

<p>GUILTY WITHOUT CHARGE: ASSESSING THE DUE PROCESS RIGHTS OF UNINDICTED CO-CONSPIRATORS</p> <p>By Ira P. Robbins*</p> <p>Abstract</p> <p>[a.1] The grand jury practice of naming individuals as unindicted co-conspirators routinely results in injury to reputations, lost employment opportunities, and a practical inability to run for public office. Yet, because these individuals are not parties to a criminal trial, they have neither the right to present evidence nor the opportunity to clear their names. Thus, Professor Robbins argues that the practice violates the Fifth Amendment guarantee that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]” While prosecutors may offer many justifications to support the practice of naming unindicted co-conspirators, these reasons do not withstand careful scrutiny. Legitimate governmental objectives can be met in other ways. Professor Robbins concludes that Congress should breathe life into the traditional “shielding” function of federal grand juries and prohibit the use of unindicted co-conspirators’ real names in grand jury indictments.</p>	<p>Table of Contents</p> <p>I. Introduction</p> <p>II. Conspiracy and Naming of Unindicted Co-Conspirators Generally</p> <p>A. Definition of “Unindicted Co-Conspirator”</p> <p>B. Background on Indictments</p> <p>C. Highly Publicized Unindicted Co-Conspirator Cases</p> <p>D. Evidentiary Advantages to the Prosecution</p> <p>E. The Process of Naming Unindicted Co-Conspirators</p> <p>III. The Debate on Naming Unindicted Co-Conspirators</p> <p>A. Reasons for Naming Unindicted Co-Conspirators</p> <p>B. The Problems Associated with Naming Unindicted Co-Conspirators</p> <p>IV. Proposals for Grand Jury Reform Included Provisions to Eliminate the Naming of Unindicted Co-Conspirators</p> <p>V. Conclusion</p>
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I. INTRODUCTION

[I.1] The grand jury practice of naming individuals as unindicted co-conspirators in formal indictments appears to be an anomaly in United States law, in that it violates the Fifth Amendment guarantee that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]”¹ The practice was a hotly debated legal issue in the 1970s, but has never been revisited. It is surprising that would-be grand jury reformers have not revived the issue, given recent widely publicized trials involving unindicted co-conspirators, such as the Whitewater prosecutions during the Clinton administration. Despite the dormancy of the issue, fertile ground for reintroducing arguments against the identification of unindicted co-conspirators exists in the terrorist trials arising in the aftermath of the September 11, 2001 attacks on the World Trade Center and the Pentagon.

[I.2] As long as the United States grants due process rights to those tried within its borders, the process of naming unindicted co-conspirators, even if there is a terrorism connection, violates these rights. Granted, the terrorist trials present the most difficult questions for opponents of the practice because of the unpopularity of protecting the rights of individuals linked to conspiracies to kill or injure Americans. Nonetheless, the standards developed for safeguarding these individuals’ rights should be used as a springboard for reform in all civilian trials.

[I.3] This Article argues that the practice of naming unindicted co-conspirators should be prohibited because it violates their due process rights. To provide the proper background for evaluating this proposition, [Part II](#) examines conspiracy law generally and discusses the case law, policies, and processes regarding the practice. [Part II](#) also reviews examples of individuals named as unindicted co-conspirators and prosecutors’ major reasons for utilizing the practice. [Part III](#) examines the debate on identifying unindicted co-conspirators by detailing the problems associated with naming and the arguments in its favor. [Part IV](#) discusses the proposals for grand jury reform presented during the mid-to-late 1970s. These proposals centered on reformers’ concern that grand juries were no longer performing their duty of protecting the rights of individuals in the American criminal justice system. The Article concludes that reformers should act now — while highly publicized unindicted co-conspirator cases are being tried — to persuade Congress that legislation is necessary for eliminating the practice of naming unindicted co-conspirators and critical to the protection of the due process rights of all persons tried in United States courts.² Specifically, Congress should bar the use of unindicted co-conspirators’ real names in grand jury indictments.³

¹ U.S. CONST. amend. V. See also U.S. CONST. amend. XIV, § 1 (providing that no state shall “deprive any person of life, liberty, or property, without due process of law”).

² Because this paper argues that the practice is a due process violation, it could obviously be outlawed by the courts if the question were properly put before them. See, e.g., *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975). There is nothing, however, that would prohibit Congress from acting without reference to a specific case or controversy; corrective legislation could be a more expedient path to stopping the abusive practice.

³ The name of the unindicted co-conspirator could still be available to a defendant through a request for a bill of particulars. Because a bill of particulars does not have the legal imprimatur of a grand jury indictment and because measures can be taken to keep it private, the production of a bill of particulars does not affect the due process rights of the unindicted co-conspirator in the same way as being named in an indictment. See *infra* [Part IV](#).

II. CONSPIRACY AND NAMING OF UNINDICTED CO-CONSPIRATORS GENERALLY

[II.1] Conspiracy, often referred to as the prosecutor's "darling,"⁴ is one of the most frequently charged federal crimes.⁵ The main reason that conspiracy is so prevalent a charge is that most courts employ an expansive interpretation of the offense, thus allowing prosecutors to allege conspiracy in a wide range of circumstances.⁶ In fiscal year 2001, for example, out of the 82,614 defendants in criminal cases filed in United States district courts, 2,249 were in criminal conspiracy cases,⁷ compared to just 118 civil rights defendants, 1,685 counterfeiting defendants, and 1,765 robbery defendants.⁸

[II.2] The offense of federal criminal conspiracy is codified in 18 U.S.C. § 371, entitled "Conspiracy to Commit Offense or to Defraud United States."⁹ This statute applies "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy."¹⁰ Criminal conspiracy has four elements: "(1) an agreement

⁴ See, e.g., *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.) (referring to the crime of conspiracy as "that darling of the modern prosecutor's nursery").

⁵ See Raphael Prober & Jill Randall, *Federal Criminal Conspiracy*, 39 AM. CRIM. L. REV. 571, 572 (2001) (explaining that, in addition to courts' expansive reading of conspiracy, it is frequently charged because conspiracy provisions are included in many federal statutes).

⁶ *Id.*

⁷ FEDERAL JUSTICE STATISTICS DATABASE DATASET: DEFENDANTS IN CRIMINAL CASES FILED IN U.S. DISTRICT COURT, FISCAL YEAR 2001 (2001) (comparing number of defendants in conspiracy cases filed in fiscal year 2001 under 18 U.S.C. § 371 with number of defendants in cases filed in same time period under all other sections of Title 18) at http://fjsrc.urban.org/noframe/wqs/q_freq.cfm?var1=FTSECMSO&agency=AOUSC&value1='All','18_371'&saf=in&year=2001 (last visited Oct. 12, 2003).

⁸ See *id.* (comparing number of defendants in cases filed in fiscal year 2001 that fall into each subcategory of Bureau of Justice Statistics' filing offense classification) at http://fjsrc.urban.org/noframe/wqs/q_freq.cfm?var1=SUB_CAT&agency=AOUSC&value='All'&saf=in&year=2001 (last visited Oct. 12, 2003); see also Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 (2003) (stating that "more than one-quarter of all federal criminal prosecutions and a large number of state cases involve prosecutions for conspiracy").

⁹ 18 U.S.C. § 371 (2000).

¹⁰ *Id.* Individuals charged with violating 21 U.S.C. § 846, which is contained in the Drug Abuse Prevention and Control chapter of the Food and Drug laws, can also be charged with conspiring to violate the statute. 21 U.S.C. § 846 (2000). Defendants charged under the importing or exporting statute within the Drug Abuse Prevention and Control chapter of the Food and Drug laws can also face conspiracy charges under the Act. 21 U.S.C. § 963 (2000). While the federal courts continue to use a bilateral definition of conspiracy, most of the states have adopted a unilateral definition of conspiracy. See generally Ira P. Robbins, *Double Inchoate Crimes*, 89 HARV. J. ON LEGIS. 1, 26-27 (1989) (describing the bilateral approach as requiring "the agreement of two or more persons" and
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between at least two parties; (2) to achieve an illegal goal; (3) where the parties possess knowledge of the conspiracy and with actual participation in the conspiracy; and (4) where at least one conspirator committed an overt act in furtherance of the conspiracy.”¹¹ The prosecution must prove each element beyond a reasonable doubt.¹²

[II.3] Prosecutors frequently seek a conspiracy charge because of the variety of exceptional advantages it provides to the government.¹³ One advantage is that it allows prosecutors to establish venue in any district in which a member of the conspiracy perpetrated an act intended to achieve the goal of the conspiracy, regardless of the innocence or equivocality of the act.¹⁴ Another advantage involves the rules of joinder, which typically permit prosecutors to try multiple co-conspirators in one trial, thus making each defendant’s attempt to prove his or her innocence difficult if any one of the defendants is clearly guilty.¹⁵ Third, the inchoate crime of conspiracy and the substantive target crime

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the unilateral approach as “holding liable any party who believes he has consummated an agreement”).

