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The Holy Land Foundation Case: The Collapse of American Justice

*Nancy Hollander**

Thank you and it is my pleasure to be here and to speak about the Holy Land case. This is not a terribly uplifting discussion, unfortunately. Maybe together we can right this horrible wrong.

This is a tragic but true story about the case against the Holy Land Foundation and five Palestinian-American Muslim men who worked for that organization. It started for me when the Holy Land Foundation was designated as a foreign terrorist organization and a specially designated terrorist organization in 2001.¹ And then it became a criminal case against Holy Land and the five men and ended in long jail sentences.² My client, Shukri Abu Baker, is serving a sixty-five year sentence for providing charity.³ That's what he and his co-defendants were accused of, and that's what they were convicted of providing charity, nothing more.

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Her practice is largely devoted to representing individuals and organizations accused of crimes, including those involving national security issues. She has also been counsel in numerous civil cases, forfeitures and administrative hearings, and has argued and won a case involving religious freedom in the United States Supreme Court. Ms. Hollander also served as a consultant to the defense in a high profile terrorism case in Ireland, has assisted counsel in other international cases and represents two prisoners at Guantanamo Bay Naval Base.

Ms. Hollander has written extensively and has coordinated and taught training courses for criminal defense lawyers nationally and internationally. She also served as a consultant to the United Nations Development Programme in Vietnam.

In addition to other honors, in 2001, Ms. Hollander was named as one of America's top fifty women litigators by the National Law Journal. In 1992-93, she was the President of the National Association of Criminal Defense Lawyers and she is a Fellow in the American College of Trial Lawyers.

1. See Mike Allen & Steven Mufson, *U.S. Seizes Assets of 3 Islamic Groups; U.S. Charity Among Institutions Accused of Funding Hamas*, WASH. POST, Dec. 5, 2001, at A1.

2. See Gretel C. Kovach, *Five Convicted in Terrorist Financing Trial*, N.Y. TIMES, Nov. 25, 2008, at A16.

3. See ASSOCIATED PRESS, *2 Muslim charity founders get 65 years*, NBC NEWS (Oct. 18, 2013, 2:33 PM), <http://nbcnews.com/id/30970074/#.UmF-V6XU7zl>.

What I want to do through the events that I am going to tell you about is to explain how when cases involve allegations of terrorism, the rules change. The law doesn't apply as we know it and the facts don't really matter. Even a right as basic and fundamental as the Confrontation Clause that we all believe we can rely on in this country—that you have a right to confront and cross-examine your accusers—was totally violated in both of the Holy Land trials and affirmed on appeal.

And this was all in the interest of national security. That was the backdrop, national security and terrorism.

But, as you will come to understand, this case involved nothing more than the provision of charity. Food, medical supplies, wheel-chairs, and backpacks filled with school supplies—just charity. The Holy Land Foundation and these men, as I've said and will say again, were never accused of, never charged with, and never convicted of a single violent act.

The story actually begins in 1986, when a baby was born. Her name was Sanibel and she was born to my client, Shukri, and his wife, Wejdan, in Indiana. They are both of Palestinian descent. Sanibel was born with two devastating inherited conditions and required a great deal of care, which she received from a hospital in Indiana. Fortunately, now twenty-six years later, Sanibel is still alive, but she would not have lived for more than a few months had she not had the best medical care that could be provided.⁴ Shukri realized that if Sanibel had been born in Palestine, the land of his ancestors, she never would have made it into childhood, and that the children in Palestine were suffering from lack of good medical care, lack of school supplies, and lack of food. And so it was that he conceived the idea of the Holy Land Foundation for Relief and Development and started this Foundation.

Over the years, from 1986 until 2001, Holy Land raised and gave away millions of dollars to the victims of national disasters, hurricanes, tornadoes, and man-made disasters in the U.S. and in other parts of the world. For example, Holy Land arranged a blood drive after the Oklahoma City bombing. But just as many charities focus on particular people, most of their focus was on the people in their homeland—Palestine. Throughout the years that we worked on this case, no one ever disputed that the situation in Palestine was desperate. The government's own expert, Matthew Levitt, who considered himself an expert on Palestine, recognized the plight of the Palestinians as desperate and said so in trial.⁵

4. Sadly, shortly after this lecture was given, Sanibel passed away.

5. Transcript of Trial at 132, Holy Land Found. for Relief & Dev. v. Ashcroft (Vol.

But in the late 1990s, as Holy Land was raising millions of dollars and using it to provide much needed goods and services, reports began to appear in the media that the government was investigating Holy Land for supporting Hamas. Nobody knew at that time why these reports were coming out. Eventually we learned this was because the U.S. and Israeli governments claimed that Holy Land was somehow linked to Hamas.

