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Article

Constructing the Threat and the Role of the Expert Witness: A Response to Aziz Rana’s *Who Decides on Security?*

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Aziz Rana’s article presents clearly the overlooked but crucial question of “Who Decides on Security?” Namely, is determining who or what groups constitute a threat something that we are capable of making ourselves, or must we necessarily cede that authority to those in power—who supposedly have both the access to knowledge and the ability to understand it—to protect us from threats we cannot perceive? Using Rana’s historical analysis as a framework, this Article builds on his thesis to show how the wide latitude granted to the conclusions of the Executive Branch’s national security specialists in political matters has migrated into the criminal justice system. This Article focuses on the specific example of expert witnesses in federal criminal terrorism prosecutions and demonstrates that courts have been overly deferential in allowing such individuals to testify as experts. As a result, courts admit too much expert testimony of questionable methodology and reliability against defendants charged with terrorist crimes. This Article provides several examples of the phenomenon of deference to the government’s experts, as well as a focused critique of the practice of using experts to win convictions in such cases.
Aziz Rana’s thoughtful article asking the question of who decides on “security”—a term that today may have been subsumed by the concept of “national security”—provides a critical analysis of the historical and philosophical shift in how the nation has traditionally assessed (primarily external) threats to its well-being. What was once the province of the democratic collective is now the exclusive domain of experts in the employ of the executive branch. Rana’s narrative of how this shift occurred, standing as it does in contradistinction to the philosophical underpinnings of the founding of the American republic, as well as the dominant trends well into the Twentieth Century, represents a crucial intervention as scholars, government officials, and the public at large continue to struggle to make sense of the ever-expanding national security state in the decade after September 11, 2001. His identification of the central debate as one involving publicly understood common sense versus a more specialized type of expertise that only highly trained actors can possess to analyze national security is instructive in and of itself. Rana forces us to confront the issue of whether determining who or what groups constitute a threat is something that we are capable of making ourselves, or must we necessarily cede that authority to those in power, who supposedly have both the access to knowledge and the ability to understand it, to protect us from threats we cannot perceive.

Using Rana’s analysis as a framework, this paper builds on his thesis to show how the wide latitude granted expert witnesses in federal criminal terrorism prosecutions is overly deferential to the government’s position. As a result, courts admit too much expert testimony of questionable methodology and reliability against defendants charged with terrorist crimes. This Article aims to provide several examples of the phenomenon of deference to the government’s experts, as well as a focused critique of the practice of using experts to win convictions in such cases.

As an initial matter, a pause is necessary before continuing this response to Rana’s paper. One should be mindful that, rightly or wrongly,
the threat of terrorism that society confronts is presented as foreign-based. As a prime example of this trend, note that the State Department maintains a list of groups officially designated as Foreign Terrorist Organizations ("FTOs"), and the penalty for "materially supporting" these groups can be many years in prison.\(^2\) The government keeps no corresponding list of domestic terrorist groups, and as a consequence there are no laws prohibiting the provision of material support to those (non-existent) groups. Even where American citizens have been implicated in terrorist activity at home while unaffiliated with any particular group, there is usually some form of "foreign" link. For example, the Somali-born man charged with plotting to detonate a bomb during the annual Christmas tree lighting in downtown Portland, Oregon,\(^3\) and the Army officer who killed several of his fellow soldiers at Fort Hood while supposedly under the influence of the recently-assassinated Al-Qaeda figure, Anwar al-Awlaki.\(^4\)

Perhaps, then, assessing the threat requires a level of expertise beyond the reach of the average American. Where once imperialist nations like Britain and France menaced the nascent republic, today we are told that the terrorist threat to the United States might come from marginalized fanatics surreptitiously putting together a suitcase bomb in a basement apartment in Karachi. Previously, the citizenry could mobilize and consider whether Britain or France coveted territories in North America that constitute a part of the United States, whereas making sense of the secret movements and plans of non-state actors with few characteristics in common with the average American seems to demand that we put our faith in the superior knowledge of an unbiased specialist. Theoretically, there is nothing implausible in such a stance. To take nothing away from Rana's measured and careful criticism, that courts would defer to the expertise of executive branch officials seems unsurprising.

