjury at trial, we cannot conclude
8 that the mitigating factors found to support her sentence can
9 reasonably bear the weight assigned to them. This is so
10 particularly in light of the seriousness of her criminal conduct,
11 her responsibilities as a member of the bar, and her role as
12 counsel for Abdel Rahman. We therefore remand the cause to the
13 district court for further consideration of her sentence, in
14 light of, among other things, the charges of perjury against her
15 and of any other matter it deems necessary or advisable, and
16 direct the court to revoke Stewart's and Yousry's bail pending
17 appeal and to order them to surrender to the United States
18 Marshal to begin serving their sentences forthwith.

19 **BACKGROUND**

20 The transcript of the trials in the cases on appeal
21 runs in excess of thirteen thousand pages. The district court
22 issued nine opinions and a wide variety of orders addressing
23 issues presented during the course of the proceedings. See
24 principally, United States v. Sattar, 272 F. Supp. 2d 348
25 (S.D.N.Y. 2003) ("Sattar I"); United States v. Sattar, No. 02
26 Cr. 395 (JGK), 2003 WL 22137012, 2003 U.S. Dist. LEXIS 16164

1 (S.D.N.Y. Sept. 15, 2003) ("Sattar II"); United States v. Sattar,
2 314 F. Supp. 2d 279 (S.D.N.Y. 2004) ("Sattar III"); United States
3 v. Sattar, 395 F. Supp. 2d 66 (S.D.N.Y. 2005) ("Sattar IV");
4 United States v. Sattar, 395 F. Supp. 2d 79 (S.D.N.Y. 2005)
5 ("Sattar V").¹ The filings in this Court reflect the massiveness
6 of the record.² We therefore describe the proceedings in the
7 district court and the relevant facts only in the detail we think
8 necessary to explain our decision. In reviewing the conviction,
9 we set forth the facts, as we must, in the light most favorable
10 to the government. See United States v. Aleskerova, 300 F.3d
11 286, 292 (2d Cir. 2002).

12 The SAMs

13 In October 1995, Sheikh Omar Ahmad Ali Abdel Rahman was
14 convicted of a variety of terrorism-related crimes in the United
15 States District Court for the Southern District of New York.
16 According to the government's evidence at his trial,

¹ See also United States v. Sattar, No. S1 02 Cr. 395 (JGK), 2006 WL 3165791, 2006 U.S. Dist. LEXIS 79328 (S.D.N.Y. Oct. 27, 2006); United States v. Sattar, No. 02 Cr. 395 (JGK), 2003 WL 22510398, 2003 U.S. Dist. LEXIS 19770 (S.D.N.Y. Nov. 5, 2003); United States v. Sattar, No. 02 Cr. 395 (JGK), 2003 WL 22510435, 2003 U.S. Dist. LEXIS 19772 (S.D.N.Y. Nov. 5, 2003); United States v. Sattar, No. 02 Cr. 395 (JGK), 2002 WL 1836755, 2002 U.S. Dist. LEXIS 14798 (S.D.N.Y. Aug. 12, 2002).

² Excluding fifty pages of tables of contents and authorities, the government's principal brief alone approaches within several thousand words of the length of Charles Dickens's A Tale of Two Cities, see <http://www.gutenberg.org/files/98/98.txt> (last visited April 4, 2009), and is about as long as the recent popular novel "Atonement," see <http://store.scriptbuddy.com/products/Atonement/78622/> (last visited April 4, 2009).

1 Abdel Rahman, a blind Islamic scholar and
2 cleric, was the leader of [a] seditious
3 conspiracy, the purpose of which was " Jihad ,"
4 in the sense of a struggle against the
5 enemies of Islam. Indicative of this
6 purpose, in a speech to his followers Abdel
7 Rahman instructed that they were to "do Jihad
8 with the sword, with the cannon, with the
9 grenades, with the missile . . . against
10 God's enemies." Abdel Rahman's role in the
11 conspiracy was generally limited to overall
12 supervision and direction of the membership,
13 as he made efforts to remain a level above
14 the details of individual operations.
15 However, as a cleric and the group's leader,
16 Abdel Rahman was entitled to dispense fatwas,
17 religious opinions on the holiness of an act,
18 to members of the group sanctioning proposed
19 courses of conduct and advising them whether
20 the acts would be in furtherance of Jihad .³

21 United States v. Rahman, 189 F.3d 88, 104 (2d Cir. 1999) (per
22 curiam), cert. denied , 528 U.S. 1094 (2000) (citations omitted).

23 The crimes of conviction included soliciting the murder of
24 Egyptian President Hosni Mubarak while he was visiting New York
25 City; attacking American military installations; conspiring to
26 murder President Mubarak; conspiring to bomb the World Trade
27 Center in 1993, which succeeded; conspiring subsequently to bomb
28 various structures in New York City, including bridges, tunnels,
29 and the federal building containing the New York office of the
30 Federal Bureau of Investigation ("FBI"), which did not succeed;
31 and conspiring to commit crimes of sedition. Id. at 103-04, 107-
32 11. For these crimes, Abdel Rahman was sentenced to be

³ A fatwa has elsewhere been defined as "a religious opinion on Islamic law issued by an Islamic scholar." Sattar III , 314 F. Supp. 2d at 289; cf. United States v. Al-Moayad , 545 F.3d 139, 151 (2d Cir. 2008) (referring to it as a "religious ruling").

1 incarcerated for the remainder of his life. Id. at 148.
2 Following his conviction and appeal therefrom, Abdel Rahman's
3 legal team focused on two goals: improving his conditions of
4 confinement, and obtaining his transfer from prison in the United
5 States to Egypt.

6 The government asserts that Abdel Rahman was linked to
7 various other acts of violence: He is said to be, or to have
8 been, a spiritual leader of what the indictment in the instant
9 prosecution refers to as "'al-Gama'a al-Islamiyya,' a/k/a 'al-
10 Gama'at,' a/k/a 'Islamic Gama'at,' a/k/a 'Egyptian al-Gama'at al-
11 Islamiyya'" (hereinafter, "al-Gama'a"), also referred to by the
12 district court and the parties in English as the "Islamic Group"
13 or "IG." See Superseding Indictment ¶ 8. Al-Gama'a was
14 designated a foreign terrorist organization ("FTO") by the United
15 States Secretary of State in 1997 pursuant to 8 U.S.C. § 1189,
16 see Notices, Designation of Foreign Terrorist Organizations,
17 Department of State, Office of the Coordinator for
18 Counterterrorism, 62 Fed. Reg. 52650 (Oct. 8, 1997), was
19 redesignated an FTO in 1999 and 2001, see Notices, Designation of
20 Foreign Terrorist Organizations, Department of State, Office of
21 the Coordinator for Counterterrorism, 64 Fed. Reg. 55112 (Oct. 8,
22 1999); Notices, Redesignation of Foreign Terrorist Organization,
23 Department of State, Office of the Coordinator for
24 Counterterrorism, 66 Fed. Reg. 51088 (Oct. 5, 2001), and remains
25 so designated today, see Foreign Terrorist Organizations, Fact
26 Sheet, Department of State, Office of the Coordinator for

1 Counterterrorism (Apr. 8, 2008), available at
2 <http://www.state.gov/s/ct/rls/fs/08/103392.htm> (last visited Mar.
3 28, 2009).

4 "Federal regulations provide that the Bureau of Prisons
5 may implement SAMs, '[u]pon direction of the Attorney General,'
6 when 'reasonably necessary to protect persons against the risk of
7 death or serious bodily injury.' 28 C.F.R. § 501.3(a)." In re
8 Basciano, 542 F.3d 950, 954 (2d Cir. 2008) (alteration in
9 original), cert. denied, 128 S. Ct. 1401 (2009). The Bureau of
10 Prisons, following Abdel Rahman's remand to its custody in August
11 1997, imposed severely restrictive SAMs upon him. They were
12 designed to prevent him from directing or facilitating yet more
13 violent acts of terrorism from his prison cell. The SAMs have
14 been renewed, and sometimes modified, every 120 days since they
15 were first imposed.

16 The May 11, 1998, SAMs applicable to Abdel Rahman
17 "prohibited [him] from having contact with . . . others (except
18 as noted in this document) that could foreseeably result in [his]
19 communicating information (sending or receiving) that could
20 circumvent the SAM intent of significantly limiting [his] ability
21 to communicate (send or receive) terrorist information." SAMs of
22 May 11, 1998, ¶ 3. To enforce this general prohibition, the
23 measures regulated Abdel Rahman's telephone contacts, id. ¶ 4,
24 his mail, id. ¶ 5, and his visitors' visits, id. ¶ 6. The
25 measures limited his telephone contacts solely to his attorneys
26 of record and his wife, id. ¶ 4(a), and prevented matters

1 discussed in those calls from being "divulged in any manner to
2 any third party," id. ¶ 4(c)(i). The measures required the
3 screening of all his outgoing and incoming non-legal mail, id. ¶
4 5, and prohibited him from "talk[ing] with, or otherwise
5 communicat[ing] with, any representative of the news media,"
6 including "through [his] attorney(s)/staff, or otherwise," id.
7 ¶ 8. The measures also provided for the monitoring of all non-
8 legal visits. Id. ¶ 6. On the condition that his attorneys
9 would not divulge any information to third parties, Abdel Rahman
10 was permitted to communicate with his legal team by telephone,
11 id. ¶¶ 4(a) & 4(d), mail, id. ¶ 5(a), and in person, id. ¶ 6,
12 with fewer restrictions than with other persons. Members of this
13 legal team included lawyers Ramsey Clark, Abdeen Jabara, Lawrence
14 Schilling, and defendant Lynne Stewart.

15 Subsequent versions of the SAMs retained similar
16 prohibitions and screening mechanisms including the prohibition
17 against communications with the news media. See, e.g., SAMs of
18 Apr. 7, 1999, ¶ 9; SAMs of Dec. 10, 1999, ¶ 9. They retained
19 similar provisions regarding legal communications, and
20 incorporated provisions requiring Abdel Rahman's attorneys to
21 sign affirmations acknowledging their receipt of the version of
22 the SAMs in effect. See, e.g., SAMs of Apr. 7, 1999, ¶ 4; SAMs
23 of Dec. 10, 1999, ¶ 4. By virtue of those affirmations, counsel
24 agreed to abide by the terms of SAMs then in effect. See, e.g.,
25 Unsigned Affirmation of Abdeen Jabara, Apr. 2000; Unsigned
26 Affirmation of Ramsey Clark, Apr. 2000; Affirmation of Ramsey

1 Clark, Jan. 10, 2001; Affirmation of Abdeen Jabara, Jan. 10,
2 2001; Affirmation of Ramsey Clark, Apr. 24, 1997.

3 Stewart repeatedly executed such statements. On May 1,
4 1998, she signed a document entitled "Attorney Affirmation," in
5 which she affirmed, under penalty of perjury, the truth of
6 specified statements regarding the then-applicable SAMs: that she
7 had read the May 11, 1998, version of the SAMs; that she
8 "underst[ood] the restrictions contained in that document and
9 agree[d] to abide by its terms"; that during her visits to Abdel
10 Rahman she would "employ only cleared translators/interpreters
11 and [would] not leave [any] translator/interpreter alone with
12 inmate Abdel Rahman"; and that she would "only be accompanied by
13 translators for the purpose of communicating with inmate Abdel
14 Rahman concerning legal matters." Affirmation of Lynne Stewart,
15 May 1, 1998. Stewart also affirmed that neither she nor any
16 member of her office would "forward any mail received from inmate
17 Abdel Rahman to a third person" nor would she "use [her]
18 meetings, correspondence or phone calls with Abdel Rahman to pass
19 messages between third parties (including, but not limited to,
20 the media) and Abdel Rahman." Id. On May 16, 2000, and again on
21 May 7, 2001, Stewart signed similar affirmations under penalty of
22 perjury, again affirming that she had read the most recent
23 versions of the SAMs, and that she would not use her contact with
24 Abdel Rahman to pass messages between him and third parties,
25 including members of the media. Affirmation of Lynne Stewart,
26 May 16, 2000; Affirmation of Lynne Stewart, May 7, 2001.

1 Defendant Mohammed Yousry, a middle-aged New York
2 University graduate student who served as one of the legal team's
3 translators had also been, in that capacity, a member of Abdel
4 Rahman's trial team. As a translator, Yousry was permitted to
5 read to Abdel Rahman, who is blind, and to take dictation from
6 him.

7 Various members of the team, including Stewart and
8 Yousry, also maintained contact with defendant Ahmed Abdel
9 Sattar, who had served as a paralegal during Abdel Rahman's
10 trial. The evidence established that Sattar was in continual
11 contact with various members of al-Gama'a abroad. See, e.g.,
12 Transcript of Conversation between Ahmed Abdel Sattar and Rifa'i
13 Ahmad Taha Musa, May 9, 2000.

14 The Visits to Abdel Rahman

15 Sometime in 1997, more than three years after Abdel
16 Rahman was taken into federal custody, a faction of al-Gama'a
17 declared a unilateral "cease-fire," i.e., a halting of violent
18 operations, in Egypt. When the cease-fire was first announced,
19 Abdel Rahman was understood to support it.

20 In November 1997, despite the cease-fire, a group
21 associated with al-Gama'a attacked, killed, and mutilated the
22 bodies of more than sixty tourists, guides, and guards at the
23 Hatshepsut Temple in Luxor, Egypt. Rifa'i Taha Musa ("Taha") --
24 a military leader of al-Gama'a, a follower of Abdel Rahman, and
25 an unindicted co-conspirator herein -- was involved in the

1 incident.⁴ Alaa Abdul Raziq Atia ("Atia"), later a leader of
2 al-Gama'a's military wing in Egypt, was also involved in the
3 killings. Al-Gama'a later claimed responsibility for the attack
4 and demanded Abdel Rahman's release from prison in the United
5 States.

6 In January 1998, Abdel Rahman was assigned by the
7 Bureau of Prisons to the Federal Medical Center in Rochester,
8 Minnesota ("FMC Rochester"). In March 1999, Stewart and Yousry
9 visited him there. Prior to the visit, Stewart signed and
10 delivered to the United States Attorney's Office for the Southern
11 District of New York a document in which she affirmed, under
12 penalty of perjury, that she would abide by the SAMs imposed by
13 the Bureau of Prisons on Abdel Rahman.

14 At about this time, defendant Sattar was in contact
15 with members of al-Gama'a, who were divided over their support
16 for what remained of the cease-fire. Pro-cess-fire and anti-
17 cease-fire factions developed, and members of the organization
18 wanted Abdel Rahman to take a position on the matter. To that
19 end, several wrote messages addressed to Abdel Rahman, which they
20 sent to Sattar for delivery to Abdel Rahman. Sattar gave the
21 messages to Stewart and Yousry, who surreptitiously brought the
22 messages with them to Abdel Rahman during a subsequent visit in
23 May 2000.

⁴ In 1998, Taha joined with Osama Bin Laden and Ayman Al-Zawahiri to sign a fatwa entitled "Jihad against the United States and the Jews." See Translation of World Islamic Front's Statement Urging Jihad Against Jews and Crusaders.

1 Yousry read the messages to Abdel Rahman during the
2 visit, and Abdel Rahman dictated to Yousry responses to some of
3 them. Yousry and Stewart then smuggled the responses out of FMC
4 Rochester among their legal papers, and sent them to Sattar. As
5 directed by Abdel Rahman, Sattar informed various members of al-
6 Gama'a that Abdel Rahman was willing to reconsider the
7 effectiveness of the cease-fire and had rejected the associated
8 idea that al-Gama'a should form a political party in Egypt.

9 News of Abdel Rahman's purported position spread. But
10 some members of the media in the Middle East expressed skepticism
11 about the veracity of Sattar's representations, questioning
12 whether they in fact came from Abdel Rahman or whether Sattar had
13 fabricated them himself. To refute those reports, Sattar and
14 Yousry asked one of Abdel Rahman's lawyers, former United States
15 Attorney General Ramsey Clark, to tell a reporter for an Arabic-
16 language newspaper that Abdel Rahman opposed al-Gama'a's
17 formation of a political party. Clark, they thought, would be
18 perceived as more authoritative than Sattar. Clark eventually
19 agreed to talk to the reporter. He told the reporter that "[t]he
20 Sheikh has said he believes that the formation of a new political
21 party to engage in politics in Egypt at this time is . . . not
22 correct and should not be done." Transcript of Conversation
23 between Ahmed Abdel Sattar, Mohammed Yousry, Ramsey Clark, and
24 Muhammad Al-Shafi'i, Nov. 5, 1999, at 15.

25 In September 1999, Farid Kidwani, the then-leader of
26 al-Gama'a's military wing, was killed along with three other

1 members of the group in a shootout with Egyptian police.
2 Kidwani's death precipitated further tension and debate within
3 al-Gama'a regarding the advisability and efficacy of the cease-
4 fire.

5 Taha sent another message to Sattar to be relayed to
6 Abdel Rahman urging Abdel Rahman to support the termination of
7 the cease-fire and noting that Taha and his associates needed a
8 "powerful word" from Abdel Rahman to achieve this goal. Taha
9 told Sattar that such support from Abdel Rahman would "strengthen
10 me among the brothers." Sattar agreed to send the message to
11 Abdel Rahman and prepared a letter to Abdel Rahman for that
12 purpose. In mid-September 1999, Clark and Yousry surreptitiously
13 took the letter, along with newspaper articles relating to the
14 killing of Kidwani in Egypt, with them during a visit to Abdel
15 Rahman in FMC Rochester. Yousry read the letter and newspaper
16 clippings aloud to Abdel Rahman. From these documents, Abdel
17 Rahman first learned of Kidwani's death.

18 Abdel Rahman dictated a letter to Yousry in response.

19 To those against whom war is made, permission
20 is given to fight, because they are wronged
21 (oppressed) -- and verily God is most
22 powerful for their aid. . . . The latest
23 thing published in the newspapers was about
24 the Egyptian regime's killing of four members
25 of the Group. This is . . . enough proof
26 that the Egyptian regime does not have the
27 intention to interact with this peaceful
28 Initiative [i.e., the cease-fire] which aims
29 at unification. I therefore demand that my
30 brothers, the sons of [al-Gama'a] do a
31 comprehensive review of the Initiative and
32 its results. I also demand that they
33 consider themselves absolved from it.

1 Transcript of Conversation between Ahmed Abdel Sattar and Rifa'i
2 Ahmad Taha Musa, Sep. 20, 1999, at 6-7 (emphasis omitted,
3 parenthetical in original). Sattar expected Clark to make a
4 public statement to similar effect, but Clark declined to do so.

5 On February 18 and 19, 2000, Yousry and Abdeen Jabara,
6 an Arabic-speaking lawyer and member of Abdel Rahman's legal
7 team, visited Abdel Rahman at FMC Rochester. They brought with
8 them another letter which included another message from Taha,
9 again asking for Abdel Rahman's support for ending the cease-
10 fire. But Jabara would not permit Abdel Rahman to dictate a
11 letter to Yousry in response. And, notwithstanding pressure from
12 Sattar and Taha, Jabara, like Clark before him, refused to issue
13 any public statement regarding Abdel Rahman's position on the
14 matter.

15 On May 16, 2000, defendant Stewart signed another
16 affirmation that she and her staff would abide by the SAMs. She
17 did not submit that affirmation to the United States Attorney's
18 Office until May 26.

19 On May 18, 2000, Stewart met with Sattar, who gave her
20 more letters for Abdel Rahman, including another message from
21 Taha yet again seeking Abdel Rahman's approval of an end to the
22 cease-fire. Taha asked Abdel Rahman to take a "more forceful
23 position" regarding the end of the cease-fire and to "dictate
24 some points we can announce in a press conference with Lynne."

25 Transcript of Second Audiovisual Recording involving Omar Abdel

1 Rahman, Mohammed Yousry, Lynne Stewart, and others, May 19, 2000,
2 ("Video Tr. May 19, 2000, Tape 2"),⁵ at 36.

3 On May 19 and 20, 2000, Stewart and Yousry visited
4 Abdel Rahman, taking Sattar's most recent letters with them,
5 including the letter containing the message from Taha.
6 Unbeknownst to them, the government, pursuant to a warrant,
7 videotaped the meetings. Yousry told Abdel Rahman that Abu
8 Sayyaf -- an Islamic terrorist group in the Philippines -- had
9 taken hostages to be used in bargaining for the release of Abdel
10 Rahman and others. When Yousry explained to Stewart that he was
11 "telling the Sheikh about the Abu Sayyaf group in the
12 Philippines" and how "they took hostages," Stewart replied, "Good
13 for them." Transcript of First Audiovisual Recording involving
14 Omar Abdel Rahman, Mohammed Yousry, and Lynne Stewart, May 19,
15 2000, at 27.

16 From the beginning of the visit, Stewart was aware of
17 the prison guards' presence. For example, she asked Yousry, "Do
18 they usually sit like this and watch us?" Id. at 10. And during
19 this meeting, Stewart and Yousry took overt steps to ensure that
20 the nature of their communication with Abdel Rahman would be
21 concealed from the prison guards. As she suggested to Yousry,
22 they "should give them [i.e., the guards] something to watch."

⁵ Similar citations to transcripts of audiovisual recordings of prison visits to Abdel Rahman will follow the same format, i.e., "Video Tr. May 19, 2000, Tape 1," "Video Tr. May 20, 2000, Tape 1," "Video Tr. May 20, 2000, Tape 2," and "Video Tr. July 13, 2001, Tape 2."

1 Id. at 11. When the guards were standing close to the window of
2 the conference room in which Abdel Rahman, Stewart, and Yousry,
3 were meeting Yousry told Stewart to "look at me and talk a little
4 bit because they are watching us closely." Id. at 51. While
5 Yousry read the message to Abdel Rahman, Stewart uttered a
6 meaningless series of phrases to Yousry so that it would appear
7 to an observer as though she was taking part in a three-way
8 conversation: "I am talking to you about. . . him going to have
9 a, uh, chocolate eh . . . heart attack here Why don't
10 you stop a minute now. And (UI)⁶ say to him that, you know, 'You
11 understood what we are saying, (UI).'" Id. As Stewart spoke,
12 Yousry said to Abdel Rahman, "I don't know, Sir, they are
13 standing very close by the glass. . . . Lynne says, (UI) when
14 they look, you look at me a little, talk, then look at the
15 Sheikh." Id.

16 Stewart continued to talk while Yousry read aloud
17 Taha's statement in Sattar's letter. Yousry explained to Abdel
18 Rahman that "Lynne just says anything, [laughing] (UI) Sir." Id.
19 at 52 (bracketed material in original). Stewart remarked, "I can
20 get an academy award for it." Id.

21 Stewart and Yousry then had this exchange:

22 YOUSRY: . . . Lynne, I think you should talk
23 to him because they are looking at me.

⁶ "UI" stands for "unintelligible."

1 STEWART: (UI) there (UI), they, uh, (UI). . .
2 [she taps Yousry's pad with her pen]⁷ uhm, if
3 he finds out what this is, then we're . . .
4 [Laughs.]

5 YOUSRY: [Laughs] In trouble.

6 STEWART: [Laughing] Yeah, that's right.

7 Video Tr. May 19, 2000, Tape 2, at 29 (brackets in original).

8 Stewart and Yousry also took evasive action when a
9 guard appeared to take interest in their conversation. At one
10 point, while Yousry was conversing with Abdel Rahman, Stewart
11 touched Yousry's hand and said "Why don't you stop there and
12 we'll talk a minute um, the, uh. . . . Ahmed's youngest son
13 needs glasses, did you know that?" Id. at 30. Yousry then
14 explained to Abdel Rahman, "Lynne says, stop a little because
15 they are by the glass." Id. Not long afterwards, Stewart tapped
16 with the pen on the paper in front of Yousry and told him to
17 "continue reading this 'cause this is setting up the
18 organizational system around his conditions." Id. Yousry
19 continued reading. Stewart then made a series of statements
20 unrelated to the substance of the conversation between Yousry and
21 Abdel Rahman. Yousry kept Abdel Rahman informed of what Yousry
22 and Stewart were doing, noting that "Lynne continues to eh, she's
23 watching them, she's watching them," to which Abdel Rahman
24 replied, "[v]ery good, very good." Id. at 33. After Yousry

⁷ These bracketed comments, which are in the original transcripts of the audiovisual recordings that were introduced as exhibits, are descriptions of relevant visual information.

1 finished reading Taha's message to Abdel Rahman, he returned it
2 to a notebook that he had brought with him and with which he
3 left.

4 On the second day of the same visit, Abdel Rahman
5 dictated to Yousry, among other things, a letter to an al-Gama'a
6 lawyer who favored the cease-fire, asking him to allow others in
7 al-Gama'a to criticize it, and another to Taha asking him to
8 "escalate the language" of criticism of the cease-fire. Video
9 Tr. May 20, 2000, Tape 2, at 32.

10 Meanwhile, Stewart and Yousry continued to engage in
11 what Stewart later called "[c]overing noises," Video Tr. July 13,
12 2001, Tape 2, at 12, and other tactics designed to obscure the
13 nature of what they were doing. After one such incident, Yousry
14 explained to Abdel Rahman, "[S]he just has to say that in order
15 to break the . . . The people are looking." Video Tr. May 20,
16 2000, Tape 1, at 14. Stewart told Yousry, "I am making
17 allowances for them looking in at us and seeing me never speaking
18 and writing away here while you talk Arabic." Id. at 17. She
19 then directed Yousry to "talk back to me now, because otherwise
20 it doesn't make any sense. . . . So say something in
21 English" Id. As Yousry explained to Abdel Rahman, "We
22 are now acting, I talk to her in Arabic, and she responds in
23 English, and they don't understand what is going on." Video Tr.
24 May 20, 2000, Tape 2, at 38.

25 At the end of the visit, Stewart and Yousry took the
26 Yousry-transcribed responses from Abdel Rahman with them from the

1 prison, and later gave them to Sattar. Sattar then passed them
2 along to Taha and another member of al-Gama'a. Sattar also spoke
3 to various members of al-Gama'a, informing them that Abdel Rahman
4 would have "no objection" to a return to violence. Transcript of
5 Audio Recording of Ahmed Abdel Sattar, Rifa'i Ahmad Taha Musa,
6 and Salah Hashim, May 29, 2000, at 3.

7 At about this time, Sattar told members of al-Gama'a
8 that Stewart would be making a public statement about Abdel
9 Rahman's views on the cease-fire. Sattar and Stewart first
10 discussed what Stewart would say to the press. Then, on June 13,
11 2000, Sattar and Stewart spoke to Esmat Salaheddin, a Reuters
12 reporter based in Cairo. Stewart told Salaheddin that Abdel
13 Rahman "is withdrawing his support for the ceasefire that
14 currently exists." Trial Transcript ("Trial Tr.") at 5574, 5617,
15 testimony of Salaheddin. She explained that Abdel Rahman had
16 made the statement from prison two weeks before.

17 The next day, other Middle Eastern press outlets
18 carried the news that Abdel Rahman had withdrawn his support for
19 the cease-fire. Many noted that for the cease-fire to hold,
20 Abdel Rahman's support was essential.

21 On June 20, 2000, Stewart participated in a telephone
22 conference with Abdel Rahman. She then sent another statement on
23 Abdel Rahman's behalf via facsimile to Salaheddin, the Reuters
24 reporter in Cairo. The telecopy said, "Everything said in the
25 previous statements is correct" and quoted Abdel Rahman as
26 saying, "I do withdraw my support to the [cease-fire]

1 initiative." Statement for Release, Abdel Rahman, June 20, 2000.
2 Following Stewart's statements on Abdel Rahman's behalf, several
3 members of al-Gama'a began preparations to engage anew in acts of
4 violence.

5 On October 4, 2000, Sattar and Taha completed a fatwa
6 on Abdel Rahman's behalf, imitating his style, "mandating the
7 killing of the Israelis everywhere" and "the killing [of] the
8 Jews wherever they are (UI) and wherever they are found."
9 Transcript of Audio Recording of Ahmed Abdel Sattar and Yassir
10 Al-Sirri Oct. 4, 2000, ("Audio Tr. Oct. 4") at 13-16.⁸ Sattar

⁸ Sattar read the fatwa to Yassir Al-Sirri, a London-based supporter of al-Gama'a and an unindicted co-conspirator, during a telephone conversation that was intercepted by U.S. agents. Another portion of the transcript of the conversation reads in small part:

A statement to the nation, the old and the young: Fatwah mandating the killing of the Israelis everywhere. . . . I, as a Muslim scholar . . . I appeal to my brothers, the scholars all . . . over our Islamic world: From our Islamic world, to portray their role, and issue a unanimous Fatwah calling on the Islamic nation to mandate the killing [of] the Jews wherever they are (UI) and wherever they are found. . . . [T]he Jihad today is the duty of the entire nation until Palestine and the Aqsa Mosque are liberated, and till the Jews are driven to their graves or out to the countries where they had come from. . . . The Muslim youth everywhere, especially in Palestine, Egypt, Syria, Lebanon and Jordan, as nations neighboring the Aqsa Mosque . . . they have to fight the Jews by all possible means of Jihad, either by killing them as individuals or by targeting their interests and their advocates, as much as they can.

Your Brother, Omar Abdel Rahman . . . [i]n
(continued...)

1 sent the fatwa to, among others, Atia, who had in the meantime
2 become the military leader of al-Gama'a. Upon receiving the
3 message, Atia began preparing for an attack. But, on October 19,
4 2000, before Atia could act, the Egyptian authorities raided his
5 hideout, killing him and killing or arresting other al-Gama'a
6 members.

7 On July 13 and 14, 2001, Stewart again paid a visit to
8 Abdel Rahman at FMC Rochester, having signed a revised
9 affirmation agreeing to abide by the SAMs and having sent the
10 affirmation by facsimile to the United States Attorney's Office
11 for the Southern District of New York on May 7, 2001. Stewart
12 again, with Yousry's assistance and contrary to provisions of the
13 SAMs, surreptitiously brought messages to and from Abdel Rahman.

14 Procedural History

15 On April 8, 2002, the defendants were indicted in
16 connection with these and related acts; a superseding indictment
17 was filed on November 19, 2003. On February 10, 2005, a jury
18 found the defendants guilty on all counts in the superseding
19 indictment. Specifically, all three defendants were convicted of
20 conspiring to defraud the United States in violation of 18 U.S.C.
21 § 371 (Count One) by violating SAMs imposed upon Abdel Rahman,
22 and various related offenses. Sattar was convicted of conspiring

⁸(...continued)
the USA's prisons, and a scholar of the
Azhar.

Audio Tr. Oct. 4 at 13, 15-17.

1 with Taha, Abdel Rahman, and others to murder persons in a
2 foreign country in violation of 18 U.S.C. § 956 (Count Two), and
3 with soliciting persons to commit crimes of violence -- murder
4 and conspiracy to commit murder -- in violation of 18 U.S.C. §
5 373 (Count Three). Stewart and Yousry were convicted of
6 providing and concealing material support to the Count-Two
7 conspiracy, in violation of 18 U.S.C. § 2339A and 18 U.S.C. § 2
8 (Count Five), and with conspiracy to provide and conceal such
9 support, in violation of 18 U.S.C. § 371 (Count Four). Stewart
10 was also convicted of making false statements in violation of 18
11 U.S.C. § 1001 (Counts Six and Seven).

12 On October 16, 2006, following the denial of the
13 defendants' motions for a judgment of acquittal and other relief,
14 the district court sentenced the defendants. See Sentencing
15 Transcript of Oct. 16, 2006 ("Sent'g Tr."). Sattar was sentenced
16 to a 288-month term of incarceration to be followed by a five-
17 year term of supervised release and a \$300 special assessment;
18 Stewart was sentenced to a 28-month term of incarceration to be
19 followed by a two-year term of supervised release and a \$500
20 special assessment; and Yousry was sentenced to a 20-month term
21 of incarceration to be followed by a two-year term of supervised
22 release and a \$300 special assessment. Sattar is currently
23 serving his sentence; Stewart and Yousry are free on bail pending
24 appeal.⁹

⁹ We are aware of a statement famously attributed to
(continued...)

1 All three defendants appeal, challenging the validity
2 of their convictions on a variety of grounds. The government
3 challenges the reasonableness of the sentences on cross-appeal.

4 DISCUSSION

5 I. Standard of Review

6 We review de novo the district court's legal
7 conclusions, including those interpreting and determining the
8 constitutionality of a statute. United States v. Awadallah, 349
9 F.3d 42, 51 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005).
10 We also review de novo a district court's denial of a motion
11 pursuant to Federal Rule of Criminal Procedure 29 for a judgment
12 of acquittal on the ground that the evidence was insufficient to
13 sustain the conviction. United States v. Florez, 447 F.3d 145,
14 154 (2d Cir.), cert. denied, 549 U.S. 1040 (2006). Because the
15 jury verdict will be upheld against a sufficiency challenge "if
16 we find that 'any rational trier of fact could have found the
17 essential elements of the crime beyond a reasonable doubt,'" United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000)
18 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis

⁹(...continued)

Stewart by, inter alia, the Los Angeles Times, immediately following her sentencing: "I can do that [time] standing on my head." Ellen Barry, Terrorist's Lawyer Gets Two-Year Term, L.A. Times, Oct. 17, 2006, at A12. A fuller purported quotation in the article reads, "I don't think anybody would say that to go to jail for two years is anything to look forward to. But -- as some of my clients once put it -- I can do that standing on my head." Id. Whether Stewart made this statement in full, in part, or not at all, is obviously entirely irrelevant to any of the issues before us.

1 in Jackson)), a convicted defendant making such a claim "bears a
2 very heavy burden," United States v. Desena, 287 F.3d 170, 177
3 (2d Cir. 2002). We are required to evaluate "all of the evidence
4 in the light most favorable to the government." United States v.
5 Aleskerova, 300 F.3d 286, 292 (2d Cir. 2002).

6 II. Count One

7 Each defendant asserts that the evidence admitted at
8 trial was insufficient to support his or her conviction under 18
9 U.S.C. § 371 for defrauding the United States and obstructing the
10 Department of Justice and the Bureau of Prisons in the
11 administration and enforcement of the SAMs in force with respect
12 to Abdel Rahman. Stewart also argues that the SAMs do not apply
13 to lawyers, and that the district court improperly prevented her
14 from challenging the underlying validity of the SAMs.

15 A. Sufficiency of the Evidence

16 In order to establish a conspiracy-to-defraud offense
17 under 18 U.S.C. § 371 as charged in Count One of the indictment,
18 a reasonable jury must have been able to conclude beyond a
19 reasonable doubt "(1) [that the defendants] entered into an
20 agreement (2) to obstruct a lawful function of the government [in
21 this case, the administration and enforcement of the SAMs] (3) by
22 deceitful or dishonest means and (4) at least one overt act in
23 furtherance of the conspiracy." United States v. Ballistrea, 101
24 F.3d 827, 832 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997)
25 (citation and internal quotation marks omitted). "'Both the
26 existence of a conspiracy and a given defendant's participation

1 in it with the requisite knowledge and criminal intent may be
2 established through circumstantial evidence.'" United States v.
3 Huezo, 546 F.3d 174, 180 (2d Cir. 2008) (quoting United States v.
4 Stewart, 485 F.3d 666, 671 (2d Cir. 2007)) (alteration omitted).

5 1. Evidence as to Stewart. Stewart argues that her
6 defiance of the SAMs was open, not deceitful. One aspect of her
7 defiance was undoubtedly public -- the conveyance of Abdel
8 Rahman's statements regarding the cease-fire and related matters
9 to the Reuters journalist. But we agree with the district court
10 that "[a] reasonable jury could certainly [have found] that
11 Stewart gained access to Abdel Rahman [and thereby the
12 information that she conveyed to the journalist] by deceit and
13 dishonest means." Sattar V, 395 F. Supp. 2d at 89. "Without
14 [Stewart's] agreement to abide by the SAMs and the other
15 representations contained in her affirmations, she knew that she
16 would not have been allowed to visit Abdel Rahman," id.; see also
17 id. at 84-89, and therefore would not later have been able to
18 defy the regulations openly by publicizing messages on his
19 behalf.