Hamas is an organization in Palestine that grew out of the Muslim Brotherhood there. It was created in 1987 in response to the first Palestinian Intifada, which was a spontaneous uprising in Palestine against the Israeli Occupation. No one on any side contests that this was a spontaneous uprising, a revolt by Palestinians against the Israeli occupation of their land and virtual total control of their lives. I do not want to get diverted too much into Hamas, except to say that Israel originally welcomed Hamas as a counter to the Palestinian Liberation Organization and thought that a religious organization, which is what Hamas was, would be helpful. And that lasted for a while until Hamas began suicide bombings inside Israel. At that point Israel declared Hamas a terrorist organization and outlawed it.

In response to the growing violence, and the suicide bombs, the United States banned financial support to Hamas on January 25, 1995.⁶ President Clinton issued an Executive Order under the International Emergency Economic Powers Act, known as “IEEPA.”⁷ That date becomes significant.

In 1997, the United States criminalized financial support for Hamas in a slightly different way, calling it a foreign terrorist organization, and that brought it under the prohibitions of Title 18 U.S.C. §2339(b), which specifically makes it a crime to provide any support to a designated terrorist organization, and that included Hamas.

So, what was Holy Land doing? Holy Land provided its support and its charity originally through what are called zakat committees. I do not know the exact translation, but for all intents and purposes, these are charity committees that exist throughout the Muslim world because Muslims are required by their faith to provide charity if they are able. Most Muslim countries have set up these committees. They are in each town or area and the people who run them are usually the wealthier people in town who get together as volunteers so that if people, for example, in the United States

7, Sept. 23, 2008).

6. Executive Order Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process, 60 Fed. Reg. 5079 (Jan. 25, 1995).

7. *See id.*

want to give money in Palestine, they give it to a zakat committee and the committee then gives it out to those who are most in need. The zakat committees operate with low overhead so most of the money actually gets to the needy. Some of the zakat committees have become quite big. In Palestine, the Jenin Zakat Committee runs a hospital. Some zakat committees even provide animals to people who are starting farms. They run dental clinics. They provide school supplies. They open schools. Zakat committees have been in existence for hundreds of years throughout the Muslim world.

Of the specific zakat committees that Holy Land contributed to, not one, to this date, now several years after the Holy Land convictions, has ever been on a designated terrorist list in the U.S. and this is important to understand because the designation process serves two critical functions. The designation process is primarily handled through the Office of Foreign Assets Control for the U.S. Department of the Treasury. The head of that office explained at one time, and I will quote, that the designation of an entity, serves two critical functions: it “alert[s] the world to [its] true nature” and “cut[s] it off from the U.S. financial system.”⁸

The U.S. government has always admitted that it did not become illegal to support or fund Hamas until 1995. At that point, the Treasury Department created this public list, and you can go on the website of the Treasury Department’s designated terrorists and you’ll find this huge list. Actually there are several different lists with hundreds and hundreds of foreign terrorist organizations, specially designated terrorist organizations, specially designated global terrorist organizations and some individuals. They update it every two weeks. You can sign up to get regular updates so you know who goes on and who comes off. The list is public, and the purpose of it being public is so anybody knows who is on the list. For example, I check that list every two weeks because of the clients I represent. I want to make sure I am not representing someone on the list because if I am, I have to get a license from the Treasury. That is the purpose of the list; it is public so everyone will know who you cannot give money to.

This list includes people and entities that the U.S. government believes to be “owned or controlled by, or to act for on behalf of Hamas.” Several Hamas officials appeared on the list starting in 1995, but not a single one of the zakat committees that the Holy Land ever gave money to was on the

8. Transcript of Trial at 94–95, *United States v. Holy Land Found. for Relief & Dev.* (Vol. 23, Oct. 22, 2008).

list. To this day none are on the list. But when these reports began to appear, about 1997, Holy Land retained a lawyer who was a former Congressman, John Bryant in Dallas, Texas and asked him to find out why these negative reports were in the media.