Rana offers two examples of decisions involving matters of foreign policy in which the court chose not to examine what it deemed a non-justiciable political question, citing a lack of access to the relevant information and the specialized knowledge necessary to distill that

\(^2\) Bureau of Counterterrorism, U.S. Dep't of State, Foreign Terrorist Organizations (Jan. 27, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm (listing fifty groups as FTOs); see 18 U.S.C. § 2339B(a) (2006) (creating a penalty of up to fifteen years incarceration for knowingly providing support for terrorists). Additionally, the Treasury Department’s Office of Foreign Assets Control maintains a lengthy list of “Specially Designated Nationals,” the overwhelming majority of whom are foreign, all of whom are alleged to be acting on behalf of foreign countries or groups, and with whom trade and other dealings are prohibited. See, e.g., Office of Foreign Assets Control, U.S. Dep’t of Treasury, Specially Designated Nationals List (SDN) (Mar. 28, 2012), http://www.treasury.gov/ofac/downloads/t1slsdn.pdf. While not exclusively concerned with terrorist targets, perhaps the major focus of the list is counterterrorism.

\(^3\) Colin Miner et al., Bomb Plot Foiled at Holiday Event in Portland, Oregon, N.Y. TIMES, Nov. 28, 2010, at A1.

In the post-9/11 realm, however, the discourse has undergone a subtle shift from mere judicial deference to highlighting the rationale behind that deference. Specifically, courts express their anxiety about being perceived as impeding the government’s efforts to protect the public at large. This is true even when the political question doctrine does not bar review in a terrorism-related case, and courts make clear their respect for government officials’ efforts to fight terrorism. The dynamic is evident whether courts rule for or against the government, as even the appearance of challenging the government’s primacy in matters of national security demands a proactive stance.

For example, in Boumediene v. Bush, where the Supreme Court struck down the Military Commissions Act and held habeas corpus applicable to detainees held in Guantanamo Bay, the Court noted that “[t]he law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.” In a decision overturning the grant of attorney’s fees to a non-citizen detained by the immigration authorities for over eighteen months on the basis of secret evidence, the Third Circuit hinted at its rationale by stating, “[w]e are not inclined to impede investigators in their efforts to cast out, root and branch, all vestiges of terrorism both in our homeland and in far off lands.” In a series of decisions reading a specific intent requirement into the criminal ban on providing material support to FTOs, the court in United States v. al-Arian expressed its belief that such a requirement “does not, will not, and should not hamper the government’s anti-terrorism efforts,” taking pains to add that “it is in no way creating a safe harbor for terrorists or their supporters to try and avoid prosecution . . . .”

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5 Rana, supra note 1, at 1473 & n.187, 1474 & n.188.
6 Boumediene v. Bush, 553 U.S. 723, 797 (2008) (“[The Court’s] opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.”).
7 Kiareldeen v. Ashcroft, 273 F.3d 542, 555, 553 (3d Cir. 2001) (criticizing the district court for “disregard[ing] the often complex determinations involved in releasing confidential counter-terrorism intelligence into the public arena . . . .”). According to David Cole, Kiareldeen’s attorney:

The government’s principal source appears to have been Kiareldeen’s ex-wife, with whom he was in a custody dispute over their child. He offered unrebuted testimony that she had made numerous false allegations against him in the course of the dispute, all of which had been dismissed by local officials. But one allegation, that he was associated with terrorists, was passed on to the FBI, and that allegation landed him in jail on secret evidence for over 19 months.

8 United States v. al-Arian, 329 F. Supp. 2d 1294, 1305 (M.D. Fla. 2004); United States v. al-Arian, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004) (“This opinion in no way creates a safe harbor for terrorists or their supporter to try and avoid prosecution . . . .”).
The above examples demonstrate the judiciary’s desire to be perceived as helping, as opposed to hindering, the protection of Americans by properly discharging its adjudicative role. In this context, the issue of deferring to the government’s expertise assumes greater importance, since, in the midst of the war on terror and the rise of a national security state, the government has sought to expand the nature of what constitutes the threat. This phenomenon can be observed in the government’s efforts to prosecute criminally individuals charged with terrorist crimes. In my previous scholarship, I have explored aspects of the criminal terrorist prosecution such as the admissibility of foreign confessions, the use of informants, and the ban on providing material support to FTOs. My research has shown that criminal terrorism prosecutions have moved the law in the direction of granting the government more discretion and expanding the scope of what the law will allow when employing the war on terror rubric. The experts’ role in generating this type of terrorist exceptionalism should not be underestimated.