¹¹ Prober & Randall, *supra* note 5, at 574.

¹² *See id.* (explaining that, notwithstanding the reasonable-doubt standard, circumstantial evidence by itself can be enough to prove conspiracy).

¹³ *See United States v. Stoner*, 98 F.3d 527, 533 (10th Cir. 1996) (“ ‘It is clear that a conspiracy charge gives the prosecution certain unique advantages and that one who must defend against such a charge bears a particularly heavy burden.’ ”) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.4(b), at 526 (2d ed. 1986)); *see generally* Katyal, *supra* note 8, at 1369-80 (reviewing traditional conspiracy doctrine); *Developments in the Law — Criminal Conspiracy*, 72 HARV. L. REV. 920, 975-1000 (1959) (discussing many procedural and substantive advantages to prosecution). The Supreme Court, however, has limited certain prosecutorial advantages, particularly where concealment conspiracy charges are alleged. *See* PAUL MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES, § 4.05[3] (2002). In *Krulewitch v. United States*, for example, the government proposed and the court of appeals agreed that “implicit in a conspiracy to violate the law is an agreement among conspirators to conceal the violation after as well as before the illegal plan is consummated. Thus the conspiracy continues, at least for purposes of concealment, even after its primary aims have been accomplished.” 167 F.2d 943, 948 (2d Cir. 1948). The Supreme Court reversed and, in doing so, rejected the argument that a conspiracy to conceal could be inferred in every conspiracy, because to so hold would mean that the statute of limitations on such a charge would never begin to run. *Krulewitch v. United States*, 336 U.S. 440, 443 (1949). Justice Jackson, in a powerful concurrence, highlighted the negative consequences that would result from affirming the court of appeals: “Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court.” *Id.* at 456 (Jackson, J., concurring).

¹⁴ *See* MARCUS, *supra* note 13, at § 3.03[1] (noting that the venue determination in a conspiracy case is not subject to the Sixth Amendment requirement that a defendant be tried in the district in which the crime was committed).

¹⁵ *See id.* at § 6.01 (quoting Justice Jackson’s statement on joint conspiracy trial problems in *Krulewitch*):

It is difficult for the [co-defendant in a conspiracy trial] to make his

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of the conspiracy are treated as two separate crimes,¹⁶ allowing sentences for the crimes to run consecutively, with the sentence for the conspiracy often exceeding the sentence for the substantive crime.¹⁷ Fourth, the *Pinkerton* doctrine¹⁸ provides that, through vicarious liability, substantive offenses committed by one conspirator in furtherance of the conspiracy are attributable to all members of the conspiracy.¹⁹ The Supreme Court used this doctrine to hold Daniel Pinkerton liable for the substantive crimes that his brother Walter had committed in furtherance of their conspiracy, even though Daniel was in jail at the time that Walter perpetrated the substantive criminal acts.²⁰

[II.4] This doctrine of vicarious liability may likely aid the United States government in prosecuting a figure like Zacarias Moussaoui, who was behind bars in a Minneapolis jail at the time of the September 11, 2001 terrorist attacks.²¹ To prove that Moussaoui was a conspirator in the attacks, even though he was unable to participate directly in the hijackings and bombings, prosecutors need only show that he joined the conspiracy.²² They do not need to prove that he knew every member

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own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

Krulewitch, 336 U.S. at 454.

¹⁶ See MARCUS, *supra* note 13, at § 7.03 (explaining that, in *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court rejected the common law rule that merged the conspiracy and the substantive crime).

¹⁷ See MARCUS, *supra* note 13, at § 7.04 (noting that there is a very small number of “consistent patterns” in conspiracy sentencing in the United States).

¹⁸ See *Pinkerton v. United States*, 328 U.S. 640 (1946).

¹⁹ See *id.* at 647 (“[W]e fail to see why . . . acts in furtherance of the conspiracy are . . . not attributable to the others for the purpose of holding them responsible for the substantive offense.”).

²⁰ See *id.* at 645 (“There is . . . no evidence to show that Daniel participated directly in the commission of the substantive offenses on which his conviction has been sustained, although there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement of conspiracy existing between the brothers.”).

²¹ See John Gibeaut, *Prosecuting Moussaoui*, 88 A.B.A. J. 36 (2002) (explaining that Moussaoui was held in custody since his August 16, 2001 arrest on immigration charges).

²² See *id.* (recounting the government’s allegations indicating that Moussaoui did participate in the conspiracy by, among other things, participating in one of Osama bin Laden’s training camps in Afghanistan, taking flying lessons, purchasing flight training videos and navigation equipment, researching crop dusting, and receiving money from a suspected terrorist in Hamburg, Germany, who funded the other hijackers’ activities). The government’s indictment of Moussaoui charges him with six counts of conspiracy, including (1) Conspiracy to Commit Acts of Terrorism Transcending National Boundaries (18 U.S.C. §§ 2332b(a)(2) & (c)); (2) Conspiracy to Commit Aircraft Piracy (49 U.S.C. §§ 46502(a)(1)(A) & (a)(2)(B)); (3) Conspiracy to Destroy Aircraft (18 U.S.C. §§ (continued...))

of the conspiracy, that he was aware of the end result of the conspiracy, or that he took any steps toward achieving the plot — only that he could reasonably have foreseen that people would be killed.²³

A. DEFINITION OF “UNINDICTED CO-CONSPIRATOR”

[II.A.1] The term “unindicted co-conspirator” refers to any person who allegedly “agreed with others to violate the law but who is not being charged with an offense and who, consequently, will not be tried or sentenced for his criminal conduct.”²⁴ The law permits admission of unindicted co-conspirators’ statements and acts performed during and in furtherance of the conspiracy as evidence in determining the guilt or innocence of the indicted conspirators.²⁵ Prosecutors often have enough evidence to indict these individuals, but instead name them as unindicted co-conspirators for a variety of strategic reasons.²⁶

B. BACKGROUND ON INDICTMENTS

[II.B.1] To understand the process of naming unindicted co-conspirators in a grand jury indictment, it is first necessary to address the federal grand jury’s historical role.²⁷ The [Fifth Amendment](#) to the United States Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”²⁸ Federal grand

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32(a)(7) & (34)); (4) Conspiracy to Use Weapons of Mass Destruction (18 U.S.C. § 2332(a)); (5) Conspiracy to Murder United States Employees (18 U.S.C. §§ 1114 & 1117); and (6) Conspiracy to Destroy Property (18 U.S.C. §§ 844(f), (i), (n)). [United States v. Moussaoui, No. 1-455-A \(E.D. Va. July 16, 2002\)](#).

²³ See Gibeaut, *supra* note 21 (stating that, although the case against Moussaoui is strong, bin Laden’s statement that many of the hijackers were unaware that they would die in the September 11, 2001 attacks could serve as a mitigating factor).

²⁴ [Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process?: Hearing Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the Sen. Comm. on the Judiciary, 105th Cong. 225 \(1998\)](#) (statement of Peter F. Rient, attorney and partner in Gainer, Rient and Hotis) [hereinafter Rient Statement].

²⁵ See discussion [infra Part II.D](#) (examining the co-conspirator hearsay exception, [Rule 801\(d\) of the Federal Rules of Evidence](#)).

²⁶ See Dan Freedman, *Clinton Adviser to be Named Unindicted Co-Conspirator*, [TIMES UNION](#) (Albany, NY), June 20, 1996, at A3 (highlighting the co-conspirator exception to hearsay rules as a primary reason for naming an individual as an unindicted co-conspirator); see also [infra Part III.A](#).

²⁷ See Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 [CREIGHTON L. REV.](#) 821 (2000) (describing American grand juries as “notoriously misunderstood and unknown” by most of the public).

²⁸ [U.S. CONST. amend. V](#).

juries listen to “a recitation of charges by a government witness”²⁹ in determining whether to formally charge the accused with a crime.³⁰ Although one of the grand jury’s responsibilities is to accuse wrongdoers, its primary function is to shield the innocent from ill-conceived or malicious allegations.³¹

[II.B.2] Pursuant to the [Fifth Amendment](#), the federal grand jury performs its “shielding” function by issuing presentments and indictments.³² A presentment refers to an accusation short of a formal indictment, made on the grand jury’s own motion.³³ Indictments are formal written statements charging a person with an offense. They are drafted by a prosecuting authority and affirmed by the grand jury. The grand jury proceeding involves presentation of evidence by the prosecutor, outside

²⁹ Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 623 (1994).

