ANONYMOUS ACCUSERS IN THE HOLY LAND: SUBVERTING THE RIGHT OF CONFRONTATION IN THE UNITED STATES' LARGEST TERRORISM-FINANCING TRIAL

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In December of 2011, a panel for the Fifth Circuit Court of Appeals affirmed the convictions of five individual defendants and one corporate defendant in *United States v. El-Mezain*, commonly called the Holy Land Trial.[1] While the decision generated little news coverage, the prosecution of the Holy Land Foundation for Relief and Development (HLF) and the organization's leadership had become the defining case in the early years of the domestic "War on Terror."[2] The federal shutdown and subsequent prosecution of HLF signaled a new era in antiterrorism investigation and enforcement, one in which the Department of Justice would pursue a growing number of individuals and organizations for providing "material support" to designated entities.[3] The Department prosecuted more than 100

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1. *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011). The defendants' petition for panel rehearing as well as hearing *en banc* were denied in February of 2012.

2. Leslie Eaton, *Judge Declares Mistrial in Muslim Charity Case*, N.Y. TIMES Oct. 22, 2007, http://www.nytimes.com/2007/10/22/world/americas/22iht-22holy.8005339.html; Jason Trahan, *Agent: Holy Land. Charity was Part of Plot: Testimony about '93 Meeting Highlight of Methodical Trial Facing Jury Concerns*, DALLAS MORNING NEWS, Aug. 8, 2007, *available at* 2007 WL 15228237 [hereinafter *Agent*].

3. Wadie E. Said, *Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 544 (2011). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress defined "material support" as:

"[a]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more

material support cases in the first five years after September 11th, but none was so highly publicized and controversial as the Holy Land Trial.[4]

When former President George W. Bush initially announced the shutdown of HLF, he accused the charity of acting as the financial apparatus of Hamas, a designated terrorist organization.[5] However, by the time HLF and its leadership faced a jury, the government no longer argued that a direct link existed between HLF and Hamas: the defendants were charged only with providing humanitarian aid to Palestinian charities that the prosecution insisted were tied to Hamas, thereby "helping [Hamas] win the hearts and minds of Palestinians."[6] Prosecutors failed to convince a jury that HLF's activities were criminal as the first HLF trial ended in several near acquittals and ultimately a mistrial; but in a second trial the following year, prosecutors won convictions against all six defendants, on all 108 counts.[7] Coming on the heels of several high-profile material support trials that ended without terrorism convictions, the HLF prosecution became a crucial win in the faltering domestic "War on Terror," and a cautionary tale for American Muslims who had long supported the renowned charity.[8]

Over the course of the 1990s, HLF became the largest Muslim charity in the United States, raising millions of dollars each year for hospitals, schools, and refugees in the U.S. and throughout the world.[9] While HLF supported a variety of relief

individuals who may be or include oneself), and transportation, except medicine or religious materials." 18 U.S.C § 2339A(b)(1) (2009).

4. *Id.* at 594 (quoting DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR 75-76 (2003)).

5. Julian Borger, *U.S. Turns Against Hamas,* THE GUARDIAN, Dec. 4 2001, http://www.guardian.co.uk/world/2001/dec/05/usa.israel?INTCMP=SRCH.

6. Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sept. 18, 2007, http://www.nytimes.com/2007/09/18/us/nationalspecial3/18holyland.html.

7. Jason Trahan, *Experts Split as Prosecutors Consider Retrial in Holy Land Case: Experts Split on Whether Prosecution Can be Successful*, DALLAS MORNING NEWS, Oct. 27, 2007, *available at* 2007 WL 21201943 [hereinafter *Experts Split*]; Gretel C. Kovach, *Five Convicted in Terrorism Financing Trial*, N.Y. TIMES, Nov. 24, 2008, http://www.nytimes.com/2008/11/25/us/25charity.html?_r=1&ref=holylandfoundationforreliefanddevelopment.

8. Leslie Eaton, *Case Against Muslim Group Rests, With Defense Still Denying Hamas Ties*, N.Y. TIMES, Sept. 19, 2007, http://www.nytimes.com/2007/09/20/us/20holyland.html?ref=holylandfoundationforreliefanddevelopment.

9. Jason Trahan, *Holy Land's Attorneys Question Lead FBI Agent: Official*

efforts domestically and internationally, the organization maintained a strong funding focus on Palestinians in the West Bank and Gaza, as well as Palestinian refugee communities throughout the Middle East.[10] HLF's long-standing support for impoverished and displaced Palestinian communities, coupled with the organization's reputation for trust-worthiness and compliance with religious rules governing Muslim charitable giving, called zakat, made the foundation a mainstay for Muslim American civic and religious activity.[11]

HLF's rise to prominence coincided with increasing concern among lawmakers about U.S.-based fundraising for terrorist activity abroad. By the end of the 1990s, Congress had criminalized the provision of "material support" to a growing list of entities and individuals, with a particular focus on Hamas and other Palestinian resistance groups.[12] But the federal shutdown of HLF publicly signaled a dramatic shift in the government's antiterrorism strategy. While the Department of Justice had previously pursued individuals accused of direct involvement in violent activity, prosecution of individuals and organizations accused of providing funding to designated terrorist entities would become the centerpiece of federal antiterrorism enforcement.[13] Furthermore, although Bush administration officials had framed the nascent "War on Terror" as a fight against Al Qaeda, the U.S. would now pursue Israel's national security goals as vehemently as it pursued its own.[14]

Admits Some Evidence Predates 1995 Hamas Terror Label, DALLAS MORNING NEWS, Aug. 9, 2007, *available at* 2007 WL 15359689.

10. *Id.*

11. Laurie Goodstein, *Mideast Flare-Up: Muslims; 8 Groups in U.S. Protest Bush Move Against Foundation*, N.Y. TIMES, Dec. 5, 2001, http://www.nytimes.com /2001/12/05/world/mideast-flare-up-muslims-8-groups-in-us-protest-bush-move-against-foundation.html?ref=holylandfoundationforreliefanddevelopment [hereinafter Goodstein, *Mideast Flare-up*]; AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 55 (2009), http://www.aclu. org/pdfs/humanrights/ blockingfaith.pdf [hereinafter BLOCKING FAITH].

12. 18 U.S.C § 2339B (2006); Thanassis Cambanis, *Some Oppose Antiterror Law's Time Limit on Review 1-Year Deadline Called Unjust in Some Cases*, BOSTON GLOBE, Nov. 29, 2002, *available at* 2002 WL 2571192; Said, *supra* note 3, at 557.

13. Said, *supra* note 3, at 594; Jeff Breinholt, U.S. Dep't. of Justice, *Reaching the White Collar Terrorist: Operational Challenges* (Sept. 2004), *available at* www.imf.org/external/np/leg/sem/2004/cdmfl/eng/breinh.pdf (noting that the material support statute is a "powerful law enforcement tool" that "effectively altered the challenge" of prosecuting terrorism financing cases.).

14. President George W. Bush and Secretary Paul O'Neill, News Conference at the

The prosecution of the Holy Land Foundation is disconcerting on a number of levels. Providing humanitarian aid is a mainstay of American civic engagement, and "winning hearts and minds" of refugee communities is a dubious basis for an accusation of terrorism involvement. Furthermore, the expansion of the United States' "War on Terror" to incorporate Israel's own national security goals would have dramatic consequences for Muslims in the U.S., as well as the Palestinian communities in the Middle East that rely on U.S. organizations for humanitarian support. The HLF trials are particularly troubling because of their potential ramifications for federal criminal trials. The defendants, who were all U.S. citizens, were unable to access much of the evidence used against them, and could not prevent prosecutors from showing disturbing footage of Hamas suicide bombings to the jury, despite the fact that HLF was not accused of funding any violent activities.[15]

While many aspects of the HLF prosecution warrant critical consideration, no element of the trial is so constitutionally questionable as the prosecutors' use of anonymous and hearsay evidence, both of which formed the crux of the government's case.[16] Two Israeli security officials testified anonymously in the HLF trials, a stark divergence from previous judicial interpretations of a defendant's constitutional right to confront his accuser.[17] Even more remarkably, one of the security officials may have become the first anonymous witness to offer expert testimony in U.S. history.[18]

White House (Dec. 4, 2001), http://www.justice.gov/archive/ag/speeches/2001/1204newsconferencewithbush.htm [hereinafter White House Conference].

15. United States v. El-Mezain, 664 F.3d 467, 507-08 (5th Cir. 2011).

16. Jason Trahan, *Key Israeli Witnesses to Speak in Holy Land Terror-Financing Trial*, DALLAS MORNING NEWS, Oct. 20, 2008, *available at* 2008 WL 19909653 [hereinafter *Terror-Financing Trial*].

17. *Id.* Brief for Petitioner-Appellant Ghassan Elashi (with Common Issues) at 27, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560).

18. Jason Trahan, *Israeli Secret Agent Testifies in Holy Land Trial*, DALLAS MORNING NEWS, Aug. 15, 2007, *available at* 2007 WL 15819406 (noting that this witness may be the first to ever offer anonymous expert testimony in the history of the U.S. legal system); Brief for Petitioner-Appellant Ghassan Elashi (with Common Issues) at 27, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560) (noting that no published decision has permitted an expert witness to testify anonymously for the prosecution in a criminal trial since the Supreme Court held that anonymous testimony "effectively . . . emasculate[d] the right of cross-examination" in Smith v. Illinois, 390 U.S. 129, 131 (1968)); Brief for United States at 49-50, United States v. El Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560) (on file with author) (noting the petitioners' claim that preserving the confidentiality of

The right of confrontation is enumerated in the Sixth Amendment, which ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[19] The Supreme Court has interpreted the Confrontation Clause to protect criminal defendants from the introduction of unimpeachable hearsay evidence, and to ensure a defendant's right to effectively cross-examine all witnesses against him.[20] The Court rejected the use of anonymous witnesses in *Smith v. Illinois*,[21] stating that denying a defendant's access to the name of a witness "is effectively to emasculate the right of cross-examination itself."[22] Since the *Smith* decision, judges have carefully balanced government concerns for witness safety and national security against the constitutional rights of criminal defendants, and have permitted anonymous witnesses to testify in a small number of cases.[23] Even in those cases where witnesses testify anonymously, judges have almost always required prosecutors to disclose the witnesses' identities and other information to the defense in the days before trial.[24] But in the HLF trial, defense counsel never learned the names of the anonymous witnesses and was therefore unable to effectively impeach these key witnesses before the jury.

This comment focuses on the constitutionality of this

an expert witness for the government is unprecedented, and pointing to no case prior to the Holy Land trials to rebut that claim).

19. U.S. CONST. amend. VI.

20. *See* Smith v. Illinois, 390 U.S. 129 (1968).

21. *Id.*

22. *Id.* at 131.

23. Opening Brief for Petitioner Ghassan Elashi (with Common Issues) at 27, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560); Brief for United States at 50, 54, United States v. El Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560) (on file with author) (noting only four cases in which courts have permitted anonymous witnesses to testify for the government in criminal cases without ever disclosing their identity to the defense); United States v. Ayala, 601 F.3d 256 (4th Cir. 2010); United States v. Zelaya, 336 Fed. Appx. 355 (4th Cir. 2009) (unpublished) (per curium); United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2011); United States v. Abu Marzook, 412 F. Supp. 2d 913 (N.D. Ill. 2006)). These cases are discussed at length *infra* notes 190-210 and accompanying text.

24. *See, e.g.*, United States v. Navarro, 737 F.2d 625 (7th Cir. 1984); Clark v. Ricketts, 958 F.2d 851 (9th Cir. 1992); United States v. Celis, 608 F.3d 818 (D.C. Cir. 2010); United States v. Fuentes, 988 F. Supp. 861 (E.D. Pa. 1997); *but see* United States v. Abu Marzook, 412 F. Supp. 2d 913 (N.D. Ill. 2006) (holding that Israeli security agents could testify at a suppression hearing about statements the defendant made to them under the same pseudonyms the witnesses used during their personal encounter with the defendant.); *see infra* notes 190-93.

anonymous testimony. In the post-September 11th context of increasing investigation and prosecution of Muslim American civic and religious engagement,[25] the erosion of the Confrontation Clause threatens to rob United States citizens and residents of a fundamental right to which they are entitled at trial. The Supreme Court and lower courts, as well as Congress, have provided mechanisms for balancing the government's interest in national security and witness safety with the public's interest in fair, open, and constitutional trials.[26] These mechanisms include withholding witnesses' addresses or places of employment, limiting the defense counsel's ability to disclose the names of witnesses testifying under pseudonyms, and substituting substantially similar testimony from unclassified sources under the Classified Information Procedure Act.[27] However, the Fifth Circuit's *Holy Land* decision disregards Confrontation Clause-conforming solutions in a near-mechanical acquiescence to the demands of the United States and Israeli governments.