In fact, examination of 18 U.S.C. § 2339B, the ban on providing material support to FTOs and the most important statute in the criminal prosecution of terrorists, reveals that the government employs experts in a dual role. First, there is the issue of the government’s own designation of particular groups. To be so designated, a group must be foreign, engage in terrorism, and that terrorism must harm American nationals or American national security, which is loosely defined. While an FTO may challenge its designation, it can only do so under extremely limited circumstances before the D.C. Circuit. Even then, the State Department’s determination that an FTO’s violence harms the United States or its nationals cannot be reviewed. To date, there has not been one successful instance of an FTO

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14 See id. § 1189 (c)(1) (“Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.”).
15 People’s Mojahedin Org. of Iran v. Dep’t of State, 182 F.3d 17, 23 (D.C. Cir. 1999); Said, Material Support, supra note 11, at 562-63.
successfully overturning its designation. The group that has come closest, the Mujahedin-e-Khalq ("MEK" or "People's Mujahedin"), a dissident Iranian group opposed to its country's government, has only succeeded on two occasions in getting the D.C. Circuit to remand the issue of designation to the State Department for a new hearing in which the group was allowed access to a greater portion of the administrative record against it. Having failed in getting the D.C. Circuit to overturn its designation, the MEK has mounted a public campaign to change its status, recruiting in the process several high-profile politicians from both the Democratic and Republican parties to take up its cause. To date, the MEK's campaign has been unsuccessful, even as reports have surfaced of its members being trained secretly by the Department of Defense in the United States to conduct operations against the Iranian government. The specialized knowledge and expertise of the executive branch in defining the terrorist groups most disfavored by the United States enjoys a great deal of deference and, to date, has not been shaken by high-profile campaigns to question the State Department's conclusions.

The government also employs experts in a second manner, beyond that of merely designating groups. When the government accuses an individual of violating § 2339B and the prosecution proceeds to trial, the government usually produces an expert witness to give the jury information on an FTO's background, methods, and beliefs. Critically, as opposed to a fact witness, the expert provides an opinion as to how the defendant's actions in particular further the charge of providing material support to an FTO. While this Article discusses examples of expert testimony in more depth below, some points are worthy of note at the outset. Initially, the role of the expert witness at trial differs from that of the behind-the-scenes bureaucrat armed with specialized knowledge and making determinations that courts refuse to examine, as seen in the examples Rana provides in his study. While criminal defendants are precluded from challenging the validity of an FTO's designation in their own underlying § 2339B

16 See Said, Humanitarian Law Project, supra note 11, at 1489 n.156 (citing cases in which the D.C. Circuit upheld the designation to illustrate that this political decision has been insulated from judicial review).

17 See People's Mojahedin Org. of Iran v. Dep't of State, 613 F.3d 220, 231 (D.C. Cir. 2010) (remanding while leaving the designation intact); Nat'l Council of Resistance of Iran (NCRI) v. Dep't of State, 251 F.3d 192, 209 (D.C. Cir. 2001) (remanding while leaving the designation intact).


19 Seymour Hersh, Our Men in Iran, NEWS DESK (Apr. 6, 2012), http://www.newyorker.com/online/blogs/newsdesk/2012/04/mek.html.

20 FED. R. EVID. 702 ("[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . .").

21 Rana, supra note 1, at 1468–72.
prosecution, they may challenge an expert's viability to testify via a Daubert\textsuperscript{22} hearing. Even when courts permit the government's witness to testify as an expert, a defendant enjoys an expansive Confrontation Clause right to cross-examine the expert and his or her conclusions. Therefore, the use of the expert witness at trial is not the same as the unassailable government employee shielded by the cloak of executive political authority, as the trial testimony is subject to a much greater scope of challenge.