³⁰ For a criticism of the present-day grand jury process, see *id.* at 578 (labeling modern-day grand juries as the prosecutors’ “indictment mill,” “rubber stamp,” “tool,” and “playtoy”); see also Tony Mauro & Kevin Johnson, *Grand Jury “Very Lonely” For Witness*, [USA TODAY](#), Mar. 3, 1998, at 2A:3 (quoting former New York Chief Judge Sol Wachtler as stating that “any prosecutor who wanted to could indict a ham sandwich”); Stuart Taylor, Jr., *Taking Issue: Enough of the Grand Jury Charade*, [LEGAL TIMES](#), May 18, 1992, at 23 (describing grand jury indictments as “essentially unilateral decisions by prosecutors”).

³¹ See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 270 (1995) (describing the “shielding” function as a grand jury’s “raison d’être”); see generally Phillip E. Hassman, *Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Person with Crime or Misconduct*, 28 A.L.R. FED. 851, 857 (1976); see also Roots, *supra* note 25, at 821 (arguing that, theoretically, the grand jury should act as a check on the government, serving as a watchdog against arbitrary and malevolent prosecutions). For a general description of the grand jury’s operation and purpose, see *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

³² For both presentments and indictments, the purpose of the shielding function is to protect innocent persons from adverse consequences associated with being accused by federal bodies. Courts in the latter part of the twentieth century appeared uniformly to adopt the rationale of protecting people from grand jury accusations by barring federal grand juries from issuing presentments. See Roots, *supra* note 27, at 839. Those who are innocent but who are nonetheless formally charged in an indictment often face adverse consequences to their reputations and employment. See *Gentile v. Nevada*, 501 U.S. 1030 (1991) (noting that, in the time period between indictment and trial, the accused may suffer ruinous consequences to his reputation and employment that may not be remedied even by an acquittal).

³³ Hassman, *supra* note 31, at 855 n.8; see also Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333 (1994) (describing presentments as charges that the grand jury brings on its own initiative, whereas an indictment is almost always initially drawn up by a prosecutor and then submitted to the grand jury for approval). The act of signing a presentment transforms it into an indictment. *Id.* Lettow argues that, although a presentment is capable of serving as a formal charging indictment, its main function is to publicize. *Id.* Similar to problems associated with naming unindicted persons in a formal indictment, those named in a presentment lack the opportunity to answer the accusation in a judicial forum. See *id.* at 1359 (quoting Chief Justice Finesilver in *People v. McCabe*, 266 N.Y.S. 363, 367 (Sup. Ct. 1933), as stating that “[t]he injury it may unjustly inflict may never be healed”).

the presence of a judge, and an ensuing vote by the members of the grand jury on whether to indict — without ever hearing from defense counsel.³⁴ In deciding whether to charge an individual with a crime, the grand jury is authorized to determine whether there is probable cause to believe that a crime has been committed and to issue an indictment accordingly.³⁵ It follows that, if the grand jury believes there is enough evidence to support a criminal charge, it has a duty to return an indictment.³⁶ Many courts have refused to recognize any authority for a grand jury to accuse a person of a crime without indicting that person.³⁷

[II.B.3] There is no express authority granting or denying a federal grand jury the power to issue an indictment or presentment accusing an unindicted person of a crime or misconduct.³⁸ However, the [Fifth Amendment to the U.S. Constitution](#),³⁹ as well as the grand jury's traditional shielding function, is frequently asserted as authority to prohibit such pronouncements.⁴⁰

[II.B.4] The constitutional problems faced by an unindicted, but named, co-conspirator are legion. Whereas a criminal defendant is presumed innocent until proven guilty (and has a Sixth Amendment right to a speedy trial), there are rarely procedural mechanisms in place to protect an individual who is identified as an unindicted co-conspirator.⁴¹ A person named by a federal grand jury as an unindicted co-conspirator does not become a party to the attendant criminal trial, and the Federal Rules of Criminal Procedure grant that individual no right to intervene in order to clear his or her

³⁴ See Frederick P. Hafetz & John M. Pellettieri, *Time to Reform the Grand Jury*, 23 CHAMPION 12, 13 (Jan./Feb. 1999) (arguing that the grand jury functions largely as an investigative tool of the prosecutor).

³⁵ Hassman, *supra* note 31, at § 2(a).

³⁶ *Id.*; see *United States v. Briggs*, 514 F.2d 794, 803 (5th Cir. 1975) (discussing the grand jury's shielding function and holding that, if charges are baseless, the accused person should not be subjected to public branding; on the other hand, if the charges are supported by probable cause, the accused should be provided a forum to plead his case).

³⁷ See Hassman, *supra* note 31, at § 3(b); *infra* Part II.B (reviewing key court cases that have developed this standard); see also *Briggs*, 514 F.2d at 801 (“We have found no reported opinion or scholarly commentary, and the government suggests none, contending that a federal grand jury is empowered to accuse a named private person of crime by means of an indictment which does not make him a defendant.”).

³⁸ Hassman, *supra* note 31, at § 2(a).

³⁹ See U.S. CONST. amend. V (providing that no person shall “be deprived of life, liberty, or property, without due process of law”).

⁴⁰ Hassman, *supra* note 31, at § 2(a); see *Briggs*, 514 F.2d at 803 (tracing the development of the grand jury's shielding function and holding that a grand jury that returns an indictment naming a person as an unindicted co-conspirator does not perform its shielding function but instead does exactly the reverse).

⁴¹ See Barry Tarlow, *RICO Report*, 24 CHAMPION 56, 59 (Dec. 2000).

name.⁴² Moreover, acquittal of *indicted* conspirators will neither vindicate the unindicted conspirator nor bar his or her subsequent indictment.⁴³ Many courts have held that these consequences deny the unindicted person the due process of law to which he or she is entitled by the [Fifth Amendment](#)⁴⁴ and violate the grand jury's traditional shielding function.⁴⁵

[II.B.5] The seminal case on point is *United States v. Briggs*,⁴⁶ decided in 1975, in which the United States Court of Appeals for the Fifth Circuit used a balancing test to weigh the governmental interest in prosecuting crime against the possible harm caused to those named as unindicted co-conspirators. The court found a Fifth Amendment due process violation when the grand jury named three persons as unindicted co-conspirators in connection with riots and other unlawful activities at the Republican Party's 1972 National Convention in Miami Beach, Florida.⁴⁷ The unindicted co-conspirators complained of injury to their names and reputations and impairment of their ability to obtain employment — all of which the court found were legally cognizable interests entitled to constitutional protection.⁴⁸ Although the government had asserted that “the interests of justice may on occasion require that [unindicted co-conspirators] be named in the indictment,”⁴⁹ the court found no legitimate reason to deprive these individuals of their due process rights to clear their names.⁵⁰ Weighing the governmental interest in naming unindicted co-conspirators against the harm caused to those who are

⁴² Hassman, *supra* note 31, at § 2(a).

⁴³ *Id.*

⁴⁴ [U.S. CONST. amend. V](#).

⁴⁵ *E.g.*, *In re Smith*, 656 F.2d 1101 (5th Cir. 1981); *Briggs*, 514 F.2d at 803; *United States v. Anderson*, 55 F. Supp. 2d 1163 (D. Kan. 1999).

⁴⁶ 514 F.2d 794 (5th Cir. 1975).

⁴⁷ *Id.* at 806.

⁴⁸ *See id.* at 797 (citing *Wisconsin v. Constantineau*, [400 U.S. 433 \(1971\)](#)). The Fifth Circuit noted that the offenses charged were given wide notoriety and were “peculiarly offensive,” perhaps indicating why the accusation imposed such ruinous consequences on the unindicted co-conspirators. *See Briggs*, 514 F.2d at 799.

⁴⁹ *Id.* at 804. The Fifth Circuit noted that, although the government did not specify what these reasons may be, it may have been referring to the naming of unindicted co-conspirators as a “necessity to prove the conspiracy.” *Id.* at 804-05. The court countered that the government has less injurious means to prove the conspiracy than through the naming of unindicted co-conspirators. *See id.* at 805 (citing three possibilities: first, the indictment should have made the additional persons defendants if there was probable cause to believe they participated in the conspiracy — thus affording the accused due process rights at trial; second, the government could have introduced evidence at trial of a person's participation in a conspiracy even without naming that person in the indictment; and third, an unindicted co-conspirator could simply be designated anonymously as an “other person” or as “John Doe”).