By adhering to the guidance of Congress and the Supreme Court, U.S. courts can effectively adjudicate terrorism-related

25. The Associated Press recently uncovered the extent of law enforcement investigation of Muslim communities. In a series of articles, A.P. journalists revealed that New York City Police Department (NYPD) officers under the direction of a veteran CIA officer heavily surveilled Muslim stores, homes, places of worship, and neighborhoods in New York and New Jersey. Additionally, NYPD officers tracked Muslim Student Associations throughout colleges in the North East, even infiltrating a student rafting trip and documenting the number of times the students prayed. *See, e.g.*, Michael Powel*, Police Monitoring and a Climate of Fear*, N.Y. TIMES, Feb. 27, 2012, http://www.nytimes.com/2012/02/28/nyregion/nypd-muslim-monitoring-and-a-climate-of-fear.html; *NYPD Spying in Muslim Areas – with CIA's Help*, CBSNEWS, Aug. 24, 2011, http://www.cbsnews.com/2100-201_162-20096672.html; Adam Goldman and Matt Apuzzo, *NYPD Docs: "Focus" Scrutiny on Muslim Americans*, CBSNEWS, Mar. 9, 2012, http://www.cbsnews.com/8301-201_162-57393990/nypd-docs-focus-scrutiny-on-muslim-americans/; Beth DeFalco, *NJ Gov Critical of NYPD Surveillance Secrecy*, YAHOO! NEWS, Feb. 29, 2012, http://news.yahoo.com/nj-gov-critical-nypd-surveillance-secrecy-015452377.html. Law enforcement surveillance of American Muslims is not limited to the NYPD and CIA. In October of 2010, California college student, Yasir Afifi, found a GPS tracking device affixed to the bottom of his car. After a friend posted images of the device online, FBI agents arrived at Afifi's home, demanding the return of the device. Kim Zetter, *Caught Spying on Student, FBI Demands GPS Tracker Back*, WIRED, Oct. 7, 2010, http://www.wired.com/threatlevel/2010/10/fbi-tracking-device/all/1; *Muslim-American Says He Will Sue After Finding Tracking Device*, CNN, Mar. 2, 2011, http://articles.cnn.com/2011-03-02/justice/washington.surveillance.muslim_1_device-fbi-agents-gps?_s=PM:CRIME.

26. *See, e.g.*, *Celis*, 608 F.3d 818; *Fuentes*, 988 F. Supp. 861.

27. 18 U.S.C. app. § 3 (2012).

trials that honor the constitutional rights of U.S. citizens, balance critical national security and witness safety concerns, and arrive at correct verdicts based on reliable evidence. Further, The *Holy Land* case presents the Supreme Court with the opportunity to tailor the new practice of using anonymous expert witnesses to fit the constitutional rights guaranteed to U.S. criminal defendants.

The first section of this paper offers a brief history of the Holy Land Foundation and the role that HLF came to occupy within Muslim American civic and religious life, as well as the increasing scrutiny HLF faced from the Israeli and U.S. governments. This section also traces the increasing criminalization of activities ostensibly related to terrorism, including the passage of the material support statute of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the designation of Hamas as a terrorist organization. The second section offers an account of the HLF trials, with a particular focus on the anonymous witnesses as well as other hearsay evidence. The third section examines the Supreme Court's Confrontation Clause decisions as well as relevant cases from the Fifth Circuit, and contrasts this jurisprudence with the court's reasoning and holding in the *Holy Land* case. The final section looks to several lower court decisions as a model for balancing government interests against those of criminal defendants as well as the public's interest in fair and open trials.[28] These lower court opinions provide specific procedures and enforcement mechanisms, such as limiting disclosure of witness identities to defense counsel and investigators under strong judicial oversight and potential contempt charges for violating the court's limitations.[29] Further, this section also examines the Classified Information Procedures Act (CIPA), Congress's solution for balancing national security interests and citizens' trial rights. Under CIPA, the lower courts could have required the government to substitute readily available non-confidential expert testimony instead of admitting the testimony of an unimpeachable anonymous expert witness.[30] The solutions provided by these lower court decisions and CIPA ensure witness

28. This model was first articulated by attorneys Linda Moreno and John D. Cline in *El-Mezain*, and merits further consideration by federal courts. Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 23, at 28-30.

29. *Celis*, 608 F.3d at 829-30; *Fuentes*, 988 F. Supp. at 867.

30. 18 U.S.C. app. § 3; *see* Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 23, at 33-35.

and national security without violating the constitutional rights of criminal defendants.

I. THE RISE OF THE HOLY LAND FOUNDATION AND THE CRIMINALIZATION OF "MATERIAL SUPPORT"

Founded in California in 1989 under the name The Occupied Land Fund and then relocating to Richardson, Texas in 1992, the Holy Land Foundation for Relief and Development (HLF) rose to national and international prominence as a trusted humanitarian organization.[31] Between the 1992 move and the federal government's seizure of the organization's assets in 2001, HLF raised more than $57 million, becoming the largest Muslim charity in the United States.[32] Many of HLF's founders and leaders, and all of the eventual defendants in the federal trials, were either born or spent part of their childhood in the occupied Palestinian territories of the West Bank and Gaza, and HLF focused much of its charitable donations on Palestinian communities in the West Bank, Gaza, and in refugee camps throughout the Middle East.[33] In addition to providing millions of dollars to schools, hospitals, and orphans in Palestinian communities, HLF sent relief to bombing victims in Oklahoma City, flood victims in Iowa, and disaster victims and refugees in Turkey, Chechnya, Kosovo, and other countries around the world.[34]

As the charity continued to strengthen its reputation among Muslims and other donors in its early years, HLF soon attracted more critical attention from the Israeli and U.S. governments. During a 1993 interrogation that he would later say included

31. *See* Goodstein, *Mideast Flare-up*, *supra* note 11.

32. Jason Trahan, *Holy Land's Attorneys Question Lead FBI Agent: Official Admits Some Evidence Predates 1995 Hamas Terror Label*, DALLAS MORNING NEWS, Aug. 9, 2007, *available at* 2007 WL 15359689; Jason Trahan, *Mistrial Declared in Terror Case Against Muslim Charity*, DALLAS MORNING NEWS, Oct. 22, 2007, *available at* 2007 WL 20769606.

33. Jason Trahan, *Holy Land Foundation: 2nd Chance to Tie Charity, Terrorism Prosecutors Say Group Helped Hamas; Defense Says it Aided Poor Palestinians*, DALLAS MORNING NEWS, Sept. 15, 2008, *available at* 2008 WL 17528361; Goodstein, *Mideast Flare-up, supra* note 11.

34. *Holy Land Foundation for Relief and Development*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/organizations/h/holy_land_foundation_for_relief_and_development/index.html; BLOCKING FAITH, *supra* note 11. Kelly Thornton, *Charity\Leader Disputes FBI Memo Agency Says Local Man Raised Funds for Hamas*, SAN DIEGO UNION-TRIBUNE, Dec. 8, 2001, *available at* 2001 WL 12002486; Goodstein, *Mideast Flare-Up*, *supra* note 11.

torture, Palestinian American businessman Muhammad Salah told agents of the Israeli Security Agency (Shin Bet) that HLF provided financial support to the Palestinian militant group Hamas.[35] The Israeli government alerted U.S. authorities, and the FBI began surveilling the charity in that same year.[36] In 1996, Israel shut down HLF's Jerusalem office.[37]

Over the course of the 1990s, HLF's humanitarian work in the West Bank and Gaza faced increasing scrutiny as Congress and the White House enhanced their legislative focus on terrorism in the Middle East, and on Hamas in particular.[38] Former President Clinton designated Hamas as a Specially Designated Terrorist organization in 1995, thereby criminalizing the provision of funding or assets to the group.[39] That same year, the Oklahoma City bombing and a rash of bombings in Israel prompted Congress to draft the Antiterrorism and Effective Death Penalty Act (AEDPA), which former President Clinton signed into law in 1996.[40] Congress designed one component of AEDPA, the material support statute,[41] to target fundraising organizations in the United States that allegedly channel financial support for terrorism overseas under the guise of humanitarian aid.[42]

In search of guidance for complying with the new anti-terrorism legislation after HLF was accused of having Hamas ties

35. Jason Trahan, *Holy Land Charity Shut Down Memo Offers Glimpse into 8-year FBI Probe*, DALLAS MORNING NEWS, Dec. 5, 2001, *available at* 2001 WL 11716015; Said, *supra* note 3, at 594; Jason Trahan, *Holy Land Case Began Years Ago with Tip from Illinois Man*, DALLAS MORNING NEWS, Oct. 22, 2007, *available at* 2007 WL 20757262.

36. Jason Trahan, *Ex-Agent Says Criminal Probe of Richardson, Texas, Firm Based on Charity Data*, DALLAS MORNING NEWS, May 26, 2002, *available at* 2002 WL 1196567; Jason Trahan, *Holy Land Foundation: 2nd Chance to Tie Charity, Terrorism Prosecutors Say Group Helped Hamas; Defense Says it Aided Poor Palestinians*, DALLAS MORNING NEWS, Sept. 15, 2008, *available at* 2008 WL 17528361.

37. *Id.*

38. *Comprehensive Antiterrorism Act of 1995: Hearing on H.R. 380 Before the House of Representatives*, 142nd Cong. 15:98 (1996) (statements of Rep. John Conyers, Jr, Rep. Enrico Anthony Lazio).

39. Said, *supra* note 3, at 557.

40. Thanassis Cambanis, *Some Oppose Antiterror Law's Time Limit on Review 1-Year Deadline Called Unjust in Some Cases*, BOSTON GLOBE, Nov. 29, 2002, *available at* 2002 WL 2571192; Said, *supra* note 3, at 557.

41. 18 U.S.C. § 2339B (2006).

42. Said, *supra* note 3, at 558.

in the media, HLF's co-founder and eventual defendant Ghassan Elashi and former Dallas congressman-turned-lobbyist John Bryant, HLF's legal representative, met with the FBI and State Department, but received no assistance.[43] The material support statute would eventually become "the centerpiece of the Justice Department's criminal war on terrorism," under which the Department would initiate more than 100 material support prosecutions in the first five years after September 11th.[44] Trials of individuals and organizations accused of providing material support to terrorism would become the majority of terrorism prosecutions brought by the Department of Justice (DOJ).[45] The statute's application has proved expansive. U.S. citizens and residents have been convicted by jury or plea for a number of acts under the statute, including a Staten Island businessman who was sentenced to nearly six years for broadcasting the Hezbollah-affiliated television news station al Manar through his satellite company,[46] and a doctoral student put on trial in Idaho for helping to maintain the websites of groups that posted links to sites that praised suicide bombings in Chechnya and Israel.[47] But the application of the statute to the Holy Land Foundation is in many ways the DOJ's most expansive and largest-scale prosecution under the statute to date.[48]

A. HLF AND THE INTERPLAY OF ISRAELI NATIONAL SECURITY AND THE DOMESTIC "WAR ON TERROR"

Former President George W. Bush set the stage for the high-

43. Jason Trahan, *Holy Land Case Starts with Focus on Intent: Dallas Lawyer Insists 5 Strived to Ease Suffering; Prosecutors Say Goal was to Fund Terror*, DALLAS MORNING NEWS, July 25, 2007, *available at* 2007 WL 14237553; Jason Trahan, *Defense Rests in Holy Land Trial*, DALLAS MORNING NEWS, Sept. 11, 2007, *available at* 2007 WL 17754477. HLF was already under FBI investigation by this time. *Id.*

44. Said, *supra* note 3, at 594; Adam Liptak and Leslie Eaton, *Mistrial is Latest Terror Prosecution Misstep for U.S.*, N.Y. TIMES, Oct. 24, 2007, http://www.nytimes.com/2007/10/24/washington/24justice.html?ref=holylandfoundationforreliefanddevelopment.

45. Said, *supra* note 3, at 557.

46. Benjamin Weiser, *Staten Island Man Gets Prison Term for Aid to Hezbollah TV*, N.Y. TIMES, Apr. 23, 2009, http://www.nytimes.com/2009/04/24/nyregion/24cable.html.

47. Leslie Eaton, *Judge Declares Mistrial in Muslim Charity Case*, N.Y. TIMES, Oct. 22, 2007, http://www.nytimes.com/2007/10/22/world/americas/22iht-22holy.8005339.html; Timothy Egan, *Computer Student on Trial Over Muslim Web Site Work*, N.Y. TIMES, Apr. 27, 2004, http://www.nytimes.com/2004/04/27/us/computer-student-on-trial-over-muslim-web-site-work.html?src=pm.

48. Eaton, *supra* note 47; *Agent, supra* note 2.

stakes nature of the HLF prosecution when he announced the Treasury Department's freezing of the charity's assets and accounts during a press conference in the White House Rose Garden on December 4, 2001.[49] The former President told assembled reporters that Hamas obtained "much of the money that it pays for murder abroad right here in the United States, money originally raised by the Holy Land Foundation."[50] "The message is this," then President Bush continued, "Those who do business with terror will do no business with the United States—or anywhere else the United States can reach."[51] The same day, FBI agents closed and raided HLF's offices, seizing file cabinets and computers.[52]

Coming less than two months after the September 11th terrorist attacks by Al Qaeda, the President's high-profile and widely reported announcement signaled an expansion in U.S. counterterrorism measures.[53] While terrorism enforcement and prosecution had previously targeted organizations and individuals accused of direct involvement in violent actions, the government would now focus more heavily, and more publicly, on people and entities accused of financing terrorist activity.[54] Furthermore, domestic counterterrorism measures would now unambiguously pursue U.S. foreign policy goals, as well as the national security goals of the country's close ally, the state of Israel, with the same vigor as its own national security interests.[55] As Attorney General Ashcroft explained at the same press conference,

49. Julian Borger, *US Turns Against Hamas*, GUARDIAN, Dec. 4, 2001, http://www.guardian.co.uk/world/2001/dec/05/usa.israel.

50. White House Conference, *supra* note 14.

51. *Id*. 18 U.S.C § 2339B (2006).

52. *Id*. David E. Sanger and Judith Miller, *Mideast Flare-Up: The Grip Tightens; Bush Freezes Assets of Biggest U.S. Muslim Charity, Calling It a Deadly Terror Group*, N.Y. TIMES, Dec. 4, 2001, http://www.nytimes.com/2001/12/05/world/mideast-flare-up-grip-tightens-bush-freezes-assets-biggest-us-muslim-charity.html?ref=holy landfoundationforreliefanddevelopment [hereinafter *The Grip Tightens*].