So John Bryant went to Washington. He sought meetings with the F.B.I. and the State Department but they would not meet with him. He did meet with people at the Israeli embassy but they didn't tell him anything. He was attempting to make sure that Holy Land could continue to provide relief to Palestine, primarily to children and orphans. He specifically asked who Holy Land should not be providing charity to, but no one would tell him.⁹

Everything went along okay until 9/11. The world changed on that date. No one ever thought Hamas had anything to do with 9/11, of course, but after that date Muslim charities, and Muslims in America, were suspect.

On December 4, 2001, the F.B.I. raided the Holy Land offices—their main office in Dallas, and offices in New Jersey, Illinois, and California. They seized everything, down to the plants. Literally, everything, all the paper, every document, all the office supplies, all of the office chairs, the tables, personal photos, everything, and notified the banks that the money in their accounts was to be frozen.

Ramadan had come in November of that year. And the month of Ramadan is when the Holy Land did most of its fund-raising because that is actually when Muslims give the most. So approximately \$12 million or more was in the banks waiting to go out as charity and that money was frozen. It never got to the children who needed it.

Why did this happen? Holy Land Foundation never gave a dime to Hamas and it sought guidance from the U.S. Government, but there was something else going on at that time. And that was at the policy levels of the White House and the Treasury. They wanted to be public and be aggressive to show that they were dealing with terrorism. One of the ways they did it was to start designating terrorist organizations. A decision was made to have a major designation every four weeks and they admitted later that the evidentiary foundations for some of these were weak.

Paul O'Neill was George Bush's Treasury Secretary at the time, and he actually wrote about this in a book. It is a little known book, the title of which is *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neill*, written by Ron Suskind, who was O'Neill's

9. Transcript of Trial at 76, United States v. Holy Land Found. for Relief & Dev. (Vol. 29, Oct. 31, 2008).

biographer. In that book he said, and this again is a quote, that, after 9/11, “all there was to do was seize some assets, and quickly. The President was to announce the new executive order on September 24, launching the war on terrorism. He needed some assets to point to.”¹⁰

David Aufhauser, who was general counsel to the Treasury at the time, said, “It was almost comical.” He also said, “We just listed out as many of the usual suspects as we could and said ‘Let’s go freeze some of their assets.’”¹¹

That is what happened and that is when Holy Land hired us to try to overturn the designation. So this became a civil case, a lawsuit against the United States to overturn this designation. Because it was an administrative case, it had an administrative record.¹² And it was a huge record of mostly newspaper articles and anonymous statements, with nothing under oath. It also contained some secret evidence that we were never permitted to see even though my co-counsel and I had security clearances already because we had handled other national security and espionage cases. That did not matter. We never saw the secret evidence.

The most significant document was actually an Israeli summary that had come from the Government of Israel. It was from alleged statements from a man named Muhammad Anati. What Holy Land had done as it got bigger, was to open its own offices in the West Bank so that it did not have to send all of its money through the zakat committees. This cut down on overhead. Holy Land had its own social workers to find the families that needed funds, the children who needed school supplies, and hospitals that needed wheelchairs and medical supplies. And this young man, Muhammad Anati, was a Palestinian man who lived in Ramallah. He ran the Ramallah Holy Land office and he also worked through the Ramallah zakat committee. The U.S. requested Israel to arrest him, which Israel did and then interrogated him. But his actual statements once they were translated and actually put onto the record were far different from the summary. For example, he insisted repeatedly that Holy Land had no connection with Hamas.

He said that Holy Land did not fund Hamas and did not give preference to Hamas orphans and families. The original administrative

10. Ron Suskind, *THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O’NEILL* 193 (2004).

11. *Id.*

12. Memorandum from Dale L. Watson, Assistant Dir. of the Counterterrorism Division of the FBI, to Richard Newcomb, Dir. of OFAC (Nov. 5 2001) (designating Holy Land as a terrorist organization and the resulting OFAC blocking notice).

record contained an English summary of his statements, which had come from Israel, and also contained his actual statement as written down in Hebrew. What happens with these interrogations in Palestine is that the Palestinian generally says it in Arabic, then it is translated by the interrogator into Hebrew. Although the administrative record contained his whole statement, the U.S. Government had not bothered to translate the actual statement and just accepted the translated summary. We had it translated and it turned out that, for example, the administrative record says, “Anati stated Holy Land provided aid to the needy, but some of the aid was channeled to Hamas.” But that was not in the actual statement. The administrative record said Anati enabled every branch to allocate the money freely, but since some of the heads of the branches were connected with and supporters of Hamas some of the money served Hamas. Except that was not in his statement. Several other examples included instances where the English summary was flat wrong and, in fact, the opposite of what Anati actually said.