⁵⁰ *Id.* at 806.

named, the court determined that the balance tipped wholly in favor of protecting against the harm.⁵¹ The Fifth Circuit remanded the case to the district court with instructions to expunge the appellants' names from the indictment.⁵²

[II.B.6] The Fifth Circuit further developed the *Briggs* weighing standard in 1981 in *In re Smith*.⁵³ There, the court ordered that court filings and other records naming the plaintiff, an unindicted co-conspirator, be sealed and struck from the record.⁵⁴ The decision expanded the *Briggs* due process standard beyond the grand jury context, as the plaintiff had not been formally indicted but had been named in connection with a guilty plea by an indicted corporation.⁵⁵ The official hearing record referenced the plaintiff's name several times,⁵⁶ and he suffered months of adverse publicity as a result.⁵⁷ Citing an "individual's interest in preserving his personal reputation,"⁵⁸ the Fifth Circuit extrapolated from its finding in *Briggs* that "no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights."⁵⁹ The court explained that it would not "distinguish between an official defamation originating from a federal grand jury or an Assistant United States Attorney."⁶⁰

[II.B.7] More recently, the United States District Court for the District of Kansas held, in *United States v. Anderson*,⁶¹ that the public naming of unindicted co-conspirators in pre-trial papers violated

⁵¹ *Id.*

⁵² *Id.* at 808.

⁵³ 656 F.2d 1101 (5th Cir. 1981).

⁵⁴ *Id.* at 1107.

⁵⁵ *Id.* at 1103.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1104.

⁵⁸ *Id.* at 1102.

⁵⁹ *In re Smith*, 656 F.2d. at 1106.

⁶⁰ *Id.* The Fifth Circuit concluded:

[W]e completely fail to perceive how the interests of criminal justice were advanced at the time of the plea hearings by such an attack on the Petitioner's character. The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct without affording him a forum for vindication.

Id. at 1107.

⁶¹ 55 F. Supp. 2d 1163 (D. Kan. 1999). The court noted that, although there were no prior Tenth (continued...)

the Due Process Clause of the Constitution. The prosecution had named three prominent health-care attorneys as unindicted co-conspirators in connection with an alleged Medicare kickback scheme.⁶² The prosecution's subsequent identification of those three attorneys in a memorandum in support of a pre-trial motion was immediately and widely reported in the legal and health-care communities, adversely affecting the plaintiffs' reputations.⁶³ Following the *Briggs* and *Smith* standard of balancing the governmental interests in naming unindicted co-conspirators against the individual harm that stems from being accused without being afforded the opportunity to obtain vindication,⁶⁴ the *Anderson* court found a due process violation and ordered the offending document permanently stricken from the record.⁶⁵

C. HIGHLY PUBLICIZED UNINDICTED CO-CONSPIRATOR CASES

[II.C.1] The American public is no stranger to the term "unindicted co-conspirator," due to several highly publicized conspiracy trials in the last thirty years.⁶⁶ Many Americans first became familiar with the term in March 1974, when President Richard Nixon was named as an unindicted co-conspirator in the Watergate conspiracy.⁶⁷ A grand jury of the United States District Court for the

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Circuit cases discussing the propriety of naming unindicted co-conspirators, a number of courts have followed the Fifth Circuit's lead in *Briggs* and *Smith*. *Id.* at 1166.

⁶² *Id.* at 1165.

⁶³ *Id.* at 1166.

⁶⁴ *Id.* at 1167. Although the district court ultimately acquitted those who had been indicted, that did not exonerate the named unindicted co-conspirators. *Id.* at n.4. Thus, this case demonstrates that a named unindicted co-conspirator may be labeled a criminal in the eyes of the public, regardless of whether the defendants are found guilty. In other words, the unindicted co-conspirators may be in a worse position than the indicted defendants.

⁶⁵ *See id.* at 1168, 1170 (holding that "the very real stigmatization suffered by the movants by this governmental action far outweighs the nonexistent government interest in publicly naming them as coconspirators").

⁶⁶ *E.g.*, *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971). The court in *Hammond* expunged the report of an Ohio grand jury that had indicted twenty-five persons in connection with the events in 1970 at Kent State. *Id.* at 358. The indictment had charged twenty-three unindicted faculty members with sharing responsibility for the shooting by the National Guardsmen. *Id.* at 347-48. Unindicted co-conspirators also frequently appear in highly publicized "mega trials" — so named because they involve a large number of defendants. *See, e.g.*, *United States v. Gallo*, 668 F. Supp. 736 (E.D.N.Y. 1987), *aff'd*, 863 F.2d 185 (2d Cir. 1988). In *Gallo*, a twenty-two count indictment named sixteen defendants and charged thirteen of them with conspiring with each other and with several unindicted co-conspirators "to participate in the affairs of a racketeering enterprise." *Id.* at 738. The court stated that these "monster" trials burden the court, the defendants, and the jury. *Id.* at 754.

⁶⁷ *United States v. Nixon*, 418 U.S. 683, 687 (1974). *See Nixon v. United States*, 417 U.S. 960 (1974) (stating that, on February 25, 1974, the June 5, 1972 Grand Jury voted 19-0 to permit the Special Prosecutor to name President Nixon as an unindicted co-conspirator in this case); Naftali (continued...)

District of Columbia named Nixon in an indictment of seven individuals who were charged with conspiracy to defraud the United States and conspiracy to obstruct justice, among other crimes.⁶⁸ President Nixon claimed that the doctrine of executive privilege exempted him from having to comply with the prosecutor's subpoena duces tecum for the production of tapes and documents. Although this case afforded the United States Supreme Court the opportunity to rule on the question of whether a grand jury had the power to name a sitting President — or anyone else — as an unindicted co-conspirator, the Court instead resolved President Nixon's privilege claim without ruling on the practice of naming unindicted co-conspirators.⁶⁹

[II.C.2] The term "unindicted co-conspirator" was popularized again during the Whitewater era, when President Bill Clinton's Arkansas confidant and White House advisor Bruce Lindsey was named an unindicted co-conspirator in the trial of two Arkansas bankers.⁷⁰ The bankers were accused of misappropriating \$13,217 from Perry County Bank for political contributions to Clinton's 1990 campaign for governor, as well as to other campaigns.⁷¹ Lindsey asserted that he was branded with this label so that prosecutors could offer into evidence statements about him from Bank President Neil Ainley, who had reached an agreement with Whitewater Special Prosecutor Kenneth Starr to plead guilty to misdemeanor charges in exchange for dismissal of felony counts.⁷²

[II.C.3] In another conspiracy case involving a government official's misconduct, federal prosecutors named sixty-one individuals as unindicted co-conspirators, under seal, during the trial of former Louisiana Governor Edwin W. Edwards.⁷³ Edwards, along with several others, was charged with

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Bindavid, *Lindsey's Status: Common, Controversial; Prosecutor's Tool Takes Political Toll*, LEGAL TIMES, June 24, 1996, at 1 ("President Richard Nixon was named an unindicted co-conspirator — marking the first time most Americans had heard that ominous term.").

⁶⁸ See *Nixon*, 418 U.S. at 687.

⁶⁹ *Id.* at 687 n.2.

⁷⁰ See Dan Freedman, *supra* note 26 (relating Lindsey's statement that, during the time he served as the treasurer for Clinton's re-election campaign for governor in 1990, he arranged and accepted withdrawals from Perry County Bank employees Herby Branscum, Jr. and Robert M. Hill).

⁷¹ See *id.* (explaining that Lindsey would be named as a co-conspirator on a charge of concealing excessive cash withdrawals from the IRS; federal law mandates that banks report all cash transactions in excess of \$10,000 to the IRS).

⁷² See *Wolf Blitzer: Lindsey Refutes Unindicted Co-Conspirator Charge* (CNN News television broadcast, June 19, 1996) (recounting Lindsey's assertion that Ainley had said that his interactions with him were customary and regular, but that being named would permit any statements that would otherwise be hearsay into the record as evidence). An even more recent source of popular unrest concerning grand juries was the 1998 impeachment of President Clinton for perjury and obstruction of justice offenses. See *Roots*, *supra* note 27, at 821 n.2.

⁷³ See John Hill, *EWE Prosecutors Name 61 Unindicted Co-conspirators*, TIMES (Shreveport, LA), Jan. 20, 2000, at 1A (stating that the list of unindicted co-conspirators includes three of Edwards' children, a Louisiana State Senator, a former Senate President, a Louisiana State Representative, and a past Riverboat Gaming Commission Chair.).

corruption for illegally attempting to influence Louisiana’s licensing of riverboat casinos.⁷⁴ Although Edwards’ aides argued that receiving politicians’ backing for license applications was simply “politics,” prosecutors maintained that Edwards had violated official corruption laws when he provided the licensing commission with a list of the riverboats he supported.⁷⁵

[II.C.4] The term “unindicted co-conspirator” again surfaced in the American vocabulary following the September 11, 2001 terrorist attacks. The government’s indictment of Zacarias Moussaoui named twenty-three unindicted co-conspirators — including Osama bin Laden and the nineteen dead hijackers. Most likely, the prosecution did not indict bin Laden and his top lieutenants because, if and when they are captured, the government intends to try them before military tribunals.⁷⁶ A formal indictment in a federal court might give bin Laden and al Qaeda members grounds to claim they have a right to be tried in civilian courts.⁷⁷

[II.C.5] In 2003, a grand jury named fifteen unindicted co-conspirators in connection with the indictment of University of South Florida professor Sami Amin Al-Arian and seven other individuals.⁷⁸ The fifty-count indictment charges the defendants with conspiracy to commit murder

⁷⁴ See *id.* (asserting that Edwards had appointed the vice-chairman of the Riverboat Gaming Commission, who made the motion to approve the last seven casino licenses in 1994, one of which formed a major part of the trial; Edwards also allegedly paid off a Gaming Control Board member and lunched with another member in order to influence the licensing process).