53. *See, e.g.*, Sanger and Miller, *supra* note 52; Mike Allen, *Bush Freezes Suspected Terror Assets*, WASH. POST, Dec. 4, 2001, http://www.washington post.com/ac2/wp-dyn/A54764-2001Dec4?languag e=printer; Borger, *supra* note 49; *New Target in War on Terror: Hamas*, ABC NEWS, Dec. 4, 2001, http://abcnews.go.com/US/story?id=92116&page=1; Laurie Cohen et al., *Islamic Charity's Assets Frozen*, CHICAGO TRIBUNE, Dec. 5, 2001, http://articles.chicago tribune.com/2001-12-05/news/0112050323_1_holy-landfoundati on-hamas-west-bank.

54. Said, *supra* note 3 at 546.

55. *Id.* at 545.

> [b]y freezing the financial apparatus of Hamas, we signal that the [U.S.] will no longer be a staging ground for the financing of those groups that violently oppose peace as a solution to the Israeli-Palestinian conflict. We won't tolerate it any more than we will tolerate the financing of groups that on September 11th attacked our homeland.[56]

The announcement was a long-sought victory for the Israeli government, which had pushed the Bush administration to drop its earlier distinction between the U.S.' fight against Al Qaeda and Israel's own military operations against Palestinian resistance groups, which Bush officials had previously argued would be best addressed through negotiations.[57] Israeli officials had long accused HLF of funding Hamas, and had publicly urged the U.S. to close HLF's offices since at least 1995, at times expressing frustration at the U.S.' inaction.[58] The former President's press conference coincided with Israeli Prime Minister Ariel Sharon's visit to the White House, and took place the week after three Hamas suicide bombings killed 25 people and wounded 200 more.[59] In the wake of the Hamas bombings and public disagreements between the two governments over HLF and the nature of the "War on Terror," the former President's announcement was a "strong demonstration of solidarity" with the Prime Minister.[60]

B. THE HOLY LAND FOUNDATION SHUTDOWN: MUSLIMS IN THE CROSSHAIRS

While Israel welcomed the development, the HLF shutdown sent shockwaves through Muslim communities across the country.[61] HLF was the largest Muslim charity in the U.S., raising $13 million in the previous year alone.[62] HLF had

56. White House Conference, *supra* note 14.

57. Borger, *supra* note 49.

58. Jason Trahan, *Fostering Unrest or Helping the Poor?: Public Records Show a Case Open to Debate*, DALLAS MORNING NEWS, June 11, 2000, *available at* 2000 WL 9430471.

59. *The Grip Tightens*, *supra* note 52.

60. *Id.*

61. *Id.* Michael Paulson, *A Changed World Alters Muslims' Charity Giving*, BOSTON GLOBE, Dec. 15, 2001, *available at* 2001 WL 2277684.

62. *The Grip Tightens*, *supra* note 52; Jason Trahan, *Holy Land's Attorneys Question Lead FBI Agent: Official Admits Some Evidence Predates 1995 Hamas Terror Label*, DALLAS MORNING NEWS, Aug. 9, 2007, *available at* 2007 WL 15359689;

developed a strong reputation among American Muslim donors as a trusted organization responsible for crucial humanitarian aid to communities in the U.S. and around the world, and had recently established a foundation for victims of the September 11th terrorist attacks.[63] Prominent mainstream Muslim organizations such as the Council on American Islamic Relations accused the Bush administration of caving to unreasonable demands by the Israeli government.[64] Many were incensed by the timing of the closure, which came in the middle of Ramadan, a month-long holiday during which Muslims are religiously obligated to make charitable donations.[65] For years, mosques throughout the country had celebrated the end of Ramadan by collecting millions of dollars in donations for HLF.[66] In the previous year, a full third of the $13 million that HLF had raised came in during Ramadan.[67] But as Ramadan drew to a close in 2001, American Muslims focused their giving on domestic charitable projects within the U.S. or through non-Muslim organizations for fear of being accused of funding terrorism.[68]

The story of HLF would play a powerful role in the public perception and civic involvement of American Muslims in the years to come. Muslims had already faced increased violence, discrimination, and scrutiny since the terrorist attacks. Between September 11th and February 2002, Muslim individuals and organizations reported more than 1,700 hate crime incidents.[69] The government detained more than 5,000 people in the wake of September 11th, most of them Arab, Muslim, or South Asian, and some detained for weeks or longer without charges or access to counsel.[70] More than 80,000 foreign nationals from Arab or

Jason Trahan, *Mistrial Declared in Terror Case Against Muslim Charity*, DALLAS MORNING NEWS, Oct. 22, 2007, *available at* 2007 WL 20769606.

63. Goodstein*, Mideast Flare-Up, supra* note 11.

64. *Id.*

65. Ross E. Milloy, *Mideast Flare-Up: Frozen Assets; In Texas, Donors to Muslim Charity Seethe at Raids by Government*, N.Y. TIMES, Dec. 6, 2001, http://www.nytimes.com/2001/12/06/world/mideast-flare-up-frozen-assets-texas-donors-muslim-charity-seethe raids.html?ref=holylandfoundationforreliefanddevelopment.

66. Goodstein, *Mideast Flare-Up, supra* note 11.

67. *Id.*

68. Michael Paulson, *A Changed World Alters Muslims' Charity Giving*, BOSTON GLOBE, Dec. 15, 2001, *available at* 2001 WL 2277684.

69. Neil Vidmar, *When All of Us are Victims: Juror Prejudice and "Terrorist Trials, Symposium: The Jury at a Crossroad: The American Experience III. The Jury in Practice,* 78 CHI.-KENT L. REV. 1143, 1153 (2003).

70. Rabea Chaudhry, *Effective Advocacy in a Time of Terror: Redefining the Legal*

Muslim countries were required to specially register with the government, which included fingerprinting and photographing.[71] The leaders of HLF were well known and highly respected within the Muslim community in Texas and throughout the country, and their arrest intimidated many community members who were generous supporters of hospitals, schools, and other humanitarian projects overseas.[72] In their indictment, prosecutors argued that all charitable committees in the Palestinian territories were categorically controlled by Hamas, which frustrated Muslims' attempts to donate to any of these vital charitable organizations without fear of prosecution.[73] Over the course of the HLF investigation and trials, the government produced a list of nearly 300 names of organizations and individuals that it claimed were un-indicted co-conspirators in the case.[74] The list included such leading Muslim organizations as the Council on American-Islamic Relations (CAIR), the Islamic Society of North America, and the North American Islamic Trust. The title of "un-indicted co-conspirator" continues to haunt those named, who have no right to dispute the accusation in court.[75] During trial testimony, an FBI special agent even labeled CAIR, an organization that was currently working in partnership with the FBI to fight terrorism in American Muslim communities, as a front group for Hamas.[76]

II. ON TRIAL FOR WINNING HEARTS AND MINDS

Muslims had good reason for concern over the HLF investigation and eventual trials. While former President Bush

Representation of a Suspected Terrorist Facing Secret Evidence, 8 UCLA J. ISLAMIC & NEAR E. L. 101, 116 (2008-2009).

71. *Id.*

72. Trial Brief for United States, Attachment A: List of Unindicted Co-conspirators and/or Joint Venturers United States v. Holy Land Foundation, CR NO. 3:04-CR-240-G, *available at* http://www.investigativeproject.org/documants/case_docs/423.pdf.

73. Said, *supra* note 3, at 586.

74. Trial Brief for United States, Attachment A: List of Unindicted Co-conspirators and/or Joint Venturers United States v. Holy Land Foundation, CR NO. 3:04-CR-240-G, *available at* http://www.investigativeproject.org/documants/case_docs/423.pdf.

75. BLOCKING FAITH, *supra* note 11, at 55; Said, *supra* note 3, at 587-88.

76. Jason Trahan, *Judge Due to Rule on Holy Land Defense Challenge*, DALLAS MORNING NEWS, Oct. 14, 2008, *available at* 2008 WL 19527769; Joseph Abrams, *FBI Cuts Ties with CAIR Following Terror Financing Trial*, FOX NEWS, Jan. 30, 2009, http://www.foxnews.com/politics/2009/01/30/fbi-cut-ties-cair-following-terror-financing-trial/.

had originally accused the charity of funding violent actions by Hamas, the government's theory of HLF's material support for terrorism changed substantially over time: By the 2007 trial, HLF was not on trial for providing direct support to Hamas for violent operations.[77] Instead, the government accused HLF of helping Hamas "win the hearts and minds"[78] of Palestinians by providing charitable donations to West Bank and Gaza charities, called zakat committees, which the government claimed were controlled by Hamas.[79] These committees then used the donations for strictly humanitarian purposes.[80]

The government's "hearts and minds" theory represented a departure from previous material support prosecutions that focused on charitable giving. Prior to the HLF trial, most material support prosecutions had operated under the "money is fungible" theory that emerged from *Humanitarian Law Project v. Reno*,[81] an unsuccessful challenge to the constitutionality of the material support statute.[82] Under this theory, "support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."[83] When applied to designated foreign terrorist organizations whose activities include both violent and humanitarian efforts, such as Hamas, the theory assumes that the foreign terrorist organization's finances are centralized enough that money donated for humanitarian purposes frees up money for violent purposes—an assumption that was not supported by congressional findings during the passage of the material support statute and one that the *Humanitarian Law Project* ruling does not question.[84] However, while prosecutors had relied on the "money is fungible" theory in their indictment, at trial they did not claim that the $12.7 million

77. Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sept. 17, 2007, http://www.nytimes.com/2007/09/18/us/nationalspecial3/18holyland.html.

78. Trial Brief for United States at 11, United States v. Holy Land Foundation, CR NO. 3:04-CR-240-G (N.D. Tex. May 29, 2007), *available at* online.wsj.com/public/resources/documents/govholyland.pdf.

79. Eaton, *supra* note 77; Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, WASH. POST, Oct. 23, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/10/22/AR2007102200731_2.html.

80. *Id.*

81. 205 F.3d 1130 (9th Cir. 2000).

82. Said, *supra* note 3, at 583-84.

83. *Humanitarian Law Project*, 205 F.3d at 1136.

84. Said, *supra* note 3, at 584, 594.

that HLF was accused of donating to zakat committees freed up funding for Hamas' terrorist activities—HLF was on trial simply for providing humanitarian relief.[85]

Prosecuting the charity and its leadership for providing humanitarian aid was a daunting task. Throughout jury selection, prosecutors asked potential jurors whether they could apply the material support statute and convict someone for providing support to a designated terrorist organization, even if that support came in the form of humanitarian aid, and then rejected those jurors who said they could not.[86] Even worse, the connection between Hamas and the zakat committees listed in the indictment was less than convincing. The U.S. never designated any of the zakat committees that HLF supported as a terrorist organization, and the Palestinian government licensed all of the zakat committees.[87] The former U.S. Consul General in Jerusalem, who had also been the State Department's second-highest-ranking intelligence official, testified for the defense that he had received daily briefings from the C.I.A. during the years he spent in the Middle East, and he had never heard that Hamas controlled any of the zakat committees that HLF had supported.[88] Moreover, some of the same zakat committees and hospitals listed in the indictment had also received aid from the Red Cross, the United States Agency for International Development, and various agencies within the United Nations.[89] The indictment also cited aid that HLF provided to more than 400 Palestinians who Israel accused of being Hamas members and then deported to southern Lebanon in 1992, an act for which HLF allegedly "publicly lauded itself" (and which took place prior to the designation of Hamas as a terrorist organization).[90] But the U.S.

85. Eaton, *supra* note 77; Indictment at 3, United States v. Holy Land Foundation, CR NO. 3:04-CR-240-G (N.D. Tex. Jul. 26, 2004), *available at* www.nefafoundation.org/file/HLF/U.S._v_HLF_Indictment.pdf.

86. Jason Trahan, *Jury Selection Begins in Holy Land Trial*, DALLAS MORNING NEWS, July 16, 2007, *available at* 2007 WL 13555793.

87. *Experts Split, supra* note 7; Said, *supra* note 3, at 589; Jason Trahan, *Prosecutors: Holy Land Foundation Key in Hamas Effort*, DALLAS MORNING NEWS, July 26, 2007, *available at* 2007 WL 14258757.

88. Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, WASH. POST, Oct. 23, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/10/22/AR2007102200731_2.html.

89. BLOCKING FAITH, *supra* note 11, at 62; Said, *supra* note 3, at 586-87.

90. Indictment at 3, United States v. Holy Land Foundation, CR NO. 3:04-CR-240-G (N.D. Tex. Jul. 26, 2004), *available at* www.nefafoundation.org/file/HLF/U.S._v_ HLF_Indictment.pdf.

and British governments as well as the U.N. and the International Committee of the Red Cross provided aid to the same refugees, and joined in the international demand for Israel to permit the expelled Palestinians to return.[91] Prosecutors offered evidence of Hamas-affiliated speakers HLF had hosted at fundraising events, but the U.S. had not designated any of those speakers as terrorists, and the prosecution could provide little evidence that HLF used any of the Hamas-affiliated speakers after Hamas's designation as a terrorist organization in 1995.[92] A Hamas-affiliated sheikh that HLF brought to the U.S. several times between 1990 and 1991 to speak at fundraising events had returned to the U.S. in 1999, four years *after* Hamas was designated a terrorist organization, this time at the expense of the U.S. Information Agency.[93]

The prosecution's case also suffered from the age of its evidence. Many of the several hundreds of documents and videos entered into evidence over the course of the prosecution's case pre-dated Hamas's designation as a terrorist organization in 1995.[94] Prior to that date, none of the charges for which HLF and its leadership were on trial were crimes.[95] In order to convict HLF and its leadership, the prosecution would have to convince the jury that evidence that dated from before Hamas's terrorist designation reflected on HLF's post-1995 activities. Furthermore, the prosecution would have to distinguish U.S. and international financial support for these individuals and the zakat committees from the support that HLF provided.