20 Stewart insists that she acted with the intent, not to
21 defraud the government, but to "zealously" represent her
22 client.¹⁰ But the jury had a reasonable basis on which to

¹⁰ The word "zealot," taken from a first century A.D. anti-Roman Jewish movement, carries with it overtones of fanaticism, see The American Heritage Dictionary of the English Language 2000 (4th ed. 2000). The American Heritage Dictionary lists as principal definitions: "1a. One who is zealous, especially

(continued...)

1 disbelieve this, and to "disbelieve that zealous representation
2 included filing false affirmations, hiding from prison guards the
3 delivery of messages to Abdel Rahman, and the dissemination of
4 responses by him that were obtained through dishonesty." Id. at
5 90. Moreover, even if Stewart acted with an intent to represent
6 her client zealously, a rational jury could nonetheless have
7 concluded that Stewart simultaneously acted with an intent to
8 defraud the government. A genuinely held intent to represent a
9 client "zealously" is not necessarily inconsistent with criminal
10 intent.

11 2. Evidence as to Yousry. Yousry argues that, as a
12 translator who was taking direction from others, he did only what
13 he was told to do and acted in good-faith reliance on the
14 guidance and conduct of the members of the bar for whom he
15 worked. Based on the evidence admitted at trial, however, a
16 rational jury could have found that Yousry knew of and understood
17 the terms of the SAMs.

¹⁰(...continued)
excessively so. b. A fanatically committed person." Id.

The word has historically been used as a positive commandment, however, with respect to the ethical obligations of members of the bar. Until recently, for example, Canon 7 of the New York Lawyer's Code of Professional Responsibility provided: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." It is in that sense that we understand Stewart to use the term here.

1 Yousry had in his possession the December 1999 version
2 of the SAMs as well as a copy of the underlying regulations.
3 That version of the SAMs provided that Abdel Rahman's legal team
4 could pass along to him "only inmate case-related
5 correspondence," and set forth a process for screening all non-
6 legal mail. SAMs of Dec. 10, 1999, ¶ 7. The SAMs in Yousry's
7 possession also specifically prohibited Abdel Rahman's
8 communication with news media "in person, by telephone, by
9 furnishing a recorded message, through the mails, through his
10 attorney(s), or otherwise." Id. ¶ 9. Yousry himself
11 acknowledged that members of the legal team were not "to disclose
12 any portion of their conversation with the Sheik to the media."
13 Excerpts from Draft of Dissertation of Mohammed Yousry at 29.
14 Yousry also knew that Clark and Jabara had refused to relay
15 messages from Abdel Rahman.

16 From this evidence, a reasonable factfinder could
17 conclude beyond a reasonable doubt that Yousry knew that his
18 assistance, by providing translation services, in facilitating
19 Abdel Rahman's continued contact with members of al-Gama'a
20 violated the SAMs. Moreover, as with Stewart, Yousry's deceptive
21 and evasive conduct during the course of his visits to Abdel
22 Rahman undercuts his claim of good faith.

23 Yousry argues that the evidence established, at most,
24 that he intended to violate the SAMs, not that he knew that doing
25 so might constitute a crime. But even if he misunderstood the

1 law in that respect, such a mistake provides no defense to a
2 charge of criminal misbehavior. See Cheek v. United States, 498
3 U.S. 192, 199 (1991). The fact that Yousry was aware that his
4 acts, in knowing violation of the SAMs, would defraud the
5 government is sufficient to sustain the conviction. The
6 government need not also prove that he knew that there was a
7 criminal statute -- 18 U.S.C. § 371 -- that criminalized such
8 behavior. "The general rule that ignorance of the law or a
9 mistake of law is no defense to criminal prosecution is deeply
10 rooted in the American legal system." Cheek, 498 U.S. at 199.

11 B. Propriety of the SAMs

12 1. Stewart's Argument. Stewart contends that the
13 district court erred by preventing her from challenging the
14 validity of the SAMs as part of her defense. She sought to argue
15 that the Attorney General has no authority to have lawyers held
16 criminally liable for violating the SAMs and that the SAMs are
17 unconstitutionally vague as applied to her. Under Dennis v.
18 United States, 384 U.S. 855 (1966), however, Stewart's strategy
19 of collaterally attacking the validity of the SAMs is futile.

20 As the Supreme Court recognized in Dennis, there are
21 "appropriate and inappropriate ways to challenge acts of
22 government thought to be unconstitutional." Id. at 867. There
23 is "no reason for [federal courts] to consider the
24 constitutionality of a statute at the behest of petitioners who
25 have been indicted for conspiracy by means of falsehood and

1 deceit to circumvent the law which they now seek to challenge."
2 Id. at 866. Stewart, like the defendants in Dennis, was indicted
3 for engaging in a "voluntary, deliberate and calculated course of
4 fraud and deceit." Id. at 867. This is a "prosecution directed
5 at [Stewart's] fraud[,] not an action to enforce the [law]
6 claimed to be unconstitutional." Id.¹¹

7 The result may be different where the constitutionality
8 of a law is "challenged by those who of necessity violate its
9 provisions and seek relief in the courts," id. at 865, or where
10 the governmental action at issue was taken with no "colorable
11 authority," United States v. Barra, 149 F.2d 489, 490 (2d Cir.

¹¹ The fraudulent scheme in Dennis related to a statutory scheme, whereas the fraudulent conduct here related to a regulatory one. The fundamental principles, however, remain the same; the central issue remains the deceitful act, not the form or nature of the governmental conduct that prompted the deceit.

1 1945).¹² But, as with Dennis, "[t]his is not such a case." 384
2 U.S. at 865.

3 We have no basis upon which to entertain a doubt as to
4 the authority of the Attorney General of the United States to
5 ensure that reasonable measures are designed and implemented in
6 an attempt to prevent imprisoned criminals who are considered
7 dangerous despite their incarceration from engaging in or
8 facilitating further acts of criminality from their prison cells.
9 See 28 C.F.R. § 501.3(a) (setting forth the boundaries of that
10 authority). Nor have we any reason to doubt the Attorney
11 General's conclusion that Abdel Rahman fits within that category
12 of prisoner. He has demonstrated his willingness to engage in

¹² The defendants here are not, of course, subject to a contempt proceeding for violation of an injunction. But we note some similarity between the principles established in Dennis and the collateral bar rule of Walker v. Birmingham, 388 U.S. 307, 315 (1967), which limits the ability to defend against charges of contempt for violating a court-ordered injunction on the ground that the injunction itself was unconstitutional, see Matter of Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986), modified, 820 F.2d 1354 (1st Cir. 1987), cert. dismissed, 485 U.S. 693 (1988) ("As a general rule, a party may not violate [a court] order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding. Rather, the appropriate method to challenge a court order is to petition to have the order vacated or amended."). With respect to exceptions to the "general rule," there is also some similarity between Barra, 149 F.2d at 490 (allowing prosecution for making false statements in connection with government requests for information so long as the government "has colorable authority to do what it is doing") and Matter of Providence Journal Co., 820 F.2d at 1344, 1352 (allowing collateral attack on an injunction in contempt proceeding for violating that injunction where it was a "transparently invalid prior restraint on pure speech").

1 violent criminality not by acting violently himself, but by
2 ordering, encouraging, and conspiring with others who would
3 actually shed the blood. The likelihood that he would continue
4 to order, direct, or encourage such acts from prison, if he
5 could, was plain, and his incapacitation reasonably required not
6 just his physical immobility, but also his virtual silence vis-à-
7 vis the world at large.

8 Stewart might have effectively challenged the SAMs by
9 refusing to sign the affirmations in which she said she would
10 abide by them. She might then have invoked the jurisdiction of
11 the courts by bringing suit on Abdel Rahman's or her own behalf
12 to challenge their validity. She might have argued -- as she
13 forcefully does here -- that the SAMs interfered with her
14 capacity to effectively represent Rahman. But she did not.
15 Instead, she signed the affirmations. Having chosen that path,
16 she cannot be heard to attack the validity of those measures when
17 called to account for violating them, especially where, as here,
18 her fraudulent and deceptive conduct endangered people's lives.

19 The district court did not err in preventing Stewart
20 from challenging the validity of the SAMs as part of her defense,
21 and the jury acted within its province when it found that Stewart
22 intentionally and fraudulently subverted them.

23 2. Sattar's Related Arguments on Appeal. Sattar relies
24 on Stewart's and Yousry's arguments with respect to Count One.

1 For the reasons set forth above addressing those arguments, we
2 conclude that they are also unpersuasive as applied to him.

3 III. Counts Two and Three

4 Only Sattar was charged in Counts Two and Three of the
5 superseding indictment. He does not challenge the sufficiency of
6 the evidence supporting his Count Two conviction for conspiring
7 with Abdel Rahman, Taha, and others to murder persons in a
8 foreign country, in violation of 18 U.S.C. § 956.¹³ Instead, he
9 asserts that the district court should have dismissed this count
10 on the grounds of vindictive prosecution. Similarly, Sattar does
11 not challenge his conviction on Count Three for soliciting
12 persons to engage in crimes of violence -- murder and conspiracy
13 to commit murder -- in violation of 18 U.S.C. § 373.¹⁴ He argues
14 instead that he was denied a fair trial. These arguments are
15 addressed below in the context of the defendants' more general
16 challenges to the probity of the proceedings.

17 IV. Counts Four and Five

18 Stewart and Yousry challenge their Count Five
19 convictions for violating 18 U.S.C. § 2339A and 18 U.S.C. § 2 by
20 providing and concealing material support for the Count-Two
21 conspiracy for which Sattar was convicted and their Count Four

¹³ By special verdict, the jury concluded that the object of the Count-Two conspiracy was murder, not kidnaping.

¹⁴ By special verdict, the jury concluded that the crimes of violence Sattar solicited were murder and conspiracy to murder.

1 convictions for conspiracy to provide and conceal such support,
2 in violation of 18 U.S.C. § 371. They argue that the evidence
3 was insufficient to support their conviction on either count, and
4 contend that their conduct was constitutionally protected in any
5 event.

6 A. History of the Charges

7 By way of background, the initial indictment charged
8 all three defendants with violating 18 U.S.C. § 2339B.¹⁵ The
9 defendants argued before the district court that "18 U.S.C.
10 § 2339B is unconstitutionally vague . . . with regard to the
11 statute's prohibition on providing material support or resources
12 in the form of communications equipment and personnel." Sattar
13 I, 272 F. Supp. 2d at 356 (internal quotation marks omitted).
14 The district court agreed, and therefore dismissed those charges.
15 Id. at 361.¹⁶

16 The government then filed a superseding indictment
17 alleging that by essentially the same course of conduct, i.e.,
18 coordinating the surreptitious passage of al-Gama'a messages to
19 and from Abdel Rahman, Stewart and Yousry violated 18 U.S.C.

¹⁵ At the time of the relevant offense conduct, section 2339B provided, in relevant part, that "[w]hoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be [guilty of a crime.]" 18 U.S.C. § 2339B(a)(1) (2000).

¹⁶ The constitutionality of 18 U.S.C. § 2339B is not before us.

1 § 2339A.¹⁷ The relevant version of section 2339A, entitled
2 "Providing material support to terrorists," provided in relevant
3 part:

4 Whoever, within the United States, provides
5 material support or resources or conceals or
6 disguises the nature, location, source, or
7 ownership of material support or resources,
8 knowing or intending that they are to be used
9 in preparation for, or in carrying out, a
10 violation of [various enumerated statutes
11 related to terrorism] or in preparation for,
12 or in carrying out, the concealment of an
13 escape from the commission of any such
14 violation, or attempts or conspires to do
15 such an act, shall be [subject to criminal
16 punishment].

17 18 U.S.C. § 2339A(a) (2000). For purposes of both sections 2339A
18 and 2339B, "material support or resources" may be provided in the
19 form of:

20 currency or other financial securities,
21 financial services, lodging, training,
22 safehouses, false documentation or
23 identification, communications equipment,
24 facilities, weapons, lethal substances,
25 explosives, personnel, transportation, and
26 other physical assets, except medicine or
27 religious materials.

28 18 U.S.C. § 2339A(b) (1) (2000); see also id. § 2339B(g) (4) (2000)
29 ("[T]he term 'material support or resources' has the same meaning
30 given that term in section 2339A"). Section 2339A,
31 however, in contrast to section 2339B, does not penalize the

¹⁷ The superseding indictment did not charge Sattar with violating section 2339B; instead, he was charged with conspiracy to murder persons in a foreign country in violation of 18 U.S.C. § 956, i.e., Count Two.

1 provision of material support without regard to what the support
2 is for. Section 2339A requires instead that the defendant
3 provide support or resources with the knowledge or intent that
4 such resources be used to commit specific violent crimes.¹⁸

5 The government charged that the defendants provided
6 "material support or resources" in the form of "personnel" --
7 namely, Abdel Rahman -- to the Count-Two conspiracy, knowing or
8 intending that Abdel Rahman, as an active co-conspirator, would
9 help commit crimes. See Sattar III, 314 F. Supp. 2d at 296. The
10 government further asserted that Stewart and Yousry "conceal[ed]
11 and disguise[d] the nature, location, and source" of their
12 material support by means of the defendants' covert conduct
13 disguising Abdel Rahman's participation as a co-conspirator. See
14 id. The government had initially argued that Stewart and Yousry
15 could be convicted for providing themselves as "personnel" to a
16 foreign terrorist organization and by providing communications
17 equipment to the conspiracy. After the dismissal of the section
18 2339B charges and following the filing of the superseding
19 indictment, however, the government abandoned those contentions.
20 See id.

¹⁸ Section 2339B criminalizes the knowing provision of material support. See 18 U.S.C. § 2339B(a)(1) (2000). Section 2339A criminalizes the provision of material support knowing or intending that such support is used to aid crimes of terrorism. See 18 U.S.C. § 2339A(a) (2000). Therefore, the mental state in section 2339A extends both to the support itself, and to the underlying purposes for which the support is given.

1 As an initial matter, Stewart and Yousry challenge the
2 sufficiency of the evidence supporting their convictions on this
3 count. They also argue that the district court erroneously
4 instructed the jury on the elements of a violation of section
5 2339A. In addition, they raise more general challenges to the
6 statute, arguing that section 2339A does not criminalize the
7 behavior alleged in the indictment, that the provision is
8 unconstitutional as a multi-level inchoate offense, and that the
9 statute is unconstitutionally vague as applied to them. We
10 examine their arguments in the context of the statutory elements
11 of the crime, addressing first the sufficiency arguments.

12 B. Elements of Section 2339A

13
14 1. Proof of the Underlying Conspiracy to Kill Persons
15 Abroad.¹⁹ There was sufficient evidence of the existence of the
16 predicate crime -- the Count-Two conspiracy to kill or kidnap --
17 for which Sattar was convicted. Indeed Sattar, the only
18 defendant charged with and convicted of participating in the
19 Count-Two conspiracy, does not challenge the sufficiency of the
20 evidence as to this count.

21 The government offered evidence that Sattar and Taha
22 composed a fatwa in Abdel Rahman's name calling for "the killing
23 [of] the Jews wherever they are (UI) and wherever they are

¹⁹ As noted above, the jury found that the underlying conspiracy involved the murder, not the kidnaping, of persons abroad.

1 found." Audio Tr. Oct. 4, at 15. It also offered proof that
2 this fatwa was communicated to Atia, an al-Gama'a military
3 leader. Although the evidence may not have established any
4 particular plan of action to execute the fatwa, a reasonable jury
5 could have found beyond a reasonable doubt from the fatwa's
6 exhortations and Atia's readiness to act on it that there was a
7 concrete, illegal objective to murder persons abroad.

8 A review of the transcripts of various intercepted
9 telephone conversations introduced into evidence, particularly
10 the September 18, 2000, conversation involving Sattar, Taha, and
11 another party, bolsters this conclusion. The discussion goes
12 well beyond the abstract and contemplates the coordination with
13 Atia of violent actions, presumably along the lines of the Luxor
14 massacre. In light of such evidence, a rational jury could have
15 found beyond a reasonable doubt that the conspiracy as charged in
16 Count Two existed.

17 2. Proof of Material Support to the Conspiracy.

18 Stewart and Yousry also assert that they did not provide material
19 support in the form of "personnel" to the Count-Two conspiracy.
20 A reasonable jury could have concluded otherwise. There was
21 evidence introduced at trial sufficient to support a reasonable
22 juror's inference that Stewart and Yousry helped Abdel Rahman
23 participate covertly in the conspiracy to engage in violence
24 abroad by communicating to members of al-Gama'a and others his
25 withdrawal of support for the cease-fire. Abdel Rahman's

1 instrumental participation -- indeed, his leadership -- would, as
2 the district court observed, have been unavailable to the Count-
3 Two conspiracy "without the active participation of Stewart and
4 Yousry." Sattar V, 395 F. Supp. 2d at 95.

5 The defendants argue that the government established
6 only that they provided the underlying conspiracy with Abdel
7 Rahman's "pure speech" and therefore did not provide "personnel"
8 within any constitutional interpretation of section 2339A. The
9 government does not deny that section 2339A may not be used to
10 prosecute mere advocacy or other protected speech, but contends
11 that the defendants were prosecuted for criminal actions that did
12 not amount to protected speech.

13 Resolution of this dispute does not turn on whether the
14 prosecution introduced evidence of "pure speech." "Numerous
15 crimes under the federal criminal code are, or can be, committed
16 by speech alone," and certain crimes "are characteristically
17 committed through speech." Rahman, 189 F.3d at 117. The issue
18 is, instead, whether Abdel Rahman's statements were protected
19 speech. We conclude that the statements were not protected such
20 as to cast doubt on the convictions.

21 Words that are "the very vehicle of [a] crime" are not
22 protected "merely because, in part, [the crimes] may have
23 involved the use of language." United States v. Rowlee, 899 F.2d
24 1275, 1278 (2d Cir.), cert. denied, 498 U.S. 828 (1990). As we
25 recognized when affirming Abdel Rahman's sentence, "freedom of

1 speech and of religion do not extend so far as to bar prosecution
2 of one who uses a public speech or a religious ministry to commit
3 crimes." Abdel Rahman, 189 F.3d at 116-17. "[I]f the evidence
4 shows that the speeches crossed the line into criminal
5 solicitation, procurement of criminal activity, or conspiracy to
6 violate the laws, the prosecution is permissible." Id. at 117.
7 Words "that instruct, solicit, or persuade others to commit
8 crimes of violence . . . violate the law and may be properly
9 prosecuted regardless of whether they are uttered in private, or
10 in a public speech, or in administering the duties of a religious
11 ministry." Id.

12 The dissemination of some of the speech introduced at
13 trial might be viewed as nothing more than the expression of
14 views on the broad political situation in Egypt. For example, in
15 reaffirming that he was withdrawing his support for the cease-
16 fire, Abdel Rahman said that he had "expressed [his] opinion and
17 left the matters to [his] brothers to examine it and study it."
18 Statement for Release, Abdel Rahman, June 20, 2000.

19 But a reasonable jury could have found, in light of
20 Abdel Rahman's role as "spiritual" leader of al-Gama'a, that his
21 messages were ultimately intended to sway al-Gama'a members to
22 end the cease-fire, and by implication to commit criminal acts of
23 violence. Abdel Rahman's statements were therefore not an
24 expression of opinion, but a call to arms.

1 The evidence establishes, moreover, more than a one-way
2 broadcast of Abdel Rahman's views. Abdel Rahman's comments were
3 made in direct response to solicitations of his views from other
4 al-Gama'a members who were seeking to effect an end to the cease-
5 fire and to resume violence. In light of the information
6 available to Abdel Rahman at the time, a reasonable jury could
7 have read his statements as tailored to and necessary for
8 al-Gama'a's operations and increased use of violence. Viewed
9 through this lens, Abdel Rahman's statements were not materially
10 different in substance from a crime boss making decisions about
11 his criminal enterprise from prison and ordering a "hit."

12 3. Proof Regarding Knowing or Intentional Provision of
13 Material Support. Stewart and Yousry argue that the prosecution
14 did not prove the requisite mental state to sustain their
15 convictions. They contend that they were not aware of the
16 existence of the conspiracy charged in Count Two and therefore
17 could not have intended to aid it.

18 These arguments are unavailing. From the evidence at
19 trial, a reasonable factfinder could have concluded that Stewart
20 and Yousry knew (1) that an active group of people within
21 al-Gama'a including, most notably, Taha, sought to commit violent
22 crimes but were hindered by the cease-fire and by those members
23 of al-Gama'a who sought to adhere to it; (2) that the support of
24 Abdel Rahman -- a key leader of the group -- was critical to the
25 continued maintenance of the cease-fire; and (3) that, in light

1 of the letters and messages from Taha and Sattar that Yousry read
2 to Abdel Rahman in prison, Abdel Rahman's particular opinion
3 regarding the cease-fire -- and not the view of any other person
4 -- would be dispositive on the question of whether al-Gama'a
5 members would continue to abide by the cease-fire. A reasonable
6 factfinder could thus have concluded that Yousry and Stewart
7 actively and intentionally facilitated communications between
8 Abdel Rahman and al-Gama'a, in part by engaging in various ruses
9 during the course of their visits to Abdel Rahman, and thereby
10 effectively delivered Abdel Rahman's order to commit violence.
11 Stewart also did so by reaffirming to the press Abdel Rahman's
12 stated withdrawal of support for the cease-fire, thereby
13 dispelling any notion that the message came not from Abdel Rahman
14 himself, but was instead fabricated by members of the pro-
15 violence faction of al-Gama'a.

16 C. Other Challenges with Respect to 18 U.S.C. § 2339A

17 1. Vagueness. Section 2339A criminalizes the provision
18 of material support or resources "knowing or intending" that they
19 are to be used to assist in certain enumerated crimes of
20 terrorism. 18 U.S.C. § 2339A(a) (full text set forth on page
21 [38], supra). Stewart and Yousry assert that insofar as the
22 statute does not require "conscious, knowing intent" or
23 "knowledge and intent," the statute is unconstitutionally vague
24 as applied to them. They argue that the district court should
25 have dismissed the section 2339A charges for substantially the

1 same reasons that it dismissed the section 2339B charges that
2 were contained in the initial indictment. The government urges
3 to the contrary that the text of section 2339A, which requires
4 "knowing or intending," 18 U.S.C. § 2339A(a) (emphasis added), is
5 sufficiently precise.

6 In analyzing the defendants' arguments in this regard,
7 we must focus on two major differences between the initial and
8 superseding indictment.

9 First, the statutes upon which they were based differ.
10 Unlike section 2339A, section 2339B penalizes the knowing
11 provision of material support alone. Unlike section 2339A,
12 section 2339B does not require for conviction proof that the
13 defendant has provided support or resources with the knowledge or
14 intent that such resources be used to commit specific violent
15 crimes.²⁰

16 Second, the factual bases for the charges differ. In
17 the initial indictment, the government alleged that the
18 defendants violated section 2339B by the "provision" of
19 "communications equipment" to the conspiracy, Sattar I, 272 F.
20 Supp. 2d at 357, and the "provision" of themselves as "personnel"
21 to the conspiracy, id. at 358. In the superseding indictment,
22 the government charged instead that the defendants acted with the
23 "knowledge or intent" to provide material support. And rather

²⁰ As already noted, the propriety of the district court's dismissal of the section 2339B charges from the initial indictment is not before us; we assume for purposes of this discussion that the district court was correct.

1 than proceeding on the theory that the defendants provided
2 themselves as "personnel" to the conspiracy, the superseding
3 indictment alleges that the defendants provided Abdel Rahman as
4 the "personnel."

5 As we have explained, the district court dismissed the
6 section 2339B charges on the ground that they were
7 unconstitutional as applied to the defendants. The basis for
8 dismissal of the "communications equipment" charges was that the
9 statute, as read to apply to the facts of this case, could
10 "criminaliz[e] the mere use of phones and other means of
11 communication [with] neither notice nor standards for [the
12 statute's] application." Id. And the basis for the dismissal of
13 the "personnel" charges, as framed in the initial indictment, was
14 that such a charge could criminalize the actions of "[s]omeone
15 who advocates the cause of the [Foreign Terrorist
16 Organization]." Id. at 359 (quoting Humanitarian Law Project v.
17 Reno, 205 F.3d 1130, 1137 (9th Cir. 2000), cert. denied, 532 U.S.
18 904 (2001)) (brackets omitted). Without more, the district court
19 concluded, such conduct cannot be punished without violating the
20 First Amendment. See id.

21 The initial charges raised the possibility, moreover,
22 that under the government's reading of the statute, "a lawyer,
23 acting as an agent of her client, an alleged leader of an FTO,
24 could [be] subject to criminal prosecution as a 'quasi-
25 employee.'" Id. As we shall see, the charges in the superseding
26 indictment do not pose this risk.

1 A statute is unconstitutionally vague as applied "if it
2 fails to provide people of ordinary intelligence a reasonable
3 opportunity to understand what conduct it prohibits" or "if it
4 authorizes or even encourages arbitrary and discriminatory
5 enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000); accord
6 United States v. Rybicki, 354 F.3d 124, 132 (2d Cir. 2003) (en
7 banc), cert. denied, 543 U.S. 809 (2004). As a general matter,
8 scienter requirements may "ameliorate[]" concerns of improper
9 notice. See Hill, 530 U.S. at 732.

10 We are satisfied that section 2339A's knowledge-or-
11 intent formulation saves the statute from being
12 unconstitutionally vague as applied here. Unlike the application
13 of section 2339B proposed in the initial indictment, the
14 superseding indictment required the jury to find that the
15 defendants knew or intended the criminal uses to which the
16 conspiracy would put the material support they provided, thereby
17 eliminating concerns about inadequate notice. In other words, if
18 Stewart and Yousry knew that their actions provided material
19 support to a conspiracy to end the cease-fire and thereby unloose
20 deadly acts of terrorism by al-Gama'a and others, then they were
21 on notice that what they were doing was prohibited by a statute
22 that criminalizes the provision of material support "knowing or
23 intending that [such support is] to be used in preparation for,
24 or in carrying out," criminal actions. 18 U.S.C. § 2339A.

25 Stewart and Yousry argue nonetheless that several
26 statutory terms, such as "personnel," are unconstitutionally

1 vague as applied to them. They note that "personnel," undefined
2 at the relevant time, applies equally to sections 2339A and
3 2339B, compare id. § 2339A(b)(1) (2000) with id. § 2339B(g)(4)
4 (2000).²¹ They point out that the district court held this term
5 to be unconstitutionally vague in Sattar I. See 272 F. Supp. 2d
6 at 360.

7 We agree, however, with the district court's conclusion
8 that "[t]he meaning of 'personnel' is clear in the context of
9 § 2339A when applied to personnel who are to be used in
10 preparation for, or in carrying out, specific crimes." Sattar
11 III, 314 F. Supp. 2d at 301 n.11. By applying, in the first

²¹ At the time of the alleged criminal acts, "personnel" was undefined. In December 2004, the term "personnel" was changed to "personnel (1 or more individuals who may be or include oneself)." See Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, 3762 (codified at 18 U.S.C. § 2339A(b)(1)). By the same act, the term was defined in more detail for purposes of section 2339B:

No person may be prosecuted under [section 2339B] in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

Id. § 6603(f), 118 Stat. at 3763 (codified at 18 U.S.C. § 2339B(h)). This amended definition applies to section 2339B but not to section 2339A.

1 indictment, the prohibition against providing "personnel" to the
2 conspiracy to a circumstance in which the defendants provided
3 themselves, the government created a situation in which the
4 defendants could be punished for, in effect, providing themselves
5 to speak out in support of the program or principles of a foreign
6 terrorist organization, an activity protected by the First
7 Amendment. See Sattar I, 272 F. Supp. 2d at 359. The more
8 limited charge that they knowingly or intentionally provided
9 Abdel Rahman (as "personnel"), whose voice of command or words of
10 approbation were a means by which al-Gama'a members could prepare
11 for, or carry out, terrorist acts in Egypt, does not carry the
12 same risk with its corresponding constitutional implications.

13 In addition, the heightened scienter requirement in
14 section 2339A constrains prosecutorial discretion, and
15 ameliorates concerns of arbitrary and discriminatory enforcement.
16 Similar scienter requirements have saved other statutes from
17 void-for-vagueness challenges. See, e.g., Hill, 530 U.S. at 732;
18 see also Colautti v. Franklin, 439 U.S. 379, 395 & n.13 (1979)
19 (citing cases); United States v. Curcio, 712 F.2d 1532, 1543 (2d
20 Cir. 1983).

21 2. Nature of the Offense. Stewart and Yousry also
22 contend that Count Four, alleging a conspiracy to violate section
23 2339A, acts impermissibly as a charge of a "multi-level inchoate
24 offense," a "logical absurdity" that "violate[s] due process."
25 Stewart Br. 161-65. The gist of their argument is that the
26 charge effectively criminalizes a "conspiracy to conspire,"

1 thereby violating due process by extending criminal liability to
2 a degree too remote from any substantive criminal offense to pass
3 constitutional muster. Id. at 165-69. We need not consider this
4 argument;²² Count Five charges the knowing provision of aid -- a
5 substantive, not inchoate, offense -- and Count Four, pursuing a
6 conspiracy to commit that substantive offense, functions as a
7 traditional conspiracy charge.

8 As what seems to us to be a variation on the same
9 theme, Stewart and Yousry assert that the district court erred by
10 "impermissibly dilut[ing]" the proof required for conviction of
11 the Count-Two conspiracy in the context of the material support
12 convictions under section 2339A. Stewart Br. 158. But the
13 government need not have established beyond a reasonable doubt
14 that Stewart or Yousry engaged in a conspiracy to kidnap or
15 commit murder abroad; neither was charged with doing either.
16 Instead, both were charged with and convicted of violating
17 section 2339A, and, as discussed, the evidence is sufficient to
18 sustain the conviction on those charges. Stewart and Yousry do
19 not, presumably because they cannot, suggest that Congress did
20 not have the power to criminalize the relevant underlying
21 conduct.

²² We note nonetheless that the defendants do not provide authority for their argument that a "multi-level inchoate offense" such as a conspiracy to conspire would violate the Due Process Clause.

1 V. Counts Six and Seven

2 Stewart challenges her convictions on Counts Six and
3 Seven for violating the blanket provisions of 18 U.S.C. § 1001,
4 which subjects to criminal sanctions

5 whoever, in any matter within the
6 jurisdiction of the executive, legislative,
7 or judicial branch of the Government of the
8 United States, knowingly and willfully--

9 (1) falsifies, conceals, or covers up by
10 any trick, scheme, or device a material fact;

11 (2) makes any materially false,
12 fictitious, or fraudulent statement or
13 representation; or

14 (3) makes or uses any false writing or
15 document knowing the same to contain any
16 materially false, fictitious, or fraudulent
17 statement or entry

18 18 U.S.C. § 1001(a). Stewart argues that, at worst, she broke a
19 promise, and that the statute criminalizes false statements, not
20 false promises.

21 We conclude otherwise. On May 16, 2000, Stewart signed
22 an affirmation stating that she would ("shall") abide by the
23 SAMs. On May 26, 2000, Stewart submitted the affirmation to the
24 United States Attorney's Office for the Southern District of New
25 York. On May 7, 2001, Stewart signed a revised affirmation to
26 the same effect and telecopied it to the same office. Before,
27 after, and between executing these affirmations, she helped
28 smuggle messages to and from Abdel Rahman in violation of the
29 SAMs.

1 Stewart at least thrice affirmed "under the penalties
2 of perjury the truth" of certain statements. The May 16, 2000,
3 statement reads in pertinent part:

4 I . . . understand that neither I nor any
5 member of my office shall forward any mail
6 received from inmate Abdel Rahman to a third
7 person. Nor shall I use my meetings,
8 correspondence or phone calls with Abdel
9 Rahman to pass messages between third parties
10 (including, but not limited to, the media)
11 and Abdel Rahman.

12 Stewart May 2000 Aff. (Gov't Ex. 7.) In the May 7, 2001,
13 statement, Stewart affirmed:

14 I . . . specifically understand that the
15 meetings shall not be for the purpose of
16 presenting statements to the defense team for
17 further dissemination to third parties,
18 including the media. I will only allow the
19 meetings to be used for legal discussion
20 between Abdel Rahman and me.

21
22 Stewart May 2001 Aff. (Gov't Ex. 12.)

23 A reasonable factfinder was entitled to conclude that
24 Stewart affirmed under penalty of perjury that she had the then-
25 present intent to have her actions conform to the terms of the
26 SAMs. From Stewart's smuggling messages to and from Abdel
27 Rahman, the factfinder could conclude that the assertion about
28 her intent was knowingly and willfully false when it was made.
29 See United States v. Urum, 148 F.2d 187, 189 (2d Cir. 1945)
30 (concluding that allegation of a false representation as to
31 future use of loan proceeds was "an allegation of a present
32 statement and the assertion of existing intent"); cf. United
33 States v. Shah, 44 F.3d 285, 294 (5th Cir. 1995) (observing that

1 "a promise may amount to a 'false, fictitious or fraudulent'
2 statement if it is made without any present intention of
3 performance and under circumstances such that it plainly, albeit
4 implicitly, represents the present existence of an intent to
5 perform").

6 Stewart seeks support for her argument from Williams v.
7 United States, 458 U.S. 279 (1982). There, the Supreme Court
8 reversed a conviction of the defendant under 18 U.S.C. § 1014 for
9 his making of a "false statement" -- a check drawn on an account
10 containing insufficient funds -- for the purpose of influencing
11 the actions of a federally insured institution. But central to
12 the Williams Court's analysis was the proposition that a check,
13 even a bad check, "is not a factual assertion at all." Id. at
14 284. A check "d[oes] not, in terms, make any representation as
15 to the state of [the drawer's] bank balance" but "serve[s] only
16 to direct the drawee banks to pay the face amounts to the bearer,
17 while committing [the drawer] to make good the obligations if the
18 banks dishonor[] the drafts." Id. at 284-85.

19 Williams does not apply to the conduct at issue here.
20 A reasonable jury could have concluded that Stewart's
21 affirmations that she would abide by the SAMs amounted to factual
22 assertions regarding her then-present intent to abide by the
23 SAMs. Based on her repeated affirmations, and her repeated
24 violations of those affirmations, moreover, a reasonable jury
25 could have concluded that at the time Stewart executed and
26 submitted the affirmations at issue, she did not intend to abide

1 by them -- in other words, that her representations were
2 knowingly false when made. On this basis, a reasonable jury
3 could have properly concluded that Stewart violated section 1001
4 as charged in Counts Six and Seven.

5 VI. General Challenges to the
6 Validity of the Convictions

7 In addition to their challenges to specific counts in
8 the indictment, Stewart and Sattar make general assertions of
9 error regarding the government's conduct during the course of the
10 prosecution. Stewart argues that she was selectively prosecuted
11 on account of her gender and political beliefs, and both Stewart
12 and Sattar assert that the government's decision to file a
13 superseding indictment following their successful efforts to
14 dismiss several counts of the initial indictment constitutes
15 vindictive prosecution.

16 The defendants also raise various challenges to the
17 district court's case administration. First, they allege a
18 variety of pretrial errors: in the denial of their motions to
19 sever their trial from Sattar's; in the empaneling of an
20 anonymous jury; in the denial of Stewart's motion to suppress
21 certain evidence obtained pursuant to the Foreign Intelligence
22 Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 50
23 U.S.C. §§ 1801 et seq. ("FISA"); and in the denial of Stewart's
24 motion for disclosure of whether she, her co-defendants, or
25 others were subject to surveillance by the National Security
26 Agency. The defendants also argue that the district court made

1 various evidentiary errors. Finally, the defendants argue that
2 the district court erred in addressing post-conviction claims of
3 juror misconduct.

4 A. Selective Prosecution

5 Stewart argues that she was selectively prosecuted on
6 account of her gender and political beliefs in violation of the
7 Equal Protection Clause of the Fourteenth Amendment. This
8 argument requires Stewart to establish that she was "treated
9 differently from other similarly situated individuals" and that
10 "such differential treatment was based on impermissible
11 considerations such as race, religion, intent to inhibit or
12 punish the exercise of constitutional rights, or malicious or bad
13 faith intent to injure [her]." Harlen Assocs. v. Inc. Vill. of
14 Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (internal quotation
15 marks omitted); accord United States v. Fares, 978 F.2d 52, 59
16 (2d Cir. 1992); United States v. Moon, 718 F.2d 1210, 1229 (2d
17 Cir. 1983), cert. denied, 466 U.S. 971 (1984).