In addition to relying on this misleading summary, the government omitted Anati’s sworn testimony that he gave before the military court in Israel. We found his lawyer, a famous Israeli civil rights lawyer, named Leah Tsemel who had represented Anati in front of the military court in Israel. She provided us with his statements under oath where he said, “I knew everything about the organization [Holy Land], it did not go to Hamas, and if it had, I would have quit.” Anati, by the way, was released because there was no evidence against him. But those statements did not matter. The government said they were sorry the summary was a little bit wrong but what difference does it make?

In fact, it did not make any difference. It did not matter. We put sworn statements into the administrative record but it did not matter. The government conceded that it had designated Holy Land without any notice, without a hearing, without a warrant, but it didn’t matter. The Appellate Court granted the government summary judgment, noting that, “[i]n a general case, perhaps the opportunity for discovery might have produced precisely that which was lacking.” It declared, however, that “this is not a general case. This is a specific case involving sensitive issues of national security and foreign policy.”¹³ Now, some of you, I am sure, are studying civil procedure and you know that before you get a grant of summary judgment you get to engage in discovery. But not in this case. No

13. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003).

discovery, no cross-examination—and by the way, the courts also considered the secret evidence that Holy Land’s lawyers never got to see—and the Supreme Court denied our writ of certiorari.¹⁴ No court ever required the government to present a single live witness for cross-examination.

Holy Land was the largest Muslim charity in America. It never had any opportunity to cross-examine a single government witness, did not even know who some of them were, and never learned what that secret evidence was.

This was all based on the need to protect national security. And I remember going to the oral argument and one of the judges saying that this case was just different. It’s just different. We have national security here so the rules don’t apply. And you have to go back and think what was the security that was being protected here? Think about the Japanese-Americans interned in the *Korematsu*¹⁵ case, what was the security interest that was protected then? It took the courts forty years to figure out that was wrong.¹⁶ The government totally overstated the danger presented by Americans of Japanese descent during World War II, leading the Supreme Court to uphold orders restricting their liberty. Think about the Pentagon Papers. We were told that publishing the Pentagon Papers would hasten the end of the world. Yet, the Pentagon Papers got published and the world did not come to an end.¹⁷

There was no semblance of due process in the Holy Land case. And of course the desperately poor children never benefitted from the millions of dollars that remained locked up in the banks. That was a civil case; it involved money. It came to an end, Holy Land was shuttered and we thought it was over. Then it got much worse.

14. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (denying the motion for a preliminary injunction and granting the official’s motion in limine and to strike), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004).

15. See *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the petitioner was convicted under a valid exclusion order), *rev’d* 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (affirming appellant’s conviction for violating an Act of Congress by disregarding an order), *rev’d* 828 F.2d 591 (9th Cir. 1987).

16. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (granting coram nobis relief because the Executive Branch misled courts about military necessity for restrictions); see also *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

17. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (holding that the government had not met its burden of showing justification for preventing publication of the contents of a study on the “History of U.S. Decision-Making Process on Viet Nam Policy”).

In 2004, Holy Land, which did not even exist anymore, and five men, including my client, Shukri Abu Baker, were indicted and tried in the Northern District of Texas in Dallas.¹⁸ They were charged with providing material support to Hamas, conspiracy to provide material support to Hamas, conspiracy and violating IEEPA, money laundering, and filing false tax returns—a huge number of counts.¹⁹ The trial began in 2007, three years later, before the Honorable A. Joe Fish in Dallas.

The indictment alleged the money had gone to seven zakat committees. They were all located in the West Bank and their names are the names of the towns: Qalqilya Zakat Committee, the Islamic Charity Committee of Hebron, Tulkarem, Jenin, Nablus, Ramallah, and the Islamic Science and Culture Committee. The government traced every dime. And every dime that left Holy Land went to the zakat committees and then went to charity. The government never traced a dime anywhere else, nor did it ever contend anything else. In fact, during one of the closing arguments, the prosecutor said, “No one is saying the defendants themselves have committed a violent act. No one is saying that the money they raised went directly to buy a suicide belt or a bomb”²⁰ The government’s theory was that since some people in these zakat committees were Hamas supporters, Hamas controlled the zakat committees, and by distributing humanitarian aid, Holy Land helped Hamas win the hearts and minds of the Palestinian people. That was the government’s theory.