However, despite this clear distinction in the ability to question an expert's conclusions, there are problematic aspects of such testimony in a §2339B prosecution. First, there is a basic philosophical question as to why background information on an FTO is necessary. Second, courts generally allow the government's experts to testify in that capacity, despite the fact that the shortcomings and biases of this relatively small class of experts are relatively apparent. Courts tend to accept that, in a terrorism prosecution, the government expert's methodology is essentially unassailable and have generally refused to conduct searching inquiries into an expert's qualifications as a witness. This situation raises serious questions about the government expert's ability to carefully parse the evidence in a given case, as an expert's biases or a lack of scholarly credentials can produce erroneous testimony. In such situations, the traditional deference accorded government experts in the area of national security appears to be on shaky footing.

Turning to the first issue, it would seem that if a group is designated as an FTO, it is designated, and learning about its violent actions can be both irrelevant and needlessly inflammatory—the international terrorism equivalent of the bloody shirt. Learning about the violent acts of a group can quickly veer into prejudicial overkill, so there is a real question as to why expert testimony is necessary in such cases. The legal standard required for conviction under §2339B provides an answer. In Holder v. Humanitarian Law Project,\textsuperscript{23} the Supreme Court held that, for a conviction under the statute to comport with the First Amendment, a defendant must know that what he or she is providing to the group is material support and that the recipient has been designated an FTO or has engaged in terrorist activity.\textsuperscript{24} In so ruling, the Court expressly held that the government need

\textsuperscript{22}Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–97 (1993) (holding that the Federal Rules of Evidence are the predominant method for determining whether or not an expert is qualified to testify. In making this determination, judges can consider factors prior to the trial, such as testability, whether the method has been subject to peer review, the known rate of error, general acceptance in the field, as well as other applicable Rules of Evidence).

\textsuperscript{23}130 S. Ct. 2705 (2010).

\textsuperscript{24}Id. at 2717–18 (“Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”).
not prove a defendant had a specific intent to further the illegal goals of an FTO. This means that a § 2339B defendant cannot make arguments related to the motivations behind the provision of material support. It is immaterial whether a defendant meant to support an FTO's undisputed humanitarian endeavors or not; if he or she knew that the material support was going to an FTO, that is enough for the statute to pass constitutional muster. While the Supreme Court did not touch on the same knowledge versus specific intent in the Fifth Amendment due process context—a more or less identical inquiry—the vast majority of lower courts that have ruled on the issue have refused to read a specific intent requirement into the statute.

However, while general background information on an FTO can be useful, an expert's testimony can often veer into a highly prejudicial explication of an FTO's violent actions. Depending on the nature of the charges in a given case, the relevance of this type of testimony can be questionable. And it is precisely this dynamic that implicates the second concern about the government's use of expert witnesses in terrorism cases. Namely, that their lack of certain critical qualities, such as language skills or proper methodology in the regions they purport to know as "experts," impedes reaching viable conclusions. Given this situation, it is fair to examine whether courts' qualifications of government witnesses as experts has been an exercise in too much deference. This phenomenon is examined by positing two examples, one of a particular expert, the other of a particular case.

First, let us focus on Evan Kohlmann, the government's most high-profile, and perhaps most-used, expert witness. The government generally offers Kohlmann as an expert witness on al-Qaeda and affiliated groups. Courts have qualified him as an expert witness in over twenty prosecutions in the United States, and he helpfully links to some courts'
Daubert rulings reflecting that fact on his website. However, a closer look at his credentials reveals knowledge gaps that cannot be easily brushed aside. Initially, Kohlmann does not know Arabic, or any other foreign language in which al-Qaeda purportedly communicates, and must use a translator to make sense of the data he collects. In addition to being a serious impediment not likely to be tolerated in other areas of research—could we imagine that an expert in French dissident movements would not know French—hiring a translator necessarily creates an employer-employee dynamic that has the potential to skew the translator’s results in favor of an employer’s views and expectations. For example, a recent magazine profile of Kohlmann revealed that he found his most recent translator on the website Craigslist; the position was initially for an intern, but Kohlmann turned it into a full-time position because of the success the two found working together. Consider the following exchange:

“Laith [Alkhouri—the translator] is one of the very few people who [sic] I’ve managed to identify who has the linguistic and cultural background to begin with and can also learn the technical aspect. But Laith now knows this stuff like I do.” Alkhouri chimes in: “No, you’re the master. I’m not in the same category.”