18 Stewart compares her treatment with that of Abdel
19 Rahman's former lawyers Ramsey Clark and Abdeen Jabara, who, even
20 though they allegedly violated the same SAMs as she did, were not
21 prosecuted for doing so. Clark's and Jabara's alleged
22 misconduct, however, was different from Stewart's adjudicated
23 misconduct in at least one crucial respect: both Clark and Jabara
24 refused to publicize Abdel Rahman's withdrawal of support for the
25 al-Gama'a cease-fire, something Stewart did at least twice. Like
26 Stewart, Clark spoke to the media on Abdel Rahman's behalf. But

1 unlike Stewart, the message Clark disseminated in apparent
2 violation of the SAMs -- that Abdel Rahman did not support the
3 formation of a political party in Egypt -- did not have the same
4 potential for inciting violence. For that reason and those set
5 forth by the district court in its decisions addressing the
6 matter, see Sattar V, 395 F. Supp. 2d at 103 (denying selective
7 prosecution claim), cf. Sattar III, 314 F. Supp. 2d at 311-14
8 (denying vindictive prosecution claim), and Order, Sept. 1, 2004
9 (denying selective prosecution claim), Stewart's arguments in
10 this regard are without merit.²³

11 B. Vindictive Prosecution

12 Sattar argues that the district court erred in denying
13 his motion to dismiss the Count-Two conspiracy charge in the
14 superseding indictment because the institution of the charge was
15 driven by prosecutorial vindictiveness. This argument is also
16 without merit.

17 The government filed the original five-count indictment
18 in April 2002. In it, Sattar, Stewart, Yousry, and another²⁴

²³ In rejecting Stewart's selective prosecution claim in part by comparison with Clark's and Jabara's alleged misbehavior, we do not, of course, suggest our approval of Clark's or Jabara's remarkable alleged courses of conduct. But neither of them was indicted or tried for, let alone convicted of, a crime. We are therefore reluctant to comment on their alleged misdeeds at any length. Stewart cites them as evidence of selective prosecution, however, and we therefore note an important difference between Clark and Jabara's alleged actions and Stewart's -- that she, unlike either of them, was willing to issue a public statement regarding Abdel Rahman's changed position on the cease-fire.

²⁴ In addition to the defendants here, the initial indictment also named Yassir Al-Sirri, a/k/a "Abu Ammar," as a
(continued...)

1 were charged with providing, attempting to provide, and
2 conspiring to provide material support and resources to an FTO in
3 violation of 18 U.S.C. § 2339B. Sattar moved to dismiss these
4 charges on the ground that section 2339B was unconstitutionally
5 vague as applied to the allegations in the indictment. By
6 opinion and order dated July 22, 2003, the district court agreed
7 with Sattar. Sattar I, 272 F. Supp. 2d at 358-61. Following
8 that decision, the government filed a superseding indictment
9 adding a new count charging Sattar with conspiring to murder
10 persons in a foreign country in violation of 18 U.S.C. § 956.

11 Sattar argues that the government's decision to file
12 the superseding indictment and add the charge of violating
13 section 956 "was a retaliatory act . . . motivated by the
14 embarrassment [the government] suffered as a result of the
15 dismissal" of two central counts in the original indictment.
16 Sattar Br. 17. He asserts that an inference of vindictive
17 prosecution is supportable in two ways: First, the addition of
18 Count Two -- which carries a potential sentence of life
19 imprisonment, a longer sentence than that authorized by the
20 dismissed charge pursuant to section 2339B -- "up[ped] the ante"
21 for the consequences of conviction. Sattar III, 314 F. Supp. 2d
22 at 311. Second, the government could have brought the section
23 956 charge in the original indictment, inasmuch as it was based

²⁴(...continued)
defendant. The superseding indictment named him as an unindicted
co-conspirator, instead.

1 on information known to the government prior to the filing of the
2 initial indictment, but the government declined to do so.

3 "[T]he decision as to whether to prosecute generally
4 rests within the broad discretion of the prosecutor, and a
5 prosecutor's pretrial charging decision is presumed legitimate."
6 United States v. Sanders, 211 F.3d 711, 716 (2d Cir.), cert.
7 denied, 531 U.S. 1015 (2000) (citations and internal quotation
8 marks omitted). Nonetheless, "a prosecution brought with
9 vindictive motive, penalizing those who choose to exercise
10 constitutional rights, would be patently unconstitutional." Id.
11 (internal quotation marks omitted). We will dismiss an
12 indictment if actual vindictiveness has been demonstrated, or if,
13 under the circumstances, "there is a presumption of
14 vindictiveness that has not been rebutted by objective evidence
15 justifying the prosecutor's action." Id. (internal quotation
16 marks omitted).

17 We review a district court's factual findings on
18 prosecutorial vindictiveness for clear error, and its legal
19 conclusions de novo. United States v. Johnson, 171 F.3d 139, 140
20 (2d Cir. 1999) (per curiam). We review a district court's
21 decision denying discovery on claims of prosecutorial
22 vindictiveness for abuse of discretion. Sanders, 211 F.3d at
23 717.

24 "Th[e] need to avoid the appearance of vindictiveness
25 has taken the form of a presumption of prosecutorial
26 vindictiveness . . . , applied when (but only when) the

1 circumstances of a case pose a "realistic likelihood" of such
2 vindictiveness. United States v. King, 126 F.3d 394, 397 (2d
3 Cir. 1997) (citations and internal quotation marks omitted). The
4 district court found no reason to presume that the actions at
5 issue, which arose in a pretrial setting, were vindictive. See
6 Sattar III, 314 F. Supp. 2d at 311-12.

7 "The circumstances must present a realistic likelihood
8 of vindictiveness that would be applicable in all cases, and any
9 such presumption may be overcome by objective evidence justifying
10 the prosecutor's action." Sanders, 211 F.3d at 717 (citations
11 and internal quotation marks omitted). "[T]his court has
12 consistently adhered to the principle that the presumption of
13 prosecutorial vindictiveness does not exist in a pretrial
14 setting." Paradise v. CCI Warden, 136 F.3d 331, 335 (2d Cir.),
15 cert. denied, 525 U.S. 836 (1998) (internal quotation marks
16 omitted); see also Sanders, 211 F.3d at 717 (same). Sattar
17 provides no reason for us to deviate from this general rule here,
18 and no basis upon which we can conclude that the district court's
19 findings in this respect were clearly erroneous.

20 Sattar's claim of actual, as opposed to presumptive,
21 vindictiveness is also without merit. A finding of actual
22 vindictiveness requires a showing that a "prosecutor's charging
23 decision [is] a 'direct and unjustifiable penalty,' that resulted
24 'solely from the defendant's exercise of a protected legal
25 right.'" Sanders, 211 F.3d at 716-17 (internal citation
26 omitted). The evidence Sattar offers in this regard is that the

1 government possessed the same information when preparing the
2 original and superseding indictments, that the maximum punishment
3 Sattar faced if convicted under the superseding indictment was
4 greater than that he faced if convicted under the original
5 indictment, and that the superseding indictment was the result of
6 the district court's dismissal of the section 2339B material
7 support charges in the original indictment. We have no warrant
8 to conclude that the district court clearly erred in finding that
9 the charging decision was not vindictive, or that the government
10 was attempting to do anything more than hold Sattar criminally
11 responsible for engaging in the underlying acts that form the
12 basis of the indictment. See Paradise, 136 F.3d at 336. Put
13 another way, it does not follow from the facts Sattar recites
14 that the resulting charge was necessarily brought vindictively;
15 for this reason the district court did not err in concluding
16 otherwise.

17 C. Trial Administration

18 1. Alleged Pre-Trial Errors

19 **a. Severance**

20 Stewart and Yousry assert that the district court
21 abused its discretion by denying their motions to sever their
22 trial from the trial of Sattar because Sattar was charged with,
23 and convicted of, conspiracy to murder persons in a foreign
24 country -- allegations different from and more serious than those
25 with which Stewart and Yousry were charged. To succeed on this
26 argument, Stewart and Yousry must show that the district court

1 abused its discretion in this regard and that the resulting
2 prejudice rose to the level of "a miscarriage of justice." See
3 United States v. Yousef, 327 F.3d 56, 150 (2d Cir. 2003).
4 Stewart and Yousry complain primarily that as a result of the
5 district court's denial of their motion for severance, evidence
6 irrelevant to their actions and unfairly prejudicial to their
7 case permeated the trial. They further contend that the volume
8 of limiting instructions given to the jury rendered them
9 effectively useless in attempting to curb any prejudicial effect.

10 But the district court did not abuse its discretion in
11 this respect. Count Two charged Sattar with conspiring to murder
12 persons in a foreign country. Count Five charged Stewart and
13 Yousry with providing and concealing material support to that
14 conspiracy, and Count Four charged them with conspiring to
15 provide and conceal that support. Most of the evidence against
16 Sattar that Stewart and Yousry assert to have been unduly
17 prejudicial to them -- evidence submitted to establish the
18 existence of the Count-Two conspiracy charge against Sattar --
19 would have been admissible against Stewart and Yousry even had
20 the trial been severed. See Sattar I, 272 F. Supp. 2d at 380-81.
21 This is so because the Count-Two conspiracy was an element of the
22 crimes charged against Stewart and Yousry in Counts Four and
23 Five, and the government would have been entitled, and expected,
24 to elicit relevant evidence regarding its existence. "[T]he fact
25 that testimony against a codefendant may be harmful is not a
26 ground for severance if that testimony would also be admissible

1 against the moving defendant tried separately." United States v.
2 Rosa, 11 F.3d 315, 341 (2d Cir. 1993), cert. denied, 511 U.S.
3 1042 (1994).

4 To the extent that evidence introduced at trial was not
5 admissible against a particular defendant, the district court
6 gave detailed -- if necessarily voluminous -- curative
7 instructions to the jury. Neither Stewart nor Yousry proffer
8 instructions that should have been given, but were not. Nor do
9 they identify improper curative instructions that were given.
10 This is not a case where "the risk that the jury [would] not, or
11 [could] not, follow instructions [was] so great, and the
12 consequences of failure so vital to the defendant, that the
13 practical and human limitations of the jury system [could not] be
14 ignored." Bruton v. United States, 391 U.S. 123, 135 (1968).
15 Despite the length of the instructions, we presume, as did the
16 district court, see Sattar V, 395 F. Supp. 2d. at 104, that the
17 jurors followed them, see, e.g., Richardson v. Marsh, 481 U.S.
18 200, 206 (1987) (noting that it is an "almost invariable
19 assumption of the law that jurors follow their instructions");
20 United States v. Salameh, 152 F.3d 88, 116 (2d Cir. 1998), cert.
21 denied, 525 U.S. 1112 (1999) ("Juries are presumed to follow
22 their instructions." (internal quotation marks and brackets
23 omitted)). Neither Stewart nor Yousry provide us with a
24 convincing reason to conclude that the district court abused its
25 discretion in this regard.

1 **b. Empaneling an Anonymous Jury**

2 By order dated April 29, 2004, the district court
3 granted the government's motion to empanel an anonymous jury, in
4 light of the substantial publicity surrounding the case and the
5 seriousness and nature of the charges in the indictment,
6 especially the charge that the defendants had attempted "to
7 interfere with the ordered procedures of law enforcement and the
8 judicial process." Order, Apr. 29, 2004. As a general rule, a
9 district court may order the empaneling of an anonymous jury upon
10 "(a) concluding that there is strong reason to believe the jury
11 needs protection, and (b) taking reasonable precautions to
12 minimize any prejudicial effects on the defendant and to ensure
13 that his fundamental rights are protected." United States v.
14 Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991), cert. denied, 505
15 U.S. 1220 (1992). A defendant's apparent "willingness to tamper
16 with the judicial process" will support the use of an anonymous
17 panel. United States v. Aulicino, 44 F.3d 1102, 1116 (2d Cir.
18 1995) (internal quotation marks and ellipses omitted). Where
19 otherwise warranted,

20 the use of an anonymous jury does not
21 infringe a defendant's constitutional rights,
22 so long as the court conducts a careful voir
23 dire designed to uncover any bias as to the
24 issues or the defendants and takes care to
25 give the jurors a plausible and non-
26 prejudicial reason for not disclosing their
27 identities.

28 Id. If "there is evidence to support the district court's
29 finding of reason to believe the jury needs protection," and if

1 "the court has taken reasonable precautions to minimize any
2 prejudicial effects on the defendant and to ensure protection of
3 his fundamental rights, the decision to empanel an anonymous jury
4 is reviewed only for abuse of discretion." United States v.
5 Thai, 29 F.3d 785, 801 (2d Cir.), cert. denied, 513 U.S. 977
6 (1994).

7 In light of (a) the charges against the defendants,
8 which included a terrorist conspiracy to murder, and Stewart's
9 and Yousry's alleged provision of material support to that
10 conspiracy; (b) the reasonable likelihood that the pervasive
11 issue of terrorism would raise in the jurors' minds a fear for
12 their individual safety; (c) the fact that the charges against
13 Stewart and Yousry were in significant part about their alleged
14 corruption of the judicial process; (d) the widespread pretrial
15 publicity about the case; and (e) the extensiveness of the voir
16 dire administered to the jury by the court, we conclude that the
17 district court did not abuse its discretion.

18 **c. Pre-Trial Suppression of Evidence**

19 **i. Suppression of Evidence Obtained Pursuant to**
20 **FISA.** The defendants argue that evidence obtained from
21 electronic surveillance pursuant to FISA should have been
22 suppressed because such surveillance was improperly instituted
23 for the purpose of a criminal investigation, rather than for the
24 gathering of intelligence, and because FISA was unconstitutional
25 as applied in this case.

1 By Opinion and Order dated September 15, 2003, the
2 district court denied the defendants' motions to suppress the
3 relevant evidence. Sattar II, 2003 WL 22137012, at *22, 2003
4 U.S. Dist. LEXIS 16164, at *70. At a pretrial hearing held on
5 April 9, 2002, the government informed the district court and the
6 defendants that it had

7 conducted a series of court-authorized
8 electronic surveillance over a period of
9 several years authorized under [FISA],
10 consisting of the electronic surveillance of
11 defendant Sattar's home phone, his computer,
12 [and] fax machine, [and] defendant Yousry's
13 telephone. The government also monitored
14 several prison visits, both audio and video,
15 to Sheik Abdel Rahman over the past several
16 years, one of which involved defendant
17 Stewart in May of 2000.

18 Id. at *2, 2003 U.S. Dist. LEXIS 16164, at *6. A month later, by
19 letter dated May 8, 2002, the government also informed the
20 defendants that "information obtained or derived pursuant to the
21 authority of the FISA was used, and will continue to be used, in
22 connection with the prosecution of [this] case." Id.; see 50
23 U.S.C. § 1806(c) (providing that where the government intends to
24 disclose information obtained from FISA surveillance, the
25 government "shall, prior to the trial . . . notify the aggrieved
26 person and the court . . . that the Government intends to so
27 disclose or so use such information").

28 As part of its pretrial obligations under FISA, the
29 government

30 made extensive disclosures to the defendants,
31 including over 85,000 audio recordings of
32 voice calls, fax-machine sounds, and

1 computer-modem sounds obtained through audio
2 surveillance of telephone numbers used by
3 Sattar and Yousry; the FBI's written
4 summaries . . . of approximately 5,300 voice
5 calls that the FBI deemed to contain foreign
6 intelligence information and therefore did
7 not minimize; approximately 150 draft
8 transcripts of voice calls; and approximately
9 10,000 pages of e-mails obtained through
10 electronic surveillance of an e-mail account
11 used by Sattar. The Government has also
12 disclosed certain evidence solely to Stewart
13 and Yousry, including audiotapes of 63
14 telephone conversations between the
15 imprisoned Sheikh Abdel Rahman and his
16 attorneys and Yousry, and audio and video
17 recordings of three prison visits to Sheikh
18 Abdel Rahman by his attorneys and Yousry on
19 February 19, 2000, May 19 and 20, 2000, and
20 July 13 and 14, 2001.

21 Sattar II, 2003 WL 22137012, at *2, 2003 U.S. Dist. LEXIS 16164,
22 at *7.

23 In accordance with the procedure set forth in FISA, see
24 50 U.S.C. § 1806(e), Sattar and Stewart moved to suppress the
25 evidence arising out of the FISA surveillance, and for access to
26 classified information regarding that surveillance. The
27 government argues on appeal, as it did before the district court,
28 that the FISA surveillance at issue was lawfully authorized and
29 conducted. The government moved the district court to order that
30 none of the classified documents or classified information
31 contained therein would need to be disclosed to the defendants.
32 Pursuant to 50 U.S.C. § 1806(f), the government requested that
33 the court conduct an in camera and ex parte review of the
34 materials and proffered an affidavit of then-Attorney General
35 John Ashcroft stating, in relevant part, that "it would harm the

1 national security of the United States to disclose or have an
2 adversary hearing with respect to materials submitted to the
3 United States Foreign Intelligence Surveillance Court . . . in
4 connection with this matter." Sattar II, 2003 WL 22137012, at
5 *5, 2003 U.S. Dist. LEXIS 16164, at *18.

6 After reviewing the classified materials, the district
7 court concluded that "all of the requirements of FISA were
8 satisfied" and "each of the FISA surveillances was authorized by
9 a FISA Court order that complied with the statutory requirements
10 for such orders and was supported by the statements and
11 certifications required by the statute." Id. at *6, 2003 U.S.
12 Dist. LEXIS 16164, at *21. The district court also concluded
13 that this was "not a case where disclosure [of the classified
14 FISA materials] was necessary or where a review of all of the
15 materials suggested that due process required disclosure to the
16 defendants." Id. at *6, 2003 U.S. Dist. LEXIS 16164, at *22.

17 On appeal, Stewart argues that the materials generated
18 pursuant to the FISA surveillance should have been suppressed
19 because the surveillance was instituted for the purposes of a
20 criminal investigation, not for the purpose of intelligence
21 gathering. In addition, Stewart contends that the FISA review
22 process lacks meaningful judicial review, and that due process
23 required that her counsel have access to the FISA applications
24 and warrants.

25 Stewart's attacks on the constitutionality of the FISA
26 statute are foreclosed by this Court's decision in United States

1 v. Duggan, 743 F.2d 59 (2d Cir. 1984), which, despite its age,
2 remains binding precedent in this Circuit. There, we concluded
3 that "the procedures fashioned in FISA [are] a constitutionally
4 adequate balancing of the individual's Fourth Amendment rights
5 against the nation's need to obtain foreign intelligence
6 information." Id. at 73.

7 Congress created the FISA system in an attempt to
8 accommodate "the legitimate need of Government for intelligence
9 information and the protected rights of our citizens." United
10 States v. U.S. District Court, 407 U.S. 297, 322-23 (1972). As
11 we have explained, "Congress passed FISA to settle what it
12 believed to be the unresolved question of the applicability of
13 the Fourth Amendment warrant requirement to electronic
14 surveillance for foreign intelligence purposes, and to remove any
15 doubt as to the lawfulness of such surveillance." Duggan, 743
16 F.2d at 73 (internal quotation marks omitted). FISA's primary
17 focus is surveillance for the purpose of gathering foreign
18 intelligence information, which is defined to include
19 "information that relates to, and if concerning a United States
20 person is necessary to, the ability of the United States to
21 protect against [inter alia] international terrorism." 50 U.S.C.
22 § 1801(e)(1).

23 FISA established a court (the "FISA Court") comprised
24 of designated district court judges ("FISA Judges"). The FISA
25 Court has jurisdiction over applications for electronic
26 surveillance relating to the gathering of potential foreign

1 intelligence information under the procedures set forth in FISA.
2 See id. § 1803. FISA generally permits a federal officer, when
3 authorized by the President of the United States acting through
4 the Attorney General, to obtain from any FISA Judge an order
5 "approving electronic surveillance of a foreign power or an agent
6 of a foreign power for the purpose of obtaining foreign
7 intelligence information." Id. § 1802(b). "[A] group engaged in
8 international terrorism or activities in preparation therefor,"
9 is a "foreign power," id. § 1801(a)(4), and an "agent of a
10 foreign power" includes any person who "knowingly engages in
11 sabotage or international terrorism, or activities that are in
12 preparation therefor, for or on behalf of a foreign power" or
13 "knowingly aids or abets any person in [such] conduct," id.
14 § 1801(b)(2)(C) & (E).

15 In order to secure an order authorizing surveillance
16 from a FISA Judge, the officer's application must meet the
17 statutory requirements set forth in 50 U.S.C. § 1804. For
18 example, the application must set forth the identity or
19 description of the target of the surveillance, id. § 1804(a)(2),
20 and a statement of facts and circumstances relied upon to justify
21 the officer's belief that the target is a foreign power or agent
22 of a foreign power and that each facility or location to be
23 subjected to surveillance is being used or is about to be used by
24 the target, id. § 1804(a)(3). Prior to October 26, 2001, such a
25 federal officer was required to certify to the FISA judge that
26 "the purpose" of the FISA surveillance was the interception of

1 foreign intelligence information. See id. § 1804(a)(7)(B)
2 (2000). In Duggan, we interpreted this provision to mean that
3 the interception of foreign intelligence information must be the
4 "primary objective" of the surveillance. Duggan, 743 F.2d at 77.
5 The statute was changed in the wake of the events of September
6 11, 2001, however, to require only that "a significant purpose"
7 of the surveillance be the interception of such information. See
8 50 U.S.C. § 1804(a)(7)(B) (2003); see also 50 U.S.C.
9 § 1804(a)(6)(B) (2008) (redesignated from (a)(7)).

10 Only after a FISA Judge has been satisfied that the
11 application meets FISA's requirements will he or she authorize
12 the surveillance. To enter an order approving surveillance, the
13 FISA Judge must find that the application was properly filed and
14 properly authorized by the Attorney General; that associated
15 procedures designed to minimize the acquisition and retention of
16 non-publically available information concerning "United States
17 persons" satisfy FISA's requirements, see id. § 1801(h); that the
18 facts set forth in the application provide probable cause to
19 believe that the target is a foreign power or agent of such a
20 power; and that the locations to be subject to surveillance are
21 being used, or are about to be used, by the target, id.
22 § 1805(a).

23 When the application is complete and properly certified
24 by an executive branch official, however,

25 it is, under FISA, subjected to only minimal
26 scrutiny by the courts. Congress deemed it a
27 sufficient check in this regard to require

1 the FISA Judge (1) to find probable cause to
2 believe that the target of the requested
3 surveillance is an agent of a foreign power;
4 (2) to find that the application is complete
5 and in proper form; and (3) when the target
6 is a United States person, to find that the
7 certifications are not "clearly erroneous."
8

9 Duggan, 743 F.2d at 77. Stewart's argument that FISA does not
10 ensure adequate judicial view is therefore foreclosed by Duggan.
11 See id. at 77 & n.6.

12 Although the purpose of the surveillance must be to
13 obtain foreign intelligence information, "otherwise valid FISA
14 surveillance is not tainted simply because the government can
15 anticipate that the fruits of such surveillance may later be
16 used . . . as evidence in a criminal trial." Id. at 78. To the
17 contrary, the statute specifically contemplates the introduction
18 of FISA surveillance evidence in criminal prosecutions. See 50
19 U.S.C. § 1806(b). As both Congress and this Court have
20 recognized, "in many cases the concerns of the government with
21 respect to foreign intelligence will overlap those with respect
22 to law enforcement." Duggan, 743 F.2d at 78.

23 When such FISA information is introduced in the course
24 of a criminal prosecution, and upon review of a suppression
25 motion, the trial court has the opportunity to review the FISA
26 Court's order, issued pursuant to 50 U.S.C. § 1805, in light of
27 the underlying applications for surveillance, filed pursuant to
28 50 U.S.C. § 1804, in order "to determine whether the surveillance
29 [at issue] was lawfully authorized and conducted." 50 U.S.C.
30 § 1806(f). The district court's review of the FISA Judge's

1 decision is, like the FISA Judge's decision itself, deferential.
2 "[A] reviewing court [has] no greater authority to second-guess
3 the executive branch's certifications than has the FISA Judge."
4 Duggan, 743 F.2d at 77.

5 FISA applications are likely to contain allegedly
6 sensitive information relating to perceived issues of national
7 security. The applications are required to set forth how and why
8 the Executive Branch knows what it knows, which may include
9 references to covert agents and informers. For this reason, "'ex
10 parte, in camera determination is to be the rule.'" Id. at 78
11 (quoting United States v. Belfield, 692 F.2d 141, 147 (D.C. Cir.
12 1982)). The district court has the "discretion to disclose
13 portions of [relevant materials], under appropriate protective
14 procedures, [but] only if [it] decides that such disclosure is
15 'necessary to make an accurate determination of the legality of
16 the surveillance'" or is otherwise required by due process. Id.
17 (quoting 50 U.S.C. § 1806(f)).

18 Stewart argues on appeal that the "primary purpose" of
19 the FISA wiretapping in this case was to pursue a criminal
20 investigation, not to collect foreign intelligence information.
21 The district court, having reviewed the FISA materials, concluded
22 that "all of the surveillance at issue was conducted with the
23 appropriate purpose," whether with a "primary purpose" or "a
24 significant purpose" to obtain foreign intelligence information.
25 Sattar II, 2003 WL 22137012, at *12-*13, 2003 U.S. Dist. LEXIS
26 16164, at *40-*42.

1 Upon our own in camera review of the underlying
2 material and the district court's order filed under seal, we are
3 confident that the district court did not err in so concluding.
4 Since the interceptions meet the "primary purpose" test, we, like
5 the district court, need not and do not address Stewart's
6 argument that FISA's new and less demanding "significant purpose"
7 test is unconstitutional. Cf. In re Sealed Case, 310 F.3d 717,
8 735 (FISA Ct. Rev. 2002) (rejecting the "primary purpose" test in
9 favor of a "significant purpose" test). Similarly, based on the
10 relevant evidence which, as adduced at trial, is outlined above,
11 the district court did not err in finding there to be "ample
12 probable cause to believe that the targets of the relevant
13 surveillance -- Sattar, Yousry, and Sheikh Abdel Rahman -- were
14 acting as agents of a foreign power" as defined by FISA, i.e.,
15 al-Gama'a, "and that each of the facilities at which the
16 surveillance was directed was being used, or was about to be
17 used, by that target." Sattar II, 2003 WL 22137012, at *7, 2003
18 U.S. Dist. LEXIS 16164, at *24.

19 Stewart also argues that she was an inappropriate
20 target of the surveillance. As the district court noted,
21 however, Stewart was never designated as a target in any of the
22 applications at issue; her alleged co-conspirators were. "Once
23 the proper preconditions are established with respect to a
24 particular target, there is no requirement in FISA that all those
25 likely to be overheard engaging in foreign intelligence
26 conversations be named." Duggan, 743 F.2d at 79. Because

1 Stewart's co-conspirators were targeted pursuant to proper
2 procedures, the Fourth Amendment did not require that Stewart
3 also be identified or described as a target in order for her
4 intercepted conversations to be used in a criminal prosecution.
5 Id. at 79 n.7.

6 Stewart further argues that the district court erred in
7 declining to disclose FISA materials to her counsel. The
8 district court may order disclosure of FISA materials "under
9 appropriate security procedures and protective orders," but "only
10 where such disclosure is necessary to make an accurate
11 determination of the legality of the surveillance." 50 U.S.C.
12 § 1806(f). When the district court "determines that the
13 surveillance was lawfully authorized and conducted, it shall deny
14 the motion of the aggrieved person except to the extent that due
15 process requires discovery or disclosure." Id. § 1806(g).

16 As we have noted, in these circumstances disclosure is
17 the exception and "'ex parte, in camera determination is [] the
18 rule.'" Duggan, 743 F.2d at 78. The need to disclose materials
19 to defense counsel may arise if the judge determines there to be
20 "potential irregularities such as possible misrepresentation of
21 fact, vague identification of the persons to be surveilled or
22 surveillance records which include a significant amount of
23 nonforeign intelligence information, calling into question
24 compliance with the minimization standards contained in the
25 order." Id. (internal quotation marks and brackets omitted).
26 But Stewart does not point to any case where any court has

1 ordered disclosure in a situation similar to hers. Upon our own
2 review of the materials, we conclude that there was no error in
3 the district court's determination that disclosure was
4 unnecessary for an accurate determination of the legality of the
5 surveillance at issue or to satisfy the requirements of due
6 process.

7 ii. Disclosure Regarding NSA Surveillance. On
8 June 16, 2006, Stewart moved to compel disclosure as to whether
9 she or any of her co-defendants were subject to surveillance by
10 the National Security Agency ("NSA"). The government filed, ex
11 parte, a classified response to be reviewed in camera. At a
12 hearing on September 25, 2006, the government insisted that its
13 classified submission was properly filed under section 4 of the
14 Classified Information Procedures Act ("CIPA"), Pub. L. No.
15 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. 3). The
16 government also argued that none of the defense counsel was
17 properly cleared for access to the information and that, "without
18 going into the details of the classification level of our
19 submission, I don't think any defense counsel would ever have a
20 need to know the details of the terrorist surveillance program,
21 especially in this case." H'g Tr. 13-14, Sept. 25, 2006.
22 Following the hearing and in response to subsequent orders from
23 the district court, the government filed supplemental ex parte
24 confidential responses dated October 6, 2006, October 12, 2006,
25 and October 13, 2006 for in camera review. After additional
26 materials were submitted by the government, the district court

1 granted, in part, the motion for disclosure, ordering the
2 government to make specified disclosures,²⁵ but otherwise denied
3 the motion. Order, Oct. 17, 2006, at 2. In that public order,
4 the district court noted that it had filed an "ex parte Order
5 under seal containing classified information which explains in
6 detail the reasons for the Court's decision," and found that
7 there was a

8 compelling reason for filing the additional
9 Order ex parte and under seal because it
10 contains classified information that cannot
11 reasonably be segregated from the other
12 material in the Order, and that such a filing
13 is consistent with the Classified Procedures
14 Act and the rights of the defendants. See
15 [United States] v. Yunis, 867 F.2d 617, 622-
16 25 (D.C. Cir. 1989).

17
18 Id.

19 Through CIPA, Congress established procedures for
20 handling classified information in criminal cases. "Classified
21 information" is defined to include "information or material that
22 has been determined by the United States Government pursuant to
23 an Executive order, statute, or regulation, to require protection
24 against unauthorized disclosure for reasons of national
25 security." 18 U.S.C. app. 3 § 1(a). CIPA is "meant to protect
26 and restrict the discovery of classified information in a way

²⁵ The ordered disclosures do not appear to be in the record on appeal. According to Stewart, by letter dated October 13, 2006, the government informed her that certain telephone conversations between a third party and Sattar were intercepted pursuant to a court-authorized Title III warrant in 1994, that these conversations, or the "fruits" of those conversations, were not used as evidence in the present case, and that there was no Brady material. Stewart Br. 211.

1 that does not impair the defendant's right to a fair trial."
2 United States v. Aref, 533 F.3d 72, 78 (2d Cir. 2008)
3 (alterations and internal quotation marks omitted), cert.
4 denied., 129 S. Ct. 1582 (2009).

5 Section 4 of CIPA establishes procedures for discovery
6 of classified information. It provides:

7 The court, upon a sufficient showing, may
8 authorize the United States to delete
9 specified items of classified information
10 from documents to be made available to the
11 defendant through discovery under the Federal
12 Rules of Criminal Procedure, to substitute a
13 summary of the information for such
14 classified documents, or to substitute a
15 statement admitting relevant facts that the
16 classified information would tend to prove.
17 The court may permit the United States to
18 make a request for such authorization in the
19 form of a written statement to be inspected
20 by the court alone. If the court enters an
21 order granting relief following such an ex
22 parte showing, the entire text of the
23 statement of the United States shall be
24 sealed and preserved in the records of the
25 court to be made available to the appellate
26 court in the event of an appeal.

27 18 U.S.C. app. 3 § 4.

28 This section "clarifies district courts' power under
29 Federal Rule of Criminal Procedure 16(d)(1) to issue protective
30 orders denying or restricting discovery for good cause," which
31 includes "information vital to the national security." Aref, 533
32 F.3d at 78 (internal quotation marks omitted). CIPA does not
33 itself create a government privilege against the disclosure of
34 classified information; it presupposes one. Id. The "most
35 likely source for the protection of classified information lies

1 in the common-law privilege against disclosure of state secrets."
2 Id.

3 We have recently held that the state-secrets privilege
4 applies to criminal cases, but that "it must give way under some
5 circumstances to a criminal defendant's right to present a
6 meaningful defense." Id. at 79. To determine such
7 circumstances, we have employed the standard first articulated in
8 Roviaro v. United States, 353 U.S. 53 (1957), in the context of
9 the so-called informer's privilege in criminal prosecutions, see
10 Aref, 533 F.3d at 79-80.²⁶

11 First, the district court must determine whether the
12 material in dispute is discoverable, and if so, whether the
13 state-secrets privilege applies. Id. at 80. It applies if "(1)
14 there is 'a reasonable danger that compulsion of the evidence
15 will expose . . . matters which, in the interest of national
16 security, should not be divulged,' and (2) the privilege is
17 'lodged by the head of the department which has control over the
18 matter, after actual personal consideration by that officer.'" Id.
19 at 80 (quoting United States v. Reynolds, 345 U.S. 1, 8, 10
20 (1953)). If the information is discoverable but the privilege
21 applies, then the district court must determine "whether the

²⁶ The privilege is "in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law," and it "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Roviaro, 353 U.S. at 59.

1 information is helpful or material to the defense, i.e., useful
2 'to counter the government's case or to bolster a defense.'" Id.
3 (citation omitted). In order to be helpful or material, the
4 evidence "need not rise to the level that would trigger the
5 Government's obligation under Brady v. Maryland, 373 U.S. 83
6 (1963), to disclose exculpatory information." Id.

7 We review the district court's decision to issue a
8 protective order under CIPA section 4 and Federal Rule of
9 Criminal Procedure 16(d)(1) for abuse of discretion. Aref, 522
10 F.3d at 80. Similarly, we review for abuse of discretion the
11 district court's finding whether evidence is "helpful" or
12 "material to the defense." Id.

13 At the time of the district court's decision and order,
14 our decision in Aref had not yet issued. As noted in the
15 district court's public order denying the motion to compel,
16 however, the district court relied on an opinion by a sister
17 circuit embracing a test similar to that embraced by the Aref
18 panel. Order, Oct. 17, 2006, at 2 (citing United States v.
19 Yunis, 867 F.2d 617, 622-25 (D.C. Cir. 1989)).²⁷

²⁷ Under the D.C. Circuit's decision in Yunis, first, the district court must determine, in camera and ex parte, whether the information at issue is relevant. Yunis, 867 F.2d at 623. If irrelevant, the inquiry ends. If relevant, however, the district court must determine whether "the assertion of privilege by the government is at least a colorable one." Id. If the claim is colorable, the court must then determine whether the information is "at least 'helpful to the defense.'" Id. (quoting Rovario, 353 U.S. at 60-61). "Where the government asserts a privilege, a trial court abuses its discretion if it orders disclosure 'absent a showing of materiality.'" Id. at 622. The court in Yunis left open the question of whether otherwise

(continued...)

1 Here, the government has invoked the state-secrets
2 privilege. It asserts that the details of the NSA's operations,
3 including the surveillance vel non of any particular individual
4 or group, implicate national security and are among "the nation's
5 most guarded secrets." Gov't Br. 389-90; id. (quoting Halkins v.
6 Helms, 598 F.2d 1, 7 (D.C. Cir. 1978)). Where evidence is
7 intercepted, the sensitive nature of the information might lie
8 "not so much in the contents of the [information], as in the
9 time, place, and nature of the government's ability to intercept
10 the [information] at all." Yunis, 867 F.2d at 623.²⁸

11 In light of these general concerns and the principles
12 set forth in Yunis and Aref, and based on our own review of the
13 underlying materials and the district court's sealed order, we
14 are satisfied that the district court did not abuse its
15 discretion or otherwise err in denying Stewart's motion to compel
16 disclosure.

17 We note, as we did in Aref, which postdated the
18 district court's order here, the absence of a formal public
19 "claim of privilege[] lodged by the head of the department which
20 has control over the matter, after actual personal consideration
21 by that officer." Reynolds, 345 U.S. at 7-8; see Aref, 533 F.3d
22 at 80. As in Aref, we conclude that in the pre-Aref context,

²⁷(...continued)
privileged information is protected from disclosure where such
information has "more than theoretical relevance" and is
"genuinely helpful to [the] defense." Id. at 625.