Now, one thing to keep in mind is that all these zakat committees were legal. They had been licensed, depending on what year they were created, either by Jordan, when the West Bank was under Jordanian control or by Israel when under Israeli control, or by the Palestinian Authority, when under its control. So they were all licensed organizations; they all had boards of directors that came from all political spectra.

There is no doubt that the Treasury Department has the authority to designate terrorist organizations. Interestingly, in August 2007, during the

18. See Indictment, *United States v. Holy Land Found. for Relief & Dev.*, 2005 WL 4902463 (N.D. Tex.).

19. The indictment—as superseded before trial—charged conspiracy to provide material support to Hamas (18 U.S.C. § 2339B(a)(1)); substantive material support offenses; conspiracy to violate the International Emergency Economic Powers Act (IEEPA) (18 U.S.C. § 371, 50 U.S.C. §§ 1701–1706); substantive IEEPA offenses; conspiracy to commit money laundering (18 U.S.C. § 1956(h)); substantive money laundering offenses; and, as to Baker and Elashi, conspiracy to file false tax returns and substantive false tax return offenses (26 U.S.C. § 7206(2)).

20. Transcript of Closing Argument at 32. *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 35, Nov. 10, 2008).

first Holy Land trial, Treasury did designate a zakat committee as a terrorist organization. It was the Al-Salah Society in Gaza, not in the West Bank. And Treasury designated some of the people who worked for it, and designated it specifically based on its relationship with Hamas. So there is no doubt that Treasury can do it. The prosecution's expert, Matthew Levitt, testified that this designation criminalized American donations to al-Salah and officially informed banks and donors of the organization's ties to and activities on behalf of Hamas.²¹ But the government's theory in prosecuting Holy Land was basically that donations to Al-Salah had been "criminalized" since 1995, when Hamas was first designated, even though it had not been designated—because that was its theory against Holy Land.

Edward Abington was the U.S. Consul General in Jerusalem from 1993-1997, essentially the Ambassador to the Palestinian Authority. He served for thirty years as a Foreign Service officer, and before that worked for the C.I.A. He reported to the United States State Department.²² Ed Abington testified in both the Holy Land trials that he had been briefed that he was to have nothing to do with Hamas. Do not talk to Hamas, do not talk to anyone from Hamas. Do not go anywhere where Hamas is likely to be at the same time.²³ Yet he had been to all of these zakat committees, the same ones that Holy Land supported and he had never heard about any link between Hamas and the zakat committees.²⁴

The United States Agency for International Development, USAID, also has strict instructions not to deal with Hamas. This is a U.S. agency that provides charity around the world. It provided funds for many years to the same zakat committees, including Jenin, Nablus, and Qalqilya. We found that, in 2004—the same year that Holy Land was indicted (so you could not say that the government did not know)—USAID provided \$47,000 to the Qalqilya Zakat Committee and in 2005, it provided over \$6,000 to the Nablus Zakat Committee.²⁵ And this all came into evidence.

For over ten years the government had been wiretapping Shukri and his co-defendants. And by wiretapping, I mean they had tapped their phones, they had copied their emails, they had read all the faxes, they had

21. Transcript of Expert Testimony at 28–29, *United States v. Holy Land Found. for Relief and Dev.*, (Vol. 7, Sept. 23, 2008).

22. Transcript of Testimony at 142, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 32, Nov. 5, 2008).

23. Transcript of Testimony at 24, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 33, Nov. 6, 2008).

24. *Id.* at 31.

25. *Id.* 45–48.

put listening devices in their houses and in the offices, and they had photographed everyone coming in or out. It was all through the Foreign Intelligence Surveillance Act, FISA. Two things are significant about that. One is that it means the government knew all along where the money was going, not that they found out later. The government had intercepted every fax that went from or came into Holy Land saying, for example, this is the Jenin Zakat Committee, we have received your contribution of such and such, or this is Holy Land, we are sending you this money. And the money went through wire transfers so the government knew about all of it, and the government knew it at the time it was happening.

