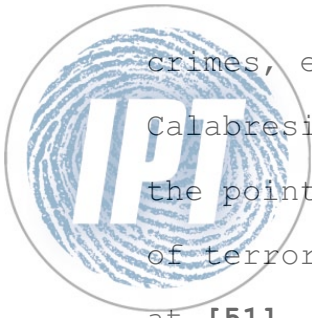


1 Egyptian police caught and killed Alaa Abdul Raziq Atia, a
2 violent co-conspirator, after Abdel Rahman and Stewart withdrew
3 Rahman's support for the cease-fire, but before Atia could act on
4 that message. This fortuity likely prevented Stewart's crime
5 from harming victims, but "[f]ortuity has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

15 In finding the district court's heavy reliance on the lack
16 of proven harm to be reasonable, neither the majority's opinion
17 nor Judge Calabresi's concurrence has case law support, and I
18 have found none. Judge Calabresi is reduced to observing that
19 attempted crimes are sometimes treated differently from completed

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 enhancement 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.

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 crimes, even when only fortuity separates the two. Op. of J.
2 Calabresi at [5-6]. But how the law treats attempts is besides
3 the point. As the majority itself recognizes, material support
4 of terrorism is "a substantive, not inchoate, offense." Maj. Op.
5 at [51]. "This is an independent crime, complete in its most
6 serious form when the [material support] is complete and nothing
7 is added to its criminality by success or consummation, as would
8 be the case, say, of attempted murder." Spies v. United States,
9 317 U.S. 492, 498-99 (1943).

10 Stewart completed her crime as Congress chose to define it,
11 and the Sentencing Commission, in drafting the terrorism
12 enhancement, elected not to mitigate its seriousness by rewarding
13 a defendant whose crime did not ultimately result in death or
14 serious injury with a reduced sentencing range. It is for this
15 reason that lack of success cannot normally be a mitigating
16 factor even though achievement of harm may be an aggravating
17 factor. Permitting a district judge to require success in
18 harming innocents before he will apply the terrorism enhancement
19 in a "heartland" case is to permit that judge to disregard the
20 fact that material support is itself a fully completed crime.

21 The majority states that "[f]ortuitous events are not
22 categorically irrelevant to the determination of a just
23 punishment nor is their consideration necessarily inappropriate."
24 Maj. Op. at [100]. As a general matter, of course, I agree. In
25 addition, I do not mean to suggest that there can never be a
26 terrorism case in which absence of harm might be an appropriate



1 consideration, only that there is a very broad heartland of cases
2 in which it should not be considered. If, for example, an
3 incompetent terrorist satisfies the enhancement by putting a
4 small amount of arsenic into a reservoir for New York's drinking
5 water with every intention of killing thousands, but without
6 understanding that the quantity is insufficient to cause harm,
7 the complete absence of any practical possibility that the plot
8 could cause harm may well be relevant. But, that is far from the
9 instant case, in which Stewart's actions were designed to
10 embolden Rahman's followers to resume a murderous jihad against
11 scores of innocent individuals in Egypt and elsewhere. In this
12 case, it was unreasonable for the district court to place any
13 weight on the fortuitous and attenuated events that saved the
14 potential victims of Stewart's crime, much less to use it to wipe
15 out the congressionally mandated terrorism enhancement.

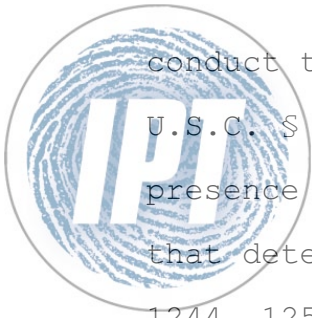
16 Judge Calabresi's attempt to defend the district court's
17 analysis, by offering a hypothetical comparing the punishment of
18 a terrorist who succeeds in causing harm with the punishment of
19 one who does not misses the mark. See Op. of J. Calabresi at
20 **[9]**. The question at issue is not whether the amount of harm can
21 never be a factor in sentencing. It is whether the terrorist who
22 attempts to detonate a bomb in a public place, with the intent of
23 killing many innocent Americans, should be able to escape the
24 terrorism enhancement altogether simply because his plan happens
25 to fail or be foiled by authorities. The answer, as the
26 Sentencing Commission has made clear, is no. A more persuasive



1 reason than the mere absence of injury must be provided by the
2 district judge who uses that factor to eliminate the terrorism
3 enhancement. To permit a judge to completely set aside the
4 enhancement in a "heartland" case simply because the terrorist
5 did not succeed, without further explanation as to why that case
6 is sui generis, is to overlook the reality that the objective of
7 terrorism is to kill large numbers of innocent people and that
8 maximum deterrence needs to be achieved irrespective of success.