²⁸ We make neither reference to nor conclusions regarding
the material at issue in the instant case.

1 such a flaw "is not necessarily fatal," and that "[i]t would 'be
2 of little or no benefit' for us to remand for the purpose of
3 having the department head agree that disclosure of the
4 classified information would pose a risk to national security
5 here." Aref, 533 F.3d at 80. But the absence of the formal
6 claim is not a trivial matter. We do not demean it. We expect
7 that, in light of the holding in Aref, we will not need to
8 address this issue in appeals from future prosecutions in which
9 the state-secrets privilege is invoked as the government is now
10 well-informed of this obligation. Cf. id. ("Based on our holding
11 today . . . we trust that this issue will not arise in future
12 CIPA cases.").

13 We reject Stewart's claim that the district court erred
14 in reviewing materials ex parte and in camera. As we noted in
15 Aref, "[b]oth CIPA section 4 and Rule 16(d)(1) authorize ex parte
16 submissions. . . . When the 'government is seeking to withhold
17 classified information from the defendant, an adversary hearing
18 with defense knowledge would defeat the very purpose of the
19 discovery rules.'" Aref, 533 F.3d at 81.

20 The CIPA procedures followed by the district court
21 place all parties involved (except perhaps the government) at a
22 substantial disadvantage: defendants are hampered in contesting
23 the assertions that are being made to the court by the
24 government; district courts and courts of appeals are deprived of
25 the opportunity for an adversarial proceeding upon which they are
26 typically dependent in attempting fairly and properly to resolve

1 disputes; and the public, as well as the litigants, are deprived
2 of the assurances that come with public scrutiny of the work of
3 the courts. The procedures are also, of course, subject to abuse
4 by the executive. But a method for protection of classified
5 material is necessary, and these procedures have been established
6 by Congress and held to be constitutional. We, as did the
7 district court, therefore accept them as a necessary, if
8 imperfect, accommodation of the varied interests implicated.

9 2. Alleged Trial Errors. Both Sattar and Yousry
10 challenge various evidentiary rulings made by the district court.
11 Sattar argues that the court abused its discretion by admitting a
12 book by Taha and a videotape of Taha, Osama Bin Laden, and other
13 al-Gama'a members encouraging violence, and by excluding news
14 footage purporting to depict Israeli violence against Palestinian
15 demonstrators. In addition, Yousry challenges the exclusion of
16 several statements he made to FBI agents.

17 We review a district court's evidentiary rulings for
18 abuse of discretion. See United States v. Kelley, 551 F.3d 171,
19 174 (2d Cir. 2009) (per curiam); United States v. Anglin, 169
20 F.3d 154, 162 (2d Cir. 1999). Here, the district court did not
21 abuse its discretion with respect to any such rulings.

22 We are guided by certain basic principles established
23 by the Federal Rules of Evidence -- that, as a general rule,
24 "[a]ll relevant evidence is admissible," Fed. R. Evid. 402, but
25 that even relevant evidence, although admissible, may be excluded
26 by the district court "if its probative value is substantially

1 outweighed by the danger of unfair prejudice, confusion of the
2 issues, or misleading the jury, or by considerations of undue
3 delay, waste of time, or needless presentation of cumulative
4 evidence," Fed. R. Evid. 403. "A district court is obviously in
5 the best position to do the balancing mandated by Rule 403."
6 Salameh, 152 F.3d at 110. "We will second-guess a district court
7 only if there is a clear showing that the court abused its
8 discretion or acted arbitrarily or irrationally." Id. (internal
9 quotation marks omitted); accord United States v. Szur, 289 F.3d
10 200, 217 (2d Cir. 2002).

11 Taha's book was relevant and admissible as evidence of
12 the existence of the Count-Two conspiracy to murder persons in a
13 foreign country. The Bin Laden video was similarly admissible,
14 and relevant to Taha's intent to murder or kidnap. The district
15 court did not err in failing to find that the evidence was unduly
16 prejudicial.

17 It was also within the district court's discretion to
18 exclude both the news video, which it found to be of minimal
19 relevance yet highly prejudicial and confusing, and Yousry's
20 statements to the FBI, which it found to be essentially
21 duplicative of Yousry's own testimony.

22 The district court made a "conscientious assessment of
23 whether unfair prejudice substantially outweigh[ed] probative
24 value," Salameh, 152 F.3d at 110 (internal quotation marks
25 omitted), and did not otherwise abuse its discretion in making

1 this assessment. We therefore will not disturb its judgments on
2 these grounds.

3 3. Allegations of Juror Misconduct. It was brought to
4 the district court's attention after the jury rendered its
5 verdict that a juror, referred to by the parties as "Juror # 39,"
6 had come forward with allegations concerning improprieties during
7 the jury's deliberations. The defendants requested that the
8 district court "'follow up' and conduct an inquiry" into these
9 allegations. Sattar IV, 395 F. Supp. 2d at 74-78. By written
10 opinion, the district court denied the request. Id. Sattar
11 argues on appeal that the district court's actions were an abuse
12 of its discretion, insisting that the court should have met,
13 post-verdict, with Juror # 39 to conduct an inquiry. We
14 disagree.

15 The district court properly construed the request as
16 one for an evidentiary hearing, and concluded that there was no
17 "clear, strong, substantial and incontrovertible evidence . . .
18 that a specific, non-speculative impropriety has occurred,"
19 United States v. Ianiello, 866 F.2d 540, 543 (2d Cir. 1989),
20 especially in light of the fact that the juror had "several
21 opportunities to communicate directly with the court" regarding
22 any potential improprieties, but failed to do so, Jacobson v.
23 Henderson, 765 F.2d 12, 15 (2d Cir. 1985). As the district court
24 explained, "the fact that Juror # 39 had direct access to the
25 Court and did not complain of any problems supports the
26 conclusion that these allegations are post hoc efforts caused by

1 dissatisfaction that do not require further post-verdict
2 inquiry." Sattar IV, 395 F. Supp. 2d at 77. We agree.

3 4. Cumulative Error Doctrine. Yousry also argues on
4 appeal that we should reverse under the cumulative error
5 doctrine. But the defendants have not identified any error in
6 the district court's rulings, "and the accumulation of non-errors
7 does not warrant a new trial." United States v. Lumpkin, 192
8 F.3d 280, 290 (2d Cir. 1999).

9 VII. Propriety of the Sentences

10 The government appeals from the sentences imposed on
11 the defendants, asserting that they are unreasonable and unduly
12 lenient. The government's principal brief was submitted prior to
13 the Supreme Court's decisions in Gall v. United States, 128 S.
14 Ct. 586 (2007), and Kimbrough v. United States, 128 S. Ct. 558
15 (2007), which, as recognized by this Circuit in its en banc
16 decision in United States v. Cavera, 550 F.3d 180 (2d Cir. 2008),
17 have significantly altered the landscape of sentencing
18 jurisprudence. The Supreme Court issued both Gall and Kimbrough
19 before the government filed its reply brief and oral argument
20 took place, but not before this Circuit had spoken in Cavera.²⁹

²⁹ As noted in this case's caption, this appeal was argued on January 29, 2008. On December 12, 2007, approximately one month prior thereto, a majority of the active judges of this Court voted to vacate the initial three-judge panel's decision in Cavera, see 505 F.3d 216 (2d Cir. 2007), and to rehear the case en banc. As Cavera preceded this case and would address many issues critical to the resolution of this appeal, and as noted in footnote [*], we deemed it prudent to stay our resolution of this case pending this Court's en banc resolution of Cavera, despite

(continued...)

1 A. Standard of Review

2 The principles that guide our review of the district
3 court's sentences are, "at first glance, beguilingly simple."
4 Cavera, 550 F.3d at 188. Generally, we review for abuse of
5 discretion. Id. at 189. That "deferential" scrutiny
6 "encompasses two components: procedural review and substantive
7 review." Id.

8 1. Procedural Review. We first determine whether the
9 sentence was procedurally reasonable. See id. Ordinarily, the
10 district court must first correctly calculate the appropriate
11 range set forth by the United States Sentencing Guidelines. Id.
12 at 190. Then it "must form its own view of the nature and
13 circumstances of the offense and the history and characteristics
14 of the defendant," id. at 188, as mandated and guided by 18
15 U.S.C. § 3553(a)(1).³⁰ In this context, "we review factual

²⁹(...continued)
the unfortunate delay involved. The en banc opinion issued on
December 4, 2008.

³⁰ Section 3553(a) provides, in pertinent part:

The court shall impose a sentence sufficient,
but not greater than necessary, to comply
with the purposes set forth in paragraph (2)
of this subsection. The court, in determining
the particular sentence to be imposed, shall
consider--

(1) the nature and circumstances of the
offense and the history and characteristics
of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of

(continued...)

1 findings for clear error and the court's interpretation of the
2 Sentencing Guidelines de novo." United States v. Jeffers, 329
3 F.3d 94, 97 (2d Cir. 2003); see also Gall, 128 S.Ct. at 597
4 (stating that a court procedurally errs when it "select[s] a
5 sentence based on clearly erroneous facts"). In imposing the
6 chosen sentence, the court must "adequately . . . explain [that]

³⁰(...continued)

the offense, to promote respect for the law,
and to provide just punishment for the
offense;

(B) to afford adequate deterrence
to criminal conduct;

(C) to protect the public from
further crimes of the defendant; and

(D) to provide the defendant with
needed educational or vocational training,
medical care, or other correctional treatment
in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the
sentencing range established [and recommended
by the Sentencing Guidelines];

(5) any pertinent policy statement . . .
issued by the Sentencing Commission . . . ;
. . . .

(6) the need to avoid unwarranted
sentence disparities among defendants with
similar records who have been found guilty of
similar conduct; and

(7) the need to provide restitution to
any victims of the offense.

18 U.S.C. § 3553(a).

1 sentence," including "any deviation from the Guidelines range."
2 Cavera, 550 F.3d at 190.

3 District courts are "generally free to impose sentences
4 outside the recommended [Guidelines] range" but "must consider
5 the extent of the deviation and ensure that the justification is
6 sufficiently compelling to support the degree of the variance."
7 Id. at 189 (citations and internal quotation marks omitted).

8 Thus, a district court "must satisfy us that it has
9 'considered the parties' arguments' and that it has a 'reasoned
10 basis for exercising [its] own legal decisionmaking authority.'" Id.
11 at 193 (quoting Rita v. United States, 551 U.S. 338, 356
12 (2007)) (brackets in Cavera). When a court commits "significant
13 procedural error," we may "remand to the district court so that
14 it can either explain what it was trying to do, or correct its
15 mistake and exercise its discretion anew . . . rather than
16 . . . proceed[ing] to review the sentence for substantive
17 reasonableness." Id. at 190 (citations and internal quotation
18 marks omitted).

19 2. Substantive Review. Once we are satisfied that a
20 sentence was procedurally proper, we then review the district
21 court's determination for substantive reasonableness, "tak[ing]
22 into account the totality of the circumstances, giving due
23 deference to the sentencing judge's exercise of discretion, and
24 bearing in mind the institutional advantages of district courts." Id.
25 at 190. Our role is no more than to "patrol the boundaries
26 of reasonableness." Id. at 191. Indeed, we "must defer heavily

1 to the expertise of district judges," id. at 193, and will "set
2 aside a district court's substantive determination only in
3 exceptional cases where the trial court's decision cannot be
4 located within the range of permissible decisions," id. at 189
5 (internal quotation marks and emphasis omitted).

6 We do not "presume that a non-Guidelines sentence is
7 unreasonable," nor do we "require 'extraordinary' circumstances
8 to justify a deviation from the Guidelines range." Id. at 190
9 (quoting Gall, 128 S. Ct. at 595). In evaluating a sentence's
10 substantive reasonableness, "we may take the degree of variance
11 into account and consider the extent of a deviation from the
12 Guidelines.'" Id. We may "consider whether the factor, as
13 explained by the district court, can bear the weight assigned it
14 under the totality of circumstances in the case." Id. at 191.
15 "[A] major departure should be supported by a more significant
16 justification than a minor one." Gall, 128 S. Ct. at 597. "But
17 we must not employ a rigid mathematical formula that uses the
18 percentage of a departure as the standard for determining the
19 strength of the justifications required for a specific sentence."
20 Cavera, 550 F.3d at 190 (internal quotation marks omitted).

21 Some decisions by the district court may be entitled to
22 more deference than others. For example, as both the Supreme
23 Court and we have noted, variations from the Guidelines "may
24 attract greatest respect when the sentencing judge finds a
25 particular case outside the heartland to which the Commission
26 intends individual Guidelines to apply." Kimbrough, 128 S. Ct at

1 574-75 (internal quotation marks omitted); accord Cavera, 550
2 F.3d at 192. When, on the other hand, the variation is based on
3 a general disagreement with the Guidelines' applicability in a
4 "mine-run case," then "closer review may be in order."
5 Kimbrough, 128 S. Ct at 575.

6 But such "closer review" is less appropriate where the
7 Guideline in question is not based on empirical data and national
8 history. The issuance of that sort of Guideline "do[es] not
9 exemplify the Commission's exercise of its characteristic
10 institutional role." Id. "[A] categorical disagreement with and
11 variance from [such a] Guideline[]," or, at least from the crack
12 cocaine Guidelines, "is not suspect." Spears v. United States,
13 129 S. Ct. 840, 843 (2009) (per curiam).

14 The Supreme Court has yet to address fully the contours
15 of the "respect" that should be afforded to "an 'inside the
16 heartland' departure," id., from Guidelines created by the
17 Commission pursuant to its characteristic institutional role.
18 Such a departure would "necessarily [be] based on a policy
19 disagreement with the Guidelines" and would "necessarily
20 disagree[] [with the Guidelines] on a 'categorical basis.'" Id.
21 We have recognized, however, that "some Guidelines enhancements
22 and reductions apply without modulation to a wide range of
23 conduct." Cavera, 550 F.3d at 192. Thus, "a district court may
24 find that even after giving weight to the [factors that drive the
25 enhancement or reduction] there is [still] a wide variety of
26 culpability amongst defendants and, as a result, impose different

1 sentences based on the factors identified in § 3553(a)." Id. Of
2 course, irrespective of whether the conduct is found to be inside
3 or outside the "heartland," the "district court must explain its
4 reasons for its chosen sentence." Id.³¹

5 Affording greater discretion to the district courts may
6 result in greater apparent disparities in sentences. But "the
7 Supreme Court has made clear its view that disparities in
8 sentences imposed by different district judges are more likely to
9 reflect justified differences than are those arising from
10 differences of opinion among appellate panels." Cavera, 550 F.3d
11 at 193.

12 B. Application to This Case

13 The government's principal claim of error on appeal is
14 that the district court abused its discretion by imposing
15 unreasonably lenient sentences. The government also argues that
16 the district court erred as a matter of law by failing to apply
17 the Guidelines terrorism adjustment, U.S.S.G. § 3A1.4, to
18 Yousry's offense level.

19 1. Yousry's Sentence. The district court initially
20 calculated Yousry's Guidelines range based on a total offense
21 level of 28 and a criminal history category of I, for a range of
22 78 to 97 months. According to the government, Yousry's

³¹ As is discussed in more detail below, the district court found that the terrorism enhancement did not apply to Yousry's conduct, and that his conduct fell outside the heartland of material support for terrorist activity crimes. The district court found Sattar's and Stewart's conduct to merit the terrorism enhancement, but, at least for Stewart, found the case to be an unusual one for the enhancement.

1 applicable Guidelines range should have been enhanced in
2 accordance with the terrorism enhancement provided by the
3 Guidelines, U.S.S.G. § 3A1.4. The district court concluded to
4 the contrary that the terrorism enhancement did not apply to
5 Yousry because he did not act with the requisite state of mind.
6 Based on the district court's findings, we agree with its
7 conclusion.

8 Upon consideration of the various factors set forth in
9 section 3553(a), the district court concluded that a significant
10 downward variance³² was appropriate, and ultimately sentenced
11 Yousry to a non-Guidelines sentence of 20 months of imprisonment,
12 followed by 2 years of supervised release.

13 **a. Guidelines Calculations**

14 We review the district court's interpretation of the
15 Guidelines de novo, and the district court's findings of fact for
16 clear error. United States v. Legros, 529 F.3d 470, 474 (2d Cir.
17 2008). We interpret the Guidelines as though they were a
18 statute, giving the words used their common meaning. United

³² We distinguish between "a 'variance' from the advisory Guidelines" and "a 'departure' within the Guidelines." Irizarry v. United States, 128 S.Ct. 2198, 2204 (2008) (Breyer, J., dissenting) (emphasis in original). As the Supreme Court noted in Irizarry, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." Id. at 2202. In contrast, a variance is a modification of the applicable Guidelines sentence "that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. [§ 3553(a)]." Id. at 2203.

1 States v. Kirvan, 86 F.3d 309, 311 (2d Cir. 1996). Section
2 3A1.4, the so-called "terrorism enhancement," provides:

3 (a) If the offense is a felony that involved,
4 or was intended to promote, a federal crime
5 of terrorism, increase by 12 levels; but if
6 the resulting offense level is less than
7 level 32, increase to level 32.

8 (b) In each such case, the defendant's
9 criminal history . . . shall be Category VI.

10
11 U.S.S.G. § 3A1.4. The application notes incorporate 18 U.S.C.
12 § 2332b(g) (5) by reference. See id. cmt. n.1. That section
13 defines a "Federal crime of terrorism" as:

14 an offense that--

15
16 (A) is calculated to influence or affect
17 the conduct of government by intimidation or
18 coercion, or to retaliate against government
19 conduct; and

20 (B) is a violation of [any one of many
21 statutes, including 18 U.S.C. § 2339A,
22 relating to the provision of material support
23 to terrorists, and 18 U.S.C. § 956(a) (1),
24 relating to conspiracies to murder persons
25 abroad].

26 18 U.S.C. § 2332b(g) (5). The conventional meaning of
27 "calculated" is "devised with forethought." II Oxford English
28 Dictionary 777 (2d ed. 1999). Therefore, if a defendant's
29 purpose in committing an offense is to "influence or affect the
30 conduct of government by intimidation or coercion, or to
31 retaliate against government conduct," the first requirement of
32 section 2332b(g) (5) (A) is satisfied. If, however, there is no
33 evidence that the defendant "sought to influence or affect the
34 conduct of the government," the crime is not a federal crime of

1 terrorism. See United States v. Leahy, 169 F.3d 433, 446 (7th
2 Cir. 1999).

3 The enhancement is not limited, however, to offenses
4 that are themselves federal crimes of terrorism. By including
5 the "intended to promote" language, the drafters of the Guideline
6 "unambiguously cast a broader net." United States v. Mandhai,
7 375 F.3d 1243, 1247 (11th Cir. 2004), cert. denied, 549 U.S. 923
8 (2006). The criminal conduct at issue need not itself meet the
9 statutory definition of a federal crime of terrorism if "a goal
10 or purpose [of the defendant's act] was to bring or help bring
11 into being a crime listed in 18 U.S.C. 2332b(g) (5) (B)." Id. at
12 1248; accord United States v. Arnaout, 431 F.3d 994, 1001-02 (7th
13 Cir. 2005).

14 The district court declined to apply the terrorism
15 enhancement to Yousry's sentence. The court explained:

16 This is a motivational requirement and
17 focuses on the defendant's purpose. The
18 government has conceded the lack of
19 motivation or purpose and has failed to show
20 that the defendant's offenses were calculated
21 to influence or affect the conduct of
22 government by intimidation or coercion or to
23 retaliate against government action.

24 Sent'g Tr. 143-44; see 18 U.S.C. § 2332b(g) (5) (A) (defining
25 "Federal crime of terrorism"). The government does not challenge
26 this finding, which we conclude to be consistent with the record
27 and not clearly erroneous.

28 Nonetheless, the government argues that the enhancement
29 is appropriate despite the fact that Yousry has committed neither
30 a federal crime of terrorism nor any other crime with the intent

1 to promote such a crime. According to the government, the
2 enhancement applies because Yousry's offense was "a felony that
3 involved . . . a federal crime of terrorism." U.S.S.G. § 3A1.4
4 (emphasis added). But under the "involved" prong of section
5 3A1.4, the enhancement would be applicable to Yousry only if he
6 himself had committed a federal crime of terrorism. See Arnaout,
7 431 F.3d at 1001 ("The ordinary and plain meaning of 'involved'
8 means 'to include.'"); United States v. Graham, 275 F.3d 490, 516
9 (6th Cir. 2001), cert. denied, 535 U.S. 1026 (2002) ("[W]e
10 believe that in the context at hand, the word 'involved'
11 signifies that a defendant's offense included a federal crime of
12 terrorism; in other words, that a defendant committed, attempted,
13 or conspired to commit a federal crime of terrorism as defined in
14 18 U.S.C. § 2332b(g)(5)."). And, as the Fourth Circuit has
15 recognized, commission of a federal crime of terrorism, which
16 would trigger the "involved" prong of the enhancement,
17 incorporates "a specific intent requirement, namely, that the
18 underlying felony was 'calculated to influence or affect the
19 conduct of government by intimidation or coercion, or to
20 retaliate against government conduct.' 18 U.S.C. § 2332b(g)(5)."
21 United States v. Chandia, 514 F.3d 365, 376 (4th Cir. 2008). So
22 the problem for the government remains: there is no evidence that
23 Yousry himself sought to influence or affect the conduct of a
24 government. The enhancement therefore does not apply under the
25 "involved" prong. See Leahy, 169 F.3d at 446.

1 The government maintains that any motivational
2 requirement imposed by the terrorism enhancement can be imputed
3 to Yousry from his co-conspirators' relevant conduct under
4 section 1B1.3(a) of the Guidelines. It provides, in relevant
5 part:

6 [A]djustments in Chapter Three [including the
7 terrorism enhancement] shall be determined on
8 the basis of the following:

9 (1) (A) all acts and omissions committed,
10 aided, abetted, counseled, commanded,
11 induced, procured, or willfully caused by the
12 defendant; and

13 (B) in the case of a jointly undertaken
14 criminal activity (a criminal plan, scheme,
15 endeavor, or enterprise undertaken by the
16 defendant in concert with others, whether or
17 not charged as a conspiracy), all reasonably
18 foreseeable acts and omissions of others in
19 furtherance of the jointly undertaken
20 criminal activity, that occurred during the
21 commission of the offense of conviction, in
22 preparation for that offense, or in the
23 course of attempting to avoid detection or
24 responsibility for that offense

25 U.S.S.G. § 1B1.3(a). The government asserts that it was
26 reasonably foreseeable to Yousry that his co-conspirators were
27 acting in a manner "calculated to influence or affect the conduct
28 of government," so that the requirement of section 2332b(g) (5) (A)
29 is satisfied as to him.

30 But sections 1B1.3(a) (1) (A) and (B) apply to "acts and
31 omissions," while, as noted above, section 2332b(g) (5) (A)
32 describes a motivational requirement, a "specific intent."
33 Chandia, 514 F.3d at 376. We cannot conflate Yousry's acts with
34 his co-defendants' mental states. As one member of this Court
35 has pointed out, "We have never regarded mens rea as an 'act' of

1 the defendant for purposes of the relevant conduct guideline, nor
2 should we." United States v. McHugh, 122 F.3d 153, 158 (2d Cir.
3 1997) (Newman, J., concurring). "Section 1B1.3(a)(1)(A) permits
4 selection of an enhanced guideline for 'acts' committed by the
5 defendant. . . . The natural meaning of 'act' connotes conduct,
6 and the meaning of the guideline should not be strained to
7 include state of mind." Id. Here, too, the terrorism
8 enhancement's motivational requirement, as incorporated by
9 reference to section 2332b(g)(5)(A), is not an "act" or
10 "omission" under section 1B1.3(a)(1)(B). The enhancement is
11 therefore not applicable.

12 We have examined the other arguments made by the
13 government in support of its expansive reading of the "involved"
14 prong of the terrorism enhancement and we find them to be
15 similarly without merit.

16 **b. Section 3553(a) Factors**

17 We conclude, then, that the district court properly
18 calculated Yousry's Guidelines range to be 78 to 97 months. We
19 must therefore determine in light of that range and the totality
20 of the circumstances whether Yousry's sentence of 20 months of
21 imprisonment, imposed following the district court's section
22 3553(a) inquiry, was substantively unreasonable.

23 We need not outline again the nature of the crimes of
24 which Yousry was convicted. We focus instead on the reasons
25 given by the district court in support of its downward variance.

1 First, the court found that Yousry's conduct was
2 "unusual and f[e]ll outside the heartland of material support for
3 terrorist activity." Sent'g Tr. 150. "[A] district court's
4 decision to vary from the Guidelines 'may attract greatest
5 respect when the sentencing judge finds a particular case outside
6 the "heartland" to which the Commission intends individual
7 Guidelines to apply.'" Cavera, 550 F.3d at 192 (quoting
8 Kimbrough, 128 S. Ct. at 574-75). We perceive no basis for
9 concluding that the district court erred in deciding that to be
10 the case with respect to Yousry, particularly because he was
11 acting as a translator, not a lawyer or other professional.

12 Second, the district court found that "no actual harm
13 to victims occurred" although the court was "well aware that such
14 harm is not required and that if such harm occurred the guideline
15 range would be higher." Sent'g Tr. 150. We conclude that it was
16 not unreasonable for the district judge to decide that the fact
17 that no injury occurred in the case mitigated the gravity of
18 Yousry's offense.³³ The criminal law often punishes the

³³ At least in cases like Yousry's where the terrorism enhancement is found not to apply, as a procedural matter, we conclude that a district court may rely on the fact that no harm resulted from the criminal act at issue. The weight that such a factor can bear in any particular instance, however, is an analytically separate, and substantive, question. We conclude that the district court did not procedurally err by considering the absence of harm as one factor relevant to the proper sentence of Yousry. We also conclude that both Sattar's and Yousry's sentences are substantively reasonable -- i.e., that the factors identified by the district court can bear the weight assigned to them. Because we vacate Stewart's sentence as procedurally unreasonable, however, we do not address whether the factors identified by the district court, including the apparent lack of

(continued...)

1 substantive commission of a crime more severely than an attempt
2 to commit the same crime, even when that which separates an
3 attempt from the substantive commission of an offense is not
4 culpability but fortuity. Fortuitous events are not
5 categorically irrelevant to the determination of a just
6 punishment nor is their consideration necessarily inappropriate.
7 As the Supreme Court has recently noted, although "[i]t is
8 unusual to impose criminal punishment for the consequences of
9 purely accidental conduct[,] it is not unusual to punish
10 individuals for the unintended consequences of their unlawful
11 acts." See, e.g., Dean v. United States, 129 S. Ct. 1849, 1857-
12 58 (2009); id. at 1852 (concluding that a defendant who carried a
13 firearm during and in relation to a bank robbery in violation of
14 18 U.S.C. § 924(c)(1)(A) is subject to a 10 year mandatory
15 minimum pursuant to 18 U.S.C. § 924(c)(1)(A)(iii) because his
16 "firearm [was] discharged" in the course of the robbery, even
17 though "the gun [went] off accidentally," was not pointed at
18 anyone when it discharged, and nobody was hurt).

19 Third, the court noted that although Yousry's offenses
20 were "plainly serious," his "role in the offenses was subservient
21 to the others involved" in the conspiracy. Sent'g Tr. 150. The
22 Guidelines were "intended to eliminate national disparity," but

³³(...continued)
substantial harm caused by her criminality, can bear the weight
assigned them. We note, however, our general view that a
district court should be cautious in determining the significance
of the fact that no harm may have occurred where a defendant
intended such harm.

1 "[w]e do not, as a general matter, object to district courts'
2 consideration of similarities and differences among co-defendants
3 when imposing a sentence." United States v. Wills, 476 F.3d 103,
4 109, 110 (2d Cir. 2007) (emphasis omitted), abrogated on other
5 grounds by Kimbrough, 128 S.Ct. at 574-75, as recognized in
6 Cavera, 550 F.3d at 191; accord United States v. Williams, 524
7 F.3d 209, 216 (2d Cir. 2008). We also defer to the district
8 court's conclusion that Yousry's conduct was less culpable than
9 that of his co-conspirators. On this basis, we conclude that the
10 district court did not err by giving weight to this factor.

11 Fourth, the district court found that Yousry "did not
12 engage in the offenses for profit and . . . did not support or
13 believe in the use of violence to achieve what he wanted."
14 Sent'g Tr. 150. These facts mitigate the gravity of the conduct
15 at issue. They also affect consideration of the "history and
16 characteristics of the defendant" and the need to "protect the
17 public from further crimes of the defendant" and to "afford
18 adequate deterrence." 18 U.S.C. § 3553(a). The court concluded
19 that a substantial downward variance was thus justified on the
20 grounds that a lesser degree of punishment than otherwise called
21 for would be sufficient for purposes of deterrence and the
22 protection of the public. As the Gall Court noted, a district
23 court is well-situated to make determinations about the
24 "character of the defendant" and whether, given such a character,
25 the defendant is more or less likely "to return to criminal

1 behavior" or constitute "a danger to society." Gall, 128 S. Ct.
2 at 600-01.

3 The district court did not err in finding that Yousry
4 was not motivated by potential profit and did not believe in the
5 use of violence. Nor did it err in considering these factors
6 while fashioning a non-Guidelines sentence for him. In
7 evaluating culpability, we cannot discount the relevance of the
8 defendant's motivations -- i.e., whether mercenary, see, e.g., 18
9 U.S.C. § 1958 (murder for hire), or born from a commitment to the
10 use of violence. The district court acted well within its
11 discretion in deciding that Yousry was both less dangerous and
12 more easily deterred than had he been acting on a for-hire basis
13 or committed to the use of violence for political ends.

14 Fifth, the district court found that Yousry's
15 conviction made it "doubtful that the defendant could pursue" his
16 career as an academic or translator, and therefore that the need
17 for further deterrence and protection of the public is lessened
18 because the conviction itself "already visits substantial
19 punishment on the defendant." Sent'g Tr. 151. The district
20 court is specifically required by section 3553(a) to consider the
21 "just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).
22 It is difficult to see how a court can properly calibrate a "just
23 punishment" if it does not consider the collateral effects of a
24 particular sentence. Upon careful review of the record and the
25 reasons given by the court, we are convinced that the court did
26 so appropriately.

1 Sixth, the district court found that Yousry provided
2 "extensive . . . cooperation" to the government following the
3 terrorist attacks of September 11, 2001. Sent'g Tr. 151. The
4 court concluded that this cooperation "demonstrates a willingness
5 to help law enforcement and reduces the need for rehabilitation
6 and deterrence." Id. We defer to the district court's
7 evaluation of the extent of Yousry's cooperation. And of course,
8 use of a defendant's cooperation to justify significant variances
9 or departures from the otherwise applicable Guidelines
10 calculations is commonplace. The government argues that Yousry's
11 assistance was not as extensive as the district court found it to
12 be, but we have been given no cause to question the court's
13 relevant findings of fact or the manner in which it accounted for
14 them in sentencing.

15 Seventh, the court found that Yousry "will not be in a
16 situation to commit the offenses of conviction again," because
17 "it is unlikely that he will ever be able to serve as an
18 interpreter in an official capacity." Id. We defer to this
19 finding, too. It is not error for a district court to evaluate,
20 based on the defendant's individual circumstances, the extent of
21 punishment "necessary to deter [him] from engaging in future
22 criminal conduct or to protect the public from his future
23 criminal acts." Gall, 128 S. Ct. at 602; see 18 U.S.C.
24 § 3553(a)(2)(B) & (C).

25 The district court did not, of course, assign precise
26 weights to particular factors. Doing so would presuppose "the

1 existence of some ascertainable method of assigning percentages
2 to various justifications," and would constitute a species of
3 "mathematical approach" which has been expressly disavowed by the
4 Supreme Court as "a classic example of attempting to measure an
5 inventory of apples by counting oranges." Gall, 128 S. Ct. at
6 596.

7 In evaluating the ultimate substantive reasonableness
8 of Yousry's sentence, we must determine, under the totality of
9 the circumstances, whether these various factors can "bear the
10 weight" assigned to them by the district court. We are satisfied
11 that they can. We are equally satisfied that the district court
12 "consider[ed] the extent of the deviation and ensure[d] that the
13 justification [was] sufficiently compelling to support the degree
14 of variance." Id. at 597.

15 In conducting our review, we are further satisfied that
16 the district court did not ignore the Guidelines or "treat them
17 merely as a body of casual advice." Cavera, 550 F.3d at 189
18 (internal quotation marks omitted). Even were we inclined to
19 think that the district court did not appreciate the weight of
20 the Guidelines -- which, as we say, we are not -- in light of all
21 of the foregoing, including the court's long-term and intimate
22 involvement with these proceedings, any such conclusion would be
23 purely a matter of surmise on our part. See Rita, 551 U.S. at
24 357-58 (noting that the sentencing judge had "greater familiarity
25 with[] the individual case and the individual defendant before
26 him than the Commission or the appeals court"); see also Gall,

1 128 S. Ct. at 597. The district court did not abuse its
2 discretion in sentencing Yousry.

3 2. Sattar's Sentence. The district court calculated
4 Sattar's total offense level to be 43 and his criminal history
5 category to be VI, for a Guidelines "range" of life imprisonment.
6 But in conducting its own independent review, as guided by
7 section 3553(a), the district court concluded that such a
8 sentence would be "seriously disproportionate" to the offense.
9 Sent'g Tr. 35. The court imposed a sentence of 24 years (288
10 months) of imprisonment, to be followed by five years of
11 supervised release.

12 **a. Guidelines Calculation**

13 The district court calculated Sattar's sentence, as it
14 did Yousry's, under the November 2000 Guidelines. The court
15 ultimately adopted the recommendations of the Probation
16 Department in making its Guidelines calculation, except insofar
17 as the district court added enhancements based on Sattar's
18 obstruction of justice.

19 i. Enhancements. Sattar's Guidelines "range" of
20 life imprisonment was arrived at based in part on the sentencing
21 court's determination that the terrorism enhancement applied to
22 both Sattar's Count-Two and Count-One conduct. The district
23 court also enhanced Sattar's sentence on the ground that he
24 obstructed justice. See U.S.S.G. § 3C1.1.

25 ii. Departures. Sattar moved for a downward
26 departure based on the conditions of his confinement. The

1 district court recognized that it was able to depart under the
2 Guidelines for severe conditions of detention, but "because thus
3 far th[ose conditions] reflect only strict security measures
4 rather than an abuse of those measures," it declined to do so.
5 Sent'g Tr. 33. Instead, the court concluded that it would take
6 Sattar's conditions of confinement into account in considering
7 the section 3553(a) factors.

8 **b. Section 3553(a) Factors**

9 The district court began its section 3553(a) analysis
10 with a correct calculation of the applicable Guidelines "range"
11 -- life imprisonment. The court then imposed the non-Guidelines
12 sentence of 24 years' imprisonment, for which it gave three
13 principal reasons.

14 First, the court concluded that the terrorism
15 enhancement overstated the seriousness of Sattar's crime by
16 transforming a Guidelines range of 97 to 121 months to life
17 imprisonment. The court found that the otherwise-applicable
18 Guideline range was "relatively low" because Sattar was convicted
19 of conspiracy to murder and not of murder itself, and that the
20 terrorism enhancement failed to account for the fact that "no
21 injury actually occurred in this case." Sent'g Tr. 35. The
22 district court noted that a variance downward from a Guidelines
23 range driven upward by the enhancement is permissible when the
24 enhancement "prevents the penalty from fitting the crime, based
25 on the facts of th[e] record." Id. at 35-36 (citing Mandhai, 375
26 F.3d at 1249).

1 Second, the terrorism enhancement put Sattar in the
2 highest criminal history category, VI, "without a single past
3 criminal history point." Id. at 36. The district court
4 concluded that such a jump "overstates [Sattar's] past conduct
5 and the likelihood that the defendant after a substantial period
6 of incarceration would commit further crimes." Id.