⁷⁵ See John Hill, *Former Gambling Panel Pair Labeled Co-Conspirators*, *ADVOCATE* (Baton Rouge, LA), Feb. 9, 2000, at 4A (relating the prosecution’s assertion that several commissioners supposedly stated that Edward’s endorsement was crucial to riverboats receiving licenses). One unindicted co-conspirator told a rejected riverboat license applicant that he did not receive approval because he “didn’t get the man to turn the key,” referring to Edwards as “the man.” *Id.*

⁷⁶ See Chris Suellentrop, *Why is Osama an Unindicted Co-Conspirator*, *SLATE MAGAZINE*, Dec. 12, 2001 (discussing reasons why bin Laden and the dead hijackers are named as unindicted co-conspirators).

⁷⁷ *Id.* Whether to put Moussaoui before a military tribunal was hotly contested, but Department of Justice officials felt that his case, like several previous terrorism cases, could be dealt with by a civilian court and that convicting Moussaoui would be relatively effortless. Moussaoui’s case is proceeding (although not without many procedural and other snarls, see, e.g., *The Moussaoui Law*, *WASH. POST*, Aug. 4, 2003 (editorial discussing problems associated with self-representation and witnesses detained abroad who have potentially exculpatory information)) in the Eastern District of Virginia. Peter Shenon, *NewsHour With Jim Lehrer: First Indictment* (Public Broadcasting Station television broadcast, Dec. 11, 2001), available at http://www.pbs.org/newshour/bb/terrorism/july-dec01/indictment_12-11.html; see Jerry Markon, *Moussaoui Hearing Closed to Public: Appeals Panel’s Ruling Renews Debate on 9/11 Case Secrecy*, *WASH. POST*, Mar. 25, 2003, at A2 (discussing Moussaoui case’s placement in the Fourth Circuit). To be sure, it is also possible that, in some respects, Moussaoui has been helped by the government having named unindicted co-conspirators. See generally Jerry Markon, *Major Issues in Moussaoui Appeal*, *WASH. POST*, Nov. 30, 2003.

⁷⁸ *United States v. Al-Arian*, No. 8:03-CR-T (M.D. Fla. filed Feb. 20, 2003). See John Mintz, *Professor Indicted as Terrorist Leader*, *WASH. POST*, Feb. 21, 2003, at A01 (stating that, in addition to the former computer engineering professor at the University of Florida, the seven indicted individuals include three Muslim activists arrested in the United States and many high-ranking officials (continued...))

through suicide attacks in Israeli and Palestinian territories, racketeering, and money laundering, among other crimes.⁷⁹ Unlike the Moussaoui indictment, twelve of the unindicted co-conspirators are referred to solely by number, such as “unindicted co-conspirator Ten.”⁸⁰ The only named unindicted co-conspirators – Khaled Muhammed Hassan, Nizar Mahmoud, and Abdel Kanel Daher – died during commission of a suicide attack in 1992.⁸¹

D. EVIDENTIARY ADVANTAGES TO THE PROSECUTION

[II.D.1] In terms of prosecutorial strategy, conspiracy trials often include testimony by alleged co-conspirators in order to assure a conviction, because co-conspirators typically are the best witnesses to the alleged conspiracy.⁸² For example, in *United States v. Jackson*,⁸³ the testimony of an unindicted co-conspirator led to the conviction of two defendants on charges of conspiracy to import marijuana, in violation of 21 U.S.C. § 952(a).⁸⁴ The government developed its case primarily around testimony provided by the unindicted co-conspirator, who was then granted immunity from

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of Islamic Jihad, who are not yet arrested, overseas). The indictment asserts that Al-Arian

was a member of the [Palestinian Islamic Jihad-Shiqaqi Faction (PIJ)], a member of the ‘Shura Council’ of the PIJ, Secretary of the ‘Shura Council,’ and the leader of the PIJ in the United States. In his capacity as a leader in the PIJ, he directed the audit of all moneys and property of the PIJ throughout the world and was the leader of the PIJ in the United States.

Al-Arian, No. 8:03-CR-T (M.D. Fla. filed Feb. 20, 2003).

⁷⁹ See *Al-Arian*, No. 8:03-CR-T (M.D. Fla. filed Feb. 20, 2003) (alleging that the defendants funded PIJ terrorist operations and praised Jihad murders). For example, after a co-conspirator linked to the PIJ killed three individuals and injured about eleven in a suicide bombing in the Gaza Strip, Al-Arian “announced his pride in the recent attack by the PIJ. He asked that God bless the efforts of the PIJ and accept their ‘martyrs,’ and urged PIJ members to be cautious and alert.” *Id.*

⁸⁰ *Id.*

⁸¹ See *id.* (indicating that these three individuals killed two people and injured about five others in a suicide attack near the Israel-Lebanon border).

⁸² Beth Allison Davis, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 803 (2001); see, e.g., *United States v. Kelly*, 204 F.3d 652, 656 (6th Cir. 2000) (convicting defendant on a counterfeiting charge in reliance on co-conspirator’s testimony); *United States v. Gaytan*, 74 F.3d 545, 558 (5th Cir. 1996) (relying on co-conspirator’s testimony in convicting defendant of drug-related charges); *United States v. Owens*, 70 F.3d 1118, 1125 (10th Cir. 1995) (holding that co-conspirator testimony may constitute independent evidence linking defendant to conspiracy).

⁸³ 579 F.2d 553 (10th Cir. 1978).

⁸⁴ *Id.* at 554.

prosecution.⁸⁵ Importantly, the unindicted co-conspirator who provided information was the only witness to directly identify the defendants.⁸⁶

[II.D.2] Generally hearsay testimony is inadmissible at trial,⁸⁷ but there is an exception for hearsay statements made by co-conspirators.⁸⁸ [Rule 801\(d\) of the Federal Rules of Evidence](#) provides that “a statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.”⁸⁹ In making the decision whether to admit a co-conspirator’s statement into evidence, the trial judge must determine, by a preponderance of the evidence, that: (1) a conspiracy existed; (2) the defendant and the declarant were involved in the conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy.⁹⁰

E. THE PROCESS OF NAMING UNINDICTED CO-CONSPIRATORS

[II.E.1] In order to name an individual as an unindicted co-conspirator, the presiding judge must agree that the individual qualifies for this designation by finding that his or her statements or acts were in furtherance of the alleged conspiracy.⁹¹ The judge may then allow the co-conspirator’s statements to be admitted into evidence if the prosecution can prove, by a preponderance of the evidence, that the person making the statement was a member of the conspiracy.⁹²

⁸⁵ *Id.*

⁸⁶ *Id.* The unindicted co-conspirator also received \$300 in compensation for his testimony. *Id.* at 555.

⁸⁷ See [FED. R. EVID. R. 801\(c\)](#) (providing that “[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”). Hearsay is generally excluded from trials because it is less reliable than live testimony. See Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 370 (1992) (providing a thorough discussion of the hearsay doctrine).

⁸⁸ See Davis, *supra* note 82, at 804 & n.102 (quoting Chief Justice Rehnquist, in *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987), as stating that “co-conspirators’ statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion”); see generally Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323 (1984) (tracing the history and mechanics of the co-conspirator hearsay exception).

⁸⁹ Davis, *supra* note 82, at 804.

⁹⁰ See *id.* (providing an exposition of this standard). Out-of-court statements by co-conspirators may be admissible under Rule 801(d) even if the defendant is not formally charged with conspiracy in the indictment. *Id.* at 805. When conspiracy is not charged, judges are more likely to admit a co-conspirator’s statement if the conspiracy is closely related to the act for which the defendant is charged. *Id.*

⁹¹ See John Hill, ‘Unindicted co-conspirator’ label carries sharp sting, TIMES (Shreveport, LA), Feb. 6, 2000, at 29A.

⁹² Suellentrop, *supra* note 76.

[II.E.2] The unindicted co-conspirator need not be named in the formal indictment to get his or her statements into evidence, but doing so may increase the likelihood that a judge will admit the testimony.⁹³ Even so, the *United States Attorneys' Manual*⁹⁴ generally recommends against naming unindicted co-conspirators in a grand jury indictment:

Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient . . . to allege that the defendant conspired with 'another person or persons known.' The identity of the person can be supplied, upon request, in a bill of particulars. . . . With respect to the trial, the person's identity or status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments.⁹⁵

[II.E.3] Similar to the guidance for federal prosecutors generally, the *Manual* counsels grand juries to avoid naming unindicted co-conspirators in formal indictments in all but the most unusual circumstances.⁹⁶ However, the *Manual* is ambiguous on what constitutes "significant justification" to permit naming.