9 Actual harm is a flawed metric when determining culpability
10 in material support prosecutions. Precisely because of the
11 devastating consequences at stake, it is, and should be, the
12 focus of enforcement authorities to make every effort to prevent
13 those consequences before they occur. When enforcement
14 authorities are successful, it is to their great credit and their
15 efforts should in no sense lessen the deterrent effect of
16 punishment by conferring a sentencing benefit on those whose
17 efforts were thwarted. Indeed, the House Report accompanying the
18 Comprehensive Antiterrorism Act of 1995, which criminalized the
19 material support of terrorism, explained that one of the
20 legislation's primary goals was to "enhance [law enforcement's]
21 capability of thwarting, frustrating, and preventing terrorist
22 acts before they result in death and destruction." H.R. Rep. No.
23 104-383, at 42 (1995) (emphasis added).

24 I fully recognize that district judges must develop ways of
25 distinguishing whether and why one form of material support is
26 more or less reprehensible than another, given the broad range of



1 conduct that the material support statute criminalizes, see 18
2 U.S.C. § 2339A. However, it makes little sense to have the
3 presence or absence of resultant harm to victims be a factor in
4 that determination. Cf. United States v. Whiteskunk, 162 F.3d
5 1244, 1251 (10th Cir. 1998) (finding it “unfair not to recognize
6 and accommodate th[e] varying spectrum of culpability” when
7 sentencing for a “broad category of conduct” (emphasis added)).
8 Because material support providers often have been, and hopefully
9 will continue to be, apprehended before the crimes that they
10 foster come to fruition, the lack of physical injury is more
11 likely to be the norm than the exception.

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



1 assigned to it. Cavera, 550 F.3d at 191. The district court
2 acted unreasonably by using the absence of proven harm to justify
3 completely discarding the terrorism enhancement and to support an
4 unwarranted mitigation of the seriousness of the crime of
5 conviction. See 18 U.S.C. § 3553(a) (2) (A).

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

18 b. The Absence of an Enhancement for Perjury and
19 Obstruction of Justice

20 After jettisoning the terrorism enhancement in assessing the
21 seriousness of Stewart's crime of conviction pursuant to §
22 3553(a) (2) (A), the district court then noted that – with this
23 mitigation – the Guidelines would provide for a sentencing range
24 for Stewart of either 78 to 97 months or 97 to 121 months,
25 depending on whether the obstruction of justice enhancement
26 applied. I join the majority's view that the district court's



1 failure to make any findings regarding obstruction was
2 procedurally unreasonable. Maj. Op. at [124]. The district
3 court's reason for not making such findings was that there was no
4 point in doing so, because the terrorism enhancement took the
5 sentence to the statutory maximum. After the district court
6 discarded the terrorism enhancement, however, the obstruction
7 enhancement became relevant to the Guidelines calculation. In
8 addition, as the majority notes, it was error for the district
9 court not to account for Stewart's potential perjury in the §
10 3553(a) calculus. See Cavera, 550 F.3d at 190.

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

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

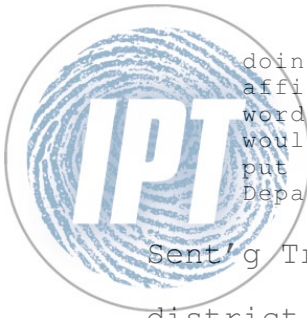


1 as noted in the previous section of this opinion reflects an
2 extreme seriousness unreasonably overlooked by the district
3 court. Stewart also committed her material support crimes by
4 garnering the trust of the government, and then blatantly
5 violating that trust – a fiduciary obligation that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

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

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

26 [T]he United States Attorney’s Office who was administering the SAMs
27 trusted Ms. Stewart, put their faith in Ms. Stewart that she was



1 doing what she promised to do. She considered that attorney
2 affirmation that she signed an oath, a promise. Those are her
3 words. And the government accepted that commitment and believed she
4 would honor that commitment, but she violated that trust that was
5 put in her by the United States Attorney's Office, by the Justice
6 Department, repeatedly violated [it].