7 Third, the court noted that Sattar had been under
8 "extremely restrictive conditions of confinement for 4-1/2
9 years," and there "is every reason to expect that his conditions
10 of confinement will continue to be substantially more severe than
11 the average prisoner." Id. at 37. These conditions include
12 being kept in a cell for 23 hours a day and under constant
13 surveillance. As a result, the court concluded, "the punitive
14 aspects of the defendant's confinement are increased and the
15 deterrent effect of the defendant's confinement is also
16 increased." Id.

17 The court further noted that, for reasons explained in
18 part under seal, a downward variance is warranted based on
19 factors relevant to the history and characteristics of the
20 defendant and the need to afford adequate deterrence.³⁴ The
21 district court observed that based on the totality of the
22 circumstances and on its review of cases presented by the
23 government as comparators, Sattar's sentence of 24 years'

³⁴ We have reviewed the document under seal. See Sattar
Statement of Reasons, Oct. 26, 2006.

1 incarceration does not promote unwarranted sentencing
2 disparities.

3 **c. Analysis**

4 The government's principal argument on cross-appeal is
5 that Sattar's sentence is substantively unreasonable in light of
6 his conduct and "long-term dedication to violence." Gov't Reply
7 Br. 39. We have no quarrel with the government as to the nature
8 and quality of Sattar's conduct. Neither, to any significant
9 extent, did the district court. It considered, at length, the
10 seriousness of Sattar's crimes.

11 "[A] sentence outside the Guidelines carries no
12 presumption of unreasonableness." Irizarry v. United States, 128
13 S. Ct. 2198, 2202 (2008). "[T]he Guidelines are only one of the
14 factors to consider when imposing sentence" Gall, 128 S.
15 Ct. at 602. Taking those precepts as a starting point, we are
16 satisfied that in fashioning a non-Guidelines sentence, the
17 district court did not clearly err in according weight to the
18 factors it identified. As we recently noted in Cavera, "at the
19 procedural part of review, we will not categorically proscribe
20 any factor 'concerning the background, character, and conduct' of
21 the defendant, with the exception of invidious factors." Cavera,
22 550 F.3d at 191. The object is always to fashion a sentence
23 "sufficient, but not greater than necessary" to accomplish the
24 purposes set forth in 18 U.S.C. 3553(a). And it was not clear
25 error for the district court to conclude that a criminal history

1 category of VI significantly overstated Sattar's criminal history
2 and likelihood of committing further offenses.

3 We have recognized that "the Sentencing Commission had
4 a rational basis for creating a uniform criminal history category
5 for all terrorists under [U.S.S.G.] § 3A1.4(b), because even
6 terrorists with no prior criminal behavior are unique among
7 criminals in the likelihood of recidivism, the difficulty of
8 rehabilitation, and the need for incapacitation." United States
9 v. Meskini, 319 F.3d 88, 92 (2d Cir.), cert. denied, 538 U.S.
10 1068 (2003). But in the same virtual breath, we said, "[a] judge
11 determining that § 3A1.4(b) over-represents 'the seriousness of
12 the defendant's past criminal conduct or the likelihood that the
13 defendant will commit other crimes' always has the discretion
14 under § 4A1.3 to depart downward in sentencing. U.S.S.G.
15 § 4A1.3." Id.

16 And even with enhancements of magnitude -- i.e., those
17 that "sharply increase the recommended sentences" -- there still
18 may be "a wide variety of culpability amongst defendants."
19 Cavera, 550 F.3d at 192. There may therefore be "different
20 sentences based on the factors identified in § 3553(a)." Id.
21 Sattar's crimes are indeed grave; he may well be the most
22 culpable of these defendants. But the district court has a
23 responsibility, inter alia, "to avoid unwarranted sentence
24 disparities among defendants with similar records who have been
25 found guilty of similar conduct," 18 U.S.C. § 3553(a)(6).
26 Perhaps all who merit this enhancement are culpable and dangerous

1 -- but some among them are more culpable, more dangerous, with
2 crimes more serious, than others. It is the district court that
3 is primarily charged with the responsibility for making such
4 distinctions.

5 The district court is also in the best position to make
6 an individual determination about the "history and
7 characteristics" of a particular defendant, and to adjust the
8 individualized sentence accordingly. See 18 U.S.C. § 3553(a);
9 cf. U.S.S.G. § 4A1.3 (permitting downward departure where "the
10 court concludes that a defendant's criminal history category
11 significantly over-represents the seriousness of a defendant's
12 criminal history or the likelihood that the defendant will commit
13 further crimes"). Upon examining the reasons the district court
14 gave, we have no reason not to defer to its assessment here.

15 It was not unreasonable for the district court to
16 conclude that the severity of the conditions of confinement would
17 increase the severity of the punishment and the amount of
18 deterrence associated with a given term of imprisonment in light
19 of the particular conditions of confinement under which Sattar is
20 incarcerated. The district court did not abuse its discretion in
21 varying downward based on those conditions here. We think that
22 the factors upon which the district court relied in determining
23 Sattar's appropriate sentence can "bear the weight" the district
24 court assigned to them. Cavera, 550 F.3d at 191.

1 We note, finally, that the court sentenced Sattar to
2 more than twice what the maximum Guideline sentence would have
3 been without the terrorism enhancement.

4 The sentence thus adequately reflected the severity of
5 the crime.

6 3. Stewart's Sentence. Before sentencing Stewart, the
7 district court calculated her offense level under the November
8 2000 Guidelines to be 41, her criminal history category to be VI,
9 and her Guidelines range to be 360 months, or 30 years, the
10 statutory maximum. The court concluded, however, that a sentence
11 of 28 months' imprisonment was sufficient but no greater than
12 necessary to accomplish the purposes set forth in 18 U.S.C.
13 § 3553(a).

14 **a. Guidelines Calculations**

15 i. Enhancements. Over Stewart's objection, the
16 district court concluded that the terrorism enhancement of
17 section 3A1.4 applied because she had committed a federal crime
18 of terrorism. The enhancement was triggered in part by the
19 district court's finding that Stewart's actions were "calculated
20 to affect the conduct of the Egyptian government through
21 intimidation and coercion." Sent'g Tr. 108. The district court
22 noted that Stewart's "conduct cannot be found to be outside the
23 heartland of the enhancement," but stated that it nonetheless
24 would "take all of the defendant's arguments [as to why the
25 enhancement did not properly apply to her conduct] into account
26 in performing the analysis under Section 3553(a)." Id.

1 The district court noted that the terrorism enhancement
2 automatically placed Stewart in criminal history category VI.
3 The court appeared to accept Stewart's argument that the
4 enhancement overstated the seriousness of her past conduct or the
5 likelihood that she would commit further crimes. Instead of
6 adjusting the criminal history in the context of the Guidelines
7 calculations themselves, however, the court found this to be "one
8 of the rare cases" under United States v. Crosby, 397 F.3d 103,
9 112 (2d Cir. 2005), where it would be more appropriate to
10 determine the extent of the downward adjustment in the context of
11 the section 3553(a) analysis. Sent'g Tr. 109.³⁵

12 The government also sought an enhancement of Stewart's
13 sentence on the ground that she obstructed justice. The
14 Guidelines provide that where a defendant "willfully obstructed
15 or impeded, or attempted to obstruct or impede, the
16 administration of justice with respect to the investigation,
17 prosecution, or sentencing of the instant offense of conviction"
18 and where the obstructive conduct related to the offense of
19 conviction or a closely related offense, that the applicable
20 Guidelines should be enhanced by 2 levels. U.S.S.G. § 3C1.1.
21 The government argued that Stewart committed perjury by

³⁵ In Crosby, we said that "a sentencing judge will normally have to determine the applicable Guidelines range" but that precise calculation of the range may not be necessary in "situations . . . where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies." Crosby, 397 F.3d at 111-12.

1 testifying "that she understood that there was a bubble built
2 into the SAMs whereby the attorneys could issue press releases
3 containing Abdel Rahman's statements as part of their
4 representation of him" and testifying about her purported lack of
5 knowledge of Taha. Sent'g Tr. 111. As we have noted, Taha was a
6 follower of Abdel Rahman and a military leader in al-Gama'a who
7 claimed responsibility for the November 1997 massacre at Luxor,
8 and was allegedly part of the Count-Two conspiracy. The district
9 court noted that there was "evidence to indicate that [Stewart's]
10 statements were false statements." Id. It concluded, however,
11 that it was "unnecessary to reach [the question] whether the
12 defendant knowingly gave false testimony with the intent to
13 obstruct the proceedings" for two reasons: First, the Guidelines
14 calculation already provided for the statutory maximum permitted
15 by the statutes of conviction, and second, a non-Guidelines
16 sentence was, in the estimation of the court, "reasonable and
17 most consistent with the factors set forth in Section 3553(a)."
18 Id. at 111-12.

19 ii. Departures. Stewart sought a downward
20 departure pursuant to section 5H1.4 of the Guidelines, which
21 provides that while "[p]hysical condition . . . is not ordinarily
22 relevant in determining whether a sentence should be outside the
23 applicable guideline range," nonetheless "an extraordinary
24 physical impairment may be a reason to impose a sentence below
25 the applicable guideline range." U.S.S.G. § 5H1.4. Stewart
26 proffered substantial documentation of serious illness. As with

1 Stewart's criminal history calculations, the district court
2 concluded that it "[did] not have to reach the question of
3 whether [Stewart's] medical condition, given her age and
4 continuing treatment, is sufficient in itself to warrant a
5 departure from the guidelines," because it would take that
6 condition into account in making its determination under section
7 3553(a). Sent'g Tr. 110.

8 The district court declined to adjust the Guidelines
9 calculations based on Stewart's argument that she committed her
10 crime in order to avoid a perceived greater harm as set forth in
11 "Lesser Harms" policy statement of the Guidelines. See U.S.S.G.
12 § 5K2.11. Stewart argued before the district court that her
13 conduct "was the product of her perception that her client's
14 health and well-being [were] seriously jeopardized by his
15 continued imprisonment in the United States." Stewart Sent'g Br.
16 44-45. Under the policy statement, where a defendant "commit[s]
17 a crime in order to avoid a perceived greater harm," "a reduced
18 sentence may be appropriate, provided that the circumstances
19 significantly diminish society's interest in punishing the
20 conduct, for example, in the case of a mercy killing." U.S.S.G.
21 § 5K2.11. However, "[w]here the interest in punishment or
22 deterrence is not reduced, a reduction in sentence is not
23 warranted." Id. Here, the district court found this case not to
24 be one where the interest in punishment or deterrence is reduced.

25 The policy statement further provides that a reduction in the
26 otherwise applicable sentence might be appropriate where "conduct

1 may not cause or threaten the harm or evil sought to be prevented
2 by the law proscribing the offense at issue" such as "where a war
3 veteran possessed a machine gun or grenade as a trophy, or a
4 school teacher possessed controlled substances for display in a
5 drug education program." U.S.S.G. § 5K2.11. But the court
6 declined to conclude that Stewart's conduct did not cause or
7 threaten the harm sought to be prevented by the statutes that
8 Stewart violated.

9 Stewart also moved for a departure on the ground that
10 her conduct was "aberrational." A Guidelines policy statement
11 provides that "[a] sentence below the applicable guideline range
12 may be warranted in an extraordinary case if the defendant's
13 criminal conduct constituted aberrant behavior." U.S.S.G.
14 § 5K2.20. But the court, noting that Stewart's conduct was
15 "committed over an extended period of time, involv[ing] repeated
16 acts of deception, and . . . significant planning," Sent'g Tr.
17 110, concluded that such a departure would be inappropriate, and
18 declined to grant it.

19 The district court thus reached its final Guidelines
20 calculation, using the November 2000 Guidelines, with a total
21 offense level of 41, a criminal history category of VI, and
22 therefore a Guidelines "range" of 360 months, the statutory
23 maximum. The government sought a term of life imprisonment;
24 Stewart sought a non-incarceratory sentence.

1 **b. Section 3553(a) Factors**

2 Based on its section 3553(a) analysis, the district
3 court's sentence substantially varied from the applicable
4 Guidelines range.

5 As the starting point for its section 3553(a) analysis,
6 the court addressed the applicability of the terrorism
7 enhancement, which "while correct under the guidelines, would
8 result in an unreasonable result . . . and produce a guideline
9 range about quadruple the range [that would otherwise apply]
10 without the enhancement." Sent'g Tr. 114. The district court
11 then observed:

12 First, that Stewart's was an "atypical case" for the
13 terrorism enhancement inasmuch as "the thrust of the violation
14 was the provision of a co-conspirator to a terrorist conspiracy,"
15 id. at 113; second, as with Sattar, that the structure of the
16 terrorism enhancement prevented the Guidelines from taking into
17 account the fact that no victim was harmed as a result of the
18 offense as charged; and third, again as with Sattar, that the
19 enhancement operated to prevent the Guidelines from taking into
20 account Stewart's actual criminal history. By virtue of the
21 terrorism enhancement, Stewart was automatically classified as
22 within criminal history category VI, the highest possible
23 category, whereas if her sentence were based on her actual
24 criminal history, she would have been classified in category I,
25 the lowest possible category.

1 The court therefore concluded that the terrorism
2 enhancement was "dramatically unreasonable" and "overstates the
3 seriousness of [her] past conduct and the likelihood that [she]
4 will repeat the offense." Id. Stewart "has no criminal history
5 and yet is placed in the highest criminal history category equal
6 to that of repeat felony offenders for the most serious offenses
7 including murder and drug trafficking." Id. at 113-14. The
8 criminal history category was inappropriate, the court
9 determined, in light of "the likelihood of recidivism, the
10 difficulty of rehabilitation and the need for incapacitation."
11 Id. at 114.

12 The court found that Stewart's opportunity to repeat
13 "the crimes to which she had been convicted will be nil" because
14 she "will lose her license to practice law" and "will be forever
15 separated from any contact with Sheikh Omar Abdel Rahman." Id.
16 Loss of her license to practice law both removes "the occasion
17 for her offenses" and "is itself a punishment." Id. at 116.

18 The district court viewed Stewart's personal
19 characteristics as "extraordinary" and thought they "argue[d]
20 strongly in favor of a substantial downward variance." Id. at
21 114. The court described her as a dedicated public servant who
22 had, throughout her career, "represented the poor, the
23 disadvantaged and the unpopular, often as a Court-appointed
24 attorney," thereby providing a "service not only to her clients
25 but to the nation." Id. at 115-16. And "[h]aving spent her

1 professional career often representing the poor, she is now, at
2 the end of her career, financially destitute." Id. at 115.

3 The court also took into account Stewart's ill health
4 -- she had, for example, suffered from cancer, for which she had
5 undergone surgery and radiation therapy, and for which there is a
6 significant chance of recurrence. The district court was of the
7 view that in light of those conditions and her age, 67 years old
8 at the time, prison would be "particularly difficult" for her,
9 and that at her age, moreover, her sentence would "represent a
10 greater portion of her remaining life than for a younger
11 defendant and provide increased punishment." Id. at 117.

12 c. Analysis

13 i. The Scope of Review. The government's
14 principal argument on appeal is that in light of the crimes of
15 which Stewart stands convicted, her sentence was substantively
16 unreasonable. Section 3553(a) instructs that the sentence must
17 "reflect the seriousness of the offense, . . . promote respect
18 for the law, and . . . provide just punishment for the offense"
19 and "afford adequate deterrence to criminal conduct." 18 U.S.C.
20 § 3553(a)(2)(A) & (B). Our review for substantive reasonableness
21 is a "particularly deferential form of abuse-of-discretion
22 review." Cavera, 550 F.3d at 188 n.5 (citing Gall 128 S. Ct. at
23 591). But our review must also be "meaningful." Gall, 128 S.
24 Ct. at 597; cf. Gerard E. Lynch, Letting Guidelines Be Guidelines
25 (And Judges Be Judges), Ohio St. J. Crim. L. Amici: Views From
26 the Field (Jan. 2008), at <http://osjcl.blogspot.com/> ("[W]e

1 should let (appellate) judges be judges . . . , performing their
2 traditional function of reining in excess and gradually
3 developing a 'common law' of what is and is not sensible."
4 (emphasis deleted)).

5 Like the district court, we are impressed by the
6 factors that figured in Stewart's modest sentence -- particularly
7 her admirable history of providing, at no little personal cost to
8 herself, proficient legal services in difficult cases to those
9 who could not otherwise afford them. We think it noteworthy,
10 moreover, that the last of the acts for which Stewart is being
11 punished occurred a short time before the September 11 attacks on
12 the United States. That carnage might have raised in her, as it
13 surely has in many or most of us, a heightened awareness of and
14 sensitivity to the imminent dangers of terrorism and the possible
15 scope of the deadly capabilities of the terrorists with whom she
16 was dealing.

17 We also recognize, as did the district court, that the
18 terrorism enhancement may apply to persons who are culpable in
19 substantially different degrees; that Stewart's culpability may
20 well be understood to be less than Sattar's; and that the
21 district court may differentiate between different levels of
22 culpable conduct that nonetheless trigger the same substantial
23 enhancement. Yet Stewart's sentence is strikingly low in light
24 of what the district court correctly described as the
25 "irreducible core of [her] extraordinarily severe criminal
26 conduct," Sent'g Tr. 118, "which was committed over an extended

1 period of time, involved repeated acts of deception, and
2 involve[d] significant planning," id. at 110.

3 We are obliged to "patrol the boundaries of [the]
4 reasonableness" of a sentence. Cavera, 550 F.3d at 191. While
5 we will not lightly deem unreasonable a sentence imposed by the
6 judge who has "access to, and greater familiarity with, the
7 individual case and the individual defendant before him than the
8 [Sentencing] Commission or the appeals court," Rita, 551 U.S. at
9 357-58, we think that in light of the fact Stewart used her
10 privileged status as a lawyer to facilitate her serious violation
11 of the law, and possibly committed perjury at trial in an attempt
12 to avoid punishment for her conduct, her sentence at least tests
13 those "boundaries."

14 ii. Stewart's Abuse of Her Status As a Member of
15 the Bar. Stewart argues that she did no more than serve as a
16 zealous advocate for her client. That belief, if indeed she
17 harbored it, gave her no license to violate the law. Stewart's
18 actions tended ultimately and ironically to subvert the same
19 fundamental right of which she took advantage -- the
20 constitutional right to counsel -- by making it less likely that
21 other incarcerated persons will have the same level of access to
22 counsel that her client was given.

23 The district court seemed to appreciate that fact,
24 noting that Stewart "abused her position as a lawyer" in
25 committing her crimes. Sent'g Tr. 118. The court did not,
26 however, explain how and to what extent the sentence reflected

1 the seriousness of the crimes of conviction in light of the fact
2 that Stewart was engaged as a member of the bar when she
3 committed them.

4 The question therefore remains whether, because she was
5 an experienced and dedicated lawyer acting as such when she broke
6 the law in the manner that she did, her punishment should have
7 been greater than it was.³⁶

8 iii. A Comparison of Yousry's and Stewart's
9 Sentences. A comparison of Stewart's and Yousry's offense
10 conduct serves to highlight the seriousness of Stewart's crimes
11 and the seemingly modest sentence she received for it. Unlike
12 Yousry, Stewart publicly disseminated "potentially lethal"
13 statements on Abdel Rahman's behalf. Unlike Yousry, Stewart was
14 convicted of making false statements to the government when she
15 agreed to abide by the terms of the SAMs. Unlike Yousry, Stewart
16 was a member of the bar and therefore acting as an officer of the

³⁶ The district court did not address whether Stewart "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense," meriting a two-level enhancement under the Guidelines. See U.S.S.G. § 3B1.3; see also United States v. Reich, 479 F.3d 179, 192 (2d Cir.), cert. denied, 128 S.Ct. 115 (2007) (concluding that district court did not err in applying enhancement where the defendant "used his special skills as a lawyer" to facilitate the crime). Judge Walker, in his opinion, criticizes the district court for "fail[ing] to explain why an enhancement for abuse of trust is not plainly appropriate in this case." Op. of J. Walker at [35:19-20]. But the government did not specifically invoke section 3B1.3 in its sentencing memorandum or on appeal. We therefore think it hard to fault the district court on this score. We nonetheless share many of Judge Walker's concerns in this regard. See id. at [35:19-38:9]. The district court may address this issue on remand.

1 court. See, e.g., United States v. Seltzer, 227 F.3d 36, 41 (2d
2 Cir. 2000). She was legally knowledgeable, highly experienced,
3 and politically sophisticated, a lawyer acting in her
4 professional capacity; he was a student working for her and Abdel
5 Rahman as a translator.

6 Yet Yousry's sentence was 20 months; Stewart's only
7 eight months longer.

8 iv. Stewart's Alleged Perjury. Also unlike
9 Yousry, Stewart may well have obstructed justice at trial. The
10 government, supported by substantial evidence, argued that
11 Stewart committed perjury at trial. The district court
12 summarized the argument as follows:

13 First, the government contends that Ms.
14 Stewart knowingly gave false testimony when
15 she testified that she understood that there
16 was a bubble built into the SAMs whereby the
17 attorneys could issue press releases
18 containing Abdel Rahman's statements as part
19 of their representation of him.

20 The government also contends that Ms. Stewart
21 testified falsely when she denied knowing who
22 Taha was until learning about him in the
23 course of the trial except for an article
24 that she came across in her representation of
25 Yasir Ahmed.

26 Sent'g Tr. 111. The court, having thus recited the allegations
27 at sentencing, declined to decide the issue.

28 As noted, the district court gave two reasons for not
29 making such a finding. First, it concluded that because
30 Stewart's Guidelines calculations had reached the statutory
31 maximum of 360 months, a finding of obstruction of justice would
32 not have changed the calculation. This would be true if the

1 terrorism enhancement had been applied in Stewart's case, but the
2 district court, after determining that Stewart's conduct was in
3 the enhancement's "heartland," may not have applied it. See
4 infra [124-25]. And even were it true, the question of Stewart's
5 perjury is nonetheless relevant to her sentence pursuant to
6 section 3553. Section 3553(a) requires the district court to
7 impose a sentence "sufficient, but not greater than necessary"
8 to, among other things, promote respect for the law. See 18
9 U.S.C. § 3553(a)(2). Whether Stewart lied to the jury under oath
10 or upon affirmation at her trial is relevant to whether her
11 sentence was "sufficient" under the circumstances.

12 The district court's second reason for declining to
13 determine whether Stewart committed perjury during the course of
14 her testimony was that it had determined that a non-Guidelines
15 sentence was "reasonable and most consistent with the factors set
16 forth in Section 3553(a)." Sent'g Tr. 111-12. But as noted, we
17 think that whether Stewart lied under oath at her trial is
18 directly relevant to whether her sentence was appropriate in
19 light of Section 3553(a). Her willingness as a lawyer knowingly
20 and falsely to affirm her intention to obey the SAMs and then to
21 seek to cover up this knowing violation of the law with
22 perjurious testimony might well, if proven, influence our
23 conclusion as to the propriety of her sentence. Any cover-up or
24 attempt to evade responsibility by a failure to tell the truth
25 upon oath or affirmation at her trial would compound the gravity
26 of her crime.

1 We conclude that by declining to decide whether Stewart
2 committed perjury or otherwise obstructed justice, the district
3 court procedurally erred.

4 v. Effect of Lack of Harm. Noting particularly
5 that the absence of harm was fortuitous and not the result of
6 efforts by Stewart to prevent harm, Judge Walker argues that it
7 was error both procedural and substantive for the district court
8 to use that factor as a basis for downward variance, especially
9 such a large one. The issue is discussed also in Judge
10 Calabresi's opinion. This Court makes no ruling on that issue
11 now, in the circumstances of Stewart's case. We note simply
12 that it is a serious issue to be given consideration by the
13 district court upon reevaluating Stewart's sentence. In view of
14 the fact that the court must resentence, we think it preferable
15 to defer this issue until after it has been reconsidered by the
16 court, upon its consideration of the commentary in the opinions
17 of Judges Walker and Calabresi.

18 vi. The Terrorism Enhancement. The terrorism
19 enhancement is set forth in section 3A1.4 of the Guidelines.

20 Terrorism

21 (a) If the offense is a felony that
22 involved, or was intended to promote, a
23 federal crime of terrorism, increase by 12
24 levels; but if the resulting offense level
25 is less than level 32, increase to level 32.

26
27 (b) In each such case, the defendant's
28 criminal history category from Chapter Four
29 (Criminal History and Criminal Livelihood)
30 shall be Category VI.

31 U.S.S.G. § 3A1.4.

1 Whether or not the district court applied the
2 terrorism enhancement to Stewart in its Guidelines calculation
3 may be subject to disagreement. Without reaching that issue, we
4 nonetheless note that in light of the facts of this case and the
5 judgments of conviction, which we affirm, the terrorism
6 enhancement plainly applies as a matter of law to the district
7 court's calculation of the applicable Guidelines range,
8 irrespective of whether Stewart's behavior was "atypical" and
9 whether it resulted in death or injury,³⁷ factors that may (or
10 may not) be employed in rendering the ultimate sentence.

³⁷ It seems possible that, in fact, the district court rejected the terrorism enhancement based on United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), by deeming this to be one of those cases where it would be more appropriate to determine the extent of the downward adjustment in the context of the section 3553(a) analysis. It may be that this invocation of Crosby led the district court to redetermine an adjusted offense level without application of the terrorism enhancement and then consider, in its section 3553(a) analysis, whether Stewart's personal characteristics warranted a variance below the sentencing range calculated without the enhancement. If the district court ultimately sentenced Stewart without "precise calculation of the applicable Guidelines range," Crosby, 397 F.3d at 112, it would, we conclude, be error.

It is possible to read the record to indicate that although, in compliance with Supreme Court instructions, the district court began its Guidelines analysis by correctly calculating an adjusted offense level of 41 with a resulting sentencing range of 360 months, see Gall, 128 S. Ct. at 596, the court nonetheless treated the terrorism enhancement as inapplicable and redetermined a sentencing range of 78 to 97 months without that enhancement. Perhaps the court then relied on its view of Stewart's personal characteristics to justify a variance substantially below this redetermined range. This too would be error because the district court, by effectively recalculating the Guidelines range, would have decided, in substance, that the terrorism enhancement was inapplicable to Stewart's Guidelines calculation.

1 Whether or not the district court gave appropriate
2 consideration in its section 3553(a) analysis to whether support
3 of terrorism is an aggravating factor in this case, similarly,
4 may be subject to disagreement. Judge Walker argues that the
5 district court's sentence was deficient in this respect, and
6 constituted both procedural and substantive error. But we need
7 not decide whether error in this respect, if any, would be
8 procedural or substantive. Without reaching these issues, and
9 without suggesting that the district court was bound to follow
10 either the Guidelines generally or any Guidelines enhancement
11 specifically in imposing its section 3553(a) sentence, we note
12 that the district court's section 3553(a) analysis must include
13 consideration of whether support of terrorism is an aggravating
14 factor in light of the court's obligation to consider "the
15 nature and circumstances of [Stewart's] offense" and "the need
16 for the sentence imposed . . . to reflect the seriousness of the
17 offense." 18 U.S.C. § 3553(a)(1)-(2)(A).

18 **d. Remand**

19 A district court's failure to find particular facts
20 will in no way impede our review in some, perhaps in most,
21 situations; this, however, is not one of them. Especially in
22 light of the absence of a finding that Stewart did not commit
23 perjury at trial or otherwise obstruct justice, we think it
24 preferable not to determine whether her sentence was
25 substantively reasonable.

1 We therefore remand this matter to the district court
2 for resentencing, in the course of which we direct the court to
3 determine the issue of perjury and if it finds such perjury, to
4 resentence Stewart so as to reflect that finding. The district
5 court should also consider whether Stewart's conduct as a lawyer
6 triggers the special-skill/abuse-of-trust enhancement under the
7 Guidelines, see U.S.S.G. § 3B1.3, and reconsider the extent to
8 which Stewart's status as a lawyer affects the appropriate
9 sentence. Finally, the district court should further consider
10 the overall question whether the sentence to be given is
11 appropriate in view of the magnitude of the offense, which the
12 court itself has explicitly recognized. Although we do not
13 preclude the district court's election to continue to impose a
14 non-Guidelines sentence, we do require that such a sentence,
15 selected after the reconsideration we have directed, begin with
16 the terrorism enhancement and take that enhancement into
17 account. We have serious doubts that the sentence given was
18 reasonable, but think it appropriate to hear from the district
19 court further before deciding the issue.

20 We have identified actions taken or not taken by the
21 district court in imposing sentence that we conclude constituted
22 procedural error and thus require resentencing. Other issues
23 are raised by Judge Walker, who finds that they resulted in
24 procedural error and substantive unreasonableness, and addressed
25 by Judge Calabresi in response. To the extent we did not
26 discuss or rule on those issues in this majority opinion, our

1 silence should not be construed by the district court, or by
2 others relying on this opinion, to mean that the majority has
3 adopted Judge Calabresi's views or rejected Judge Walker's. We
4 have not.

5 Although we find no procedural or substantive error in
6 connection with the sentencing of Sattar and Yousry, we
7 nonetheless remand their cases, too. We conclude that, inasmuch
8 as the interrelationship among the sentences of the co-
9 defendants is a principal consideration as to a proper sentence
10 of Stewart, the district court should have the ability, if not
11 the obligation, to resentence them as well.

12 After the district court completes the resentencing,
13 jurisdiction may be restored to this Court by letter from any
14 party, and the Office of the Clerk of this Court shall set an
15 expeditious briefing schedule and refer the matter to this panel
16 for further review.

17 CONCLUSION

18 For the foregoing reasons, we affirm the conviction of
19 Stewart, but remand this cause to the district court for
20 resentencing of Stewart, see United States v. Phillips, 431 F.3d
21 86, 90 (2d Cir. 2005), and resentencing of Sattar or Yousry or
22 both if the district court determines that they should receive
23 different sentences in light of the sentence imposed on Stewart.
24 Inasmuch as the current sentences will remain in effect as to
25 Stewart and Yousry until the district court resentsences Stewart
26 -- and Sattar or Yousry if it decides to do so -- and in light

1 of the fact that we affirm on all issues related to the guilt of
2 all defendants, the district court is directed to order Stewart
3 and Yousry to surrender forthwith to begin serving their terms
4 of incarceration.

1 CALABRESI, *Circuit Judge*, concurring:

2
3 I join Judge Sack's opinion in full. I write separately to comment on our decision with
4 respect to Stewart's sentence. In doing so, I do not wish to express any disagreement with the
5 majority opinion, which has withheld a final judgment on various aspects of Stewart's sentence
6 in light of the decision to remand. Where I express views on which the majority opinion is silent,
7 I write only for myself.

8 When a judge of extraordinary ability and a well-earned reputation for exceptional
9 judgment has spent as much time on a case like this, making many decisions of tremendous
10 difficulty—which on review we are all in agreement were correct and wisely done—even the
11 usual deference that the Supreme Court indicated should be paid to the district court's sentencing
12 must constitute an understatement. This is especially so with respect to any notions as to the
13 substantive reasonableness of a sentence. We may find that there are some procedural or
14 technical matters that warrant more consideration by the district judge, such as the question of
15 whether Stewart committed perjury and the relevance of this in determining an appropriate
16 sentence, given the district court's treatment of the terrorism enhancement. But for us—who
17 have not been involved in the case and do not know all the backs and forths, some of which may
18 even be best left not fully articulated—to second guess the district court's judgment seems to me
19 to be precisely what both the Supreme Court and our court sitting *en banc* in *United States v.*
20 *Cavera*, 550 F.3d 180, 194 (2d Cir. 2008), have said we should not do. I join the majority
21 opinion because I understand it to avoid second guessing, and because I believe it wisely
22 provides the district court with an opportunity to explain further and perhaps to modify the
23 sentence it has imposed. I write here to explore some of the principal issues on which this panel

1 is divided and to give fuller expression to the importance of having appellate courts appreciate
2 the limited, though still important, institutional role we play, particularly in a case such as this
3 one, where the temptation to go beyond that role is so great.¹

4 I.

5 After calculating Stewart's sentence under the Guidelines, the district court applied the §
6 3553(a) factors and concluded that the effect of the terrorism enhancement, "while correct under
7 the guidelines, would result in an unreasonable result" in this particular case. Sent'g Tr. 114.
8 The district court arrived at this conclusion based on, *inter alia*, (1) what it described as the
9 somewhat atypical nature of Stewart's case for the imposition of the terrorism enhancement, and
10 (2) the lack of evidence that any victim was harmed as a result of the charged offense.² *Id.* at

¹ Judge Walker, in his partial dissent, suggests that I believe some judges are infallible and beyond reproach. Far from it; were that my view, I could not join the majority opinion in remanding Stewart's sentence. Indeed, I agree completely with the implication in Judge Walker's statement that all judges, including distinguished appellate ones, can become so preoccupied with a case as to lose perspective. My point is simply that before we assume that a very able district judge has erred substantively in sentencing, we should be especially cautious both in our language and in our judgments, and if we have doubts we should give that judge every opportunity to explain the sentence imposed.

² The district court also found that the terrorism enhancement's increase of Stewart's Criminal History Category from I to VI—the result of the enhancement's "horizontal" component—was "dramatically unreasonable in [her] case" because it "overstate[d] the seriousness of [her] past conduct and the likelihood that [she would] repeat the offense." Sent'g Tr. 113. Because no member of this panel suggests this determination was procedural error, I do not focus on it. It is worth keeping in mind, however, that multiple considerations informed the district court's view that the terrorism enhancement—which "produce[d] a guideline range about quadruple the range without that enhancement," *id.* at 114—resulted in a sentencing range for Stewart that was too high. For that reason, some of Judge Walker's contentions—such as that the majority opinion, and my concurrence especially, "erroneously permit[] the district court to eliminate the enhancement altogether primarily because [harm did not result]," Op. of J. Walker at [28], or that the district court "[r]emov[ed]" Stewart from the "terrorism spectrum" because of its view that her crime was atypical, *id.* at [26]—strike me as misleading. Furthermore, in doing this, and

1 113. While I agree with the majority opinion that these grounds do not render the terrorism
2 enhancement inapplicable in determining the relevant Guidelines range, I do believe that each
3 ground, if properly articulated, is, as a procedural matter, within the district court's discretion to
4 consider in its application of the § 3553(a) factors. What is more, I would be extremely reluctant
5 to disturb a district court's careful effort to look to the unique circumstances of a defendant like
6 Stewart and arrive at an individualized sentence where the Guidelines recommendation is
7 controlled by an undeniably broad enhancement (or reduction) like the terrorism enhancement.

8 **A.**

9 When the terrorism enhancement is applied, it has dramatic consequences on the
10 applicable Guidelines range because it automatically increases both the offense level of a crime
11 and the defendant's Criminal History Category. In Stewart's case, for example, the
12 recommended sentence range without the enhancement was 78 to 97 months, while imposition of
13 the enhancement resulted in a recommended sentence of 360 months, the statutory maximum.
14 Yet as both the majority opinion and Judge Walker, in his partial dissent, recognize, the terrorism
15 enhancement casts a very broad net. In this case, that breadth was compounded by the fact that
16 the "federal crime of terrorism" for which Stewart was convicted, i.e. the provision of material
17 support, itself covers a wide range of conduct of varying degrees of culpability ranging from the
18 supply of lodging to the contribution of "weapons, lethal substances, [and] explosives." See 18

elsewhere in his opinion, Judge Walker seems to label as *procedural errors* decisions that are normally considered substantive judgments about the amount of weight a particular factor can bear—judgments that we are to review under a deferential abuse-of-discretion standard after taking into the account "the totality of the circumstances." See *Gall v. United States*, 128 S. Ct. 586, 597 (2007).

1 U.S.C. § 2339A. When a Guidelines recommendation has such dramatic consequences and yet
2 covers a multitude of sins, unusually broad sentencing discretion in the district court is essential.
3 Indeed, it must be so to comply with the Supreme Court’s remedial holding in *United States v.*
4 *Booker*, 543 U.S. 220, 244 (2005).