In addition to the evidentiary and factual hurdles the prosecution faced, the HLF trial was critical for the government. In the years leading up to the thrice-delayed HLF trial, the U.S. had brought similar terrorism financing cases against charities

91. Clyde Haberman, *400 Arabs Ousted by Israel are Mired in Frozen Limbo*, N.Y. TIMES, Dec. 19, 1992, http://www.nytimes.com/1992/12/19/world/400-arabs-ousted-by-israel-are-mired-in-frozen-limbo.html?pagewanted=all&src=pm.

92. Jason Trahan, *FBI Agent Ties Hamas Activists, Holy Land: Dallas: Defense Says Militants' Presence at Fundraisers Not Illegal*, DALLAS MORNING NEWS, Aug. 23, 2007, *available at* 2007 WL 16402992; *Terror- Financing Trial*, *supra* note 16.

93. Jason Trahan, *Sheikh Key Figure in Government Case Against Holy Land: FBI Memo Says Local Charity Paid for His Trips Here, but U.S. Did Too*, DALLAS MORNING NEWS, July 31, 2002, *available at* 2002 WL 13692225.

94. Jason Trahan, *Holy Land's Attorneys Question Lead FBI Agent: Official Admits Some Evidence Predates 1995 Hamas Terror Label*, DALLAS MORNING NEWS, Aug. 9, 2007, *available at* 2007 WL 15359689.

95. *Id.*

and individuals, most notably in Illinois and Florida, but had failed to convict any individual or charity on terrorism-finance-related charges.[96] The HLF trial had become the banner case for material support prosecution with former President Bush's Rose Garden press conference in 2001, and the fourteen-year investigation into the organization had cost millions of dollars.[97] In order to convince the American public and the global audience that the U.S. was effectively waging its domestic "war on terror," convictions were critical in the HLF case.

In an effort to distinguish U.S., Red Cross, and U.N. aid given to individuals and zakat committees from the aid provided by HLF, prosecutors focused on the material support statute's requirement that the alleged supporter "*knowingly* provided material support" to a foreign terrorist organization.[98] The prosecution's demonstration put the ideology of HLF members on trial, as jurors saw and heard scores of pieces of evidence illustrating the defendants' opinions about Israel, Israelis, and the peace process.[99] Jurors heard recordings of the defendants and others in a 1993 meeting in Philadelphia, dubbed the "Philadelphia conference," where attendees discussed their opposition to the controversial peace process, and how the process might be derailed.[100] They watched videos of Hamas members speaking at HLF events, as well as footage of children dressed as Hamas suicide bombers that was in no way related to HLF, and saw images of the aftermath of suicide bombings—some taken from HLF's computers.[101] They heard recordings of statements

96. Leslie Eaton, *Case Against Muslim Group Rests, With Defense Still Denying Hamas Ties*, N.Y. TIMES, Sept. 19, 2007, http://www.nytimes.com/2007/09/20/us/20holyland.html?ref=holylandfoundationforreliefanddevelopment; Jason Trahan, *Prosecutors: Holy Land Foundation Key in Hamas Effort*, DALLAS MORNING NEWS, July 26, 2007, *available at* 2007 WL 14258757.

97. *Experts Split, supra* note 7.

98. 18 U.S.C §2339B; Said, *supra* note 3, at 590.

99. Jason Trahan, *Prosecution Rests in Holy Land Foundation Terrorism Financing Retrial*, DALLAS MORNING NEWS, Oct. 31, 2008, *available at* 2008 WL 20808302.

100. Jason Trahan, *Holy Land Summations Begin Today: Ahead for Jurors Days or Weeks of Deciding Largest Terrorism Financing Case*, DALLAS MORNING NEWS, Nov. 10, 2008, *available at* 2008 WL 21484261 [hereinafter *Holy Land Summations*]. Prosecutors focused, in particular, on defendant Shukri Abi Baker's statement during the conference that attendees would need to be "subtle" moving forward.

101. Jason Trahan, *Holy Land Defense Attorney Questions FBI Agent*, DALLAS MORNING NEWS, Aug. 9, 2007, *available at* 2007 WL 15359680; United States v. El-Mezain, 664 F.3d 467, 508 (5th Cir. 2011).

made by the defendants that showed a strong affinity for Hamas's ideology—and in one instance, for Hamas's methods, as well.[102]

Defense attorneys were quick to point out that verbalizing support for Hamas and its violent activities was a valid exercise of the defendants' First Amendment right to free speech, and challenged the admission of much of this evidence on the grounds that it was unfairly prejudicial—an argument they would also make on appeal.[103] William Neal, a juror from the 2007 trial, suggested that prosecutors used unfairly prejudicial evidence to shore up their weak case, telling reporters that the prosecution "danced" around these weaknesses "by showing us videos of little kids in bomb belts and people singing about Hamas, things that didn't directly relate to the case."[104] In material support cases where the defendant is accused of funding humanitarian work as opposed to violent activities, prosecutors frequently rely on evidence of the allegedly affiliated terrorist organization's violent acts to compel the jury to a guilty verdict.[105] Such evidence can play heavily on jurors' emotions about terrorism, and encourages jurors to convict on grounds other than the actions of the defendant.[106] The jury in the first trial failed to draw a connection between the evidence of Hamas violence and the actions of HLF and its leadership. As juror Nanette Scroggins explained in an interview, "I kept expecting the government to come up with something, and it never did. From what I saw, this [case] was about Muslims raising money to support Muslims, and I don't see anything wrong with that."[107] However, the result of the second trial, which ended in convictions on all 108 counts, may not have been immune to this type of juror prejudice.

Leaning on the controversial evidence of the HLF defendants' ideologies to distinguish HLF aid from that of the U.S. government, the U.N., and the Red Cross, the prosecution turned to the difficult task of establishing that Hamas controlled

102. *Holy Land Summations, supra* note 100. In that instance, defendant Shukri Abu Baker, HLF's CEO, had phoned a fellow defendant after a suicide bombing, which Baker described as a "beautiful operation." *El-Mezain*, 664 F.3d at 529.

103. *El-Mezain*, 664 F.3d at 508.

104. Liptak et.al, *supra* note 44.

105. Said, *supra* note 3, at 592.

106. Vidmar, *supra* note at 69, at 1154.

107. Greg Kikorian, *Weak Case Seen in Failed Trial of Charity: Muslim Relief Group was Shut Based on Charges that Ended in Mistrial*, L.A. TIMES, Nov. 4, 2007, http://articles.latimes.com/2007/nov/04/nation/na-holyland4.

the zakat committees that the HLF had funded. To prove Hamas's control over the committees, prosecutors relied on their most controversial evidence of all: The anonymous lay and expert testimony of Israeli security agents, and anonymous documents the Israeli government had allegedly seized from the Palestinian Authority and turned over to the U.S. for use in the prosecution.[108]

A. ANONYMOUS WITNESSES

While anonymous witnesses have been permitted to testify in U.S. courts, such testimony is rare and mostly limited to "War on Drugs" cases involving law enforcement agents.[109] When anonymous witnesses have been permitted to testify, courts have almost always required disclosure of the witnesses' names to the defense in the days before trial, so that defense attorneys can properly investigate and effectively cross-examine the witnesses.[110] The disclosure of confidential witnesses' names is particularly feasible in cases such as the HLF trial, where all of the defense attorneys had security clearances.[111] The HLF trial was only the second trial in which Israeli secret agents were permitted to maintain their anonymity while on the witness stand.[112] And although anonymous lay witnesses have been permitted to testify in a handful of cases in the past, the HLF trial may represent the first time in U.S. history that a judge permitted an expert witness to testify anonymously.[113]

108. *Judge Declares Mistrial in Muslim Charity Case*, MSNBC, Oct. 22, 2007, http://www.msnbc.msn.com/id/21377847/ns/us_news-giving/t/judge-declares-mistrial-muslim-charity-case/#.TwdKbfF5mSM; *El-Mezain,* 664 F.3d at 498.

109. Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 17, at 27; Brief for United States, *supra* note 23, at 50, 54, United States v. El Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560), *available at* THE INVESTIGATIVE PROJECT ON TERRORISM, http://www.investigativeproject.org/case/65 (last visited Mar. 12, 2012).

110. Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 17, at 27; Brief for United States, *supra* note 23, at 62.

111. Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 17, at 22.

112. Jason Trahan, *Holy Land Trial Turns to Israeli Agent: Identity Concealed as He Testifies about Evidence from Palestinian Groups*, DALLAS MORNING NEWS, Aug. 10, 2007, *available at* 2007 WL 15435366.

113. Jason Trahan, *Israeli Secret Agent Testifies in Holy Land Trial*, DALLAS MORNING NEWS, Aug. 15, 2007, *available at* 2007 WL 15819406; Said, *supra* note 3, at 587. The first instance of Israeli secret agents offering anonymous lay testimonies was in *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 923-24 (N.D. Ill. 2006). In that case, the anonymous witnesses had had personal contact with one of the

The trial judge cleared the courtroom during the testimony of both anonymous Israeli witnesses at both trials.[114] The defendants' family members were the only public spectators allowed to remain in the courtroom during the anonymous witnesses' testimonies.[115] The prosecution's anonymous lay witness, a high-ranking member of the Israeli Defense Forces (IDF), testifying under the pseudonym "General Lior," laid the foundation for several documents the IDF had seized from the Palestinian Authority during a military operation dubbed "Operation Defensive Shield."[116] These documents were excluded from the first trial but were later admitted in the second trial, a decision the Fifth Circuit would rule as "harmless error."[117]

The prosecution's precedent-setting expert witness, an analyst and lawyer with the Israeli intelligence entity Shin Bet, testified under the pseudonym "Avi."[118] Avi's testimony and the Palestinian Authority documents excluded from the first trial but admitted into the second formed the key evidence in connecting Hamas to the zakat committees that HLF had funded.[119] Avi testified that Hamas members held staff positions at all of the zakat committees HLF had aided, and that Hamas members also served on the boards of the committees.[120] Avi further testified that Hamas presence within the zakat committees was well known within the Israeli intelligence community, and testified with impunity about a suicide bombing that he claimed was carried out by someone whose photo was found in a zakat committee, forming one of the government's few links between

defendants, distinguishing *Abu Marzook* from the HLF case.

114. *Experts Split, supra* note 7.

115. *Id.*

116. United States v. El-Mezain, 664 F.3d 467, 497 (5th Cir. 2011).

117. Jason Trahan, *Judge Bars Some Evidence in Holy Land Trial: Judge Throws Out Some Documents that Israel Said Showed Hamas Tie*, DALLAS MORNING NEWS, Aug. 15, 2007, *available at* 2007 WL 15802826. For more discussion of the documents *see infra* fns. 224-34 and accompanying text.

118. *Experts Split*, *supra* note 7; *Judge Declares Mistrial in Muslim Charity Case*, MSNBC, http://www.msnbc.msn.com/id/21377847/ns/us_news-giving/t/judge-declares-mistrial-muslim-charity-case/#.TwdKbfF5mSM.

119. *Id.*

120. *Experts Split*, *supra* note 7. Avi's testimony about the roles of Hamas members on zakat committee staffs and boards is additionally troublesome because there is currently no standard for determining what level of connectedness must exist between an FTO and another organization for the FTO to effectively control that organization. Said, *supra* note 3, at 589.

the committees and Hamas.[121]

The anonymity granted to these witnesses and in particular to Avi, was a devastating blow to the HLF defense. As the first anonymous expert witness since the Supreme Court's landmark decision in *Smith v. Illinois*[122] and possibly the first in U.S. history, Avi was permitted to testify about his alleged credentials with impunity, claiming to have earned a law degree from Tel Aviv University, to have worked for five years on the prosecution of a high-profile Hamas benefactor in Israel, and to have been recognized as an expert on Hamas's social wing by the Israeli government as well as other foreign governments.[123] Without knowing his name, the defense could not impeach Avi about his specific credentials or the methodology through which he determined whether a zakat committee was under Hamas control; thus, the defense was forced to focus its attack on more general impeachment, and on the cloak of anonymity that Avi enjoyed.[124] The ability of the defense to attack Avi on the basis of his anonymity and for general biases that he might have as an Israeli settler satisfied the Fifth Circuit, but should have raised significantly more concern.[125] Avi's employer, Shin Bet, is known throughout the world for questionable interrogation tactics and other actions that violate international law, threaten stability in the Middle East, and jeopardize U.S. foreign policy goals.[126] Most relevant to Avi's impunity, Israel's own commission charged with investigating Shin Bet in the 1980s found that agency officials "systematically lied" to Israeli courts for years – a practice that

121. *Id. El-Mezain,* 664 F.3d at 509.

122. Opening Brief for Appellant Ghassan Elashi (with Common Issues) at 27, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560) (noting that no published decision has permitted an expert witness to testify anonymously for the prosecution in a criminal trial since the Supreme Court held that anonymous testimony "effectively . . . emasculate[d] the right of cross-examination" in Smith v. Illinois, 390 U.S. 129, 131 (1968).)

123. Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 122, at 31 n.18.

124. *El-Mezain,* 664 F.3d at 492-93.