Beyond the obvious issue of language lurks the matter of educational and professional background. Kohlmann has no advanced degrees in any discipline related to the Middle East, Central Asia, or Islamic studies of any kind; rather, he has a law degree from the University of Pennsylvania. He does not have any experience as a law enforcement officer, in the military, or as an intelligence operative. He has, however, authored a book on al-Qaeda in Europe, which was cited in the 9-11 Commission official report. Is that enough to be qualified as an expert? Kohlmann essentially tracks al-Qaeda and ideologically related groups,

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30 See About Evan Kohlmann: Court Testimonies, supra note 28.
31 Yang, supra note 27.
32 Id.
33 Id.
35 Giraldi, supra note 34.
mostly on the Internet, collecting and storing the data he peruses. Consider how Kohlmann describes his work and methodology:

[H]is methodology consists of gathering multiple sources of information, including original and secondary sources, cross-checking and juxtaposing new information against existing information and evaluating new information to determine whether his conclusions remain consonant with the most reliable sources. He describes his work as a study of the micro-history of al Qaeda and its involvement in regional conflicts. His methodology is similar to that employed by his peers in his field; indeed, he explained that he works collaboratively with his peers, gathering additional information and seeking out and receiving comments on his own work.

Outside of the specific mention of al-Qaeda, the above paragraph is so general and diffuse as to both methodology and content that it is not clear from where the substance of his testimony derives. All we know about the peers in his field is that he says he relies on them, but who they are and how they might conduct their research are all undefined. There is also the related question of how Kohlmann can determine accurate information and reliable sources when, in most cases, he cannot read the language in which any communications are written. Regardless, this description of his work and methods has been enough for courts to permit him to testify as an expert in almost all the judicial opinions ruling on the matter.

Maxine Goodman has conducted a lengthy analysis of how courts evaluate Kohlmann’s expertise in the context of assessing Daubert challenges to nonscientific experts. Borrowing Isaiah Berlin’s term, she

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37 Giraldi, supra note 34.

The only reported instance of Kohlmann’s testimony being limited is United States v. Amawi, in which the district court denied his proposed testimony as “not relevant to the issues in this case,” and determined that “the limited probative value of his testimony is outweighed very substantially by its very considerable potential for unfair prejudice to the defendants.” 541 F. Supp. 2d 945, 949–55 (N.D. Ohio 2008). Kohlmann was later allowed to testify once the government further narrowed the scope of his proposed testimony. United States v. Amawi, 552 F. Supp. 2d 669, 672 n.2 (N.D. Ohio 2008).

deems him a “hedgehog-type expert, motivated by unfaltering devotion to one big idea,” and “tend[ing] toward a single, central view of the world” that “[h]e approaches ... with unwavering commitment.” She reviewed the published judicial opinions regarding Kohlmann’s expertise and proposed testimony and characterizes his “hedgehog” view as follows:

In his expert reports, Kohlmann deftly links a particular Arabic publication, website, or organization (typically the one the defendant allegedly supported) to terrorist recruitment. He then establishes the link between recruiting terrorists and Osama Bin Laden. And then, obviously, he links Bin Laden to the jihadist objective of killing American nationals. In these cases, Kohlmann repeatedly, vividly, and emphatically highlights these connections throughout his expert reports.

This type of testimony makes Kohlmann so valuable because in his single-minded focus, he essentially “corroborate[s] the government’s views of the threat” posed by “global jihad.” Specifically, a review of the opinions reveals that “courts routinely backtrack to prior admissibility decisions as a means of assessing Kohlmann’s reliability.” That is, once he has been accepted as an expert in one case, that designation will almost certainly follow in others, to the point where defendants have given up trying to challenge his suitability as an expert. But the problem, according to Goodman, is “the published Daubert opinions illustrate that courts accept his methodology and conclusions ‘hook, line, and sinker’ without any real scrutiny. ... [allowing] Kohlmann to rely primarily on Internet sources without ever having to explain to a court how he assesses the authenticity of those sources.”