5 We articulated this precise point in *Cavera*, recognizing that “some Guidelines
6 enhancements and reductions apply without modulation to a wide range of conduct.” 550 F.3d at
7 192. We identified as examples several financial crimes where the recommended sentence under
8 the Guidelines varies dramatically according to the money involved, but the culpability of an
9 individual defendant might not be captured accurately by a single variable like financial impact.
10 *Id.* Perhaps more closely analogous to the terrorism enhancement, we pointed to the Armed
11 Career Criminal Guidelines, under which the recommended sentences for firearms offenses
12 increase sharply if the defendant has a prior conviction for a “crime of violence”—an expansive
13 term that places crimes like attempted burglary of a dwelling under the same umbrella as crimes
14 like murder and rape. *See id.* (citing U.S.S.G. § 2K2.1(a)). The terrorism enhancement in its
15 breadth of coverage is akin to these examples from *Cavera*. The majority opinion understands
16 this when it says that the terrorism enhancement “may apply to persons who are culpable in
17 substantially different degrees,” and that the district court “may differentiate between different
18 levels of culpable conduct that nonetheless trigger the same substantial enhancement.” Maj. Op.
19 at [119].

20 We indicated in *Cavera* that when a district court faces such over- and under-inclusive
21 Guidelines recommendations and when, after considering the § 3553(a) factors, it promulgates a
22 sentence that varies from that recommendation, the district court’s decision, “if adequately

1 explained, should be reviewed *especially deferentially*.” 550 F.3d at 192 (emphasis added).

2 Nothing we hold here should be understood to conflict with that principle, or to cast doubt on the
3 district court’s apparent conclusion that there must be much room for discretion under the
4 terrorism enhancement.³

5 While we have raised questions about the closeness of Yousry and Stewart’s sentences in
6 light of Stewart’s seemingly greater level of responsibility and status as a lawyer, and while we
7 would benefit from greater explanation by the district court on this and other issues, it remains
8 the district court’s task, for purposes of sentencing under § 3553(a), to assess where Stewart’s
9 criminal behavior falls within the spectrum of terrorism enhancement culpability. And I would
10 be very reluctant—when and if I had to review a sentence in this case for substantive
11 reasonableness—to find an abuse of discretion in a thoroughly-explained conclusion by the

³ Let me be absolutely clear. Neither the majority opinion nor my concurrence suggests that district courts have greater discretion exclusively for sentencing terrorism defendants. In fact, I believe precisely the opposite. My point is that the terrorism enhancement is, like the examples identified in *Cavera*, one instance of a Guidelines enhancement that applies “without modulation” to a wide range of conduct, and that we should be especially deferential to a district court’s reasoned decision to vary from such a broad Guidelines recommendation. *See Cavera*, 550 F.3d at 192.

In contrast, Judge Walker does appear to advocate a separate sentencing jurisprudence for terrorism cases. Judge Walker repeatedly seeks to distinguish terrorism-related crimes from other crimes, and even suggests that, as to harm in terrorism crimes, the sentencing reviews of appellate courts should run in one direction only. *See Op. of J. Walker at [29]* He also states that the wide variety of conduct encompassed by “terrorism support,” unlike the wide variety of conduct covered by other crimes, does not give rise to added district court discretion in sentencing. *See id. at [26]*. He attributes this to congressional decisions. With great respect, I have difficulty reading what Congress has mandated as creating these differences. Judge Walker clearly views terrorism-related crimes as in a different category from all other very serious felonies—and he may well be right. It is, however, an error—though a common one among all judges—to attribute one’s own heartfelt and perhaps correct views to the legislators.

1 district court that Stewart’s conduct, though undeniably serious, was significantly less serious
2 than that of other defendants subject to the terrorism enhancement.

3 **B.**
4

5 I am more ambivalent about the degree to which absence of harm is a valid ground on
6 which to mitigate a sentence. I join the majority opinion in withholding judgment on this issue
7 with respect to Stewart. My general view, however, is that while a district court ought to be
8 careful about giving too much weight to a factor like harm that might vary based on events
9 beyond the defendant’s control, we should not preclude a district court from giving lack of harm
10 some weight, even for some crimes of terrorism.

11 Whether it is fair to assign different levels of culpability in criminal sentencing to the
12 same criminal conduct based on the fortuity of whether harm results has long been a contested
13 question in Anglo-American jurisprudence. See H.L.A. HART, *THE CONCEPT OF LAW* 131 (1968)
14 (“Why should the accidental fact that an intended harmful outcome has not occurred be ground
15 for punishing less a criminal who may be equally dangerous and equally wicked?”). But
16 whatever significance the consequences of a defendant’s actions ought to have, it is an inevitable
17 part of human nature—and our law—that we as a society *do* give consequences considerable
18 weight when we mete out punishment and blame.⁴ This is deeply entrenched in our legal system.

⁴ See Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L & CRIMINOLOGY 679, 688 (1994) (“While in principle it’s difficult to find good reasons for making desert turn on chance, here’s the rub: most of us do in fact make judgments precisely of this kind.”). See generally PAUL H. ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995) (presenting studies suggesting public judgments about criminal culpability turn significantly on the level of harm that results from an action).

1 The majority opinion identifies the law of attempts as one generally accepted instantiation of this
2 tendency, Maj. Op. at [99–100], but there are many others—such as crimes of culpable risk
3 creation, like vehicular homicide. And while it is true that material support to terrorism is a
4 complete crime rather than an inchoate one, and so fully punishable even if no further harm
5 results, it simply does not follow that the amount of punishment may not at least in part depend
6 on the harm that occurred. The level of punishment for a completed crime varies all the time
7 based on the amount of harm that has occurred, and the Guidelines themselves often directly
8 embrace such a policy.⁵

9 Judge Walker suggests terrorism is different, and that, at least in the “very broad
10 heartland of cases,” it is procedural error for the district court to consider absence of harm as
11 relevant to the application of the terrorism enhancement and ultimately to the imposition of a
12 sentence.⁶ He argues that treating harm as a consideration relevant to sentencing those convicted

⁵ Judge Walker identifies several examples in his opinion, though he reaches a different conclusion about their import. See Op. of J. Walker at [28 n.11] (identifying as examples the increase of the offense level for conspiracy or solicitation to commit murder if the offense results in death, U.S.S.G. § 2A1.5(c)(1)), and the increase of the offense level for aggravated assault based on victim’s injuries, *Id.* § 2A2.(b)(3)). There are many other examples. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1476 (2008) (“Guidelines sentences for both drug crimes and financial crimes depend heavily on the quantity of harm found by the sentencing judge . . .”).

⁶ Though Judge Walker suggests otherwise, it is not at all unprecedented for a district court to consider lack of harm relevant to sentencing in a terrorism case. Indeed, in a case that Judge Walker cites, the Eleventh Circuit affirmed a district court decision that did just that. See *United States v. Garey*, 546 F.3d 1359, 1363-64 (11th Cir. 2008) (per curiam). In that case, the district court found that the terrorism enhancement applied, but then granted a downward variance based in part on the fact that the defendant had not carried out any violent acts at the time of his apprehension. See *United States v. Garey*, 383 F. Supp. 2d 1374, 1379 (M.D. Ga. 2005) (“It is . . . troubling that another defendant who carried out a threat to bomb public facilities, injuring and maiming (but not killing) thousands of people, would face the same sentence as this Defendant who did not cause physical injury to a single person.”). In upholding the defendant’s sentence as

1 of terrorism related crimes, such as for material support, would effectively nullify the policy
2 considerations of Congress and the Sentencing Commission, who have not made reductions for
3 lack of harm part of the terrorism enhancement. Even if the Guidelines do not themselves make
4 lack of harm relevant for the application of the terrorism enhancement—and they fail to do so
5 only in the narrow sense that the enhancement does not positively reflect the existence of
6 injury—the Supreme Court has made clear that a district court, which has “greater familiarity
7 with [] the individual case and the individual defendant,” may properly decide that sentencing
8 judgments made by the Guidelines fail properly to reflect the § 3553(a) considerations. *See Rita*
9 *v. United States*, 551 U.S. 338, 351 (2007).

10 What is more, the Court has evidenced profound skepticism toward arguments that
11 certain policy judgments, which require departing from the Guidelines, have implicitly been
12 taken off the table as a result of congressional silence or inaction. *See Kimbrough v. United*
13 *States*, 128 S. Ct. 558, 570-73 (2007). As the Court explained, it is usually inappropriate to draw
14 inferences from congressional silence on sentencing practices because Congress has shown that,

not unreasonable, the Eleventh Circuit specifically noted that the district court had already considered the defendant’s arguments about the lack of actual harm and, on the basis of the § 3553(a) factors, imposed a reasonable sentence below the advisory Guidelines range. *See Garey*, 546 F.3d at 1364.

Judge Walker cites *Garey*, and other cases, for the proposition that courts apply the terrorism enhancement even in the absence of harm. Op. of J. Walker at [29 n.13]. That is true, but it is not relevant to the precise issue we face because the district court here asserted that the enhancement applied to Stewart under the Guidelines, and the majority opinion has stated clearly that any decision to the contrary would be error. Maj. Op. at [125–26] It is also incorrect to say that, for all practical purposes, the district court used lack of harm to nullify the sentencing enhancement, because that was not the only consideration relied upon by the district court to support its variance. *See supra* note 2. The real question is whether, *as a procedural matter*, lack of harm can support some downward variance in a terrorism case. To this narrow question, other courts have said, or at least strongly implied, that the answer is yes.

1 when it wants to, it knows how to direct levels of sentencing in express terms. *Id.* at 571 (citing
2 28 U.S.C. § 994(h), which required Sentencing Commission to set Guidelines sentences for
3 recidivist offenders at or near the statutory maximum). As a result, the fact that Congress
4 increased the statutory maximum in 2001 for material support convictions that caused death, *see*
5 *Op. of J. Walker at [28]*, and did so without saying anything whatever about how a district court
6 may treat harm when issuing a sentence that is less than the applicable maximum, cannot be read
7 to diminish the discretion the district court otherwise has under § 3553(a).⁷

8 I also rather doubt that we would be willing to apply consistently a principle that harm is
9 irrelevant in terrorism cases. Consider two potential defendants, both of whom provide funds to
10 different terrorists and have the requisite *mens rea* to support a conviction under 18 U.S.C §
11 2239A. In one case, the terrorist whom the defendant funds attempts to detonate an explosive in
12 a public place, but the explosives do not go off properly and so cause only a few injuries and one
13 death that results, in part also, from inadequate medical treatment. In the second case, the
14 terrorist's detonation attempt succeeds, blowing up a city bus and causing a major traffic
15 collision that kills or injures hundreds of people. While reasonable minds might differ as to the
16 weight the level of harm should be given in this scenario, surely we would not hold it
17 procedurally unreasonable for the district court to take the amount of harm into account when
18 sentencing the respective defendants and—while sentencing the first severely—use it as a reason
19 to give the second defendant a much greater sentence. Yet if that is so, the converse must hold,

⁷ Indeed, that Congress saw fit to increase the maximum sentence for material support based solely on whether death results can easily be understood to suggest that Congress thought amount of harm *does* matter in this context, even if, at times, that harm is largely fortuitous.

1 because “sentencing discretion is like an elevator in that it must run in both directions.” *Cavera*,
2 550 F.3d at 194. To concede, as I think we must, that when hundreds of people are injured or
3 killed rather than just one a district court may take the amount of harm into account and impose a
4 higher sentence, but then to deny the court that same discretion to reach a lower sentence when,
5 through fortuity, no harm results, would manifestly contravene that principle.⁸

6 II.

7 I have focused to this point on factors the district court may consider procedurally when
8 sentencing, but this case also illustrates the importance of *our* adherence as an appellate court to
9 the right procedure for review of district court sentences. In *Cavera*, we explained that our
10 review involves a two-step process. We first ensure that the district court has not committed
11 procedural error, and only later engage in substantive review to examine whether the district
12 court has rendered a sentence that is one of the “exceptional cases where the trial court’s decision
13 cannot be located within the range of permissible decisions.” 550 F.3d at 189 (internal

⁸ I by no means suggest that a district court may not err by attributing too much importance to results, whether on the upside or the downside. When reviewing a sentence for substantive reasonableness, appellate courts may question whether the presence or absence of actual harm can “bear the weight” attributed to it by a district court. *Cavera*, 550 F.3d at 191. And while an appellate court must never forget that its review is deferential, *see Gall*, 128 S. Ct. at 596, it may need to look carefully at a district court’s reasons for giving weight to results, especially given the natural tendency to overvalue consequences. The majority opinion appropriately treats this substantive question as analytically distinct from whether a district court may, *as a procedural matter*, rely on lack of harm. *See* Maj. Op. at [99-100 n.33]. The majority opinion also quite properly leaves open, at this time, the question of whether the district court’s actual use of lack of harm as grounds upon which to mitigate Stewart’s sentence led to a result that was erroneous. Like the majority opinion, I do not yet express any view as to whether the district court in this case placed too much weight on the apparent lack of harm that resulted from Stewart’s actions. *See* Part II *infra*.

1 quotations and emphasis omitted). Following this sequence of review is central to our limited
2 role. Because district courts “have an institutional advantage over appellate courts” when
3 making sentencing decisions, *Koon v. United States*, 518 U.S. 81, 98 (1996), our job as a
4 reviewing court is mainly to ensure that a district court’s sentence “resulted from the district
5 court’s considered judgment as to what was necessary to address the various, often conflicting,
6 purposes of sentencing.” *Cavera*, 550 F.3d at 189-90. Evaluating the substantive reasonableness
7 of a sentence before we have found it free from procedural defect risks the substitution of our
8 “considered judgment” for that of the district court.

9 When we identify procedural error, we have recognized the desirability of remanding to
10 the district court to let it correct its mistake and “exercise its discretion anew,” rather than
11 proceeding prematurely to review the sentence for substantive reasonableness. *See Cavera*, 550
12 F.3d at 190. While we have not held that this course must necessarily be followed in all
13 instances, a review of our cases makes clear that it is the ordinary and much preferred remedy.
14 *See, e.g., United States v. Williams*, 558 F.3d 166, 176 (2d Cir. 2009) (“In light of our decision to
15 remand, we reject, as premature, [the defendant’s] challenge to the substantive reasonability of
16 his sentence.”); *United States v. Williams*, 524 F.3d 209, 215-17 (2d Cir. 2008) (vacating
17 sentence without reaching issue of whether sentence was substantively reasonable “because we
18 conclude that the district judge committed procedural error”); *United States v. Wills*, 476 F.3d
19 103, 111 n.6 (2d Cir. 2007) (“*Because we hold that the sentence is procedurally unreasonable,*
20 *we do not reach the government’s argument that if [the district court had not relied on*
21 *procedurally erroneous factors,] [Defendant’s] sentence should be deemed unreasonable based on*

1 its length alone.”) (emphasis added), *abrogated on other grounds by Kimbrough*, 128 S. Ct. at
2 574–75, *as recognized in Cavera*, 550 F.3d at 191.

3 Other circuits have expressed a similar preference, and have sometimes stated it in even
4 more categorical terms: first remand to allow a district court to correct procedural errors and only
5 later review for substantive reasonableness.⁹ This is no formalism. It is consonant with our
6 system of sentencing, which asks the district court to reach a complete judgment about the
7 appropriate sentence in light of the factors enumerated in § 3553(a). Procedural errors prevent
8 the district court from properly arriving at such a holistic judgment. And in light of our
9 obligation to defer significantly to a procedurally correct sentence, we should almost always wait
10 until we have such a sentence to review before evaluating overall reasonableness.

11 Judge Walker argues that judicial efficiency compels us to identify substantive error at
12 the same time we remand for procedural error. No one wants unnecessary appeals. But I fail to
13 see any systemic advantages from issuing advisory opinions on the reasonableness of sentences
14 that we are vacating, and hence that are now no longer really before us. The decision to remand
15 for procedural unreasonableness presupposes that we believe the district court might not have
16 imposed the same sentence but for the procedural defect. *See, e.g., United States v. Jass*, 569
17 F.3d 47, 68 (2d Cir. 2009) (recognizing that procedural errors in sentencing are subject to
18 harmless error rule). When we remand for procedural flaws, it may seem inviting to comment at

⁹ *See, e.g., United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009) (holding that where procedural error is identified, “we must remand” unless error is harmless, and that a court should not move on to *Gall*’s second step to review substantive reasonableness of sentence if there is non-harmless procedural error); *United States v. Grissom*, 525 F.3d 691, 696 (9th Cir. 2008) (“[W]e will remand non-harmless procedural errors . . . and *only proceed to review the substantive reasonableness of procedurally sound sentences.*”) (emphasis added).

1 the same time on other factors relied upon by the district court that, though procedurally proper,
2 do not, in our judgment, bear the weight the district court attributed to them. It may even be
3 appropriate *in dicta* to suggest our preliminary view on the matter. But it is not our role to weigh
4 the individual § 3553(a) factors ourselves and, in a holding, to give binding advice to the district
5 court based on our views. *See Gall*, 128 S. Ct. at 602.

6 Let me repeat: Substantive reasonableness calls for review of the overall sentence, not
7 individual factors. And § 3553(a) calls for balancing all the relevant factors. As a result, any
8 non-harmless procedural errors necessarily affect the sentencing calculus. Our task is to evaluate
9 (deferentially) the district court's finished product, and not to grade its individual ingredients. To
10 do this properly, we must almost always wait for the district court to correct the procedural errors
11 that we have identified and to explain its sentence, and only then to consider the substantive
12 reasonableness of the sentence.

13 I do not mean to suggest an absolutist view on this matter. It may be that there are cases
14 where there is procedural error that—even though it is not harmless—is sufficiently separate
15 from any serious substantive concerns that we have, so as to make it plausible to address the two
16 issues at once. I cannot think of any such cases offhand, however. And, for the reasons well
17 expressed by the majority opinion in its decision to remand, this case is not one of them.

18 III.

19 Another, perhaps uncomfortable, issue deserves discussion. Stewart does not appear to
20 have been the only member of Abdel Rahman's legal team both to agree to abide by the SAMs
21 imposed upon Rahman and then subsequently to violate them. One of Rahman's lawyers,
22 Abdeen Jabara, read to Rahman newspaper articles and letters from followers, while another,

1 Ramsey Clark, the former Attorney General of the United States, acknowledged issuing a
2 statement to the media on behalf of Rahman.¹⁰ Yet neither Jabara nor Clark was prosecuted for
3 these apparent violations. This does not mean that the Government's decision to prosecute only
4 Stewart was invidious or improper, and I join the majority opinion in rejecting Stewart's claim of
5 selective prosecution. But though Stewart's selective prosecution challenge fails, it does not
6 follow that the alleged misconduct of Jabara and Clark—whom the district court may well have
7 decided shared in certain respects the culpable behavior for which Stewart was convicted—is
8 entirely irrelevant to Stewart and to her sentence. I think it possible that it *is* relevant, and I
9 believe that usually only the district court is positioned to evaluate that relevance.

10 As to claims of selective prosecution, we have properly recognized that our scope of
11 review is limited, for “the decision as to whether to prosecute generally rests within the broad
12 discretion of the prosecutor.” *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003). As the
13 Supreme Court has explained, this is because “the decision to prosecute is particularly ill-suited
14 to judicial review.” *Wayte v. United States*, 470 U.S. 598, 607 (1985). Yet this does not mean
15 that unfettered (even when it is non-invidious) prosecutorial discretion over who gets charged,
16 and for what, is categorically desirable. Quite the contrary: while prosecutorial discretion may be
17 salutary in a wide variety of cases, when left entirely without any controls it will concentrate too
18 much power in a single set of government actors, and they, moreover, may on occasion be
19 subject to political pressure. The result may well be to produce disparities in the way similarly

¹⁰ See Letter in Support of Lynne Stewart from Abdeen M. Jabara to Judge Koeltl (June 28, 2006), and Letter in Support of Lynne Stewart from Ramsey Clark to Judge Koeltl (Oct. 2, 2006), *available in* J. App. at 2211, 2334.

1 situated people are treated, disparities that our complex, Guidelines-with-district-court-
2 discretion, system has sought to minimize. The district court's exercise of its sentencing
3 discretion may provide the only effective way to control and diminish unjustified disparities,
4 without operating in the blunt fashion of selective prosecution judicial review. It may reduce
5 improper differences in treatment, without impinging on the executive's obligation to enforce the
6 law.

7 Our case law provides support for this approach. For instance, while we have not
8 *required* a district court to consider sentencing disparities among co-defendants, we have held
9 that district courts are *permitted* to do so. As we explained, it is "appropriate for a district court,
10 relying on its unique knowledge of the totality of circumstances of a crime and its participants, to
11 impose a sentence that would better reflect the extent to which the participants in a crime are
12 similarly (or dissimilarly) situated and tailor the sentences accordingly." *Wills*, 476 F.3d at 110
13 (internal emphasis omitted). This, as has been recognized, allows district courts to provide a
14 check against certain otherwise unbounded prosecutorial decisions, as to what charges to bring
15 and as to whether to make substantial assistance motions with respect to only some defendants.¹¹

¹¹ See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 140-42 (1998) (articulating concern, pre-*Booker*, that "exercise of broad prosecutorial authority over sentencing *within a system that severely limits the sentencing discretion of federal judges* means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of that power" and advocating system where judges have the "countervailing discretionary authority to restrain prosecutorial power") (emphasis in original); Ryan Scott Reynolds, Note, *Equal Justice under the Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendant's Sentences?*, 109 COLUM. L. REV. 538, 564-66 (2009) (contending that the emerging rule among circuit courts that allows district courts to consider co-defendant disparity is desirable because it mitigates negative effects of excessive prosecutorial power over sentencing).

1 It is not much of an extension to permit the district courts to exercise analogous supervision over
2 those decisions as to which prosecutors enjoy the greatest discretion and that result in the greatest
3 disparities: the decisions on whether to bring any charges at all.

4 There are, of course, many reasons for prosecutors to fail to bring charges or to bring
5 lesser charges than they could have, and some of these reasons are clearly irrelevant to the proper
6 sentence of the person who has been charged and convicted. But other reasons may be relevant
7 because they may suggest arbitrariness and can lead to abuse—such as the political clout of some
8 potential defendants as against others. We as appellate judges are ill-suited to distinguish
9 between relevant and irrelevant reasons in any given case. The same cannot be said, however,
10 for a district court judge who has presided over a whole trial in which the behavior of uncharged
11 or undercharged parties was part and parcel of the discussion.

12 This does not mean that when a district court issues a sentence that it should articulate its
13 reliance on the prosecution's decision not to charge (or to undercharge) other parties. I am not
14 sure. While we generally ask a district court to explain the reasons behind its sentence, and
15 indeed indicated in *Cavera* that “a district court errs if it fails adequately to explain its chosen
16 sentence, and must include an explanation for any deviation from the Guidelines range,” 550
17 F.3d at 190 (internal quotations omitted), there are some things that are perhaps best left unsaid
18 by the district court, even though their potential relevance is apparent on the record.¹² A
19 prosecutor's decision to charge only some parties rather than others may be one of these things.

¹² *Cf.* Guido Calabresi, *A COMMON LAW FOR THE AGE OF STATUTES* 172-81 (1982) (discussing tradeoffs between open recognition of a doctrine and greater opacity, where the latter might be useful in preventing a doctrine's abuse).

1 The district court might quite reasonably want to avoid impugning the reputation of parties who
2 have not been indicted or tried, and hence have not had the opportunity to assert innocence in
3 open court. But that does not mean that a judge who has presided over a full trial may not have
4 valid reasons to conclude that the failure to charge some potential co-defendants affects, *under*
5 *the § 3553 factors*, the propriety of a sentence.¹³

6 I am inclined to think that the district court should not be barred from considering the
7 relevance of prosecutorial discretion in a particular case, and that our legal system should take
8 advantage of the district court's unique position to consider a defendant's sentence "in its
9 *complete relevant context*," *Wills*, 476 F.3d at 110 (emphasis added). As appellate courts we
10 should therefore also keep this issue in mind when we review a district court's sentence, and
11 recognize it as a further reason to defer to a district court's sentencing judgments. In particular,
12 though we may properly ask the district court to explain apparent sentencing anomalies among
13 convicted defendants as both the majority opinion and the partial dissent do here, we should not
14 forget that there might be even greater disparities between a defendant and other individuals who
15 were not charged at all.¹⁴

¹³ Significantly, our system of sentencing allows the district court to consider uncharged conduct by the defendant so as to ensure that the sentence is based upon "the *real conduct* that underlies the crime of conviction." *Booker*, 543 U.S. at 250 (Remedial Op., Breyer, *J.*). One of the principal reasons for this, as expressed by the Court, is to prevent prosecutors, when they make charging decisions, from "exercis[ing] a power the Sentencing Act vested in judges." *Id.* at 257.

¹⁴ At footnote 20 *post*, Judge Walker describes as academic my discussion of the possible relation between the sentence imposed on the defendant before us, and the absence of any charges brought against the other lawyers originally involved in this case—lawyers, some of whose acts could surely be described in language as powerful as that used by Judge Walker with respect to the defendant's misdeeds. Whatever may be said of my views, they are not academic. They reflect instead the very practical consequences of: (a) the necessary absence of any judicial control over prosecutorial decisions as to whom to charge, decisions which, as Judge Walker rightly notes, are "exclusive and absolute" and "insulated from judicial review," Op. of J. Walker

IV.

1
2 Finally, I would be remiss if I did not follow the majority opinion in observing the fact
3 that all of the acts for which Stewart was convicted occurred before the attacks of September 11,
4 2001, an event that illustrates in particularly excruciating fashion that results do matter to us. It
5 does not diminish the gravity of Stewart's crimes to take judicial notice of their timing, and to
6 recognize that our attitudes about her conduct have inevitably been influenced by the tragedy of
7 that day. To suggest otherwise, and to ignore that 9/11 has profoundly influenced our
8 retrospective assessment of the culpability of certain actions related to terrorists and terrorist
9 organizations, would be to ignore reality. As the majority opinion says, Stewart herself might
10 well have viewed her actions differently after 9/11 when the dangerousness of terrorism became
11 so palpable, so stark, and—most important— so proximate. *See* Maj. Op. at [119]. We must be
12 careful then in judging Stewart based on lessons that we learned only after her—very
13 serious—crimes were committed.¹⁵ In the end, this factor too is part of the district court's

at [48 n.20]; (b) the inevitable tendency of human beings, and hence also of “prosecutors acting in good faith,” *id.*, to take easy rather than difficult (and possibly politically costly) actions. (It is perhaps worth noting again in this regard that one of the uncharged lawyers in this case was formerly the chief prosecutor of the United States, while the defendant is described by the district court as having “represented the poor, the disadvantaged and the unpopular,” Sent’g Tr. 115); (c) the fact that without “initiating [any] inquisitorial foray into the prosecutor’s office,” Op. of J. Walker at [48 n.20], a district court can get a pretty good read on the likely relative behavior of those involved in the complex set of actions that led to a particular trial, including those participants not charged; and (d) that the district court is given by law the direct task of determining what is “just punishment” and, in doing so, to “avoid unwarranted . . . disparities,” 18 U.S.C. § 3553(a).

¹⁵ On various occasions Judge Walker, in his partial dissent, makes reference to much higher sentences given by other federal courts to those who have aided terrorists, including in cases in which no harm occurred. *See* Op. of J. Walker at [7 n.4, 29 n.13]. It is no small matter, however, that the overwhelming majority of the cases Judge Walker cites involved post-9/11 actions by the defendants. *See, e.g., United States v. Khan*, 309 F. Supp.2d 789, 796 (E.D. Va.

1 obligation to consider “the nature and circumstances of the offense,” and to impose a sentence
2 that “reflect[s] the seriousness of the offense” and “provide[s] just punishment.” *See* 18 U.S.C. §
3553(a)(1)-(2).

2004) (describing activities of Randall Royer and co-defendants and indicating “[t]he indictment alleges that . . . preparations culminated in [co-defendants and their co-conspirators] attending a terrorist and jihad training camp after September 11, 2001, with the intent to proceed to Afghanistan and fight for the Taliban and Al-Qaeda against United States troops”).

This is not the only difference between Stewart and the defendants sentenced for material support crimes in the cases Judge Walker mentions—leaving aside one case, relied on by Judge Walker, where the convictions were subsequently vacated on appeal. *See United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008) (vacating convictions of Al-Moayad and his co-defendant Mohsen Zayed due to serious evidentiary errors). Indeed, in one instance where the district court imposed a 180-month sentence, the court explicitly found that, for a variety of reasons, the defendant was *not* similarly situated to Stewart. *See United States v. Aref*, No.04-CR-402, 2007 WL 804814, at *7 (N.D.N.Y. Mar. 14, 2007).

1 United States v. Stewart
2 No. 06-5015-cr

3 WALKER, Circuit Judge, concurring in part and dissenting in part:

4 For two years, defendant Lynne Stewart, through artifice and
5 deception, and despite sworn commitments to the contrary made to
6 the government, carried out a criminal plan to transmit
7 instructions from her imprisoned client, a terrorist leader, to
8 his jihadist followers in the Middle East, including, ominously,
9 his withdrawal of support for a fragile cease-fire in Egypt, an
10 action that effectively sanctioned renewed terrorist attacks and
11 indiscriminate loss of human life. The district court termed
12 these deliberate and horrific crimes of terrorism, for which the
13 Sentencing Guidelines recommends 30 years' imprisonment,
14 "extraordinarily severe criminal conduct." And yet the district
15 court imposed a breathtakingly low sentence of 2 1/3 years.
16 Because the majority fails to recognize that this sentence
17 trivializes Stewart's extremely serious conduct with a "slap on
18 the wrist" that is substantively unreasonable, and because the
19 majority fails to appreciate the full extent of the district
20 court's numerous procedural errors, I respectfully dissent.¹
21

¹ I concur, however, in the majority's opinion insofar as it upholds the defendants' convictions and directs the district court to resentence Stewart on the basis that it procedurally erred by failing to account for Stewart's likely perjury and obstruction of justice in imposing a sentence. The majority also has determined that, at resentencing, the district court must consider "whether Stewart's conduct as a lawyer triggers the special skill/abuse of trust enhancement under the Guidelines, see U.S.S.G. § 3B1.3 (2000), and reconsider the extent to which Stewart's status as a lawyer affects the appropriate sentence," Maj. Op. at [127], but declined to find the district court's failure in this regard to be a procedural error. For reasons I set forth, this failure was one, among several, procedural errors that the majority failed to recognize.

1 In imposing Stewart's comparably insignificant sentence, the
2 district judge rejected entirely a major enhancement, established
3 by the Sentencing Commission under Congress' express command,
4 that applies generally to the "material support" of terrorism.
5 Despite finding that Stewart's crime was within the enhancement's
6 "heartland," Sent'g Tr. 108, the district court found that the
7 "atypicality" of Stewart's "material support" conduct in
8 "provi[ding] a co-conspirator to a terrorist conspiracy," Sent'g
9 Tr. 113, justified discarding the terrorism component of
10 Stewart's crime in its § 3553(a) analysis. But, wholly apart
11 from the fact that the provision of "personnel" falls squarely
12 within the definition of "material support" provided in 18 U.S.C.
13 § 2339A(b), it trivializes Stewart's conduct to even suggest that
14 enabling a jailed terrorist leader, with enormous sway over his
15 jihadist followers, to actively conspire with others in a scheme
16 to kidnap and kill innocent people somehow mitigates the gravity
17 of the crime. The district court also based its rejection of an
18 enhancement for the material support of terrorism on the fact
19 that Stewart's conduct did not result in actual injuries or
20 death, even though that fact is rarely, if ever, a mitigating
21 circumstance, much less a reason to jettison the terrorism
22 enhancement altogether in its § 3553(a) analysis.

23 In addition to failing to make required findings on
24 obstruction of justice based on evidence of Stewart's double
25 perjury at trial, as the majority recognizes, Maj. Op. at [122-
26 **124**], the district court also all but ignored Stewart's gross

1 abuse of the fiduciary trust placed in her by the United States
2 government, and, in the face of contrary policy statements by the
3 Sentencing Commission, gave unjustified controlling weight to its
4 mitigating view of Stewart's age, health, and previous career.
5 Numerous additional errors attended the radical reduction of
6 Stewart's sentence from the recommended 30 years to 2 1/3 years.

7 Section 3553(a) of Title 18 of the United States Code, which
8 governed Stewart's sentence, requires that every sentence take
9 into appropriate account "the nature and circumstances of the
10 offense[,] and the history and characteristics of the defendant";
11 "reflect the seriousness of the offense"; "promote respect for
12 the law"; and "adequate[ly] deter[]" similar conduct in the
13 future. 18 U.S.C. § 3553(a)(1)-(2). The statute also mandates
14 consideration of "the need to avoid unwarranted sentenc[ing]
15 disparities." Id. § 3553(a)(6). Recognition of the full scope
16 of the district court's procedural errors makes plain that
17 Stewart's sentence fails to respect these goals and is so
18 extraordinarily lenient as to manifest an abuse of discretion
19 resulting in a substantively unreasonable sentence.

20 The majority appropriately acknowledges the fine reputation
21 of the district court judge, a point with which I concur. And,
22 like the majority, I commend the district court's management of
23 this complex and difficult trial. However, the majority goes on
24 to suggest, with Judge Calabresi's concurrence being quite
25 explicit, that because of the district court's reputation, our
26 review of the Stewart sentencing should be more deferential than

1 would normally be the case. This court has never recognized two
2 classes of judges - those who are so good that their judgment is
3 beyond reproach, and all the rest. Indeed, no judge on any
4 federal court, including the Supreme Court, can lay claim to
5 infallibility. Great respect for a particular judge cannot be a
6 basis for overlooking what, in my view, amounts to a distortion
7 of our sentencing laws. For the foregoing reasons, and others
8 that I will describe, Stewart's sentence must be vacated and she
9 must be resentenced.

10 **I. The Defendants' Exceptionally Serious Criminal Conduct**

11 Sheik Abdel Rahman, Stewart's client, is a dedicated
12 terrorist leader with a large jihadist following in the Middle
13 East, known as the "Islamic Group" among other names, Maj. Op. at
14 [10], and a more discrete following in the United States. See
15 United States v. Rahman, 189 F.3d 88, 104-05 (2d Cir. 1999) (per
16 curiam). Abdel Rahman was locked up in federal prison in
17 Rochester, Minnesota, to serve a life sentence imposed in 1996,
18 after he was convicted for both (1) trying to wreak havoc in New
19 York City by blowing up bridges, tunnels, and buildings, and (2)
20 attempting to assassinate Egyptian President Hosni Mubarak. See
21 id. at 148.

22 For two years, 2000 and 2001, the defendants in this case -
23 Sattar, another jihadist with direct links back to Abdel Rahman's
24 Egyptian followers; Stewart, Abdel Rahman's lawyer; and Yousry,
25 Stewart's student interpreter - made sure that Abdel Rahman could
26 continue to communicate with his jihadist cohorts. The

1 Department of Justice had employed "Special Administrative
2 Measures" (SAMs) specifically designed to prevent such
3 communications while still enabling an imprisoned terrorist to
4 speak to, and be effectively represented by his attorney.
5 Compliance with the SAMs system largely depends upon the trust
6 placed in the attorney. In accordance with the SAMs, Stewart,
7 repeatedly swore under oath that she would not transmit any non-
8 legal communications to or from Abdel Rahman. She swore falsely.

9 Undeterred by the SAMs, Stewart, assisted by Yousry,
10 executed a scheme of lies and deception against the government to
11 keep the lines of communication open between Abdel Rahman and
12 Sattar, and, through Sattar, the Egyptian jihadists. These
13 communications included a declaration by Abdel Rahman that he was
14 withdrawing his support for a tenuous cease-fire that, for some
15 time, had aimed at curbing violent attacks by Abdel Rahman's
16 followers upon targets in Egypt.² Stewart even went so far as to
17 deliver this statement to an Arab journalist on Abdel Rahman's
18 behalf, which resulted in the message's wide dissemination
19 through the media in the Middle East.

20 The federal crimes committed by the defendants are numerous.
21 All three conspired to defraud the United States, in violation of
22 18 U.S.C. § 371. Rahman, Sattar, and other jihadists conspired
23 to kill and to kidnap persons in a foreign country, in violation

² The cease-fire's fragility is evident from its inability to stop an Islamic Group faction from slaughtering sixty tourists in Luxor, Egypt in 1997. See Douglas Jehl, 70 Die in Attack at Egypt Temple, N.Y. Times, Nov. 18, 1997, at A1.