The second thing about this concerns Rule 16 of the Federal Rules of Criminal Procedure. That rule, which allegedly applies in all federal prosecutions, requires the government to “disclose to the defendant” any “relevant . . . recorded statement by the defendant.”²⁶ The government, through FISA wiretaps, listened for ten years to our clients’ conversations, most of which were in Arabic. There was no way that the non-Arabic speaking lawyers were able to sort through these. They were all classified. We had security clearances but our clients did not. The government refused to let the clients review their own statements, contrary to Rule 16, claiming it would be a national security problem if they saw them. But these were their own statements; they theoretically knew whom they had spoken to and what they had said. The clients never got to see the statements except for a few the government declassified so they could use them at trial and a few more the government agreed to declassify for defense use.

The court also admitted into evidence documents that were found in the homes of two other individuals who were not on trial. These were documents that allegedly portrayed Holy Land supporting Hamas. This was blatant hearsay. These were, I call them documents, but some were scraps of paper, handwritten, no provenance, who knows who wrote them or when. Many of these documents were dated before 1995 when it would have been legal to support Hamas in any event. The government said these are co-conspirator’s statements under a joint venture theory and the court, of course, admitted them into evidence because the court basically admitted just about anything the government asked for. And then it got worse.

For the first time in the history of an American criminal trial, an expert was permitted to testify anonymously. The defense was never able to know anything about him, or even if he was who he said he was.

26. See FED. R. CRIM. P. 16(a)(1)(B)(i).

During the second trial, which I will get to momentarily, Joshua Dratel, one of my co-counsel, asked this man who we only knew as Avi this question: “And there is no way that we could do any research on you or your writings or your work or who you are or your credentials. Right? Because we don’t know your real name. “Avi” answered: “Only what you heard here, yes. You cannot research me. That is correct.”²⁷

That was essentially his testimony during the first trial as well. We never knew anything about him. And there have only been a few times in American jurisprudence that any prosecution witness, even lay witnesses, have been allowed to testify without disclosing their identity. Avi was allowed to opine, based on criteria that he selected, that these zakat committees really were Hamas. I will quote one memorable sentence from the first trial. Avi said, “We saw it in the key chain. Again in the videos, posters. It’s all around them. Everywhere. The color of Hamas, the smell of Hamas. It’s every-where. . . .”²⁸

Decades ago, the U.S. Supreme Court said in *Smith v. Illinois* that such a procedure “effectively . . . emasculate[s] the right of cross-examination itself.”²⁹ Permitting this anonymous expert to testify in the Holy Land trial was an unprecedented ruling that violated the Fifth and Sixth Amendment rights we thought existed in the United States Constitution.

But it got even worse. The jury saw repeated pictures of burning busses, the result of suicide bombs, but no defendant was accused of burning a bus. The jury saw a videotape of demonstrators stomping on and burning an American flag. No defendant was accused of stomping on and burning American flags. There were violent images the government had pulled off the computers; there were explanations of how suicide bombers choose their targets, how they carry out their plans; there was discussion about how Hamas kills collaborators with Israel, videos of schoolchildren marching around with Hamas flags in schools that Holy Land had not given a dime to because Holy Land had been closed down years before the video was made. With all that, and I have only talked about the worst of it, with every hearsay objection overruled, every confrontation objection overruled (except one that I will talk about in a minute), after eight weeks of evidence, and twenty days of jury deliberations, not one conviction. There

27. Transcript of Expert Testimony at 85, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 28, Oct. 30, 2008).

28. Transcript of Expert Testimony at 309, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 13, Aug. 15, 2007).

29. *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

were some partial acquittals and mistrials as to everyone else.³⁰ But not one conviction.³¹ The jury saw through all of it.

And then there was the second trial. The second trial took place a year later. After six weeks of evidence and nine days of deliberations, the jury found everyone guilty.³² So what was different? Once again the jury heard from Avi; once again the jury heard about the irrelevant suicide bombings; once again the jury heard irrelevant questions about Iraq and Saddam Hussein that had nothing to do with Holy Land or this case. And they kept seeing these pictures of burning busses over and over again. All of that came into evidence, just like it did in the first trial. But four specific areas of evidence in the second trial were significantly different. The government, having lost the first time but knowing the judge was going to grant its every wish, here is what they did: First, the court permitted the government to call a former National Security staff member, Steven Simon, who testified that Hamas violence threatens to increase the risks of another 9/11 style attack on the United States. He was not even testifying as an expert, this was allegedly lay testimony, although it was clearly expert opinion. And it was irrelevant, it was highly and unfairly prejudicial, it appealed to the jurors' fears that somehow these defendants had been linked to 9/11 and there would be another 9/11 style attack on the United States if they were not found guilty.³³ On appeal, the Fifth Circuit Court of Appeals agreed with the defense that this testimony was irrelevant.³⁴