[II.E.4] This ambiguity is reflected in yet other guidance to United States Attorneys that, in most circumstances, uncharged third parties should not be identified by name during the course of criminal proceedings:

In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-

⁹³ *Id.*

⁹⁴ See DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS MANUAL 1-1.100 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/lmdoj.htm (last visited Oct. 12, 2003) [hereinafter USAM] (explaining that the USAM is a reference guide on policies and procedures for United States Attorneys, Assistant United States Attorneys, and Department attorneys in charge of prosecuting federal law violations). The *Manual* is for internal Department of Justice advising only and does not "create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *Id.*

⁹⁵ *Id.* at 9-11.130.

⁹⁶ See *id.* at 9-27.760 ("[I]n the absence of some significant justification, it is not appropriate to identify . . . a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney or his designee should be obtained prior to the hearing absent exigent circumstances."). The *Manual* does not clarify what constitutes "exigent circumstances," "unusual instance[s]," or "significant justification." See *id.*

parties. In the context of public plea and sentencing proceedings, this means that, in the absence of some significant justification, it is not appropriate to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney or his designee should be obtained prior to the hearing absent exigent circumstances. In other less predictable contexts, federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties. With respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal. Prosecutors shall comply, however, with any court order directing the public filing of a bill of particulars.

As a series of cases make clear, there is ordinarily “no legitimate governmental interest served” by the government’s public allegation of wrongdoing by an uncharged party, and this is true “[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future.”⁹⁷ . . . Courts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings.

In all but the unusual case, any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through means other than those condemned in this line of cases. For example, in those cases where the offense to which a defendant is pleading guilty requires as an element that a third-party have a particular status . . . the third-party can usually be referred to generically (“a Member of Congress”), rather than identified specifically (“Senator Jones”), at the defendant’s plea hearing. Similarly, when the defendant engaged in joint criminal conduct with others, generic references (“another individual”) to the uncharged third-party wrongdoers can be used when describing the factual basis for the defendant’s guilty plea.⁹⁸

[II.E.5] Despite all the caution, the fact that uncharged individuals’ due process rights could be compromised if prosecutors publicly name them — which is one of the strongest criticisms of the practice of naming — is not mentioned. And even though the *Manual* strongly advises against naming individuals, United States Attorneys are granted discretion in determining what constitutes

⁹⁷ Naming an individual as an unindicted co-conspirator does not estop the government from indicting the individual at a later time. *See After 3 Months, 1st Indictment for 9-11 Terror Comes Down*, INVESTOR’S BUSINESS DAILY, Dec. 12, 2001, at A4 (explaining that naming bin Laden and other alleged terrorists as unindicted co-conspirators did not necessarily mean that they would never be formally indicted).

⁹⁸ USAM, at 9-27.760.

“significant justification” for such naming. Combining this discretion with the fact that the guidance is not binding on United States Attorneys provides insight into why the practice of naming unindicted co-conspirators continues uncorrected.⁹⁹

III. THE DEBATE ON NAMING UNINDICTED CO-CONSPIRATORS

A. REASONS FOR NAMING UNINDICTED CO-CONSPIRATORS

[III.A.1] Commentators have suggested a number of reasons why prosecutors might identify by name unindicted co-conspirators in grand jury indictments. These reasons are discussed below. None of the reasons, however, is weighty enough to justify the assault on the due process rights of the named individual, and several of the reasons plainly constitute abuses of prosecutorial power.

[III.A.2] First, the government might name an individual in order to benefit from the hearsay rule regarding statements made by co-conspirators. As previously noted, under the [Federal Rules of Evidence](#), a statement is not hearsay if it is made “by a co-conspirator of a party during the course and in furtherance of the conspiracy.”¹⁰⁰ When the government does not have adequate evidence to prove the individual’s guilt beyond a reasonable doubt, but still might be able to prove that he or she was somehow related to the conspiracy,¹⁰¹ prosecutors are likely to name the individual if his or her relation to the conspiracy involved statements or acts that could aid in proving the guilt of the indicted defendants. However, an individual need not be named in the formal indictment to allow his or her statements to be admitted,¹⁰² as the trial judge must necessarily make a separate determination of who will be considered a co-conspirator for the purpose of admitting testimony. Similarly, acts performed during and in furtherance of a conspiracy are also admissible as evidence against indicted conspirators;¹⁰³ therefore, the naming of unindicted co-conspirators in a grand jury indictment is entirely unnecessary for evidentiary purposes.

[III.A.3] Second, prosecutors might name unindicted co-conspirators when they have already been charged in another case with a crime arising from the conspiracy at issue in the indictment.¹⁰⁴ As above, however, there is no need to name the individuals in the indictment.

⁹⁹ Though it is possible that an especially compelling reason for naming an unindicted co-conspirator in an indictment could surface in some case in the future, the current reasons that prosecutors use the practice are not compelling. See [infra Part III.A](#).

¹⁰⁰ Davis, [supra](#) note 82; see also [supra Part II.D](#) (examining evidentiary issues applied when unindicted co-conspirators are involved in a conspiracy trial).

¹⁰¹ See Suellentrop, [supra](#) note 76.

¹⁰² See CHRISTOPHER MUELLER & LAIRD C. KIRKPATRICK, *Procedure for Applying Coconspirator Exception*, FEDERAL EVIDENCE § 429 (2d ed. 1994); Suellentrop, [supra](#) note 76.

¹⁰³ See Rient Statement, [supra](#) note 24.

¹⁰⁴ See MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY* 95 (1977).

[III.A.4] Third, some suggest that the government names individuals as unindicted co-conspirators, rather than indicting them directly, when it wishes to try them before a military tribunal.¹⁰⁵ A formal indictment of such co-conspirators could provide them with grounds to assert that they have a right to be tried in civilian courts.¹⁰⁶ There is some speculation that this is the reason that Zacarias Moussaoui's prosecutors have not indicted Osama bin Laden and several high ranking al Qaeda military lieutenants.¹⁰⁷ Setting aside questions about the propriety of using military tribunals in this fashion, including the names of unindicted individuals in a grand jury indictment does not help the government meet its burden in the case being tried, for all of the reasons stated. However, it may well prove extremely prejudicial to the defendant, who will have to overcome the stigma of being legally associated with a high profile enemy of the state.

[III.A.5] Fourth, because of complicated constitutional questions, a prosecutor who believes that a sitting President has committed criminal wrongdoing may name the President as an unindicted co-conspirator rather than seek formal indictment.¹⁰⁸ For instance, the grand jury did not indict President Nixon because it was not clear whether a sitting President could be prosecuted.¹⁰⁹ Instead, the grand jury named him as an unindicted co-conspirator. It is to be hoped that this remains an exceptional situation, though it is easy to imagine such a device being used as a political weapon, rather than for a legitimate prosecutorial purpose.

[III.A.6] Fifth, prosecutors may choose to name unindicted co-conspirators simply because they are dead.¹¹⁰ For example, the prosecution in the *Al-Arian* case named only deceased co-conspirators, referring to live unindicted co-conspirators only with numbers.¹¹¹ Unfortunately, the prosecution has not provided any insight into its naming rationale. Due process arguments against naming dead unindicted co-conspirators are likely to fall on deaf ears because these individuals no longer have clear constitutional rights. Nevertheless, they do possess a legacy and a memory that might deserve protection from being linked to criminal activity.

[III.A.7] Sixth, some commentators suggest that prosecutors abuse the ability to name unindicted co-conspirators when they are upset with them for not cooperating with the government.¹¹²

¹⁰⁵ Don Van Natta, Jr. & Benjamin Weiser, *A Nation Challenged: The Legal Venue*, N.Y. TIMES, Dec. 12, 2001, at B1, available at http://www.law.uchicago.edu/tribunals/nyt_121201.html.

¹⁰⁶ Suellentrop, *supra* note 76.

¹⁰⁷ *Id.*; see also Van Natta & Weiser, *supra* note 105; Shenon, *supra* note 76.

¹⁰⁸ See *supra* Part II.C (discussing the grand jury's decision to name President Nixon as an unindicted co-conspirator in the Watergate scandal).

¹⁰⁹ See FRANKEL & NAFTALIS, *supra* note 104, at 95; see also Harvey Berkman & Marcia Coyle, *\$64 Question: Can a Sitting President be Indicted? If Monica Lewinsky Talks, the Answer Becomes Critical*, NAT'L L.J., June 22, 1998, at A1.