1 of 18 U.S.C. § 956(a)(1), (a)(2)(A), and solicited crimes of
2 violence, in violation of 18 U.S.C. § 373. Stewart and Yousry,
3 both individually and in conspiracy, provided and concealed
4 material support to terrorist activity – namely Rahman’s and
5 Sattar’s conspiracy to kill and to kidnap – in violation of 18
6 U.S.C. §§ 371, 2339A. Additionally, Stewart made multiple false
7 statements to the Department of Justice and to the Bureau of
8 Prisons, in violation of 18 U.S.C. § 1001. Such behavior
9 constitutes extraordinarily serious, indeed horrendous, criminal
10 conduct; that there was no evidence that Stewart’s conduct
11 ultimately resulted in death and injury to innocent people was
12 due to law enforcement’s diligence, and not to any lack of effort
13 by the defendants or their confederates.

14 For such crimes, the advisory Sentencing Guidelines
15 effective on November 1, 2000, applicable here, provided for
16 lengthy sentences: life imprisonment for Sattar, 360 months’
17 imprisonment for Stewart, and 78 to 97 months’ imprisonment for
18 Yousry. A Guidelines recommendation, of course, is just that – a
19 recommendation – and a district judge has considerable discretion
20 to sentence outside of the Guidelines. See Gall v. United
21 States, 128 S. Ct. 586, 594 (2007). The district court sentenced
22 the defendants well below the recommended Guidelines ranges,
23 lowering Sattar’s sentence from a recommended life term to 24
24 years, Yousry’s sentence from 78 months to 20 months, and
25 Stewart’s sentence from 360 months to a mere 28 months.

26 What is immediately striking about Stewart’s sentence is not

1 simply its extraordinary 92 percent reduction from the
2 recommended Guidelines range,³ but also the fact that the actual
3 term of incarceration imposed – 2 1/3 years – is unprecedented in
4 convictions for material support of terrorism.⁴ The Supreme
5 Court has made clear that the Guidelines provide “the starting
6 point and the initial benchmark” for sentencing, and that

1 ³ In Gall, the Supreme Court instructed appellate courts not to use, as
2 a general matter, “the percentage of a departure [from the Guidelines] as the
3 standard for determining the strength of the justifications required for a
4 specific sentence.” 128 S. Ct. at 595. This proscription recognizes that
5 percentages cannot speak reliably across the Guidelines ranges. See id. (“The
6 mathematical approach also suffers from infirmities of application.”). For
7 low Guidelines ranges, even small sentencing variances can yield large
8 percentages, unfairly exaggerating a district court’s action in imposing a
9 non-Guidelines sentence. Id. For high Guidelines ranges, major variances can
10 yield relatively modest percentages, inaccurately representing the
11 significance of the district court’s action. That percentages cannot always
12 accurately measure a variance’s significance does not, however, mean that
13 percentages are always irrelevant. When, as here, a variance from the
14 recommended Guidelines range is extraordinarily large both in terms of the
15 actual reduction of time to be served (a 232-month reduction) and the
16 percentage of the reduction (92 percent), these facts taken together strongly
17 signal the need for careful review of the justifications advanced for the
18 challenged sentence. See id. at 597 (observing that appellate courts may
19 reasonably expect a “major departure” from the Guidelines sentencing range to
20 be supported “by a more significant justification than a minor one”).

1 ⁴ In material support convictions after the Guidelines were deemed
2 advisory in United States v. Booker, 543 U.S. 220, 245 (2005), district courts
3 have generally imposed sentences of at least ten years per material support
4 count, with considerably higher total sentences. See, e.g., United States v.
5 Aref, No. 04-CR-402, 2007 WL 804814, at *8 (N.D.N.Y. Mar. 14, 2007) (total
6 sentences of 15 years for each of two defendants, with 15 years on each of 16
7 material support (MS) counts); United States v. Paracha, No. 03-CR-1197,
8 Docket Entry No. 88 (S.D.N.Y. July 21, 2006) (total of 30 years, with 15 years
9 on each of 2 MS counts); United States v. Ali, No. 05-CR-53, Docket Entry No.
10 397 (E.D. Va. Apr. 17, 2006) (total of 30 years, with 10 years on each of 4 MS
11 counts); United States v. al-Moayad, No. 03-CR-1322, Docket Entry Nos. 197,
12 205 (E.D.N.Y. Sept. 14, 2005) (total of 75 years, with 15 years on each of 5
13 MS counts for first defendant; total of 45 years, with 15 years on each of 3
14 MS counts for second defendant), rev’d on other grounds, 545 F.3d 139 (2d Cir.
15 2008); United States v. Lakhani, No. 03-CR-880, Docket Entry No. 99 (D.N.J.
16 Sept. 12, 2005) (total of 47 years, with 15 years on one MS count); United
17 States v. Gamarra-Murillo, No. 04-CR-349, Docket Entry No. 59 (M.D. Fla. Aug.
18 9, 2005) (total of 25 years, with 15 years on one MS count); United States v.
19 Rover, No. 03-CR-296, Docket Entry Nos. 600-02 (E.D. Va. July 29 2005) (total
20 of 10 years for each of two defendants, with 10 years on each of 2 MS counts;
21 total of 97 months for third defendant, with 97 months on 1 MS count). Most
22 of these courts chose the maximum material support sentence available to them
23 under federal law: fifteen years. See 18 U.S.C. §§ 2339A(a), 2339B(a)(1).

1 district judges must "remain cognizant of them" throughout the
2 sentencing process. Id. at 596, 597 n.6; accord United States v.
3 Cavera, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). When faced
4 with an "unusually lenient" sentence such as Stewart's, we must
5 ensure that the district judge has offered "sufficient
6 justifications" to support his conclusion that the sentence is
7 appropriate. Gall, 128 S. Ct. at 594. Despite the significant
8 discretion accorded to district judges, we retain a limited but
9 important reviewing function: We must review sentences for both
10 procedural and substantive reasonableness.

11 **II. Relevant Legal Standards**

12 Our review proceeds under a "deferential abuse-of-discretion
13 standard," Gall, 128 S. Ct. at 591, and "a district court's
14 decision to vary from the Guidelines 'may attract greatest
15 respect when the sentencing judge finds a particular case [to be]
16 outside the "heartland" to which the Commission intends
17 individual Guidelines to apply,'" Cavera, 550 F.3d at 192
18 (quoting Kimbrough v. United States, 128 S. Ct. 558, 574-75
19 (2007)). However, "closer review may be in order when the
20 sentencing judge varies from the Guidelines based solely on the
21 judge's view that the Guidelines range fails properly to reflect
22 § 3553(a) considerations even in a mine-run case." Kimbrough,
23 128 S. Ct. at 575 (internal quotation marks omitted); accord
24 Cavera, 550 F.3d at 192. The basic contours of our role are as
25 follows.

26 To evaluate procedural reasonableness, we must ensure that

1 the district court, in imposing a sentence, followed the
2 procedural steps prescribed by law. Procedural reasonableness
3 "requires that we be confident that the sentence resulted from
4 the district court's considered judgment as to what was necessary
5 to address the various, often conflicting, purposes of
6 sentencing." Cavera, 550 F.3d at 189-90. Thus, a district court
7 commits procedural error when it fails to calculate or
8 incorrectly calculates the Guidelines range, treats the
9 Guidelines as mandatory, neglects to consider the factors set
10 forth in 18 U.S.C. § 3553(a),⁵ or bases its sentence on a clearly

⁵ Section § 3553(a) states in relevant part:

The [district] court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed-
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for-
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-
- ...
- (5) any pertinent policy statement-

1 erroneous factual finding. See id. at 190. To avoid procedural
2 error, a district court must also “adequately . . . explain its
3 chosen sentence,” including the reasons that the sentence should
4 be different (in this case, extraordinarily different) from that
5 recommended by the Guidelines, id., in order “to allow for
6 meaningful appellate review and to promote the perception of fair
7 sentencing,” Gall, 128 S. Ct. at 597.

8 We do not categorically proscribe any factor “concerning the
9 [defendant’s] background, character, and conduct,” with the
10 exception of invidious factors. 18 U.S.C. § 3661; see also
11 Cavera, 550 F.3d at 190-91; United States v. Kaba, 480 F.3d 152,
12 156-57 (2d Cir. 2007). Still, while a district court may “take
13 into account any information known to it,” United States v.
14 Concepcion, 983 F.2d 369, 387 (2d Cir. 1992), it does not possess
15 “a blank check to impose whatever sentences suit [its] fancy,”
16 Cavera, 550 F.3d at 191 (quoting United States v. Jones, 531 F.3d
17 163, 174 (2d Cir. 2008)). And a district court, despite its
18 discretion, cannot ignore any of the § 3553(a) factors; it must
19 consider them all, Gall, 128 S. Ct. at 596, including the
20 relevant Guidelines range and “any pertinent Sentencing
21 Commission policy statement,” Cavera, 550 F.3d at 188-89. See
22 also 18 U.S.C. § 3553(a)(4)-(5). As we stated in United States v.

(A) issued by the Sentencing Commission

(6) the need to avoid unwarranted sentence disparities among
defendants with similar records who have been found guilty of
similar conduct; and

(7) the need to provide restitution to any victims of the offense.

1 Fernandez:

2 As long as the judge is aware of both the statutory requirements and
3 the sentencing range or ranges that are arguably applicable, and
4 nothing in the record indicates misunderstanding about such
5 materials or misperception about their relevance, we will accept
6 that the requisite consideration [of the § 3553(a) factors] has
7 occurred.

8
9 443 F.3d 19, 29-30 (2d Cir. 2006) (quoting United States v.
10 Fleming, 397 F.3d 95, 100 (2d Cir. 2005) (emphasis from Fernandez
11 omitted)). However, if the district court has "ignored or
12 slighted a factor that Congress has deemed pertinent" in §
13 3553(a), it has abused its discretion. United States v. Taylor,
14 487 U.S. 326, 337 (1988); Gall, 128 S. Ct. at 607 (Alito, J.,
15 dissenting); see also id. at 596 (majority opinion) (directing
16 district courts to "consider all of the § 3553(a) factors"
17 (emphasis added)).

18 In performing substantive reasonableness review, we must
19 determine whether the district court's sentence is "located
20 within the range of permissible decisions." Cavera, 550 F.3d at
21 191 (internal quotation marks omitted). "[W]e take into account
22 the totality of the circumstances, giving due deference to the
23 sentencing judge's exercise of discretion, and bearing in mind
24 the institutional advantages of district courts." Id. at 190.
25 But we must accept that such discretion is not boundless. "In
26 sentencing, as in other areas, district judges at times make
27 mistakes that are substantive. . . . Circuit courts exist to
28 correct such mistakes when they occur." Rita v. United
29 States, 551 U.S. 338, 354 (2007). Because the § 3553(a) factors
30 are to "guide sentencing," the factors also "guide appellate

1 courts . . . in determining whether a sentence is unreasonable.”
2 United States v. Booker, 543 U.S. 220, 261 (2005). And because
3 “it is fair to assume that [the Guidelines], insofar as
4 practicable, reflect a rough approximation of sentences that
5 might achieve § 3553(a)’s objectives,” Rita, 551 U.S. at 350, our
6 judgment of a sentence’s substantive reasonableness must be
7 informed by “the extent of any variance from the Guidelines
8 range,” Gall, 128 S. Ct. at 597.

9 In light of a district court’s wide discretion in
10 sentencing, we do not “presume that a non-Guidelines sentence is
11 unreasonable.” Cavera, 550 F.3d at 190. But when a district
12 judge chooses to step away from the Guidelines, we “must consider
13 the extent of the deviation and ensure that the justification is
14 sufficiently compelling to support the degree of the variance.”
15 Gall, 128 S. Ct. at 597; accord Cavera, 550 F.3d at 190. There
16 is no “rigid mathematical formula that uses the percentage of a
17 departure as the standard for determining the strength of the
18 justifications required for a specific sentence.” Gall, 128 S.
19 Ct. at 595. Rather, our focus on the degree of deviation is
20 derived from the “uncontroversial” proposition “that a major
21 departure should be supported by a more significant justification
22 than a minor one.” Id. at 597. Whatever the justification, its
23 persuasive power depends in large part on the quality of its
24 reasoning. Accordingly, in order to determine whether the
25 sentencing court acted reasonably, we must examine how it reached
26 its conclusions, and determine how persuasive its stated reasons

1 are in supporting its exercise of discretion. See id. at 600-02.
2 If the district judge's reasoning is sound, "we will not second
3 guess the weight (or lack thereof) that the judge accorded to a
4 given [§ 3553(a)] factor as long as the sentence
5 ultimately imposed is reasonable in light of all the
6 circumstances presented." Fernandez, 443 F.3d at 32, 34
7 (emphasis added). We have noted, however, that "unjustified
8 reliance upon any one factor is a symptom of an unreasonable
9 sentence," United States v. Rattoballi, 452 F.3d 127, 137 (2d
10 Cir. 2006), but only a symptom: We must reach our decision by
11 examining the reasoning of the district court in light of the
12 totality of the circumstances, with due deference to the district
13 court's judgment.

14 **III. Stewart's Sentence**

15 A. The District Court's Findings and Conclusions

16 In sentencing Stewart, the district court began by
17 calculating her sentencing range under the Guidelines, and found
18 it to be 360 months, the statutory maximum.⁶ Sent'g Tr. 112.
19 The district court's Guidelines calculation was clearly
20 appropriate. The majority speculates that the district court
21 might not have fully applied the terrorism enhancement in
22 calculating Stewart's range, see Maj. Op. at [125 n.37]; this
23 speculation is belied by the record and is therefore unwarranted,
24 see Sent'g Tr. 112, 114. Over Stewart's objection, the district

⁶ The district court calculated Stewart's total Adjusted Offense Level at 41 with a Criminal History Category of VI, yielding a Guidelines "sentencing range" of the statutory maximum of 360 months' imprisonment.

1 court found that the Guidelines terrorism enhancement, U.S.S.G. §
2 3A1.4 (2000), applied because she had committed a "federal crime
3 of terrorism." Sent'g Tr. 107-08. In light of the "ample
4 evidence" showing that Stewart's "actions were calculated to
5 affect the conduct of the Egyptian government through
6 intimidation and coercion," the district judge held that her
7 conduct "cannot be found to be outside the heartland of the
8 enhancement." Sent'g Tr. 108. The district court acknowledged
9 Stewart's arguments that the enhancement did not apply, and that
10 its effect on her Criminal History Category overstated the
11 seriousness of her past conduct and the likelihood that she would
12 commit further crimes. Sent'g Tr. 108-09. The district court,
13 however, did not waver from its "heartland" determination, and
14 chose to defer consideration of Stewart's non-application and
15 overstatement claims to its § 3553(a) analysis, instead of
16 determining whether they warranted departures within the
17 Guidelines' scheme. Sent'g Tr. 109.

18 The district court also declined to determine whether
19 Stewart's conduct warranted a Guidelines enhancement for her
20 potential obstruction of justice under U.S.S.G. § 3C1.1 (2000).
21 The government had urged this enhancement based upon Stewart's
22 alleged double perjury at trial. Sent'g Tr. 111. The district
23 court found "evidence to indicat[e] that [Stewart's] statements
24 were false." Sent'g Tr. 111. The court nonetheless chose not to
25 consider the enhancement's applicability, on the basis that the
26 Guidelines, because of the terrorism enhancement, already

1 provided for the statutory maximum. Sent'g Tr. 111. The
2 district court also noted that it believed a non-Guidelines
3 sentence would be "most consistent with the [§ 3553(a)] factors."
4 Sent'g Tr. 111-12.

5 Stewart sought several downward departures under the
6 Guidelines. First, she argued that she deserved a "lesser harms"
7 departure pursuant to U.S.S.G. § 5K2.11 (2000) because she
8 committed her crime in order to avoid a perceived greater harm.⁷
9 Rejecting this argument, the district court found that "the
10 circumstances of this case do not diminish society's interest in
11 punishing the conduct at issue," and that "[t]his is not a case
12 where the interest in punishment or deterrence is reduced."
13 Sent'g Tr. 109-10. The district court also rejected Stewart's
14 request for a downward departure under U.S.S.G. § 5K2.20 (2000),
15 which applies to "aberrant behavior." The district court refused
16 to grant this departure because Stewart's conduct "was committed
17 over an extended period of time, involved repeated acts of
18 deception, and involve[d] significant planning." Sent'g Tr. 110.

⁷ Specifically, Stewart claimed that her criminal conduct "was the product of her perception that [Abdel Rahman's] health and well-being were seriously jeopardized by his continued imprisonment in the United States." Stewart Sent'g Br. 44-45. She explained at trial that it "was important for [Abdel Rahman's] frame of mind that he have sort of peace of mind about his family, about people he had known when he was in the world, or the letters that were usually sent to him." Trial Tr. 7720-21. Stewart's justification for her conduct is patently absurd in light of evidence that she transmitted messages related not to personal family matters but rather to plans to kidnap and kill large numbers of innocent people, and to terrorize even more. The fact that Stewart attempted to justify her potentially devastating criminal conduct by citing her obligations to her client not only highlights her eagerness to corrupt the role of defense counsel, but also casts serious doubt on two of the district court's purported mitigating factors: (1) the unlikelihood that Stewart would provide material support to terrorism in the future, and (2) the "public service" value of her work as a defense attorney.

1 Finally, the district court stated that it would take into
2 account Stewart's requested departure for "extraordinary medical
3 conditions," pursuant to U.S.S.G. § 5H1.4, when making its §
4 3553(a) determination.

5 Having found that the Guidelines called for Stewart to
6 receive the statutory maximum of 360 months, the district court
7 proceeded to its § 3553(a) analysis. The district court cited
8 what it believed to be "numerous factors that argue in favor of a
9 very substantial downward variance." Sent'g Tr. 113. First, the
10 district court noted that "this is an atypical case for the
11 terrorism enhancement," because "there are few, if any, cases
12 where the thrust of the violation was the provision of a co-
13 conspirator to a terrorist conspiracy." Sent'g Tr. 113.

14 "Moreover," the district court explained, "there is no evidence
15 that any victim was in fact harmed as a result of the offense as
16 charged" Sent'g Tr. 113. The district court also found
17 the terrorism enhancement's impact on Stewart's Criminal History
18 Category to be "dramatically unreasonable." Sent'g Tr. 113.

19 The district court thus concluded that application of the
20 full terrorism enhancement, "while correct under the guidelines,
21 would result in an unreasonable result in this atypical case and
22 produce a guideline range about quadruple the range without that
23 enhancement." Sent'g Tr. 114. Accordingly, the district court
24 proceeded to consider Stewart's sentence as if there was no
25 terrorism component to her material support. Although the
26 district court reached the appropriate Guidelines calculation,

1 the district court, in its § 3553 analysis, effectively set aside
2 the enhancement, sentencing Stewart as if the Guidelines ranges
3 were 78 to 97 months' imprisonment without the government's
4 requested obstruction enhancement, and 97 to 121 months'
5 imprisonment with that enhancement. Sent'g Tr. 114. The
6 district court then stated that these ranges did not "tak[e] into
7 account the extraordinary personal characteristics of the
8 defendant[,] which also argue strongly in favor of a substantial
9 downward variance." Sent'g Tr. 114.

10 Noting that "[t]he personal characteristics of the defendant
11 are intertwined with several of the [§ 3553(a)] factors," Sent'g
12 Tr. 115, the district court then discussed at length Stewart's
13 age, health, and career. The district court described Stewart's
14 career of "represent[ing] the poor, the disadvantaged[,] and the
15 unpopular," and concluded that it was "no exaggeration to say
16 that Ms. Stewart performed a public service not only to her
17 clients but to the nation." Sent'g Tr. 115-16. Although
18 acknowledging that, under the Guidelines, "prior good works are
19 not ordinarily relevant" to a defendant's sentence, the district
20 court noted that even the Guidelines permitted "extraordinary
21 contributions [to] take a defendant outside the Guidelines
22 ra[n]ge." Sent'g Tr. 116. Accordingly, the district court held
23 that Stewart's past work warranted a "substantial downward
24 variance." Sent'g Tr. 116.

25 The district court then explained that Stewart's conviction
26 would likely prevent her from ever practicing law again. The

1 court found that this "is itself a punishment," and "means that
2 the occasion for offenses will be removed and that a lengthy
3 sentence of imprisonment would be an excessive one . . . for
4 deterrence and protection of the public." Sent'g Tr. 116-17.

5 The district court noted that Stewart was 67 years old,
6 making "imprisonment . . . particularly difficult on her."
7 Sent'g Tr. 117. And the court found Stewart's history of
8 overcoming cancer relevant because she had a "statistically
9 significant chance of recurrence" and "suffers from other medical
10 conditions including sleep apnea." Sent'g Tr. 117. The district
11 court acknowledged that "[m]edical care can be delivered while in
12 prison," but found it "clear that prison will be particularly
13 difficult for this defendant." Sent'g Tr. 117.

14 Despite noting that "age and physical condition are
15 discouraged factors under the guidelines," the district court
16 concluded that, "[b]ecause imprisonment will be particularly hard
17 on the defendant, a lesser sentence than otherwise called for by
18 the advisory guidelines would be sufficient to accomplish the
19 goals of Section 3553(a)(2)." Sent'g Tr. 117-18. But the
20 district court reiterated that there still was "an irreducible
21 core of extraordinarily severe criminal conduct." Sent'g Tr.
22 118. The court "point[ed] out that the offenses of conviction
23 were serious, involved dishonesty and breach of trust, and had
24 potentially lethal consequences" Sent'g Tr. 119.
25 However, the district court felt that "the seriousness of the
26 offense d[id] not wipe out the three decades of service and the

1 other characteristics of the defendant and the particular effects
2 of the sentence on this defendant." Sent'g Tr. 119.

3 Accordingly, "[t]aking all of the [§ 3553(a)] factors into
4 account," the district court sentenced Stewart to 28 months'
5 imprisonment. Sent'g Tr. 120.

6 B. The District Court's Procedural and Analytical Errors

7 The majority raises four issues concerning Stewart's
8 sentence: (1) It does not understand why Stewart's abuse of her
9 position as a lawyer did not warrant a higher sentence, Maj. Op.
10 at [120-121]; (2) it does not understand why Stewart's sentence
11 was only eight months longer than Yousry's, despite her
12 significantly more egregious conduct, Maj. Op. at [121-122]; (3)
13 it finds that the district court procedurally erred by ignoring
14 Stewart's potential perjury, which was relevant to her sentence
15 under § 3553(a), Maj. Op. at [122-124]; and (4) without finding
16 error, it notes the district court's failure to include
17 consideration of whether support of terrorism is an aggravating
18 factor and suggests that the district court reconsider whether
19 Stewart's sentence was appropriate in view of the offense for
20 which she was convicted; Maj. Op. at [124-126]. Accordingly, the
21 majority remands for resentencing, directing the district court
22 to address the perjury issue, consider whether Stewart's conduct
23 as a lawyer triggers the abuse-of-trust enhancement under
24 U.S.S.G. § 3B1.3, reconsider the extent to which Stewart's status
25 as a lawyer affects the appropriate sentence, and examine the
26 overall appropriateness of Stewart's sentence, taking into

1 account the terrorism enhancement, in light of the magnitude of
2 her offense. Maj. Op. at [127-128].

3 Although I share the majority's four concerns and its
4 conclusion that resentencing is required, the district court made
5 several substantial errors that the majority refuses to identify
6 as legal errors. Our error correcting function requires us to
7 specify these errors now, when they are evident to the court, to
8 prevent their repetition on remand and in other cases. Notably,
9 because the district court's stated reasons for effectively
10 removing altogether the terrorism object of Stewart's material
11 support in its § 3553(a)(2)(A) analysis cannot, in fact, mitigate
12 the seriousness of Stewart's crime, I identify procedural error
13 in the district court's application of 18 U.S.C. § 3553(a)(2)(A).
14 This grave error in assessing the seriousness of Stewart's crime,
15 moreover, was compounded by the district court's failure to
16 account for two aggravating factors plainly relevant under the
17 Guidelines: Stewart's perjury, and her persistent and blatant
18 abuse of a position of trust to commit her crime. See 18 U.S.C.
19 § 3553(a)(4). While the majority acknowledges these last two
20 procedural errors, its failure to explicitly recognize the error
21 that they compound minimizes the magnitude of the district
22 court's error in identifying the seriousness of Stewart's
23 criminal conduct – which, in turn, contributed to other errors.

24 Without a reasonable assessment of the seriousness of
25 Stewart's crime, the district court could not reliably determine
26 the sentence necessary to afford adequate general and specific

1 deterrence for crimes of material support of terrorism. See 18
2 U.S.C. § 3553(a)(2)(B). The district court's error in assessing
3 the seriousness of Stewart's crime further precluded a reliable
4 determination of the sentence necessary to avoid unwarranted
5 disparities with similarly situated criminals. See 18 U.S.C. §
6 3553(a)(6).

7 Moreover, the district court's error in assessing the
8 seriousness of Stewart's crime prompted it to accord Stewart's
9 age, health, and career mitigating weight that they cannot
10 reasonably bear. The totality of these procedural errors, all
11 originating in a disturbing misunderstanding of the seriousness
12 of Stewart's conduct, contributed to a sentence that so
13 trivializes the terrorism crimes of conviction as to present a
14 rare occurrence in this court: a sentence that cannot be deemed
15 to fall within the wide range of substantively reasonable choices
16 available to a sentencing judge. Cf. Jones, 531 F.3d at 174.

17 1. Assessing the Seriousness of Stewart's Crime as Required
18 by § 3553(a)(2)(A)

19 a. The Terrorism Enhancement

20 In 1994, Congress expressly mandated that the Sentencing
21 Commission provide for a terrorism enhancement to ensure that
22 crimes of terrorism were met with a punishment that reflected
23 their extraordinary seriousness. See Violent Crime Control and
24 Law Enforcement Act of 1994, Pub. L. 103-322, § 120004, 108 Stat.
25 1796, 2022. The Commission accordingly created an enhancement
26 that operates both vertically, increasing the offense level to

1 indicate the seriousness of the crime, and horizontally
2 increasing the defendant's Criminal History Category to reflect
3 the need for deterrence, regardless of the defendant's prior
4 record. See U.S.S.G. § 3A1.4 (2000).⁸ As the majority
5 acknowledges, the Sentencing Commission "unambiguously cast a
6 broad[] net" when drafting the terrorism enhancement. Maj. Op.
7 at [95] (quoting United States v. Mandhai, 375 F.3d 1243, 1247
8 (11th Cir. 2004)). The import of this enhancement "could not be
9 clearer": It reflects Congress' and the Commission's policy
10 judgment "that an act of terrorism represents a particularly
11 grave threat because of the dangerousness of the crime and the
12 difficulty of deterring and rehabilitating the criminal, and thus
13 that terrorists and their supporters should be incapacitated for
14 a longer period of time." United States v. Meskini, 319 F.3d 88,
15 91-92 (2d Cir. 2003) (emphasis added). Under the applicable
16 Guidelines, the enhancement increases the Guidelines sentence for
17 a terrorism crime to a minimum of 210 months or 17 1/2 years;
18 particularly serious crimes, such as Stewart's, have even higher
19 sentences after the enhancement is applied.⁹

⁸ The terrorism enhancement provides:

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

U.S.S.G. § 3A1.4 (2000).

⁹ As previously noted, the district court calculated the Guidelines "sentencing range" to be the statutory maximum of 360 months' imprisonment.

1 Despite finding that Stewart's crime fell within the
2 terrorism enhancement's "heartland," the district court, in its §
3 3553(a) analysis, sentenced Stewart as if there was no terrorism
4 component to her material support - and then proceeded to reduce
5 her sentence considerably further for additional reasons. The
6 district court effectively sentenced Stewart as though she had
7 committed no "federal crime of terrorism," U.S.S.G. § 3A1.4
8 (2000), even though the jury and the district court itself had
9 expressly found to the contrary. In an effort to avoid
10 addressing this issue today, the majority suggests that the
11 record could support the conclusion that the district court, in
12 fact, considered the terrorism aspect of Stewart's crime as an
13 aggravating factor and thus did not commit error by failing to
14 factor the terrorism component of Stewart's crime into its §
15 3553(a) analysis. This suggestion has no basis in the record,
16 and the majority does not even begin to explain how the terrorism
17 component could have possibly been an aggravating factor in a
18 sentence that radically reduced Stewart's sentence from the
19 recommended 30 years to a mere 2 1/3 years.

20 Whatever the merits of the district court's disregard of the
21 enhancement on the basis that it overstated Stewart's criminal
22 history, the district court's complete elimination of the effect
23 of the enhancement's vertical component in assessing the
24 seriousness of Stewart's crime cannot withstand scrutiny in light
25 of the district court's obligation to impose a sentence
26 sufficient to reflect the seriousness of the crime of conviction.

1 The district court offered two rationales for ignoring the
2 terrorism enhancement's vertical component when determining
3 Stewart's sentence under § 3553(a): the "atypical" nature of
4 Stewart's crime, and the lack of evidence of harm to victims.
5 Neither rationale is sustainable in this case.

6 Because the district court offered unsound rationales for
7 mitigating the seriousness of the terrorism aspect of Stewart's
8 crime, effectively sentencing Stewart as if there was no
9 terrorism component to her crime whatsoever, I find error. The
10 error is evident in light of the values inherent in the
11 Guidelines, which provide a very strong signal that crimes in
12 furtherance of terrorism objectives are to be considered
13 exceptionally serious, see U.S.S.G. § 3A1.4 (providing for a 12
14 offense level increase with a minimum offense level of 32 and
15 minimum Criminal History Category of VI). Jettisoning the
16 terrorism component of Stewart's crime in its § 3553(a) analysis
17 is particularly inexplicable when considered against the district
18 court's recognition that Stewart's conduct fell within the
19 enhancement's "heartland," and the fact that terrorism was a
20 required element of the crime for which Stewart was convicted.

21 Offering its first rationale, the district court stated that
22 Stewart's conviction was "an atypical case for the terrorism
23 enhancement" despite concluding minutes earlier that Stewart's
24 conduct "cannot be found to be outside the heartland of the
25 enhancement." Sent'g Tr. 108, 113. The "atypical" heartland
26 conduct, the district court added, was "the provision of a co-

1 conspirator to a terrorist conspiracy." Sent'g Tr. 113. The
2 district court did not explain this conclusion, nor can the
3 record support a reasonable explanation. At the outset, I
4 question the atypicality of this conduct as a mitigating factor.
5 Congress itself has made plain that giving material support,
6 which is a crime of terrorism under the Guidelines, can be
7 satisfied entirely by the provision of "personnel." See 18
8 U.S.C. § 2339A(b) (including the provision of personnel in the
9 definition of "material support"). Indeed, it is absurd and
10 therefore necessarily unreasonable to even suggest that enabling
11 an incarcerated terrorist leader with enormous influence to
12 actively conspire with others in a scheme to kidnap and kill
13 innocent persons somehow mitigates the seriousness of the crime.

14 Sheik Abdel Rahman was no ordinary "co-conspirator." He was
15 the head of the snake, a spiritual leader of a violent terrorist
16 group whose words carried the force of a holy writ among his
17 followers, and a man serving a life term for conspiring to bring
18 deadly chaos to New York City. See Rahman, 189 F.3d at 103-11.
19 After Abdel Rahman's influence had been sapped by the
20 incarceration and isolation attending his lawful conviction,
21 Stewart's crime specifically targeted undoing this protection by
22 successfully enabling Abdel Rahman, as the Islamic Group's
23 spiritual leader, to communicate with his followers and to
24 support the renewal of bloodshed. Abdel Rahman's unique stature
25 in the terrorist world surely renders Stewart's crime "atypical,"
26 but this atypicality is an aggravating factor, not a mitigating

1 one, thereby making Stewart more culpable than a defendant
2 engaged in more "typical" material support, such as providing
3 money or a cache of firearms to a terrorist group.

4 Although material support of terrorism may cover a
5 "multitude of sins," as Judge Calabresi's concurrence states, Op.
6 of J. Calabresi at [3], this observation does no work in
7 justifying a district court's complete disregard of the terrorism
8 enhancement. Each "sin" has a critical feature in common; it
9 supports terrorism. And Congress has sent a clear signal that
10 this feature alone warrants enhancement of punishment. See
11 U.S.S.G. § 3A1.4 (providing for a 12 offense level increase with
12 a minimum offense level of 32 and minimum Criminal History
13 Category of VI). That signal was not heeded in this case. The
14 procedural concern with the district court's sentence is not with
15 where Stewart's conduct was placed on the terrorism spectrum: it
16 is with whether that conduct was placed on the spectrum at all.
17 Removing Stewart from the spectrum on account of the nature of
18 her "sins" is particularly egregious given that Stewart's conduct
19 supported Abdel Rahman, a terrorist at the highest level.

20 Beyond erroneously finding mitigating atypicality in
21 "provi[ding] a co-conspirator to a terrorist conspiracy," Sent'g
22 Tr. 113, the district judge offered no further explanation of why
23 Stewart's "atypical" conduct should lessen Stewart's culpability
24 or justify ignoring the terrorism object of Stewart's material
25 support as an aggravating factor in its § 3553(a) analysis,
26 particularly in view of its "heartland" finding. As a result, we

1 are left only with the district judge's bare assertion of
2 atypicality, which cannot reasonably support the complete
3 rejection of the terrorism enhancement. See Cavera, 550 F.3d at
4 193.

5 The district court's second rationale for giving no effect
6 to the terrorism component of Stewart's material support – the
7 absence of evidence that Stewart's terrorism crimes resulted in
8 actual harm – is similarly flawed.¹⁰ Several points must be made
9 before explaining why this reasoning amounted to procedural
10 error. First, the absence of harm is in no sense attributable to
11 Stewart. Alaa Abdul Raziq Atia, the leader of the violent
12 faction of the Islamic group, including Abdel Rahman, was located
13 and killed by Egyptian authorities after the cease-fire was
14 lifted but before he could act upon it. Second, the district
15 court did not simply consider the absence of harm as a factor to
16 lessen the effect of the terrorism enhancement; it used that
17 fortuity to completely eliminate the effect of the terrorism
18 enhancement in its § 3553(a) consideration, so that Stewart, in
19 substance, was punished as if she had committed no crime of
20 terrorism at all. Third, the district court provided no reason,
21 much less a persuasive one, for why the absence of death or
22 injury should have such a steep mitigating effect in this case.

23 I take issue with the majority's failure to identify as
24 procedural error the district court's deeply flawed reliance on

¹⁰ Because the district court's flawed reliance on the absence of harm in this case also infected Sattar's and Yousry's sentences, I would vacate their sentences and remand for resentencing as to them as well.

1 the fortuity that Stewart's crime did not have the horrific
2 consequences that she and Abdel Rahman intended. In doing so,
3 the majority fails to appreciate the unique nature of terrorism
4 support crimes, and the enhancement punishment they warrant as
5 envisioned by Congress. Judge Calabresi's concurrence mistakenly
6 equates such crimes to ordinary crimes and attempts, and
7 erroneously permits the district court to eliminate the
8 enhancement altogether primarily because the intended destruction
9 of innocent life did not come to pass. Op. of J. Calabresi at
10 **[6]**.

11 Congress and the Sentencing Commission plainly intended for
12 the punishment of crimes of terrorism to be significantly
13 enhanced without regard to whether, due to events beyond the
14 defendant's control, the defendant's conduct failed to achieve
15 its intended deadly consequences. See United States v. Abu Ali,
16 528 F.3d 210, 264-65 (4th Cir. 2008). Such intent is plain from
17 the many criminal statutes and Guidelines unrelated to terrorism
18 that specifically account for the level or absence of injury,
19 while the material support statute and terrorism enhancement do
20 not.¹¹ Moreover, Congress amended Stewart's statute of
21 conviction in 2001 so that causing death increased the statutory

¹¹ See, e.g., 18 U.S.C. § 2119 (varying maximum penalty for carjacking based on injuries caused); U.S.S.G. § 2A1.5(c)(1) (2000) (increasing offense level for conspiracy or solicitation to commit murder if the offense resulted in the death of a victim); id. § 2A2.2(b)(3) (2000) (varying offense level for aggravated assault based on the victim's injuries).