125. *Id.* at 493.

126. *See, e.g.*, Dr. Hanan Chehata, *Shin Bet: An Ingrained Culture of Torture and Deceit*, Middle East Monitor, Sept. 19, 2011, http://www.middleeastmonitor.org.uk /resources/briefing-papers/2838-shin-bet-an-ingrained-culture-of-torture-and-deceit; Ishai Menuchin, *Still the Same Shin Bet: The 1980s are Over, and Yet the Torture Continues to this Day – As Does the Culture that Permits Lying to Judges and to the Public in the Name of 'Security,'* HAARETZ, July 10, 2011, http://www.haaretz.com/ print-edition/opinion/still-the-same-shin-bet-1.388659.

Israeli human rights advocates charge continues to this day.[127] The anonymous testimony of Major Lior, a high-ranking member of the IDF, should have raised similar concerns for the court, as foreign governments, the United Nations, and prominent human rights organizations have condemned many IDF operations.[128] The prosecution had introduced a variety of exhibits appealing to jurors' emotions regarding Hamas's violent activities, but without knowing the identities of Avi and Major Lior, the defense could not inquire into these witnesses' own potentially controversial personal and career histories.[129]

1. "CROSS-EXAMINATION IS A MATTER OF RIGHT"[130]

Prior to the first trial, prosecutors moved to permit Avi and Major Lior to testify anonymously based on the theory that disclosing the witnesses' identities would potentially endanger their safety, and that their names were classified under both U.S.

127. *Id.*

128. U.N. Secretary-General, Report of the Secretary-General prepared pursuant to United Nations General Assembly Resolution ES-10/10, U.N. Coc. A/ES-10/186 (July 30, 2002), *available at* www.un.org/peace/jenin (reporting on Operation Defensive Shield, the IDF's 2002 incursion into Jenin refugee camp and other parts of the Occupied West Bank, during which nearly 500 Palestinians were killed in just over two months, nearly 1,500 were wounded, more than 17,000 Palestinians lost their homes, strict curfews were enforced, military road closures paralyzed economic activity, and more than 630,000 people were rendered food security vulnerable by food and supply shortages.) [hereinafter U.N. Report]; Isabel Kershner, *U.N. Report Criticizes Israel for Actions at Border*, N.Y. TIMES, July 7, 2011, http:// www.nytimes.com/2011/07/08/world/middleeast/08mideast.html (discussing the U.N.'s condemnation of the IDF's use of live ammunition to repel unarmed and nonviolent Palestinian protestors attempting to cross into Israel through the fence at the Lebanese border); *Precisely Wrong: Drone Missile Attacks in Gaza*, HUMAN RIGHTS WATCH (July 1, 2009), http://www.hrw.org/en/video/2009/06/30/precisely-wrong (documenting the IDF's use of drone missiles in Gaza in 2008 and 2009); *Rain of Fire: White Phosphorus in Gaza*, HUMAN RIGHTS WATCH (Mar. 25, 2009), http:// www.hrw.org/en/video/2009/03/25/rain-fire-white-phosphorus-gaza (documenting the IDF's use of white phosphorous during its attacks on Gaza in 2008 and 2009); *Israeli Killings of Gaza Ship Activists Must be Investigated*, AMNESTY INTERNATIONAL, May 31, 2010, *available at* http://www.amnesty.org/en/news-and-updates/israeli-killings gaza-ship-activists-must-be-investigated-2010-05-31; Zoe Magee, *American, 19, Among Gaza Flotilla Dead*, ABC WORLD NEWS, June 3, 2010, http://abcnews.go.com /WN/Media/american-killed-gaza-aid-flotilla/story?id=10814848 (discussing IDF attack on international delegation of peace activists, during which eleven activists were killed, including nineteen-year-old dual U.S. and Turkish citizen Furkan Dogan).

129. *El-Mezain*, 664 F.3d at 507-08.

130. Alford v. United States, 282 U.S. 687, 691 (1931).

and Israeli law.[131] The prosecution submitted classified affidavits from Shin Bet, the IDF, and the FBI in support of their motion, which Judge A. Joe Fish granted over the defense's objection.[132] The defendants moved to compel discovery of the witnesses' names before the second trial, but Judge Jorge A. Solis denied the motion, finding that disclosing the names could threaten the safety of the witnesses and their families, and could "jeopardize national security."[133] Judge Solis further found that the defendants had not established that disclosure of Avi and Major Lior's identities was "reasonably likely" to "lead to evidence helpful to their cases."[134]

While witness safety and national security are crucial considerations for courts in determining whether to disclose witnesses' identities, these considerations must be weighed against the right of a criminal defendant to confront his accuser through cross-examination, "beyond doubt the greatest legal engine ever invented for the discovery of truth."[135] The right of confrontation is enumerated in the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[136] Professor Wigmore summarized the basic thrust behind this right when he stated that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."[137] The Supreme Court has consistently upheld the view that "cross-examination is a matter of right," and that the purposes of meaningful cross-examination include that "the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood."[138] In *Smith v. Illinois*, the Court further held that:

> the very starting point in "exposing falsehood and bringing out the truth" through cross-examination

131. Brief for United States, *supra* note 23, at 39.

132. *Id.* Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 122, at 17.

133. *Id.* at 40.

134. *Id.*

135. California v. Green, 399 U.S. 149 (1970) (citing to 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

136. U.S. CONST. amend. VI.

137. Davis v. Alaska, 415 U.S. 308 (1974) (citing to 5 WIGMORE § 1395).

138. Alford v. United States, 282 U.S. 687, 691 (1931).

> must necessarily be to ask the witness *who he is and where he lives*. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. *To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself*."[139]

In *Smith*, the Court considered a Sixth Amendment challenge raised by a defendant who was convicted of narcotics trafficking after a key witness offered testimony regarding an alleged drug transaction about which only he and the defendant testified.[140] When the witness admitted during cross-examination that the name he had given the court was a pseudonym, the trial court sustained the prosecutor's objections to the defense's questions about the witness's real name and where he lived.[141] The Supreme Court reversed the lower court's decision, finding that the trial court's withholding of the name and address of the witness violated Smith's Sixth Amendment right of confrontation.[142]

While the Supreme Court has consistently protected the right of a defendant to confront his accuser through cross-examination, the Court has also made clear that trial judges may place reasonable limits on cross-examination when the court is concerned about harassment, confusion of the issues, prejudice, repetitive inquiries, and most of all, the safety of the witness.[143] In *Roviaro v. United States*,[144] the Court proscribed a balancing test for lower courts considering issues of disclosure, determining that courts must weigh "the public interest in protecting the flow of information against the individual's right to prepare his defense."[145] The Court has also emphasized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[146] However, since the Court ruled in *Smith* that a witness's

139. Smith v. Illinois, 390 U.S. 129, 131 (1968) (internal citations omitted) (emphasis added).

140. *Id.* at 129-30.

141. *Id.* at 130-31.

142. *Id.* at 133.

143. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

144. 353 U.S. 53 (1957).

145. *Id.* at 62.

146. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis in original).

name and address are the "starting point in exposing falsehood and bringing out the truth through cross-examination,"[147] the Court has not considered whether the cross-examination of an entirely anonymous witness can be "effective."

2. THE HARMLESS ERROR STANDARD

The Court has mandated that an otherwise valid conviction will not be set aside if, based on a review of the full record, a constitutional error such as a violation of the confrontation clause was harmless beyond a reasonable doubt.[148] In *Delaware v. Van Arsdall*, the Court noted that a reviewing court focuses on the underlying fairness of the trial, and not exclusively on "the virtually inevitable presence" of immaterial error.[149] Under *Van Arsdall*, appellate courts weigh a number of factors to determine whether the error was harmless, including the importance of the witness's testimony to the government's case (a crucial consideration in the *Holy Land* case), whether other evidence corroborated or contradicted the witness's testimony on important points, the extent of cross-examination that the trial court otherwise permitted, whether the witness's testimony was cumulative, and the overall strength of the prosecution's case.[150]

B. THE CONFRONTATION CLAUSE IN THE DISTRICT AND APPELLATE COURTS

In cases where prosecutors felt that some level of anonymity was necessary to protect witnesses' safety, courts have permitted witnesses to withhold their current address or membership in social or political organizations from the defense,[151] protected witnesses' identities, home address, or employment information from being publicly revealed on the stand;[152] or in extreme cases,

147. Smith v. Illinois, 390 U.S. 129, 131 (internal quotations omitted).

148. *Van Arsdall*, 475 U.S. at 681.

149. *Id.*

150. *Id.* at 684.

151. *See, e.g.*, United States v. Contreras, 603 F.2d. 1237, 1239 (5th Cir. 1979); United States v. Alston, 460 F.2d 48 (5th Cir. 1972).

152. *See, e.g.*, Clark v. Ricketts, 958 F.2d 851, 854-55 (9th Cir. 1991) (stating that the defense was barred from publicly eliciting the witness's name and address on cross examination because the defense's ability to investigate the witness using his true name had not been impeded); United States v. Navarro, 737 F.2d 625, 634 (7th Cir. 1984) (prohibiting defense from publicly eliciting witnesses' address and current employment information on cross-examination, but at least one witness's home address was known to defendants, who therefore could investigate the witness unimpeded).

courts have sometimes withheld the name of a witness until a few days before the witness's testimony, ensuring as much protection as possible for the witness while still giving defense attorneys adequate time to investigate.[153]

In *United States v. Fuentes*,[154] a case that could have served as a model for the HLF trial, prosecutors fought a district court order requiring them to disclose the identity of a Colombian confidential informant in a drug prosecution.[155] Prosecutors successfully convinced the court that disclosure of the informant's identity would likely endanger the informant as well as members of his family, and could also jeopardize ongoing Drug Enforcement Agency (DEA) investigations.[156] While the court resolved to protect the informant and his family to the greatest possible extent, "leav[ing] the defense with no way of testing the veracity or completeness of the [g]overnment's disclosures" proved unacceptable, and no amount of disclosures from the government could replace the value to the defense of having the witness's true name.[157] Concerned about the defense's ability to investigate prior bad acts by the defendant in both the U.S. and Colombia, the court ordered the government to disclose the informant's identity to defense counsel, who could "of course" share the identity of the informant with their clients, and then limited the defense's disclosure of the informant's identity to one investigator, who would work on behalf of all defendants in investigating the witness, and would only reveal the name of the informant when required by the investigation.[158] The court then warned defense counsel and defendants that failure to comply with the limitations set by the court would result in contempt of court charges.[159] The court further expressed that the government had the option of maintaining the confidentiality of its witness, but that if the government chose not to disclose the witness's name, his testimony would be suppressed.[160]

153. United States v. Celis, 608 F.3d 818, 830 (D.C. Cir. 2010).
154. 988 F. Supp. 861 (E.D. Pa. 1997).
155. *Id.* at 863.
156. *Id.*
157. *Id.* at 865-66.
158. *Id.* at 867.
159. *Fuentes*, 988 F. Supp at 867.
160. *Id.*

C. THE CONFRONTATION CLAUSE AT THE FIFTH CIRCUIT

Like its sister circuits and the Supreme Court, the Fifth Circuit has consistently balanced reasonable fears of witness safety and other considerations while protecting defendants' rights of confrontation through cross-examination in the decades leading up to its *Holy Land* ruling.[161] In *United States v. Alston*,[162] the court considered whether a defendant had been denied his right of confrontation when the district court refused to require that the prosecution disclose the current address of a DEA agent witness in the case.[163] The Fifth Circuit determined that the prosecution had made a sufficient showing of a reasonable fear for the witness's safety, and that the only information the witness had withheld was his current address.[164] In his appeal, Alston relied heavily on the *Smith* case discussed above, but the Fifth Circuit distinguished *Smith* by pointing out that while Alston had access to the witness's name, pseudonyms, and occupational history, the defendant in *Smith* did not have access to the anonymous witness's name, and was therefore left "with absolutely nothing on which to base an effective cross-examination for purposes of contradiction or impeachment of the Government's primary witness."[165] The defendant in *Alston*, unlike the defendant in *Smith* and the HLF defendants, could speak to the agent's coworkers, former neighbors, and associates to place the agent in his community, and test his credibility and reliability.

Only a few years after *Alston*, the Fifth Circuit considered *United States v. Contreras*,[166] another case in which the home address of a DEA agent had been withheld from the defense because the prosecution had made a showing that a reasonable fear existed for the safety of the witness and his family.[167] In *Contreras*, the court noted that the agent had testified to his name, alias, age, qualifications, and past and current employment, and that the defense's cross-examination of the

161. *See, e.g.*, United States v. Alston, 460 F.2d 48, 50 (5th Cir. 1972); United States v. Contreras, 602 F.2d 1237, 1239 (5th Cir. 1979); United States v. Diaz, 637 F.3d 592, 598 (5th Cir. 2011).

162. 460 F.2d 48.

163. *Id.*

164. *Id.* at 53.

165. *Id.* at 51.

166. 602 F.2d 1237.

167. *Id.*

agent was "vigorous and probative."[168] The court found that because the defense had engaged the witness in such a "thorough" cross-examination, the withholding of the agent's home address could not have prejudiced the defendant.[169]

In *United States v. Davis*,[170] the Court found that the district court did not abuse its discretion by prohibiting defendants from asking one question of a witness who had been cross-examined for more than two days on subjects including the witness's indictment, his plea agreement with the government, and whether prosecutors had promised to dismiss the indictment in exchange for the witness's testimony.[171] In that case, the defense was able to show that the witness was a convicted felon, and that he had lied to his lawyer, friends, and even to juries during his own trials.[172] The Fifth Circuit found that the witness's answer to a single question would not have altered the jury's impression of him in light of extended cross-examination and the numerous facts the defense had successfully elicited from the witness about his credibility.[173] The level of access the *Davis* defendants had to investigate and then confront their witness is particularly striking in the face of the total anonymity of Avi and Major Lior.