The second thing the trial court permitted was for the government to call an expert from the office of Foreign Assets Control of the Treasury Department.³⁵ Now, you recall that is the very office that designates organizations as foreign terrorist organizations.³⁶ His name was John McBrien.³⁷ He also was supposedly giving non-expert, lay opinion testimony.³⁸ He testified that the defendants should have known they could

30. See Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. TIMES, Oct. 23, 2007.

31. See *id.*

32. See Gretel C. Kovach, *Five Convicted in Terrorist Financing Trial*, N.Y. TIMES, Nov. 25, 2008, at A16.

33. Transcript of Testimony at 152, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 18, Oct. 15, 2008).

34. *United States v. El-Mezain*, 664 F.3d 467, 516 (5th Cir. 2011).

35. *Id.* at 511.

36. *Id.* at 511–12.

37. *Id.* at 512.

38. *Id.*

not give money to these zakat committees even though they weren't designated.³⁹ The trial court allowed him to testify about the core issue in this case as a lay witness and present expert testimony.⁴⁰

The Fifth Circuit, again agreeing with the defense, said “the defense argued that McBrien was not noticed as an expert witness, that his testimony was improper lay opinion and that he gave an improper legal conclusion. We agree with the defendants.”⁴¹

The third thing the government did was introduce the evidence of an informant.⁴² His name was Mohamed Shorbagi.⁴³ Shorbagi had been convicted of a massive fraud against his employer having nothing to do with Holy Land, but the government offered him a deal in that case if he would testify against Holy Land since he had worked briefly for Holy Land.⁴⁴ Shorbagi had never been to the West Bank in his entire life, nonetheless, he testified that everyone in the West Bank knew Holy Land provided money to Hamas.⁴⁵ He was from Gaza and he had not even been to Gaza since 1991.⁴⁶ This case was being tried in 2008.⁴⁷ The government asked Shorbagi the basis for his knowledge, and he responded: “It came from newspapers, it came from leaflets, it came from Hamas—the Internet later on in ‘98, ‘99, the website of Hamas, and from also talking among friends.”⁴⁸ The Fifth Circuit again agreed with the defense that this was all hearsay. It should not have been admitted.⁴⁹

Fourth, the government offered three documents that the Israeli Defense Force had seized from the Palestinian authority.⁵⁰ Now this was one objection we had actually won in the first trial so the government was not able to use this hearsay in the first trial.⁵¹ In 2002, Israel invaded the

39. Transcript of Testimony at 146–151, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 23, Oct. 22, 2008).

40. *Id.*

41. *United States v. El-Mezain*, 664 F.3d 467, 511 (5th Cir. 2011).

42. *Id.* at 488–89.

43. *Id.* at 494.

44. *Id.* at 494–97.

45. *Id.* at 494.

46. Transcript of Testimony at 133, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 20, Oct. 17, 2008).

47. *Id.*

48. *United States v. El-Mezain*, 664 F.3d 467, 494 (5th Cir. 2011).

49. *Id.* at 496.

50. Brief of Petitioner–Appellant Ghassan Elashi at 42, Nos. 09-10560, 08-10664, 08-10774, 10-10590, 10-10586 (5th Cir. Oct. 19, 2010).

51. *El-Mezain*, 664 F.3d 467, at 489–90.

Palestinian Authority under something called Operation Defensive Shield.⁵² They went all over the West Bank and took thousands of documents, many of which came into this case. But these were specific documents that were allegedly found in the Palestinian Authority offices.⁵³ Two of the documents had unnamed authors and relied on unnamed sources.⁵⁴ The documents purported to describe the Hamas fundraising network and identified the Ramallah Zakat Committee as being part of that network and saying that Holy Land provided funds for it.⁵⁵ Judge Fish in the first trial had excluded these.⁵⁶ But Judge Solis, who admitted everything, admitted them into evidence in the second trial.⁵⁷ The government got them admitted under the catch all exception, Rule of Evidence 807.⁵⁸ If you are not familiar with it, this rule is not intended to be a way to get any hearsay in front of the jury regardless of its lack of reliability.⁵⁹ We had argued successfully in the first trial, and obviously unsuccessfully in the second trial, that nothing was known about the circumstances of these documents. Nothing was known about how or where or when they were created. Nothing was known about the duty of the authors to prepare the documents—what procedures, what methods, how did they reach their conclusions? Essentially, what were the circumstances of reliability? We did not even know the identity of two of the authors; these were handwritten documents.