A compelling example of the drawbacks associated with courts accepting Kohlmann’s methodology without rigorous scrutiny occurred when he was asked to testify as an expert against two men charged with participating in a plot to buy a missile intended to shoot down the plane of
the Pakistani ambassador to the United Nations.47 The government put Kohlmann forward as an expert on the Bangladeshi wing of a terrorist group active in Southeast Asia.48 Despite the fact that Kohlmann had never written about the group or interviewed any of its members, and could not even name the group’s leader, the court qualified him as an expert based on information he had obtained from the Internet.49 In that case, as in others, Kohlmann’s testimony drew a link between al-Qaeda and the defendants, essentially guaranteeing a guilty verdict.50 While Kohlmann’s effectiveness as an expert witness is obvious, his technique is highly controversial, to say the least, and has been subject to withering criticisms by leaders in the field of terrorism studies, who have referred to his work as “junk science.”51 Perhaps the most damning statement on the use of Kohlmann as an expert witness comes from Kohlmann himself. Referring to the government, he noted “[i]f they had other options, don’t you think they would take them?”52

While Evan Kohlmann is the most high-profile of the relatively few government terrorism experts, the prosecution of the officers and directors of the Holy Land Foundation for Relief and Development (“HLF”) represents perhaps the government’s most high-profile terrorism case in


50 See Bartosiewicz, supra note 48, at 20 (“The Al Qaeda connection was critical,’ Timimi’s defense attorney Edward MacMahon Jr. told me. ‘If a jury in the US finds any connection between your client and Osama bin Laden, you’re going to get convicted. So Kohlmann provides key testimony in the case that the US bombed an Al Qaeda terror camp in Afghanistan in 1998 and there was a member of Lashkar-e-Taiba in the training camp. That was the connection, and when Timimi was telling the [other defendants] to go to Pakistan, what he was really telling them was to go to Al Qaeda. What Kohlmann really did for the prosecutors was to tie it all up in a big bow.’ Timimi was found guilty on all counts at the trial, which took place in a courtroom seven miles from the Pentagon, and sentenced to life in prison.”).

51 Yang, supra note 27 (“I think no serious academic would ever testify in such a cavalier fashion with such generalizations and quite frankly mumbo-jumbo-style analysis,’ [Magnus Ranstorp, the research director of the Center for Asymmetric Threat Studies at the Swedish National Defence College and a widely recognized authority on terrorism] says. ‘It takes about 30 seconds to spot that Kohlmann produces junk science in court.’’); see also Bartosiewicz, supra note 48, at 20 (“Jessica Stern, a professor of public policy at Harvard University who recently published a book based on four years of field interviews with insurgent leaders, says simply siphoning raw data from Internet chat rooms fails to take a complex view of terrorism. ‘They are reading what the terrorists say about themselves, and there’s lots of disinformation there,’ she said of Kohlmann and Katz.”).

52 Yang, supra note 27.
federal court, for more than one reason. The HLF defendants were charged with, and ultimately convicted of, violating § 2339B by providing material support to the FTO Hamas via the then-largest Muslim charity in the United States, the HLF. The Government’s theory was that the defendants were funding Hamas through a series of religious charities in the West Bank and Gaza Strip known as zakat committees. At trial, the government did not try to prove that the committees laundered or channeled money into Hamas’ coffers but, rather, that through their undisputed and unchallenged charitable good works, they served to enhance the reputation of Hamas in the community.

Since the government could not link the money the HLF sent to the Middle East to violence, its case hinged on linking Hamas to the zakat committees through expert testimony. In a previous article, I characterized the HLF prosecution as an example of the problematic extension of § 2339B’s “money is fungible” logic, which traditionally holds that material support in the form of money to an FTO, even if given for undisputed humanitarian aims, frees up money to buy weapons or plan attacks. In other words, the theory underpinning the HLF prosecution did not implicate the money sent to the Middle East as being used by Hamas to indirectly buy weapons.

Rather, it charged that the defendants, in donating to the zakat committees, were enhancing Hamas’ reputation and legitimacy in the eyes of the community through their funding of the committees’ charitable endeavors.