A few months before the HLF opinion, the Fifth Circuit decided *United States v. Diaz*, a case in which the defendant appealed a district court decision that prohibited him from asking a law enforcement witness whether the defendant's observed activities might have had motives other than the criminal ones the witness inferred.[174] In examining the district court's decision, the Fifth Circuit specifically noted that it "d[id] not find that the district court barred inquiries into witness credibility or reliability, *issues that are the touchstone of cross-examination rights protected by the Confrontation Clause*."[175]

The Fifth Circuit's consistent history of protecting the right

168. *Id.* at 1239-40.

169. *Id.*

170. 393 F.3d 540 (5th Cir. 2004).

171. *Id.* at 547. The only question defense counsel was not permitted to ask was whether the witness "felt guilty" of the charges listed in the indictment. *Id.* at 547-48.

172. *Id.* at 548.

173. *Id.*

174. United States v. Diaz, 637 F.3d 592, 597 (5th Cir. 2011).

175. *Id.* at 598.

of a defendant to confront his accuser through investigation and effective cross-examination sets the court's *Holy Land* opinion apart, potentially vastly expanding the power of the government to cripple a defendant's right of confrontation whenever prosecutors can make a showing that a witness's personal safety may be endangered through disclosure of his identity.

D. THE CONFRONTATION CLAUSE IN THE FIFTH CIRCUIT'S HLF OPINION

In its brief to the Fifth Circuit, the government focused its arguments on the possible threat to the safety of Avi and Major Lior if their identities were revealed,[176] an argument that the Fifth Circuit panel – comprised of Judges Carolyn King, Emilio Garza, and James Graves, Jr. – adopted in its own opinion.[177] Relying heavily on the small window left open by the Supreme Court with respect to witness safety in the case of a defendant's right to confront his accuser,[178] the Fifth Circuit determined that the "right to confront ones accusers is 'not unlimited,'"[179] and that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"[180] The court ultimately concluded that the threat to the safety of the witnesses justified withholding their names from the defense counsel, which was a proper limitation on the defendants' right to confront their accusers.[181]

While the court's finding is firmly rooted in the language of previous Fifth Circuit and Supreme Court holdings, the opinion disguises the substantial differences between the facts in the present case and the facts of the cases on which the court's opinion relied. *Diaz*, which the court cited to support the position that the right of confrontation is "not unlimited," concerned a lower court's decision to prevent a defendant from asking a law enforcement witness whether he had perhaps come to the wrong

176. Brief for United States, *supra* note 23, at 62.

177. United States v. El-Mezain, 664 F.3d 467, 491 (5th Cir. 2011).

178. *See, e.g.*, Delaware v. Van Arsdell, 475 U.S. 673 (1986); Delaware v. Fensterer, 474 U.S. 15 (1985); Smith v. Illinois, 390 U.S. 129 (1968).

179. *El-Mezain*, 664 F.3d at 491 (quoting United States v. Diaz, 637 F.3d 592, 597 (5th Cir. 2011)).

180. *El-Mezain*, 664 F.3d at 492 (quoting Delaware v. Van Arsdell, 475 U.S. 673, 679 (1986) (citation omitted)).

181. *Id*. at 493-94.

conclusion about the defendant's behavior.[182] The witness in *Diaz* did not testify anonymously, and in considering that case the Fifth Circuit noted that it "d[id] not find that the district court barred inquiries into witness credibility or reliability, issues that are the touchstone of cross-examination rights protected by the Confrontation Clause."[183] Similarly, the Fifth Circuit incorporated the Supreme Court's conclusion in *Delaware v. Fensterer*[184] that a defendant is not entitled to "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[185] But in *Fensterer*, the defense challenged the testimony of an expert who could not remember the basis for his own opinion.[186] Here again, the witness did not testify anonymously, and defense counsel could have investigated the reputation of the witness to find methods of impeaching him in front of a jury.[187]

Virtually none of the cases to which the Fifth Circuit cited permitted witnesses to testify anonymously and in one of the two cases in which witnesses did testify anonymously, defense counsel were given the witnesses' names a few days prior to trial.[188] In that case, the D.C. Circuit's analysis focused heavily on whether the defendants had the right to learn the anonymous witnesses' names *prior to* the trial, and did not contemplate whether failure to disclose the witnesses' names throughout the duration of the trial would have constituted a Sixth Amendment violation.[189]

In *United States v. Abu Marzook*,[190] the second case involving anonymous witnesses that the Fifth Circuit cited, the district court permitted two Shin Bet witnesses to testify anonymously against defendant Muhammad Hamid Khalil Salah during a suppression hearing and later at trial about statements

182. United States v. Diaz, 637 F.3d 592, 597 (5th Cir. 2011).

183. *Id.* at 598.

184. 474 U.S. 15 (1985).

185. *Id.* at 20.

186. *Id.* at 17.

187. *Id.*

188. United States v. El-Mezain, 664 F.3d 467, 491 (5th Cir. 2011) (citing United States v. Celis, 608 F.3d 818, 830 (D.C. Cir. 2010)).

189. *Celis*, 608 F.3d at 830-31 (noting that "[t]he right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.") (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987)).

190. 412 F. Supp. 2d 913 (N.D. Ill., 2006).

Salah made to them during his two-month detention in Israel.[191] In its decision, the district court noted that Salah only knew the agents by their pseudonyms, and that he would be "free to cross examine the witnesses on the basis of their direct testimony or any other proper basis."[192] The anonymous witnesses in *Abu Marzook* would only testify about their personal interactions with the defendant, who could impeach them based on inconsistencies in their accounts.[193]

Unlike the defendant in *Abu Marzook*, none of the HLF defendants had any personal contact with either Major Lior or Avi, and none had been present when Major Lior oversaw "Operation Defensive Shield," during which the controversial Palestinian Authority documents were recovered.[194] Furthermore, none of the cases cited by the Fifth Circuit addresses the issue of anonymous expert witnesses.[195] *Abu Marzook* provides little support for the new rule the Fifth Circuit created with the Holy Land decision.

While the Fifth Circuit makes no reference to other courts' rulings on the admissibility of anonymous expert testimony, the government's brief to the Fifth Circuit referenced a group of three cases prosecuted in 2008 in which anonymous expert testimony was admitted.[196] In each of these cases, two El Salvadoran police officers testified anonymously in the prosecution of alleged members of the "Mara Salvatrucha 13," a violent gang operating primarily in Central America and also in the United States.[197] While these cases involve the use of anonymous expert testimony (one of the two witnesses testified as an expert[198]), the Fourth Circuit's opinions on appeal offer little support to the government's argument in the *Holy Land* case. In one of these cases, the defendants did not raise the issue of the use of

191. *Id.* at 916.

192. *Id.* at 923-24.

193. *Id.*

194. Furthermore, Major Lior did not personally seize these documents. Oral Argument at 18:10, United States v. El-Mezain, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

195. United States v. El-Mezain, 664 F.3d 467, 490-94 (5th Cir. 2011).

196. Brief for United States, *supra* note 23, at 50; United States v. Ayala, 601 F.3d 256 (4th Cir. 2010); United States v. Zelaya, 336 F. App'x. 355 (4th Cir. 2009) (unpublished) (per curium); United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2011).

197. *Id.*

198. *Ayala,* 601 F.3d at 274 (noting that one expert testified under a pseudonym).

anonymous expert testimony on appeal, making the Fourth Circuit's opinion irrelevant to the admissibility of Avi's testimony in the Holy Land prosecution.[199] In the second case, *United States v. Zelaya*, the Fourth Circuit affirmed the admissibility of the anonymous testimony, but the court's opinion is both per curium and unpublished, rendering the ruling nonbinding in the Fourth Circuit and considerably less persuasive in other circuits.[200] Furthermore, the opinion never refers to the anonymous witness as an expert or in any way addresses the constitutional implications of anonymous expert testimony.[201] Last, the Fourth Circuit's reasoning for withholding the identity of the witness relies entirely on two cases.[202] Specifically, the *Zelaya* opinion cites to another unpublished per curium opinion from the Fourth Circuit that affirms the government's withholding of a lay witness's identity,[203] and a Seventh Circuit case in which the defense knew the witness's name, but not his address.[204]

In *United States v. Ramos-Cruz*, the third case that the government cites to support the admissibility of anonymous expert testimony, the Fourth Circuit published its opinion a few weeks after the Fifth Circuit published the *Holy Land* opinion.[205] In *Ramos-Cruz*, the Fourth Circuit concluded that the lower court did not abuse its discretion in permitting the two anonymous witnesses to testify against the defendant because the government had made a showing of the possible threat to the

199. *Id.* at 256.

200. *Zelaya*, 336 F. App'x. at 357-58. Under the Fifth Circuit's rules, citation to unpublished opinions is permitted, but those opinions do not constitute precedent. 5TH CIR. R. 47.5.4. In the Fourth Circuit, which heard the *Zelaya* appeal, unpublished opinions are not considered precedent and citation to such opinions is discouraged. 4TH CIR. R. 32.1. Neither the *Zelaya* opinion nor the *Ramos-Cruz* opinion *(infra* notes 202-207 and accompanying text) reveal whether the Salvadoran government requested that the witness's name be kept confidential. Therefore, the *Zelaya* and *Ramos-Cruz* courts do not weigh the defendants' right to confront their accusers against the national security interests of a foreign government. This absence is particularly interesting in light of the Fifth Circuit's opinion in *El-Mezain*, in which the national security interests of the Israeli government weighed heavily in the court's reasoning. *El-Mezain*, 664 F.3d at 492.

201. *Zelaya*, 336 F. App'x at 355.

202. *Id.* at 358.

203. United States v. Borda, 178 F.3d 1286, at *7 (4th Cir. 1999) (unpublished) (per curium).

204. United States v. Palermo, 410 F.2d 468, 472 (7th Cir. 1969).

205. United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2011).

witnesses' safety if their names were disclosed.[206] Certainly the Fourth Circuit's opinion in this case may have offered more support to the government than its unpublished *Zelaya* opinion if the *Ramos-Cruz* opinion had been published prior to the *Holy Land* holding. However, the *Ramos-Cruz* opinion presents additional obstacles to the government's argument in *Holy Land*. As in its *Zelaya* opinion, the Fourth Circuit never referred to either anonymous witness as an expert in any part of its *Ramos-Cruz* opinion that addresses these witnesses.[207] Furthermore, *Zelaya* is the only case involving anonymous witnesses on which the Fourth Circuit relied in affirming these witnesses' testimonies.[208] Last, and perhaps most significantly, the Fourth Circuit noted that in permitting these witnesses to testify anonymously, the lower court expressly relied in part on the fact that the Fourth Circuit had affirmed the government's use of these same anonymous witnesses in the *Zelaya* case.[209] The Fourth Circuit then stated that while "the decision in *Zelaya* is not binding, given that it involved the same witnesses and the same underlying conspiracy, we find it persuasive."[210] The trial court's reliance on the unpublished *Zelaya* opinion and the Fourth Circuit's subsequent published opinion affirms that reliance may represent a dangerous feedback loop in which the repeated use of specific anonymous witnesses in related trials creates factually related but unpublished precedent that permits the constitutionally questionable use of anonymous witnesses to become binding law.

E. ARTFULLY ERODING THE RIGHT TO CONSTITUTIONALLY SUFFICIENT CROSS-EXAMINATION

Charting new legal territory in the first published opinion to affirm the admissibility of anonymous expert testimony, the Fifth Circuit bolstered its ruling by reasoning that because Avi and Major Lior's names were classified under Israeli law, anyone familiar with the witnesses' true identities would be highly unlikely to discuss the witnesses with defense investigators.[211]

206. *Id.* at 501.

207. *Id.* at 492, 500-02.

208. *Id.* at 500-02.

209. *Id.* at 500.

210. *Id.* at 500-01.

211. United States v. El-Mezain, 664 F.3d 467, 493 (5th Cir. 2011). The court noted that the witnesses' identities are classified under Israeli and American law, apparently because of concerns for witness safety, although the court does not

The court reasoned that the defendants therefore "*cannot* show a reasonable probability that the jury might have assessed the witnesses' testimonies any differently had they been allowed to learn the witnesses' true identities."[212] This position suggests that the HLF defendants cannot show that they would have found useful information about the anonymous witnesses simply because they cannot know what they would find if they had access to their identities.

The Fifth Circuit cited only one case[213] to support this circular reasoning, but that case may actually stand for the opposite position.[214] As the Fifth Circuit noted, the court in *Davis* held that "to demonstrate prejudice the defendant 'must show that a reasonable jury might have had a significantly different impression of the witness's credibility if defense counsel had been allowed to pursue the questioning.'"[215] However, immediately prior to that holding, the *Davis* court stated that "a judge's discretionary authority to limit the scope of cross-examination comes into play *only after* the defendant has been permitted, as a matter of right, sufficient cross-examination to satisfy the Sixth Amendment."[216] The court in *Davis* emphasized how effective the defendant's cross-examination of the witness was: the defendant in *Davis* exposed the witness as a convicted felon who had lied to his friends and to juries in his own trials, and that the witness was testifying in the hope of receiving a reduced sentence as part of a plea deal with the government.[217] Given the wealth of information the defense was able to expose before the jury in that case, *Davis* is not a particularly strong case as the lone support for the proposition that the HLF defendants cannot show that a jury might have assessed Avi and Major Lior's testimony

explain why these identities are "classified" under American law. *Id.* at 492. The court further noted that the true identities of the witnesses were provided to U.S. authorities "with the expectation that they would be closely guarded and kept secret," with no further explanation of why that expectation of secrecy should extend to the witnesses' apparently voluntary participation in a criminal trial in a U.S. court. *Id.* Crucially, the court does not challenge or explain its reasoning in determining that a foreign government's interest in the confidentiality of its employees outweighs the constitutional right of U.S. citizens to confront their accuser. *Id.*

212. *Id.* (emphasis added).