The Fifth Circuit again agreed with the defense for the fourth time in its opinion: “We therefore conclude that the district court erred in finding that the PA documents contained sufficient indicia of trustworthiness pursuant to Rule 807’s residual hearsay exception.”⁶⁰

So you might wonder why it is that these convictions were not overturned. All of this evidence was admitted in the second trial that was

52. *See id.* at 490.

53. *See id.* at 497.

54. *See id.*

55. Transcript of Trial at 15–17, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 21, Oct. 20, 2008).

56. Transcript of Trial at 110–11 *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 12, Aug. 14, 2007).

57. Transcript of Trial at 17, *United States v. Holy Land Found. for Relief & Dev.*, (Vol. 21, Oct. 20, 2008).

58. FED. R. EVID. 807.

59. *See id.*

60. *United States v. El-Mezain*, 664 F.3d 467, 501 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2012).

not admitted in the first trial.⁶¹ There was a mistrial in the first trial even with the bad evidence that came in. You add this new evidence, and the defendants all get convicted. But the Fifth Circuit said it is all harmless.⁶² Harmless!

Neither Holy Land trial contained any evidence, not from the secret ten years of wiretaps, nor from the anonymous documents, nothing, that Shukri Abu Baker advocated violence against Israel. Not a word from his lips that he hated Jews. Not a word from his lips that he supported Hamas. These were fictions. Fictions that the government foisted upon the court and the jury.

The law did not matter. The facts did not matter. What mattered was that these were Palestinian men providing charity and feeding Palestinian children and in the name of national security we simply could not let it happen.

The Supreme Court denied our petition for a writ of certiorari.⁶³ Shukri and one of his co-defendants received sentences of 65 years.⁶⁴ The others received sentences of 15-20 years.⁶⁵ Interestingly, at about the same time, a man named Ali Al-Marri was sentenced in another federal court.⁶⁶ He had entered into a plea agreement with the United States and admitted that he had come into the United States on September 10, 2001, as a sleeper agent for Al-Qaeda.⁶⁷ He received a sentence of 8 years.⁶⁸ Interestingly, in Israel there were also similar prosecutions. And the biggest one involved Palestinian men who were accused of providing charity to Palestinian organizations that Israel said supported Hamas, but it is my understanding that the Israeli sentence was under five years.

It is difficult to imagine now that any American citizen would be willing to support the Palestinian people because the government has shown that the designated terrorist list does not really mean anything. It cannot be

61. *See id.*

62. *See id.* at 535.

63. *United States v. El-Mezain*, 664 F.3d 467, 501 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2012).

64. *Id.* at 490.

65. *Id.*

66. John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 29, 2009, available at http://www.nytimes.com/2009/10/30/us/30marri.html?_r=0.

67. *Id.*

68. *Id.*; see also Jonathan Turley, *Eight Years for Al-Marri: Sleeper Agent Given Low Sentence by Judge Outraged by Abuses of the United States*, JONATHANTURLEY.ORG, <http://jonathanturley.org/2009/10/30/sleeper-agent-given-low-sentence-by-judge-outraged-by-abuses-of-the-united-states/> (Oct. 30, 2009).

relied on. The government can come back years later and say that an undesignated group was actually forbidden.

The Holy Land case is, I believe, the Korematsu case of this generation.⁶⁹ The Korematsu Court upheld the internment of Japanese Americans during World War II because they believed that it was a national security issue.⁷⁰ Holy Land, like Korematsu, was based on prejudice and fear. The law and the Constitution were ignored. Five innocent men have been imprisoned, two of them for the rest of their lives. It was unconstitutional; it was unfair; it was based on prejudice; it was based on fear; and, frankly it brings shame to the American justice system.

I always hate to end on a low note by saying what a tragedy this is, but it is a tragedy. It is up to us, it is up to the people in this room and the people in this country to take back our justice system and to demand that it be fair to everyone. That must be our goal. Thank you for listening.

69. *See* Korematsu v. United States, 323 U.S. 214 (1944).

70. *See id.*