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

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

28 Stewart's abuse of trust is particularly significant because
29 it supports the arguments of those who say that our Article III
30 courts, and the constitutional protections they afford, are not



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

14 Section 3553(a) requires a district court to consider all of
15 the Guidelines relevant to a defendant's conduct. See 18 U.S.C.
16 § 3553(a) (4); Cavera, 550 F.3d at 189 (requiring a district court
17 to "conduct its own independent review of the sentencing factors,
18 aided by the arguments of the prosecution and defense"). In
19 sentencing Stewart, the district court mentioned "abuse of trust"
20 as part of the litany of her crimes and noted that Stewart
21 "abused her position as a lawyer" in order to further Abdel
22 Rahman's terrorist quest. Sent'g Tr. 118. Yet the district

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.").

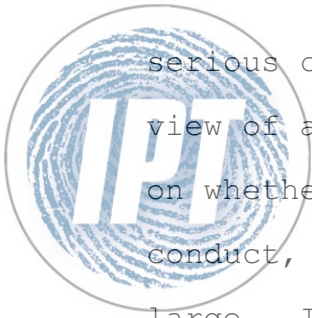


1 court gave no indication that it considered to any extent the
2 depth of Stewart's abuse of trust as argued by the government,
3 which went beyond simply abusing her position as a lawyer to gain
4 access to Abdel Rahman. By not fully responding to the
5 government's clear and forceful argument by considering the
6 policy reflected in U.S.S.G. § 3B1.3,¹⁶ and accounting for
7 Stewart's grave abuse of trust in assessing the seriousness of
8 Stewart's crime and imposing its sentence, the district court
9 erred procedurally.

10 d. The Impact of These Errors on the Rest of the § 3553
11 Analysis

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

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").

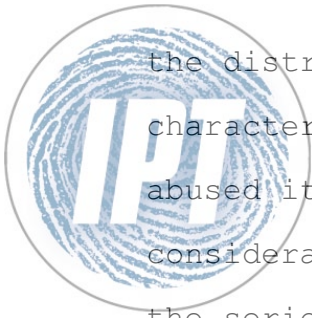


1 serious crimes require greater deterrence; an unreasonably low
2 view of a crime's severity will taint a district court's stance
3 on whether a given sentence sufficiently deters future criminal
4 conduct, both for the specific defendant and for the public at
5 large. In no area can the need for adequate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

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

16 The district judge found that Stewart's "extraordinary
17 personal characteristics . . . argue[d] strongly in favor of a
18 substantial downward variance," Sent'g Tr. 114, and used that
19 finding to effectively set aside the Guidelines and their
20 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



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

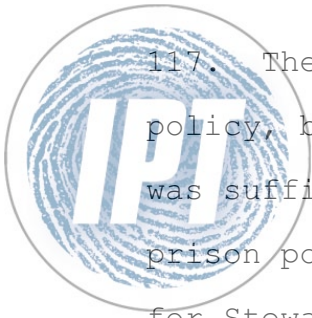
1 district judge did.



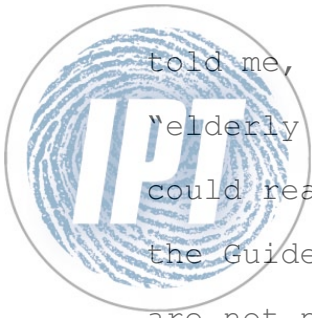
1 offense¹⁸ and disregarded the manifest purpose of the Guidelines
2 regime: to avoid “unwarranted sentencing disparities,” 18 U.S.C.
3 § 3553(a) (6). See Booker, 543 U.S. at 264-65. The Guidelines
4 “reflect a rough approximation of sentences that might achieve §
5 3553(a)’s objectives,” Rita, 551 U.S. 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).



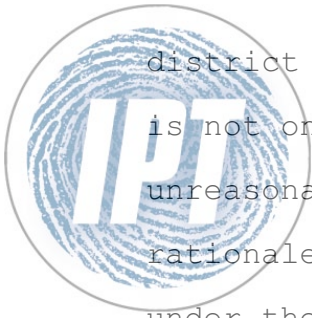
1 117. The district judge, of course, is not bound by Commission
2 policy, but the record nowhere suggests that Stewart's condition
3 was sufficiently compelling to distinguish her from others in the
4 prison population and to warrant any leniency on that score. As
5 for Stewart's age, the Commission 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 Guideline
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 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.