213. *Id.* at 493 (citing United States v. Davis, 393 F.3d 540, 547 (5th Cir. 2004)).

214. *Davis*, 393 F.3d at 548.

215. *Id.*

216. *Id.* (emphasis added).

217. *Id.*

differently if they could have accessed the names of the anonymous witnesses.[218]

Furthermore, the Fifth Circuit's assumption that a limited investigation by defense counsel was unlikely to yield useful information about Avi and Major Lior is likely incorrect.[219] Avi and Major Lior must have friends and neighbors, and may participate in local community or social organizations, which would have helped the defendants place these witnesses in their proper context, and explore their reputations for reliability in their non-confidential lives. An investigation could have also yielded information about the witnesses' affiliations and reputations in their pre-confidential lives. In particular, as citizens of Israel where military service is compulsory, both witnesses likely served in the Israeli Defense Forces, and an investigation might have revealed information about IDF activities in which either witness participated.[220] A large number of IDF operations have been condemned by foreign governments and human rights organizations, and that information may have sharply affected the way jurors thought about the testimony the witnesses gave.[221] And even as private citizens, either witness

218. Furthermore, the *Davis* court supports its reasoning that a trial court's discretion to limit the scope of cross-examination emerges only after a defendant has been permitted sufficient cross-examination under the Sixth Amendment by citing to *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993), which draws this interpretation of the Sixth Amendment from *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), in which the court noted that the right of a criminal defendant to confront a witness against him "is especially important with respect to accomplices or other witnesses who may have a substantial reason to cooperate with the government." *Davis,* 393 F.3d at 908. Elliott contemplates the importance of this right in the case of a witness who faces criminal charges and has made a deal with the government to testify, but the same logic would hold true for a member of United States or Israeli law enforcement, who is professionally invested in a successful prosecution resulting from millions of dollars and hundreds of thousands of hours of work.

219. United States v. El-Mezain, 664 F.3d 467, 493 (5th Cir. 2011).

220. *See generally The Foundation of the IDF*, ISRAEL DEFENSE FORCES, http://dover.idf.il/IDF/English/idf61/default.htm (last visited Apr. 24, 2012).

221. See U.N. Report, *supra* note 128 (reporting on Operation Defensive Shield, the IDF's 2002 incursion into Jenin refugee camp and other parts of the Occupied West Bank, during which nearly 500 Palestinians were killed in just over two months, nearly 1,500 were wounded, more than 17,000 Palestinians lost their homes, strict curfews were enforced, military road closures paralyzed economic activity, and more than 630,000 people were rendered food security vulnerable by food and supply shortages.) *Id*. at 10. Isabel Kershner, *U.N. Report Criticizes Israel for Actions at Border*, N.Y. TIMES, July 7, 2011, http://www.nytimes.com/2011/07/08/world/ middle east08mideast.html (discussing the U.N.'s condemnation of the IDF's use of live

may have participated in political or social groups that espoused or acted upon prejudiced views of Palestinians. Participation in a controversial political or social organization may be especially likely in the case of Avi, as the Fifth Circuit noted that Avi may have particularly strong sympathies toward West Bank settlers.[222]

The government argued, and the Fifth Circuit agreed, that the defense effectively exercised its right to cross examination through a general impeachment of Avi and Major Lior based on their participation in the military, their affiliations with the Israeli government, and the fact that they testified anonymously.[223] Defense attorneys vigorously questioned these witnesses based on the little information they had, but this impeachment pales in comparison to what the defense may have elicited had they known the witnesses' names. Furthermore, general impeachment of Israeli security and military employees may not be as effective as similarly general evidence offered by the government in the Holy Land Trial and other terrorism-finance cases: Throughout the government's case, prosecutors were repeatedly permitted to show jurors disturbing photographs and footage of Hamas suicide bombings and other violent activities.[224] While defense attorneys could remind jurors that their clients were not accused of providing any financial support for these disturbing acts, prosecutors were able to capitalize on the collective trauma Americans suffered on September 11th, and the "racialization" of Muslims and Arabs as terrorists.[225] This

ammunition to repel unarmed and nonviolent Palestinian protestors attempting to cross into Israel through the fence at the Lebanese border.); *Precisely Wrong: Drone Missile Attacks in Gaza*, HUMAN RIGHTS WATCH (July 1, 2009), http://www.hrw.org/en/video/2009/06/30/precisely-wrong (documenting the IDF's use of drone missiles in Gaza in 2008 and 2009); *Rain of Fire: White Phosphorus in Gaza*, HUMAN RIGHTS WATCH (Mar. 25, 2009), http://www.hrw.org/en/video/ 2009/03/25/ rain-fire-white-phosphorus-gaza(documenting the IDF's use of white phosphorous during its attacks on Gaza in 2008 and 2009); *Israeli Killings of Gaza Ship Activists Must be Investigated*, AMNESTY INTERNATIONAL, May 31, 2010, http://www. amnesty.org/en/news-and-updates/israeli-killings-gaza-ship-activists-must-be-investigated-2010-05-31; Zoe Magee, *American, 19, Among Gaza Flotilla Dead*, ABC WORLD NEWS, June 3, 2010, http://abcnews.go.com/WN/Media/american-killed-gaza-aid-flotilla/story?id=10814848 (discussing IDF attack on international delegation of peace activists, during which eleven activists were killed, including nineteen-year-old dual U.S. and Turkish citizen Furkan Dogan).

222. United States v. El-Mezain, 664 F.3d 467, 492 (5th Cir. 2011).

223. *Id.* at 492-93.

224. *Id.* at 507-08.

225. Chaudhry, *supra* note 70, at 107. According to one 2006 poll, 46% of

"racing" phenomenon strips Arab and Muslim defendants of their individual identities, and plays on jurors' fears of potential violence emanating from a particular religious or ethnic group.[226]

While defense attorneys could make similarly general attacks on Avi and Major Lior for controversial actions by the IDF or the Israeli government, American jurors are less likely to perceive Israelis with the same suspicion as Arabs or Muslims.[227] Accordingly, showing jurors images of bombings carried out by Muslims or Arabs may encourage jurors to associate these violent acts with the particular defendants on trial, but such general attacks on Israeli witnesses are unlikely to have the same effect. Unable to investigate Avi's and Major Lior's personal opinions, experience, and specific participation in social groups or military activities, or to capitalize on a broader societal distrust of the national or ethnic group to which these witnesses belonged, defense attorneys were not able to leverage general attacks in the same way as prosecutors. Furthermore, while defense attorneys could speculate about Avi's and Major Lior's involvement in a variety of Israeli security and military operations, or about Avi's sympathies for West Bank settlers, jurors who follow jury instructions will base their opinions on the evidence offered in the case, and not on speculation.[228]

Although defense attorneys could illustrate for the *Holy Land* juries the troubling nature of anonymous testimony, their ability to sow doubt about the witnesses' testimonies is of a different magnitude than the harm such anonymous testimony can permit. Because Avi and Major Lior are security employees

Americans had a negative view of Islam, seven percentage points *higher* than the number of Americans who had a negative view of Islam in the months following September 11th. A full quarter of respondents in the study admitted to harboring prejudice toward Muslims. A quarter of respondents also admitted to harboring prejudice toward Arabs. Claudia Deane and Darryl Fears, *Negative Perception of Islam Increasing*, WASH. POST, Mar. 9, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/08/AR2006030802221.html.

226. Chaudhry, *supra* note 70, at 104.

227. In a 2009 poll, 71% of Americans expressed a favorable opinion of Israelis, while only 25% viewed Palestinians favorably. James Zogby, *New Poll on American Attitudes Toward the Israeli-Palestinian Conflict*, HUFFINGTON POST, Mar. 27, 2010, http://www.huffingtonpost.com/james-zogby/new-poll-on-american-atti_b_515835.html.

228. Oral Argument at 9:40, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx; Richardson v. Marsh, 481 U.S. 200, 206 (1987) (noting the "almost invariable assumption of the law that jurors follow their instructions") (collecting cases).

of the Israeli government, they had strong incentives to testify in whatever way would support convictions in the trial of a foundation that the Israeli government had been trying to close since the 1990s.[229] These witnesses' motives are particularly relevant to testimony such as Avi's that the IDF recovered a photograph of a suicide bomber from a zakat committee HLF funded, and then his expert opinion that such a discovery established a strong link between the committee and Hamas.[230] Further, Avi and Major Lior could also testify with impunity: Because they are not citizens of the U.S. and because they reside in Israel, even if defense attorneys could determine that one of the witnesses had lied under oath, it would be extremely difficult to prosecute him in the U.S. for perjury. While defense attorneys could make these points in front of the *Holy Land* juries, the mere eliciting of a foreign citizen's de facto immunity from perjury charges cannot have the same effect as knowing the specific history and reputation of a witness, and confronting him about potentially controversial facts during cross-examination.[231] Furthermore, when defense attorneys questioned Avi about his anonymity or his potential bias as an employee of Israeli security, the anonymous lawyer, who potentially testified in order to further Israel's own case and otherwise inadmissible evidence, was able to effectively defuse this general attack by arguing that his responsibility to protect Israeli citizens from terrorist attacks required that he be objective in his assessment.[232]

F. ANONYMOUS EXPERT TESTIMONY BASED ON DOUBLE-HEARSAY DOCUMENTS

Avi's testimony was particularly damaging in the second trial, where Judge Solis permitted the government to introduce three documents that Judge Fish had excluded as hearsay in the first trial.[233] The IDF seized these documents from the Palestinian Authority (P.A.) headquarters in a 2002 raid during

229. Stevie McGonigle, *Fostering Unrest or Helping the Poor?: Public Records Show a Case Open to Debate*, DALLAS MORNING NEWS, June 11, 2000, *available at* 2000 WL 9430471.

230. United States v. El-Mezain, 664 F.3d 467, 509 (5th Cir. 2011).

231. Oral Argument at 9:50, 10:58, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

232. *Id.* at 8:45, 15:20 (noting Avi's ability to weave impermissible evidence with anonymous expert opinion, tying the government's case into a "nice, neat package").

233. *El-Mezain*, 664 F.3d at 497.

"Operation Defensive Shield."[234] Anonymous authors wrote two of the P.A. documents, while a P.A. Director of Operations purportedly authored the third.[235] During oral arguments, Judge Carolyn King was audibly disturbed that the P.A. documents were admitted at the second trial in light of their anonymous and conclusory nature as well as the hearsay contained within the documents,[236] which cite anonymous "Western security sources" and "security experts" to support the allegations they contain.[237] But, at the second trial, Avi's interpretation of these documents, and of one document in particular (P.A. 2), was critical to the government's task of connecting Hamas with the zakat committees HLF funded.[238] Unlike the other P.A. documents, that particular document, which contained an illegible signature and was therefore rendered anonymously authored, specifically listed HLF as a funding source for Hamas.[239] In addition to Avi's testimony about the document, prosecutors also cross-examined the former U.S. Consular General, one of the defense's key witnesses, about the conclusory contents of P.A. 2, and relied heavily on that document in their closing argument, telling jurors that P.A. 2 showed that "another government"—referring to the Palestinian Authority—had identified HLF as part of Hamas.[240]

The Fifth Circuit strongly rejected the admission of these P.A. documents as hearsay.[241] However, in the panel's harm assessment, the court determined that because the government had introduced other evidence showing a "close connection" between Hamas and the defendants, as well as evidence that the zakat committees at issue were controlled by Hamas, the admission of the documents was harmless because the documents were cumulative.[242] The Fifth Circuit did not address the fact that P.A. 2 alleges that HLF specifically funded Hamas, and the court's assessment of the government's evidence of HLF's "close

234. *Id.*

235. *Id.*

236. Oral Argument at 28:33, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

237. *El-Mezain*, 664 F.3d at 500.

238. Oral Argument at 32:52, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

239. *El-Mezain*, 664 F.3d at 497, 499.

240. Oral Argument at 32:15, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

241. *El-Mezain*, 664 F.3d at 501.

242. *Id.* at 526.

connection" to Hamas relied heavily on evidence dating before 1995, prior to Hamas's designation as a terrorist organization, potentially prior to the creation of P.A. 2, and before any of the defendant's alleged activities were criminal.[243]

G. HARMLESS ERROR?

While the Fifth Circuit ultimately found error in the admission of the P.A. documents, the court concluded that the error was harmless because of the overall strength of the prosecution's case. However, the Fifth Circuit's conclusion becomes problematic in light of the three other errors the court found, and the highly controversial admission of Major Lior's and particularly Avi's testimonies.[244] While the Fifth Circuit

243. *Id.* at 527-31.