¹¹⁰ See Suellentrop, *supra* note 76 (noting that the dead hijackers from the Sept. 11, 2001 attacks are named in Moussaoui's indictment because their deaths eliminate the need to indict them).

¹¹¹ *Al-Arian*, No. 8:03-CR-T (M.D. Fla. filed Feb. 20, 2003).

¹¹² See FRANKEL & NAFTALIS, *supra* note 104, at 93; see also Bindavid, *supra* note 67 (quoting (continued...))

Conversely, prosecutors generally do not seek to name individuals who do cooperate with the government,¹¹³ and courts allow prosecutors to promise immunity – as well as dropped or reduced charges or monetary payments – to witnesses in exchange for their cooperation.¹¹⁴ In *Giglio v. United States*,¹¹⁵ for example, the prosecution agreed not to indict a co-conspirator in a plot to pass forged money orders in exchange for his testimony.¹¹⁶ Prosecutors may also pay witnesses in order to secure incriminating testimony.¹¹⁷ For instance, in *United States v. Jackson*,¹¹⁸ the Drug Enforcement Administration paid an unindicted co-conspirator \$300 in exchange for his testimony.¹¹⁹ This ability to pay for testimony, however, would remain regardless of whether an individual was named in the indictment as a co-conspirator. So prosecutors would still have something to offer when bargaining for testimony to build their case against the indicted conspirators. Using the naming practice to punish someone who, despite the inducement, refuses to cooperate is an unethical use of prosecutorial power.

(...continued)

Lawrence Goldman, a partner in Goldman and Hafez, who asserts that prosecutors name individuals who refuse to cooperate because “ ‘they’re pissed off at people: ‘If Larry Goldman won’t cooperate, to hell with him. [I]f this destroys the guy’s professional life, so be it.’ ”).

¹¹³ See Suellentrop, *supra* note 76.

¹¹⁴ See Neil B. Eisenstadt, *Let’s Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 763 (1987). Eisenstadt argues that these practices are still only “minimally effective” in light of stronger constitutional protections, such as the Fifth Amendment right to remain silent. *Id.*

¹¹⁵ 405 U.S. 150 (1972).

¹¹⁶ *Id.* at 152 & n.2. The prosecution’s failure to disclose this agreement at trial, however, ultimately resulted in a Supreme Court reversal and remand regarding whether evidence of this agreement would have had an impact on the jury’s decision to convict the defendant. *Id.* at 154-55.

¹¹⁷ Eisenstadt, *supra* note 114, at 763.

¹¹⁸ 579 F.2d 553 (10th Cir. 1978).

¹¹⁹ *Id.* at 554-55. According to the American Bar Association Project on Standards for Criminal Justice,

[i]t is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.2(a) (1974). Although the prosecution did not present evidence of this payment at trial, on appeal the United States Court of Appeals for the Tenth Circuit found that details of this payment were not known by the prosecution and were not material enough to have affected the outcome of defendant’s trial. *Jackson*, 579 F.2d at 560.

[III.A.8] Seventh, prosecutors name persons as unindicted co-conspirators when the statute of limitations has expired on crimes they allegedly committed.¹²⁰ Even though the government can no longer prosecute these individuals for their alleged crimes committed in furtherance of a conspiracy, it can use their actions and statements to prosecute other conspirators who have committed crimes for which the statute of limitations has not yet expired. Yet, as discussed above, individuals whose crimes have expired need not be named in the indictment in order for their actions and statements to be used at trial against indicted conspirators. Thus, this particular use of the practice is not only unnecessary, but also appears to be another form of punishment. Again, this is an unethical use of prosecutorial power.

[III.A.9] Eighth, prosecutors may name individuals as unindicted co-conspirators to punish them because they have invoked their Fifth Amendment right not to testify before a federal grand jury. Prosecutors in the trial of former Louisiana Governor Edwards explicitly cited this reason for naming Gus Mijalis as an unindicted co-conspirator.¹²¹ The only other evidence linking Mijalis to Edwards' crimes was his statement to the "gatekeeper" outside Edwards' office that he had received a riverboat license,¹²² yet he was named as an unindicted co-conspirator when he refused to testify before the grand jury considering the Edwards case. Clearly, this is another improper and punitive use of the naming practice.

[III.A.10] Ninth, the government may use naming as a tactic to stigmatize disfavored persons and groups.¹²³ In *Briggs*, for example, naming certain individuals provided the government with a way to disgrace or embarrass political dissidents. The Fifth Circuit viewed these actions as "extrajudicial punishment . . . to chill [disfavored persons' and groups'] expressions and associations."¹²⁴ "Visiting

¹²⁰ Elizabeth Neuffer, *Seven Additional Detectives Linked to Extortion Scheme*, BOSTON GLOBE, Oct. 25, 1988, at 60.

¹²¹ See John Hill, *supra* note 91, at 29A (arguing that exercising one's Fifth Amendment rights should not have such a negative connotation that it leads to being named an unindicted co-conspirator).

¹²² See *id.* (explaining that Mijalis had a consulting agreement with the "Crescent City Queen," a casino project that went into bankruptcy within two months of opening; Mijalis' nephew owns a firm that has rights to twenty percent of the profits of the defunct project).

¹²³ This tactic could allow these disfavored persons to be "publicly branded as [] felon[s]." *Briggs*, 514 F.2d at 799. The Fifth Circuit in *Briggs* then provided a laundry list of cases in which naming unindicted co-conspirators probably "was part of an overall governmental tactic directed against disfavored persons and groups." See *id.* at 806 & n.18 (citing, *inter alia*, United States v. Russo, No. 9373 (C.D. Cal., indictment filed Dec. 29, 1971) (naming two unindicted co-conspirators in the "Pentagon Papers" case); United States v. Marshall, No. 51942 (W.D. Wash., indictment filed Apr. 16, 1970) (naming eight anti-war activists as unindicted co-conspirators); and United States v. Dellinger, No. 69 Cr. 180 (N.D. Ill., indictment filed Mar. 20, 1969) (naming twelve unindicted co-conspirators in a conspiracy to disrupt the 1968 Democratic National Convention in Chicago)); see also BENNETT L. GERSHMAN, *Stigmatizing Individual as "Unindicted Coconspirator"*, PROSECUTORIAL MISCONDUCT § 2:30 (2003) (explaining that a prosecutor can "exploit this practice to stigmatize unpopular groups, political enemies, or persons the prosecutor feels are guilty of wrongdoing but cannot be proved so, without giving the individual any chance to defend his good name").

¹²⁴ See *Briggs*, 514 F.2d at 806 (noting that the crimes charged in the instant case were given "wide
(continued...)

opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names,” the court stated, “would circumvent the adversary process” and was not an acceptable governmental interest.¹²⁵

B. THE PROBLEMS ASSOCIATED WITH NAMING UNINDICTED CO-CONSPIRATORS

[III.B.1] Although a criminal defendant is presumed innocent until proven guilty and has a Sixth Amendment right to a speedy trial, these procedural protections do little to shield an individual who is identified as an unindicted co-conspirator.¹²⁶ Because trials focus on the guilt or innocence of the indicted defendants, the practice of naming an individual as an unindicted co-conspirator in effect accuses the person of a crime without providing him or her with a forum for seeking vindication.¹²⁷ Thus, the practice routinely results in injury to their reputations, lost employment opportunities,¹²⁸ and a practical inability to run for public office.¹²⁹

[III.B.2] These particular concerns were addressed in *United States v. Briggs*, in which the Fifth Circuit “powerfully stated the case”¹³⁰ for prohibiting the grand jury practice of naming persons as unindicted co-conspirators. The court held that

[t]he grand jury that returns an indictment naming a person as an unindicted conspirator does not perform its shielding function but does exactly the reverse. If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause, he should not be denied a forum.¹³¹

[III.B.3] The American Bar Association (ABA) voiced its agreement with the Fifth Circuit’s holding in *Briggs* during its grand jury reform campaign in 1977.¹³² The ABA averred that naming persons in an indictment as unindicted co-conspirators “stains the reputation of the person without providing

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notoriety” and were “peculiarly offensive”).

¹²⁵ *Id.*

¹²⁶ See Tarlow, *supra* note 41, at 59.

¹²⁷ *Grand Juries: ABA Testifies Before Congress*, 71 A.B.A. J. 128 (1985); Dan Freedman, *supra* note 26.

¹²⁸ See FRANKEL & NAFTALIS, *supra* note 104, at 93.

¹²⁹ See *Federal Grand Jury Reform Report & ‘Bill of Rights,’* 24 CHAMPION 16, 23 (June 2000) (“The federal grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent the prosecutor from supplying such names in a bill of particulars.”).

¹³⁰ Hafetz & Pellettieri, *supra* note 34, at 63.

¹³¹ *Briggs*, 514 F.2d at 803.