The HLF prosecution stands as the prime example of the pitfalls involved in the admission of the Government’s expert witnesses, both individually and collectively. Therefore, each individual expert witness is analyzed in turn. To make the connection between the zakat committees and Hamas, the district court allowed two Israeli witnesses to testify

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53 United States v. El-Mezain, 664 F.3d 467, 483 (5th Cir. 2011); see also Said, Material Support, supra note 11, at 585–93 (discussing the prosecution and describing it as an example of § 2339B liability stretched too far).
54 El-Mezain, 664 F.3d at 485.
55 Id. ("Zakat committees are charitable organizations to which practicing Muslims may donate a portion of their income pursuant to their religious beliefs, but the Government charged that the committees to which the defendants gave money were part of Hamas’s social network.").
56 Said, Material Support, supra note 11, at 586.
57 Id. at 585, 588 (internal quotations omitted).
58 See id. at 586 (stating that the Government originally argued, but later retreated, from the position that by providing the funding to the HLF, money was freed up to support terrorist activity).
59 Id. at 586. While I argued that such a theory violates the Fifth Amendment’s guarantee of due process to criminal defendants, the majority of courts have disagreed. Additionally, the Supreme Court has endorsed the theory, albeit as consistent with the First Amendment. See Humanitarian Law Project, 130 S. Ct. at 2717–18 (rejecting the plaintiffs’ argument that that Court should interpret the material support statute to require proof that a defendant intended to further terrorist activities); Said, Material Support, supra note 11, at 578–82 (discussing cases which have addressed the issue of whether specific intent is required to find material support).
anonymously at trial. One, a military officer, testified as a fact witness regarding the seizure of mainly documentary evidence during raids by the Israeli army on several zakat committee offices in the West Bank. The other, a legal advisor to the Israel Security Agency (the main Israeli internal security apparatus) using the name “Avi,” testified as an expert witness in an effort to demonstrate that Hamas controlled the zakat committees. The Fifth Circuit upheld the district court’s ruling, holding that the anonymous testimony did not violate the defendants’ Sixth Amendment confrontation rights.

Before turning to the Sixth Amendment analysis, it should be said that allowing these particular witnesses to testify anonymously sends several messages to the jury, all of which are potentially prejudicial. First, the jury is told that the defendants are so dangerous that they will harm the witnesses unless their identity is protected. Second, given the fact that one was a military officer and the other an intelligence agent, the jury is told that these witnesses are active participants in a war on terrorism that demands secrecy, lest they fall victim to the terrorists’ schemes. Third, and specific to “Avi,” the jury is told that the expert has specialized knowledge about a terrorist organization that is indecipherable and/or inaccessible to most people, and therefore should be kept secret.

Beyond these initial issues, the Fifth Circuit’s Sixth Amendment discussion dismissed the applicability of Smith v. Illinois, a 1968 Supreme Court decision finding reversible error where the sole witness/participant in a drug transaction with the defendant testified anonymously. Despite Smith’s language that denying a defendant information about a witness’ identity “effectively .. emasculates the right of cross-examination itself,” the Fifth Circuit found the case inapposite, as it dealt with a contested recollection of a drug sale, as opposed to “classified information or issues of witness safety” in the instant case. The Fifth Circuit upheld the district court’s decision, which came after conducting a balancing test as mandated in Roviaro v. United States, and concluded that not only were the witnesses to testify pseudonymously but that defense counsel would not be given their names under a protective

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60 United States v. El-Mezain, 664 F.3d 467, 490 (5th Cir. 2011).
61 Id.
63 El-Mezain, 664 F.3d at 490.
64 Id. at 494.
66 Id. at 131–32.
67 El-Mezain, 664 F.3d at 491 (citing Smith, 390 U.S. at 133–34).
order. The court reasoned that the witnesses' identity was classified and that no one who actually knew the witnesses would or could be in a position to talk about them, a point that led Jeffrey Kahn to note: "[o]n what basis the court reached this speculative conclusion is left unstated." Essentially, the Fifth Circuit justified its holding with this conclusory statement: "[W]hen the national security and safety concerns are balanced against the defendants' ability to conduct meaningful cross-examination, the scale tips in favor of maintaining the secrecy of the witnesses' names." What is puzzling about the discussion is that it is too deferential to admitting an anonymous foreign intelligence agent to testify as an expert while relying on hearsay sources to give opinions on the evidence. While this type of testimony may be appropriate for a closed congressional briefing, the Fifth Circuit seemed to forget that it was ruling in a criminal prosecution, thereby conflating the national security function of an intelligence agent (albeit a foreign agent) with the public nature of a criminal trial.