244. In addition to the admission of the P.A. documents, the Fifth Circuit found three other errors on appeal. (1) The admission of hearsay testimony by Mohamed Shorbagi, who testified pursuant to a plea agreement. *Id.* at 496. Mr. Shorbagi, a resident of Georgia, testified that several of the zakat committees in the indictment were controlled by Hamas. *Id.* at 494. When asked the basis of his opinion, he explained that he had learned of these affiliations through newspapers, leaflets, websites, and from talking to friends – impermissible bases for the admission of testimony. *Id.* at 496. (2) The admission of expert testimony from John McBrien, a lay witness not noticed as an expert. *Id.* at 512. McBrien was the associate director of the Office of Foreign Assets Control (OFAC) within the U.S. Treasury Department. *Id.* McBrien could speak from personal experience about his work at OFAC, but his testimony went beyond the scope of personal experience and straightforward conclusions based on that experience when he testified about OFAC's procedure for designating or not designating organizations such as zakat committees as terrorist based on their affiliation with Hamas. *Id.* Further, McBrien provided the jury with a legal "test" to determine whether a donation may be made to an undesignated charity. *Id.* Because McBrien's test offered his own interpretation of the law, the court determined that portion of the testimony was improper under Fifth Circuit precedent. *Id.* (3) The admission of Steven Simon's testimony about the threat Hamas posed to U.S. interests in the Middle East and to the Oslo peace process. *Id.* at 516. Simon was a former staff member of the National Security Council who testified as a lay witness. *Id.* Defense challenged the admission of Simon's testimony on the basis that Hamas's effect on U.S. interests abroad was irrelevant to the trial, and appealed to jurors' fears that failure to convict the defendants could lead to further terrorist attacks within the U.S. *Id.* The Fifth Circuit concluded that Simon's testimony was irrelevant to the charges in the case, which concerned the defendant's alleged material support of Hamas, and determined that the testimony should have been excluded. Crucially, three of the four errors the Fifth Circuit found—The PA documents, Shorbagi's testimony, and McBrien's testimony—concerned the most contested issue at trial: Whether the zakat committees that HLF funded were controlled by Hamas. Furthermore, none of this critical and erroneously admitted evidence appeared in the first trial, in which the jury could not reach a verdict before the judge ultimately declared a mistrial. Jason Trahan, *U.S. Rests Case Against Holy Land: Dallas Defense in Terror Financing Trial to Call First*

concluded that the P.A. documents were cumulative, the court's opinion underplayed the role the documents played in cross-examining defense witnesses, and in supporting some of the prosecutors' most powerful statements during closing arguments. Further, while the two trials were hardly identical but for the admission of the P.A. documents, the fact that the first jury was moving toward acquittals by the time the judge declared mistrial while the second jury convicted on all counts suggests that the P.A. documents, which were only admitted in the second trial and about which Avi could therefore only testify in the second trial, may have been particularly compelling to the second jury. The combination of the P.A. documents with the three other errors the court found, two of which regarded evidence that, like the P.A. documents, connected the zakat committees with HLF,[245] make the power of Avi's testimony that much more critical to the government's case, and make the admission of his anonymous expert testimony that much more controversial.[246]

III. THE RIGHT OF CONFRONTATION: CONSTITUTIONAL SOLUTIONS

While the Fifth Circuit was not convinced that Avi's and Major Lior's testimonies amounted to constitutional error, that court is the only federal appellate court that has so far published an affirmation of the admissibility of anonymous expert testimony. The Fifth Circuit's creation of new evidentiary precedent is alarming in an era of complex trials rooted in

Witness Next Week, DALLAS MORNING NEWS, Aug. 31 2007, *available at* 2007 WL 17081816 (noting that Mohamed Shorbagi did not testify in the first trial); Jason Trahan, *Holy Land Summations Begin Today: Ahead for Jurors Days or Weeks of Deciding Largest Terrorism Financing Case*, DALLAS MORNING NEWS, Nov. 10, 2008, *available at* 2008 WL 21484261 (noting that Robert McBrien was a new witness for the prosecution in the second trial, and that he addressed the "key defense claim" that the zakat committees were not individually listed on government terrorist organization lists, which helped to show that they were not under Hamas control); *El-Mezain* 664 F.3d at 497 (noting that the P.A. documents were excluded from the first trial but admitted in the second trial); Oral Argument at 30:44, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgument Recordings.aspx (noting that the testimonies of Shorbagi, Simon, and McBrien, as well as the P.A. documents, were not admitted in the first trial but were admitted in the second).

245. *Id.*

246. During oral arguments, Judge King acknowledged on at least two separate occasions that Avi was a "very powerful witness" for the government. Oral Argument at 13:18, 1:08:21, *El-Mezain*, 664 F.3d 467 (No. 09-10560), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

transnational conflicts, such as the U.S. "wars" on terror, drugs, and crime. Witness safety and national security are critical to maintaining order and protecting American interests in the U.S. and abroad, but courts run the risk of overstepping when they enable prosecutors to debilitate defendants and defense attorneys in high-profile criminal trials. The Fifth Circuit's ruling is particularly distressing because the court could have proscribed a process by which district courts could have effectively balanced the witnesses' personal safety issues with the defendants' right to prepare a proper defense. Specifically, the Fifth Circuit could have looked to the *Celis*[247] and *Fuentes*[248] holdings, thereby staying within the constitutional protections the Supreme Court has offered to ensure a defendant's right to confront his accuser in the face of legitimate concerns about witness safety.

Both *Celis* and *Fuentes* concerned narcotics-related prosecutions in which the government made a compelling and specific showing that the safety of certain Colombian lay witnesses would be jeopardized if they testified using their true names, and that disclosure of the names could compromise ongoing DEA investigations.[249] Faced with the daunting task of ensuring witness safety and national security interests[250] while protecting the constitutional rights of criminal defendants, both courts agreed with the government that the names should be withheld during testimony.[251] However, recognizing both the centrality of the witnesses' testimonies and the cost to the adversarial trial system if the government never revealed the witnesses' identities, both courts ordered the government to reveal the witnesses' names so that the defense teams could properly investigate them in the United States and in

247. United States v. Celis, 608 F.3d 818 (D.C. Cir. 2010).

248. United States v. Fuentes, 988 F. Supp. 861 (E.D. Pa. 1997).

249. *Celis*, 608 F.3d at 829; *Fuentes,* 988 F. Supp. at 863.

250. The importance to U.S. national security of maintaining the confidentiality of Avi and Major Lior's identities is never explained by the government or the Fifth Circuit. The lack of such an explanation begs the question whether this confidentiality is vital to the national security of the U.S., or of Israel. Protecting the national security interests of a foreign government at the expense of the constitutional rights of U.S. citizens who are defendants in a criminal trial is a critical issue that falls outside of the scope of this comment. For purposes of this comment, the importance of confidentiality of these identities to "national security" (whether of the U.S. or of Israel) is assumed.

251. *Celis*, 608 F.3d at 829; *Fuentes,* 988 F. Supp. at 867.

Colombia.[252]

In both *Celis* and *Fuentes*, the courts worked closely with the government and defense counsel to protect the rights and interests of the parties as well as the safety of the witnesses. In *Celis*, the court required defense counsel to seek written approval from the court prior to disclosing the witnesses' names to anyone in Colombia, and the court oversaw and approved all investigation activities in which defense counsel or its investigators disclosed the name of a witness.[253] The court in *Celis* further protected witness safety by limiting disclosure and the resultant investigation period to a few days before each witness testified, but the court worked with defense counsel to ensure that limiting the length of the investigation would not hinder the defendants' ability to properly investigate and impeach the witnesses.[254] In *Fuentes*, the court permitted defense counsel to disclose the witness's name to one investigator, who would investigate the witness in Colombia on behalf of all defendants.[255] That investigator could only disclose the witness's name as the investigation required, and the *Fuentes* court warned defense counsel that failure to comply with the court's limitations on disclosure of the witness's name would result in contempt of court charges.[256]

The HLF courts could have constructed a similar solution that addressed the safety and national security concerns of the government and its witnesses while also protecting the defendants' right of confrontation. Like the *Fuentes* court, the HLF courts could have permitted defense counsel to collectively select one investigator, who would investigate Avi and Major Lior in Israel. Like the court in *Celis*, the HLF courts could have overseen and approved every investigatory step in which the investigator revealed the names of the witnesses. If the government had specific concerns that Avi or Major Lior or their families might be targeted in the days prior to their testimony, the HLF courts could have limited disclosure of their names to several days or a week before they testified, which would have helped to protect their identities for as long as possible while still

252. *Celis*, 608 F.3d at 829, 830; *Fuentes,* 988 F. Supp. at 866-67.
253. *Celis*, 608 F.3d at 829-30.
254. *Id.*
255. *Fuentes*, 988 F. Supp. at 867.
256. *Id.*

ensuring that a defense investigator could mount a proper investigation. The courts in *Celis* and *Fuentes* both ruled that the defense attorneys would be permitted to disclose the names of the witnesses to their clients. The HLF courts could have prohibited defense counsel from sharing the names of these witnesses with the defendants—a small concession under the *Celis/Fuentes* scheme, particularly in light of the complete lack of information provided to the defense counsel in the HLF trials.[257] Furthermore, like the court in *Celis*, the HLF courts could have warned defense counsel that the attorneys would have faced contempt of court charges if they violated the courts' instructions in disclosing Avi's and Major Lior's true identities.[258] Because the witnesses' identities are also classified under U.S. and Israeli law, defense counsel could have faced additional charges from the U.S. government, and possible sanctions from the Bar Association. Similarly, the defense investigator could face charges in Israel if he or she disclosed the names in a manner that violated the court's order, or violated Israeli law.

While *Celis* and *Fuentes* offer a workable model for protecting the rights and ensuring the interests of all parties, Congress has also offered a model for the use of confidential information in federal criminal trials. The Classified Information Procedures Act (CIPA)[259] creates procedures that ensure that a defendant "should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act."[260] Under CIPA, if a court finds that the government's confidential information is relevant and admissible, the government can move to substitute an unclassified version of that evidence. That solution was particularly feasible in the HLF trial, where the government had an unclassified witness who would have offered substantially similar testimony as Avi. Jonathan Fighel, a retired Israeli military officer, had been prepared to testify about Hamas-affiliated zakat committees that he claimed HLF funded. The government noticed Fighel to cover exactly the same subjects as Avi, and because his identity was unclassified,

257. *Celis*, 608 F.3d at 829; *Fuentes*, 988 F. Supp. at 867.

258. *Fuentes*, 988 F. Supp. at 867.

259. 18 U.S.C. app. 3 §§ 1-16 (2006).

260. Opening Brief for Appellant Ghassan Elashi (with Common Issues), *supra* note 122, at 33 (citing to the legislative history of the Classified Information Procedures Act (CIPA) and United States v. Libby, 467 F. Supp. 2d 20, 24 (D.D.C. 2006)).

defense counsel could have investigated Fighel unimpeded.[261]

The Fifth Circuit found that the HLF district courts conducted the same balancing of interests as the *Celis* court, and simply came to different conclusions about what justice required.[262] Further, the Fifth Circuit did not address the solution offered through CIPA. While district courts have broad discretion in their analysis of the interests involved in anonymous witness testimony, the result in the HLF trials eviscerated the defendants' ability to mount a proper defense—a constitutionally questionable outcome in the first published opinion to ever affirm the use of anonymous expert witness testimony, particularly in light of the solutions offered by Congress as well as multiple district courts.

CONCLUSION: HARMFUL ERROR

The effects of the HLF convictions continue to weigh heavily on the defendants and their families, the U.S. Muslim community, and refugee communities in the Middle East and around the world. The defendants are currently serving sentences ranging from fifteen to sixty-five years[263] in Communications Management Units, where the prisoners are banned from physical contact with their families and live in extreme isolation.[264] American Muslims are more hesitant than ever to participate in charitable giving for fear of material support prosecution, a particularly painful outcome considering that charitable giving is a religious obligation in Islam.[265] Far worse, communities in the West Bank and Gaza and around the world that depended on HLF for charitable giving now face a complete lack of support not only from HLF, but also from the many institutions and individual donors who are too intimidated to provide aid abroad for fear of prosecution. As a former Department of Treasury official under former President George

261. *Id.* at 35.

262. United States v. El-Mezain, 664 F.3d 467, 492 (5th Cir. 2011).

263. Press Release, Dep't of Justice, Federal Judge Hands Down Sentences in Holy Land Foundation Case (May 27, 2009) http://www.justice.gov/opa/pr/2009/May/09-nsd-519.html. Shukri Abu Baker and Ghassan Elashi were each sentenced to 65 years, Mufid Abdulqader was sentenced to 20 years, and Mohammad El-Mezain and Abdulrahman Odeh were each sentenced to 15 years. *Id.*

264. *Stop Isolating Prisoners in Experimental Units*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/cmu-comments; Aref v. Holder, CTR. FOR CONSTITUTIONAL RIGHTS, http//ccrjustice.org/cmu.

265. BLOCKING FAITH, *supra* note 11, at 83, 85, 92.

W. Bush explained, "we have inadvertently created an atmosphere where Muslims are getting increasingly wary that you can give to a charity and the FBI can come knocking at your door asking why you gave to this charity."[266] While the HLF trial judges and the Fifth Circuit sought to protect witness safety and national security interests by protecting the names of anonymous Israeli witnesses, their sacrifice of the defendants' constitutional right to confront their accusers only strengthens the chilling effect that the domestic "War on Terror" has had on American Muslim communities. The cautions taken by these courts have potentially permanently damaged the ability of one segment of American society to fully engage in civic and religious life, and may encourage future courts to disregard a fundamental constitutional right of U.S criminal defendants. Faced with the possibility that charitable giving may land them in federal court where they may face anonymous accusations under the acquiescent eyes of permissive judges and go on to serve long sentences for feeding and clothing refugees, American Muslims may not return in large numbers to overseas charitable giving for years to come. Such a result would hardly be a victory for the "War on Terror."

266. *Id.* at 97.