1 maximum from 15 years to life imprisonment.¹² Contrary to the
2 suggestion in Judge Calabresi's concurrence that the achievement
3 of harm, like a two-way elevator, cannot be an aggravating factor
4 unless the absence of such harm is a mitigating factor, Op. of J.
5 Calabresi at [9], Congress has been unmistakably clear that, as a
6 general matter, the achievement of actual harm may aggravate the
7 seriousness of a terrorism crime but that the absence of proven
8 harm does not mitigate such a crime. As such, the district
9 court's decision to place substantial mitigating weight upon the
10 absence of harm is thus so far contrary to the policy choices of
11 Congress and the Commission that it cannot be deemed reasonable
12 under § 3553(a)(1)(A) without persuasive explanation. See
13 Kimbrough v. United States, 128 S. Ct. 558, 575 (2007).

14 Unremarkably, courts routinely, and unflinchingly, apply the
15 terrorism enhancement in the absence of proven harm.¹³ Here, the
16 Egyptian police caught and killed Alaa Abdul Raziq Atia, a

¹² See Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 810(c)(2), 115 Stat. 272, 380 (codified as amended at 18 U.S.C. § 2339A(a), 2339B(a)(1)).

¹³ See, e.g., Meskini, 319 F.3d at 91-92; United States v. Garey, 546 F.3d 1359, 1363 (11th Cir. 2008) (per curiam); United States v. Benkahla, 530 F.3d 300, 313 (4th Cir. 2008) ("Here, . . . the terrorism enhancement is doing just what it ought to do: Punishing more harshly than other criminals those whose wrongs served an end more terrible than other crimes."); United States v. Hale, 448 F.3d 971, 988 (7th Cir. 2006) ("That [the defendant] did not commit a federal crime of terrorism is irrelevant; the district court found the purpose of his soliciting [a co-conspirator] was to promote a federal crime of terrorism" (emphasis in original)). In footnote 6 of his concurrence, Judge Calabresi correctly points out that Garey resulted in a downward variance from the Guidelines. Op. of J. Calabresi at [7 n.6]. But the district court did not reject the terrorism component of the defendant's crime altogether in its § 3553 calculus, as here. In applying a somewhat reduced enhancement - even for that mentally ill defendant who's crime was telephoning threats to a shopping mall - it imposed a 30 year prison sentence.

1 violent co-conspirator, after Abdel Rahman and Stewart withdrew
2 Rahman's support for the cease-fire, but before Atia could act on
3 that message. This fortuity likely prevented Stewart's crime
4 from harming victims, but "[f]ortuity has no bearing on
5 culpability," United States v. Mitchell, 178 F.3d 904, 910 (7th
6 Cir. 1999), nor does it mitigate to any degree the seriousness of
7 Stewart's conduct.¹⁴ Abdel Rahman himself was appropriately
8 given a life sentence even though his plans to assassinate
9 President Hosni Mubarak and to blow up bridges, tunnels, and
10 buildings in New York City were frustrated. See Rahman, 189 F.3d
11 at 124-126. There is no reason why fortuity should have enabled
12 Stewart, Rahman's supporter, enabler, and co-conspirator, to be
13 sentenced as if no terrorism crimes had ever occurred.

14 In suggesting that the district court's heavy reliance on
15 the lack of proven harm was reasonable, neither the majority's
16 opinion nor Judge Calabresi's concurrence finds support in the
17 case law, and I have found none. Judge Calabresi is reduced to
18 observing that attempted crimes are sometimes treated differently
19 from completed crimes, even when only fortuity separates the two.
20 Op. of J. Calabresi at [5-6]. But how the law treats attempts is
21 besides the point. As the majority itself recognizes, material
22 support of terrorism is "a substantive, not inchoate, offense."

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¹⁴ Cf. United States v. Simpson, 538 F.3d 459, 464 (6th Cir. 2008) ("It cannot be . . . that a crime [of insurance fraud] spanning several years . . . is not very serious merely because none of the employer's workers happened to get hurt."); United States v. Butler, 970 F.2d 1017, 1030 (2d Cir. 1992) (Newman, J., concurring) ("Whatever sentence is ultimately imposed on [the defendant], . . . [it] should not turn on fact-finding that has little if any relevance to moral culpability.").

1 Maj. Op. at [51]. "This is an independent crime, complete in its
2 most serious form when the [material support] is complete and
3 nothing is added to its criminality by success or consummation,
4 as would be the case, say, of attempted murder." Spies v. United
5 States, 317 U.S. 492, 498-99 (1943).

6 The Fourth Circuit recently agreed with my position,
7 vacating a sentence of 30 years' imprisonment because the
8 district court impermissibly reduced, on the basis of lack of
9 harm, the sentence of a defendant, as here, convicted of
10 conspiracy to provide material support. Abu Ali, 528 F.3d at
11 264-65. It reasoned that "[t]o deviate on the basis of
12 unrealized harm is to require an act of completion for an offense
13 that clearly contemplates incomplete conduct. By definition,
14 conspiracy offenses do not require that all objects of the
15 conspiracy be accomplished. The Guidelines appropriately
16 recognize this fact: while they normally afford a three-level
17 decrease for non-specific offense conspiracies that were not on
18 the verge of completion, they specifically exclude from this
19 decrease any conspiracies that involve or promote 'a federal
20 crime of terrorism.'" Id. at (citing U.S.S.G. § 2X1.1). I
21 completely agree with this statutory conclusion. As the Fourth
22 Circuit aptly stated, we are not relegated to "wait[ing] until
23 there are victims of terrorist attacks to fully enforce the
24 nation's criminal laws against terrorism." Id.

25 Stewart completed her crime as Congress chose to define it,
26 and the Sentencing Commission, in drafting the terrorism

1 enhancement, elected not to mitigate its seriousness by rewarding
2 a defendant whose crime did not ultimately result in death or
3 serious injury with a reduced sentencing range. It is for this
4 reason that lack of success cannot normally be a mitigating
5 factor even though achievement of harm may be an aggravating
6 factor. Permitting a district judge to require success in
7 harming innocents before he will consider the terrorism component
8 of a crime, particularly in a "heartland" case, is to permit that
9 judge to disregard the fact that material support is itself a
10 fully completed crime.

11 The majority states that "[f]ortuitous events are not
12 categorically irrelevant to the determination of a just
13 punishment nor is their consideration necessarily inappropriate."
14 Maj. Op. at [100]. As a general matter, of course, I agree. In
15 addition, I do not mean to suggest that there can never be a
16 terrorism case in which absence of harm might be an appropriate
17 consideration. Rather, I am suggesting that there is a very
18 broad heartland of cases in which it should not be considered,
19 and further that in this heartland, as here, it is error to use
20 lack of harm as a primary reason for rejecting the terrorism
21 component of a material support conviction. If, for example, an
22 incompetent terrorist satisfies the enhancement by putting a
23 small amount of arsenic into a reservoir for New York's drinking
24 water with every intention of killing thousands, but without
25 understanding that the quantity is insufficient to cause harm,
26 the complete absence of any practical possibility that the plot

1 could cause harm may well be relevant. But, that is far from the
2 instant case, in which Stewart's actions were designed to
3 embolden Rahman's followers to resume a murderous jihad against
4 scores of innocent individuals in Egypt and elsewhere. In this
5 case, it was unreasonable for the district court to place any
6 weight on the fortuitous and attenuated events that saved the
7 potential victims of Stewart's crime, much less to use it to wipe
8 out the terrorism component of Stewart's crime in its § 3553(a)
9 analysis, in light of the values signaled by the Guidelines
10 terrorism enhancement.

11 Judge Calabresi's attempt to defend the district court's
12 analysis, by offering a hypothetical comparing the punishment of
13 a terrorist who succeeds in causing harm with the punishment of
14 one who does not miss the mark. See Op. of J. Calabresi at
15 [9]. The question at issue is not whether the amount of harm can
16 never be a factor in sentencing. It is whether the terrorist who
17 attempts to detonate a bomb in a public place, with the intent of
18 killing many innocent Americans, should be able to escape the
19 terrorism enhancement altogether simply because his plan happens
20 to fail or be foiled by authorities. The answer, as the
21 Sentencing Commission has made clear, is no. A more persuasive
22 reason than the mere absence of injury must be provided by the
23 district judge who uses that factor to eliminate entirely the
24 effect of the terrorism enhancement. To permit a judge to
25 completely ignore the terrorism component of a material support
26 conviction in a "heartland" case simply because the terrorist did

1 not succeed, without further explanation as to why that case is
2 sui generis, is to overlook the reality that the objective of
3 terrorism is to kill large numbers of innocent people and that
4 maximum deterrence needs to be achieved irrespective of success.
5 See Abu Ali, 528 F.3d at 264-65.

6 Actual harm is a flawed metric when determining culpability
7 in material support prosecutions. Precisely because of the
8 devastating consequences at stake, it is, and should be, the
9 focus of enforcement authorities to make every effort to prevent
10 those consequences before they occur. When enforcement
11 authorities are successful, it is to their great credit and their
12 efforts should in no sense lessen the deterrent effect of
13 punishment by conferring a sentencing benefit on those whose
14 efforts were thwarted. Indeed, the House Report accompanying the
15 Comprehensive Antiterrorism Act of 1995, which criminalized the
16 material support of terrorism, explained that one of the
17 legislation's primary goals was to "enhance [law enforcement's]
18 capability of thwarting, frustrating, and preventing terrorist
19 acts before they result in death and destruction." H.R. Rep. No.
20 104-383, at 42 (1995) (emphasis added).

21 I fully recognize that district judges must develop ways of
22 distinguishing whether and why one form of material support is
23 more or less reprehensible than another, given the broad range of
24 conduct that the material support statute criminalizes, see 18
25 U.S.C. § 2339A. However, it makes little sense to have the
26 presence or absence of resultant harm to victims be a factor in

1 that determination. Cf. United States v. Whiteskunk, 162 F.3d
2 1244, 1251 (10th Cir. 1998) (finding it "unfair not to recognize
3 and accommodate th[e] varying spectrum of culpability" when
4 sentencing for a "broad category of conduct" (emphasis added)).
5 Because material support providers often have been, and hopefully
6 will continue to be, apprehended before the crimes that they
7 foster come to fruition, the lack of physical injury is more
8 likely to be the norm than the exception.

9 Accordingly, the lack of injury here was not a fact of
10 "critical relevance . . . distinguish[ing]" Stewart's conduct
11 "not only from that of all [her] codefendants, but from the vast
12 majority of defendants convicted of conspiracy in federal court."
13 Gall, 128 S.Ct. at 600. Giving the absence of harm mitigating
14 significance thus not only fails to recognize the extreme
15 seriousness of such crimes even without achievement of actual
16 harm, it undermines one of § 3553(a)'s express goals:
17 eliminating sentencing disparities. See 18 U.S.C. § 3553(a)(6);
18 United States v. Simpson, 538 F.3d 459, 464 (6th Cir. 2008)
19 (noting that focusing on "the defendant's culpability" instead of
20 fortuity when sentencing "prevents arbitrary disparities"
21 (emphasis added)). The happenstance lack of devastating injury
22 implicit in terrorism crimes generally and Stewart's in
23 particular simply cannot "bear the weight" the district court
24 assigned to it. Cavera, 550 F.3d at 191. The district court
25 acted unreasonably by using the absence of proven harm to justify
26 completely discarding the terrorism component of Stewart's crime

1 and to support an unwarranted mitigation of the seriousness of
2 the crime of conviction. See 18 U.S.C. § 3553(a)(2)(A).

3 My colleagues in the majority also suggest that because
4 Stewart's terrorism crimes preceded the events of September 11,
5 2001 her view of her own culpability might have been different
6 than would be true after that tragic day. While such a lack of
7 awareness may be true of the ordinary New Yorker, such
8 attribution is ill-suited for Stewart who, as Abdel Rahman's
9 lawyer, sat through extensive horrific evidence at his trial,
10 including that the Islamic Group was responsible for the
11 slaughter of scores of innocent tourists at Luxor and the Islamic
12 Group's plans to bring New York to its knees by blowing up
13 buildings, bridges, tunnels, and by assassinating the Egyptian
14 President while in New York City.

15 b. The Absence of an Enhancement for Perjury and
16 Obstruction of Justice.

17 After jettisoning the terrorism component of Stewart's crime
18 in assessing the seriousness of Stewart's crime of conviction
19 pursuant to § 3553(a)(2)(A), the district court then noted that –
20 with this mitigation – the Guidelines (absent the terrorism
21 enhancement) would provide for a sentencing range for Stewart of
22 either 78 to 97 months or 97 to 121 months, depending on whether
23 the obstruction of justice enhancement applied. I join the
24 majority's view that the district court's failure to make any
25 findings regarding obstruction was procedurally unreasonable.
26 Maj. Op. at [123-124]. The district court's reason for not

1 making such findings was that there was no point in doing so,
2 because the terrorism enhancement took the Guidelines sentence to
3 the statutory maximum. After the district court rejected the
4 terrorism component of Stewart's sentence, however, the
5 obstruction enhancement became relevant to its hypothesis of a
6 revised Guidelines calculation. In addition, as the majority
7 notes, it was error for the district court not to account for
8 Stewart's potential perjury in the § 3553(a) calculus. See
9 Cavera, 550 F.3d at 190.

10 c. The Absence of an Enhancement for Abuse of Trust

11 The majority properly faults the district court for failing
12 to "explain how and to what extent the sentence reflected the
13 seriousness of the crimes of conviction in light of the fact that
14 Stewart was . . . a member of the bar when she committed them."
15 Maj. Op. at [121]. The majority asks whether, in that light,
16 "her punishment should have been greater than it was," and then
17 suggests the obvious answer. Maj. Op. at [121]. I agree with
18 the majority's criticism. As a "guardian[] of the law," a lawyer
19 has a special obligation to "refrain from all illegal and morally
20 reprehensible behavior." New York Code of Professional
21 Responsibility, Preamble, EC 1-5 (effective through March 31,
22 2009). However, the majority does not go far enough. Stewart
23 was not just a lawyer who committed crimes. And she did not use
24 her professional position simply to gain access to her client and
25 to carry his jihadist messages by criminal means, conduct that,
26 as noted in the previous section of this opinion reflects an

1 extreme seriousness unreasonably overlooked by the district
2 court. Stewart also committed her material support crimes by
3 garnering the trust of the government, and then blatantly
4 violating that trust – a fiduciary obligation that lies at the
5 core of the SAMs system and that protects the right to counsel,
6 even for convicted terrorists.

7 Under the Guidelines, the abuse-of-trust enhancement applies
8 when a defendant has “abused a position of public or private
9 trust . . . in a manner that significantly facilitated the
10 commission or concealment of the offense.” U.S.S.G. § 3B1.3
11 (2000). As the Commentary explains, a position of trust is
12 “characterized by professional or managerial discretion,” for
13 “[p]ersons holding such positions ordinarily are subject to
14 significantly less supervision than employees whose
15 responsibilities are primarily non-discretionary in nature,” *id.*
16 cmt. n.1 (2000), and “[s]uch persons generally are viewed as more
17 culpable,” *id.* cmt. background (2000).

18 The district court failed to explain why an enhancement for
19 abuse of trust is not plainly appropriate in this case. The
20 majority fails to fault the district court on this score because
21 “the government did not specifically invoke section 3B1.3 in its
22 sentencing memorandum.” Maj. Op. at [121 n.37]. But the
23 government explicitly argued for consideration of Stewart’s abuse
24 of trust at the sentencing hearing:

25 [T]he United States Attorney’s Office who was administering the SAMs
26 trusted Ms. Stewart, put their faith in Ms. Stewart that she was
27 doing what she promised to do. She considered that attorney
28 affirmation that she signed an oath, a promise. Those are her

1 words. And the government accepted that commitment and believed she
2 would honor that commitment, but she violated that trust that was
3 put in her by the United States Attorney's Office, by the Justice
4 Department, repeatedly violated [it].
5

6 Sent'g Tr. 95. As a result, the issue was properly before the
7 district court.

8 The SAMs placed trust in Stewart because she was a member of
9 the bar appointed under the Criminal Justice Act to represent
10 Abdel Rahman, and she made explicit affirmations to the
11 government specifically required to curb her client's ability to
12 continue terrorist activities. Only because of the SAMs did
13 Stewart have private access to, and "significantly less
14 supervision" in her contacts with, Abdel Rahman, U.S.S.G. § 3B1.3
15 cmt. n.1 (2000), and obtain the freedom she needed to act as his
16 lawyer. Stewart used, or more accurately abused, the trust that
17 the government placed in her to "facilitat[e] the commission . .
18 . of [her] offense," *id.*, furthering terrorist communications
19 that put innocent lives in jeopardy. Stewart was only given
20 access to Abdel Rahman to discuss legal matters; instead, she
21 engaged in criminal actions that, as she conceded at trial, had
22 nothing to do with any past, pending, or future legal proceedings
23 and were unrelated to the rendering of legal advice. See Trial
24 Tr. 7722 (acknowledging that Abdel Rahman's "appeals [were]
25 exhausted, with no issue legally on the horizon").

26 Stewart's abuse of trust is particularly significant because
27 it supports the arguments of those who say that our Article III
28 courts, and the constitutional protections they afford, are not
29 suited to terrorist trials. See generally, e.g., Michael B.

1 Mukasey, Civilian Courts Are No Place To Try Terrorists, Wall St.
2 J., Oct. 19, 2009, at A21 (discussing the difficulties of trying
3 terrorists in Article III courts). The SAMs are designed to
4 safeguard those rights, but they must necessarily be conditioned
5 on attorneys respecting the trust placed in them, and cannot be
6 sustained without that trust. Stewart's conduct thus raises
7 concerns reaching even beyond her dealings with Abdel Rahman.
8 Her criminal acts jeopardize, in a sensitive set of cases, the
9 accused's right to his choice of independent counsel, which is
10 the right upon which the vindication of all of the accused's
11 other rights, and, in a larger sense, the right to a trial by an
12 Article III court, depends.¹⁵

13 Section 3553(a) requires a district court to consider all of
14 the Guidelines relevant to a defendant's conduct. See 18 U.S.C.
15 § 3553(a)(4); Cavera, 550 F.3d at 189 (requiring a district court
16 to "conduct its own independent review of the sentencing factors,
17 aided by the arguments of the prosecution and defense"). In
18 sentencing Stewart, the district court mentioned "abuse of trust"
19 as part of the litany of her crimes and noted that Stewart
20 "abused her position as a lawyer" in order to further Abdel
21 Rahman's terrorist quest. Sent'g Tr. 118. Yet the district
22 court gave no indication that it considered to any extent the

¹⁵ See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right . . . to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, [we] have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."); Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Without [this right], though [a defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

1 depth of Stewart's abuse of trust as argued by the government,
2 which went beyond simply abusing her position as a lawyer to gain
3 access to Abdel Rahman. By not fully responding to the
4 government's clear and forceful argument by considering the
5 policy reflected in U.S.S.G. § 3B1.3,¹⁶ and accounting for
6 Stewart's grave abuse of trust in assessing the seriousness of
7 Stewart's crime and imposing its sentence, the district court
8 erred procedurally.

9 d. The Impact of These Errors on the Rest of the § 3553

10 Analysis

11 The district court's errors in assessing the seriousness of
12 Stewart's crime impacted other parts of its § 3553 analysis and,
13 for that reason, must be recognized if any remand in this case is
14 to yield a reasonable sentence. Necessarily, the district
15 court's unreasonable underappreciation of the gravity of
16 Stewart's offense, evident from its reasoning despite its
17 statements to the contrary, infected its consideration of "the
18 need . . . to afford adequate deterrence to criminal conduct," 18
19 U.S.C. § 3553(a)(2), and "the need to avoid unwarranted sentence
20 disparities," id. § 3553(a)(6), because both factors are
21 calibrated by the seriousness of the offense at stake. More
22 serious crimes require greater deterrence; an unreasonably low

¹⁶ See United States v. Carty, 520 F.3d 984, 992-93 (9th Cir. 2008) (en banc) ("[W]hen a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position." (citing Rita, 551 U.S. at 355-56)); see also Gall, 128 S. Ct. at 599 ("Had the prosecutor raised the issue, specific discussion of the point might have been in order").

1 view of a crime's severity will taint a district court's stance
2 on whether a given sentence sufficiently deters future criminal
3 conduct, both for the specific defendant and for the public at
4 large. In no area can the need for adequate deterrence be
5 greater than in terrorism cases, with their potential for
6 devastating loss of innocent life. Similarly, an erroneous
7 assessment of a crime's seriousness precludes accurate comparison
8 with equally serious crimes, to avoid unwarranted disparities.
9 Thus, although the district court's mishandling of the
10 seriousness of Stewart's crime constitutes reversible error on
11 its own, I believe it also infects other judgments the court made
12 in its mandatory § 3553(a) analysis.

13 2. The District Court's Overwhelming Emphasis on Stewart's
14 Age, Health, and Career

15 The district judge found that Stewart's "extraordinary
16 personal characteristics . . . argue[d] strongly in favor of a
17 substantial downward variance," Sent'g Tr. 114, and used that
18 finding to effectively set aside the Guidelines and their
19 import.¹⁷ To be sure, it was appropriate, indeed required that

1 ¹⁷ A district court, of course, has wide discretion to impose a non-
2 Guidelines sentence after properly calculating the appropriate Guidelines
3 range. Gall, 128 S. Ct. at 597. But because the Guidelines are the
4 touchstone or "starting point" for sentencing, id. at 596, the entire thrust
5 of sentencing below or above the Guidelines is that "any deviation [is] from
6 the Guidelines," id. at 597, and is to be justified in that context. Because
7 a district judge "must begin [his] analysis with the Guidelines and remain
8 cognizant of them throughout the sentencing process," id. at 597 n.6 (emphasis
9 added), it is not permissible simply to set them aside in toto and to impose a
10 sentence that bears no rational relationship to them as if they did not exist.
11 See United States v. Williams, 524 F.3d 209, 215 (2d Cir. 2008) (explaining
12 that "displacement of the Sentencing Guidelines at the threshold . . . cannot
13 be reconciled with 18 U.S.C. § 3553(a)"). But this is precisely what the
14 district judge did.

1 the district judge consider Stewart's "history and
2 characteristics" under § 3553(a)(1). But the district court
3 abused its discretion by allowing this factor to overwhelm its
4 consideration of "the need for the sentence imposed to reflect
5 the seriousness of the offense, to promote respect for the law, .
6 . . . to provide just punishment for the offense, and . . . to
7 afford adequate deterrence to criminal conduct," 18 U.S.C. §
8 3553(a)(2), and by using it to justify the deep discount of 332
9 months in Stewart's sentence. Indeed, given the magnitude of the
10 district court's error in evaluating the seriousness of the
11 offense in this case, it could not reasonably determine what
12 weight, if any, to assign to personal mitigating factors.

13 Although we have no specific formula for balancing the §
14 3553(a) factors, "unjustified reliance upon any one factor is a
15 symptom of an unreasonable sentence," Rattoballi, 452 F.3d at
16 137, and here, the district judge's focus on Stewart's personal
17 qualities exceeded the bounds of reasonableness in light of the
18 gravity of her crimes. Whatever weight Stewart's career, age,
19 and physical condition might reasonably warrant, these factors
20 cannot support an unprecedentedly lenient 28-month sentence for
21 what the district court itself termed her "extraordinarily severe
22 criminal conduct." Sent'g Tr. 118; see supra note 3.

23 The imposition of a 28-month prison sentence "slighted,"
24 Taylor, 487 U.S. at 337, the extreme criminality of Stewart's

1 offense¹⁸ and disregarded the manifest purpose of the Guidelines
2 regime: to avoid "unwarranted sentencing disparities," 18 U.S.C.
3 § 3553(a)(6). See Booker, 543 U.S. at 264-65. The Guidelines
4 "reflect a rough approximation of sentences that might achieve §
5 3553(a)'s objectives," Rita, 551 U.S. at 350, and Stewart's age,
6 health, and career simply cannot justify the degree to which the
7 district judge deviated from the Guidelines pursuant to §
8 3553(a).

9 The district court's apparent disregard of "the need to
10 avoid unwarranted sentence disparities," 18 U.S.C. § 3553(a)(6),
11 is particularly striking in light of the court's obligation to
12 consider "pertinent [Commission] policy statement[s]," id. §
13 3553(a)(5). For example, the Commission has determined that only
14 "an extraordinary physical impairment may be a reason to impose a
15 sentence below the applicable guideline range," U.S.S.G. § 5H1.4
16 (2000) (emphasis added), yet the record indicates that Stewart,
17 despite medical issues, will receive appropriate medical care in
18 prison, and the district judge himself acknowledged that
19 "[m]edical care can be delivered while in prison," Sent'g Tr.

1 ¹⁸ The district court treated Stewart's terrorism and fraud crimes -
2 "particularly grave" offenses, Meskini, 319 F.3d at 92 - much more leniently
3 than what the Guidelines recommend for bank embezzlement, see U.S.S.G. §
4 2B1.1(b)(6)(B) (2000) (recommending a minimum range of 51-63 months for
5 embezzlement "affect[ing] a financial institution" and resulting in over
6 "\$1,000,000 in gross receipts"), and on par with the Guidelines
7 recommendations for criminal trademark infringement, see U.S.S.G. § 2B5.3
8 (2000) (recommending a minimum range of 24-30 months for the manufacture of
9 infringing items exceeding \$120,000 in total retail value), conspiring to
10 steal over \$5,000 of car parts, see U.S.S.G. § 2B1.1(b)(1)(E), (5) (2000) (15-
11 21 months), burgling a residence and stealing a \$2,600 television, see
12 U.S.S.G. § 2B2.1(a)(1), (b)(2)(B) (2000) (27-33 months), and possessing 1.5
13 grams of crack cocaine with the intent to distribute it, see U.S.S.G. §
14 2D1.1(c)(11) (2000) (27-33 months).

1 117. The district judge, of course, is not bound by Commission
2 policy, but the record nowhere suggests that Stewart's condition
3 was sufficiently compelling to distinguish her from others in the
4 prison population and to warrant any leniency on that score. As
5 for Stewart's age, the Commission has concluded that this factor
6 "is not ordinarily relevant in determining whether a sentence
7 should be outside the applicable guideline range[, but it] may be
8 a reason to impose a sentence below the applicable guideline
9 range in a case in which the defendant is elderly and infirm . .
10 . ." U.S.S.G. § 5H1.1 (2000). Again, the district court was not
11 bound by this statement. But the district judge's point that
12 Stewart's sentence "will represent a greater portion of her
13 remaining life than for a younger defendant," Sent'g Tr. 117,
14 would apply to any older defendant, and this is not an
15 extraordinary factor, such as being "elderly and infirm," that
16 can justify excessive leniency. See Rattoballi, 452 F.3d at 136
17 n.4, 137. The district court cited both Stewart's age (67 years)
18 and health (sleep apnea; cancer survivor with a chance of
19 recurrence) in concluding that "[a]ny sentence of imprisonment
20 will be particularly difficult for the defendant." Sent'g Tr.
21 117. Yet as the majority notes, Maj. Op. at [26-27 n.9], Stewart
22 herself apparently did not share the district court's misgivings:
23 "I don't think anybody would say that going to jail for 28 months
24 is anything anyone would look forward to, but as my clients have

1 told me, 'I can do that standing on my head.'"¹⁹ Stewart was not
2 "elderly and infirm," and I do not see how her age or health
3 could reasonably contribute to such a significant variance from
4 the Guidelines. Advancing age and treatable medical conditions
5 are not normally a ticket to overwhelming leniency, and this case
6 is no different from the norm in that respect.

7 Similarly, Stewart's career of public service, as admirable
8 as it seemed to the district court, can only go so far. "[I]t is
9 usually not appropriate to excuse a defendant almost entirely
10 from incarceration because [s]he performed acts that, though in
11 society's interest, also were the defendant's responsibility to
12 perform and stood to benefit the defendant personally and
13 professionally." United States v. D'Amico, 496 F.3d 95, 107 (1st
14 Cir. 2007). The district court placed emphasis on Stewart's
15 providing legal services to "the poor, the disadvantaged[,] and
16 [the] unpopular over three decades," Sent'g Tr. 115, but as the
17 district judge himself put it, "that credit does not extend to
18 the knowing violation of the law," Sent'g Tr. 119. Yet given the
19 severity of Stewart's conduct, this credit, which contributed
20 heavily to a 332-month reduction from the recommended Guidelines
21 range to a 28-month sentence, goes further than the district
22 court's explanation can bear. Giving such excessive weight to
23 Stewart's resumé trivializes the seriousness of her crimes,

¹⁹ Ellen Barry, Terrorist Lawyer Gets Two-Year Term, LA Times, Oct. 17, 2006, available at <http://articles.latimes.com/2006/oct/17/nation/na-stewart17> (last visited Aug. 20, 2009); Katie Cornell, Wrist Slap for Smirk Jerk Terror Attorney, N.Y. Post, Oct. 17, 2006, at 4.

1 particularly when her legal career, by leading the government to
2 trust her, is what enabled her to commit these crimes.

3 Overemphasizing Stewart's career as a lawyer also fails to
4 "promote respect for the law" or "afford adequate deterrence to
5 criminal conduct" under any reasonable understanding of those
6 mandatory sentencing considerations. 18 U.S.C. § 3553(a)(2).
7 The district court found that Stewart's likely disbarment
8 "significantly . . . mean[t] that the occasion for her offenses
9 will be removed," Sent'g Tr. 116. This is wrong. One does not
10 need a law license in order to materially support terrorism or to
11 defraud the U.S. government.

12 In sum, though we will rarely identify procedural error in
13 the weight a sentencing judge assigns to relevant factors, this
14 is one of those rare cases where the record of a defendant's
15 personal characteristics simply cannot bear the weight necessary
16 to support the challenged sentence. See Cavera, 550 F.3d at 192.

17 3. Overall Substantive Unreasonableness

18 I by no means assume that, upon resentencing, Stewart's
19 sentence will remain at 28 months, but I would be remiss if I did
20 not comment further on Stewart's current sentence. Unlike the
21 majority, I do not believe that this court must hold off on the
22 question of substantive unreasonableness until the procedural flaws
23 it identifies are remedied. Maj. Op. at [99-100 n.33]. The
24 "informed intuition of the appellate panel" has a place in
25 appellate review. See United States v. Rigas, No. 08-3485-cr,
26 2009 WL 3166066, at *11 (2d Cir. Oct. 5, 2009). And in the rare

1 instance when a sentence imposed by a district court judge makes
2 it plain that his judgment is in stark contrast with the
3 appellate panel's intuition - as evidenced, for example, by the
4 comparative sentences of co-defendants - judicial efficiency
5 counsels us to identify the substantive error along with
6 procedural error at this time to minimize the need for subsequent
7 appeals. This is not, as Judge Calabresi suggests, the issuing
8 of an advisory opinion. Op. of J. Calabresi at [12]. Rather it
9 is providing a district court with the full basis for the
10 appellate panel's remand prior to resentencing.²⁰

11 I stress that it is not the role of the appellate court to
12 compare the district court's sentence to what the appellate court
13 deems the "correct" sentence. Instead, our task is to ask

²⁰ Judge Calabresi's concurrence also contains the notion, never mentioned earlier in these proceedings, that because Abdel Rahman's two other lawyers were not charged with SAMs violations some justification for a lower sentence for Stewart might be found since "there might be even greater disparities between a defendant and other individuals who were not charged at all." Op. of J. Calabresi at [16-17]. Judge Calabresi further suggests that it is not much of an extension to permit district courts to use their sentencing authority "to exercise . . . supervision" over discretionary prosecutorial decisions not to bring charges where there is no claim of selective prosecution. Op. of J. Calabresi at [15]. Whatever attraction this idea might hold for a law review editor, it should not find a home in the law. Prosecutorial discretion is traditionally exclusive and absolute, subject of course to constitutional limits. See United States v. Nixon, 418 U.S. 683, 693 (1974); United States v. Molina, 530 F.3d 326, 332 (5th Cir. 2008); In re U.S., 503 F.3d 638, 642 (7th Cir. 2007). Insulated from judicial review by the separation of powers, United States v. Campo, 140 F.3d 415, 419 (2d Cir. 1998), prosecutors acting in good faith, and there is no suggestion to the contrary in this case, base their decisions not to prosecute on many factors (cooperation and truthful accounts, trial dynamics, the quality of evidence, time and resource requirements to name a few). It is enough of a task for a busy district judge to administer justice in the cases actually before the court without initiating its own inquisitorial foray into the prosecutor's office. In re U.S., 503 F.3d at 641 ("Judges in the United States resolve the parties' disputes rather than initiate their own factual inquiries on issues that the parties have not contested; that's a major difference between adversarial and inquisitorial systems.") And to what purpose? To possibly reduce an otherwise just sentence?

1 whether the sentence imposed by the district court is so high or
2 low that it is manifestly unjust or shocks-the-conscience. Id.
3 We are not a mere "rubber stamp." Id. (citing United States v.
4 Rattoballi, 452 F.3d 127, 132 (2d Cir. 2006)). "If we are going
5 to let (district) judges be judges, and trust them to exercise
6 the necessary discretion with sensitivity to the need for
7 coherent sentencing policy, so we should let (appellate) judges
8 be judges as well, performing their traditional function of
9 reining in excess and gradually developing a "common law" of what
10 is and is not sensible."²¹ Hon. Gerard E. Lynch, Sentencing
11 After Gall and Kimbrough: Letting Guidelines Be Guidelines (and
12 Judges Be Judges), Ohio St. J. Crim. L. Amici: Views From the
13 Field (Jan. 2008), available at <http://osjclblogspot.com>.

14 Even apart from the aggravating circumstances of Stewart's
15 obstruction of justice, her abuse of trust, and her false
16 statements to the government, Stewart's conduct was closer to
17 that of Sattar, whose 24-year sentence still represented a sharp
18 reduction from his Guidelines sentence of life imprisonment, than
19 that of Yousry. The district court found that Stewart and Sattar
20 had engaged in conduct that warranted application of the
21 terrorism enhancement and that was "calculated to influence or
22 affect the conduct of the Egyptian government," see Sent'g Tr.

²¹ Judge Calabresi suggests that substantive unreasonableness should not be determined when tied to procedural error than can be corrected first, although if the two are distinct then it may be "plausible to address the two issues at once" if the procedural error is not harmless. Op. of J. Calabresi at [12]. But whether the procedural error is harmless is irrelevant to substantive unreasonableness. In any event, he fails to explain the benefit of a "two-step appeal" rule that can result in correcting a good district judge on two separate occasions when one would suffice.

1 24, 28, & 108, but that student interpreter Yousry had not,
2 Sent'g Tr. 143-44.

3 Nonetheless, Stewart's sentence was much closer to that of
4 Yousry, even though, as the district court noted, Yousry's "role
5 in the offenses was subservient to the others involved," Sent'g
6 Tr. 150. Stewart was given a sentence only eight months greater
7 than that of Yousry, and in relative terms, she was treated far
8 more leniently. Yousry's conduct, unlike that of Sattar and
9 Stewart, was found by the district court to not warrant the
10 terrorism enhancement; nor did Yousry falsely sign the SAMs or
11 merit consideration for obstruction-of-justice and abuse-of-trust
12 enhancements. As a result, Yousry's Guidelines range was 78 to
13 97 months, less than one-third of Stewart's Guidelines range of
14 360 months. Yousry's actual 20-month sentence represented just
15 under one-quarter of the 88-month median of his Guidelines range,
16 while Stewart's sentence was under one-tenth of her 360-month
17 Guidelines range. Under the Guidelines, more than 260 months
18 separated the sentences of Stewart and Yousry, yet the district
19 court chose sentences that were only eight months apart. Like
20 the majority, I am puzzled by this mismatch, particularly in
21 light of "the need to avoid unwarranted sentence disparities."
22 18 U.S.C. § 3553(a)(6).

23 Because Stewart's sentence is so out of line with the
24 extreme seriousness of her criminal conduct (and, not
25 surprisingly given that fact, with what the Guidelines
26 recommend), notwithstanding the considerable deference due the

1 district court at sentencing, I conclude that Stewart's sentence
2 is not only procedurally unreasonable, but also substantively
3 unreasonable and an abuse of discretion. The district court's
4 rationale for the sentence cannot "bear the weight assigned it
5 under the totality of circumstances in the case." Cavera, 550
6 F.3d at 191. Indeed, I am at a loss for any rationale upon this
7 record that could reasonably justify a sentence of 28 months'
8 imprisonment for this defendant under § 3553(a). Accordingly, in
9 addition to the procedural flaws that I have identified,
10 Stewart's sentence should be vacated as substantively
11 unreasonable and resentencing required on that basis.