The testimony of the government's expert on the Hamas movement, Dr. Matthew Levitt, also demonstrates the problem of too much deference to expert witnesses in terrorism trials. Levitt, the Director of the Stein Program on Counterterrorism and Intelligence at the Washington Institute for Near East Policy, is a former Treasury Department official and FBI intelligence analyst with a doctorate in law and diplomacy who testifies frequently as an expert for the government in terrorism prosecutions. Levitt's testimony on the Hamas movement in general and the role of its social wing was not challenged. However, his status as an expert permitted damaging testimony that seemed to verge on unsupported guesswork. In response to the defense's argument that the presence of phone numbers of senior Hamas leaders in the defendants' personal phone books was unremarkable and not evidence of a special relationship, Levitt...

69 El-Mezain, 664 F.3d at 491–92. The Fifth Circuit distinguished the HLF prosecution from that of United States v. Celis, in which the D.C. Circuit allowed anonymous testimony against defendants connected to a Colombian FTO on the theory that those witnesses would be targeted by the FTO for appearing in court, but provided defense counsel with the witnesses' names under a protective order. Id. (citing Celis, 608 F.3d 818, 830–32 (D.C. Cir. 2010)). Critical to the Fifth Circuit's distinction was the fact that the identity of the Israeli witnesses was classified, whereas that of the Colombian witnesses was not. Id. at 493.


71 El-Mezain, 664 F.3d at 492.


73 El-Mezain, 664 F.3d at 515. Despite this ruling, it should be noted that Levitt's objectivity and credentials have been called into question outside the courtroom. See Ken Silverstein, The Government's Man, HARPER'S, June 2012, at 58–59.
testified that it was "personal and direct evidence of a relationship. . . . [T]he fact that there are connections with so many Hamas leaders is not coincidental, cannot be coincidental." It is one thing to be an expert on a group and describe its historical formation and basic makeup. But in this instance the court allowed Levitt, who does not speak Arabic and is not an expert in Palestinian society, to offer an opinion which he was unqualified to give. He was not admitted as an expert on whether Palestinian political figures, even those of Hamas, provide their phone numbers with regularity or otherwise make themselves available to their constituent public. Based on his qualifications, he could not opine about how social exchange in Palestinian society works, making his statement a startlingly conclusive assertion without much basis behind it. The Fifth Circuit's endorsement of his testimony demonstrates far too much deference to the government's expert.

It bears repeating that the HLF prosecution was of defendants charged with materially supporting an FTO by giving money to charities believed to be controlled by the FTO. There was no dispute that the charities provided genuine humanitarian aid to people in need, only that such assistance boosted the reputation and prestige of the FTO in the community. The link to violence is attenuated at best, so the court's permissive attitude toward the government's experts and their testimony allowed the government to repeatedly focus on the violent and destructive side of an FTO. It is unclear whether the court was unaware or unconcerned with the effect on the jury of the government's experts consistently testifying about Hamas' violent activities, relevant or not. Even when the Fifth Circuit concluded that the district court erred in admitting the expert testimony of Steven Simon, a former National Security Council staffer in the Clinton administration, to the effect that Hamas threatens American interests, it held that any resulting error was harmless, given the brevity of the testimony in what was a lengthy trial. It is difficult to see how testimony from a former high government official to the effect that the defendants were harming American interests and undermining American policy is not prejudicial taken on its own. When considered alongside all the other types of expert testimony the jury heard in the HLF prosecution, the Fifth Circuit's ruling becomes untenable. After all, the stakes were incredibly high for the defendants; two defendants received fifteen-year sentences, one a twenty-year sentence, and the final two were given sixty-five years in prison.

Overall, the use of expert witnesses in criminal terrorism prosecutions

74 Id.
76 El-Mezain, 664 F.3d at 516.
77 Id. at 490.
reproduces, to a fair extent, the level of deference courts offer to expert
determinations in cases involving political questions. But, as the examples
described above hopefully demonstrate, even where expert witnesses are
subject to cross-examination, criminal prosecutions that touch on national
security try to frame the issue in such a narrow way as to compel the result
the government desires. From Rana’s article, one can trace the origins of
this deference and see how it has migrated into areas where confrontation,
cross-examination, and challenge are supposedly of paramount concern.
But national security cases have their way of generating such results, and
we would be best served by subjecting the government’s experts to a bit
more of a searching inquiry.