¹³² See Hafetz & Pellettieri, *supra* note 34, at 63.

any means for the person to show his innocence.”¹³³ The ABA concluded that this damage is often incalculable because not only does it cause public embarrassment and result in lasting private humiliation, but it also frequently causes loss of employment and jeopardizes the opportunity for election to public office.¹³⁴

[III.B.4] Even setting aside these problems associated with the practice, it is clear that publicly naming individuals as unindicted co-conspirators in a grand jury indictment violates their due process rights.¹³⁵ An indictment “is a specific accusation of crime, having a threefold purpose: notice to the defendant, pleading in litigation, and the basis for the determination of acquittal or conviction.”¹³⁶ The accoutrements of due process afforded an unindicted co-conspirator are more limited than those that are available to one named as a defendant:

The unindicted conspirator is not a party to the criminal trial where names and facts come to light, and he has no right under the Federal Rules of Criminal Procedure to intervene. If he is a witness at the trial, which is at least a possibility he may be excluded from the courtroom except when testifying. And finally, of course, a decision in the trial that the defendants were not guilty of criminal conduct neither vindicates him nor bars his being subsequently indicted and tried as a defendant.¹³⁷

¹³³ *Id.*

¹³⁴ *See id.*; *see also* FRANKEL & NAFTALIS, *supra* note 104, at 93 (mentioning injury to reputation and employability as a result of being named in an indictment).

¹³⁵ *See* Tarlow, *supra* note 41, at 59-60 (summarizing and explaining the *Briggs*, *In re Smith*, and *Anderson* cases).

¹³⁶ *Briggs*, 514 F.2d at 800.

¹³⁷ *Id.* at 804. To be sure, the rights of indicted defendants are also limited, albeit less so.

One indicted by a grand jury has no right to appear before that body, under oath or otherwise. He is not entitled to present evidence or to have particular persons called as witnesses. He has only a limited right to counsel if he appears, and no right to be present in person or by counsel while evidence is being presented. He has no right to confrontation and to cross-examination, and no right to present argument. He is not entitled to know the identity of the witnesses who testified concerning him, and even after the grand jury has completed receiving evidence, its evidence is unavailable to him. He may not demand a statement of reasons supporting the body's conclusion. The evidence and the witnesses underlying the grand jury's action surface, if at all, at a criminal trial.

Id.

[III.B.5] Consequently, unindicted co-conspirators are labeled as criminals — regardless of whether the defendants themselves are found guilty — because the trial does not focus, and is not designed to focus, on evidence presented against them.¹³⁸

[III.B.6] To date, opponents of naming individuals as unindicted co-conspirators have not addressed whether their objections would apply to the same degree in cases involving unindicted foreign terrorists who are arrested in the United States. Deciding that such individuals' due process rights are not violated would require carving out an exception for naming in cases of alleged terrorists. Such an exception would be necessary because both legal and illegal aliens within the United States are afforded due process rights.¹³⁹ These rights are provided equally to aliens of all nationalities.¹⁴⁰ Due process rights do not extend to aliens outside the sovereign territories of the United States, however, which is why individuals who are arrested on terrorist charges in other countries are unlikely to be brought to trial in a United States courthouse.¹⁴¹

IV. PROPOSALS FOR GRAND JURY REFORM INCLUDED PROVISIONS TO ELIMINATE THE NAMING OF UNINDICTED CO-CONSPIRATORS

[IV.1] Grand jury reform was a hot debate in the mid-to-late 1970s, but has since largely been neglected.¹⁴² While many agreed that grand juries should serve as an investigative arm of the government capable of combating crime while simultaneously acting as a protector of citizens' rights,¹⁴³ there remained concerns that grand juries were not adequately performing their shielding,

¹³⁸ See Tarlow, *supra* note 41, at 60.

¹³⁹ See *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) (“The Fifth Amendment as well as the Fourteenth Amendment, protects every one of [the millions of aliens within the United States] from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”).

¹⁴⁰ See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that due process rights are “universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws”).

¹⁴¹ See *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding that German nationals arrested in China and held in Germany by the United States Army were not entitled to Fifth Amendment privileges). For recent cases discussing *Eisentrager* in the aftermath of September 11, 2001, see, e.g., *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1164 (9th Cir. 2002); *Rasul v. Bush*, 215 F. Supp. 2d 55, 65-68 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 124 S. Ct. 534 (2003). Military tribunals and other methods for trying individuals outside of the United States' court system are beyond the scope of this Article.

¹⁴² See Hafetz & Pellettieri, *supra* note 34, at 65. The authors argue that the grand jury is now back in the spotlight, as one “can hardly open a newspaper or turn on the radio or television without hearing criticism or concerns about unfairness to citizens exposed to the grand jury process.” *Id.* (citing Bill Moushey, *Win at All Costs: Government Misconduct in the Name of Expedient Justice*, PITTSBURGH POST-GAZETTE (1988) (10-part series)).

¹⁴³ See Hafetz & Pellettieri, *supra* note 34, at 64-65; Leipold, *supra* note 31, at 262-63 (contrasting the grand jury's function as the “investigative arm of the government” with its role of “screening” (continued...))

or safeguarding, function.¹⁴⁴ Some commentators argued that grand juries, led by prosecutors, served more to investigate than to protect.¹⁴⁵ Others argued that grand juries had become little more than an audience for summary government presentations.¹⁴⁶ Still others defined grand juries as the prosecutors' "indictment mills," "rubber stamps," "tools," or "playtoys."¹⁴⁷ Therefore, proponents of reform sought to restore the shield function to the grand jury.¹⁴⁸

[IV.2] Spearheading the reform effort in 1977, the American Bar Association's Criminal Justice Section Committee on the Grand Jury proposed six rules to reform grand juries.¹⁴⁹ One rule would have eliminated the process of naming unindicted co-conspirators in an indictment.¹⁵⁰ This particular rule would have prohibited the grand jury from naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The prosecutor could supply such names in a bill of particulars, however.¹⁵¹ The rule would also have permitted the prosecutor to disclose the names of unindicted co-conspirators in response to an appropriate request by defense counsel, affording prosecutors the opportunity to introduce unindicted co-conspirators' statements at trial. Overall, the rule would have effectively prevented harm to the reputation of an unindicted individual while still affording the prosecution a means of referencing unindicted co-conspirators throughout the trial process.¹⁵² Congress held hearings on the rules, but failed to enact new laws dealing with the naming of unindicted co-conspirators.¹⁵³

[IV.3] In general, many of the problems associated with naming individuals as unindicted co-conspirators could be solved simply by not using their real names in the indictment. If necessary, real

(...continued)

cases to protect the citizenry from "ill-conceived or malicious prosecutions").

¹⁴⁴ See generally *Roots*, *supra* note 27 (outlining the arguments of the grand jury reform movement); see also *Leipold*, *supra* note 31, at 263 (arguing that the "fundamental criticism of grand juries" is that the shielding function "works poorly" and the sword function "works only too well").

¹⁴⁵ See *Hafetz & Pellettieri*, *supra* note 34, at 13.

¹⁴⁶ *Id.*

¹⁴⁷ *Roots*, *supra* note 27, at 827. The critics' concerns have major implications because, in the time period between indictment and trial, the accused may suffer ruinous consequences to his reputation from which he may never recover — even if acquitted. See *supra* Part III.B (discussing the detrimental effects that being named can have on an individual's life).

¹⁴⁸ See *Hafetz & Pellettieri*, *supra* note 34, at 14.

¹⁴⁹ *Id.* at 14.

¹⁵⁰ See generally *id.* at 63-64 (reviewing the ABA's proposal against naming unindicted co-conspirators in an indictment).

¹⁵¹ See *id.* at 63; see *infra* note 156 and accompanying text (discussing proposal by Frankel & Naftalis).

¹⁵² This portion of the proposal responded to opponents of the first portion. *Id.* at 64.

¹⁵³ See *Hafetz & Pellettieri*, *supra* note 34, at 65.

names can be provided before trial in a bill of particulars, which “lacks the judicial appearance of the grand jury association, is usually not accompanied by the public fanfare associated with an indictment, and, unlike an indictment, may be shielded by a protective order that preserves the reputation of those not indicted.”¹⁵⁴ If the prosecution desires to focus on a specific individual in the indictment, but does not want to name him or her, the person can be referred to as “John Doe” or “Jane Doe.”¹⁵⁵ Either way, the prosecution would still be able to provide evidence at trial of the individual’s involvement in the conspiracy, thereby linking his or her acts and statements to the co-conspirators.¹⁵⁶

V. CONCLUSION

[V.1] Although grand jury reformers have not yet succeeded in influencing Congress to prohibit the practice of naming unindicted co-conspirators, the rising number of highly publicized cases involving numerous unindicted co-conspirators makes this an important time to reintroduce reform proposals. Judges have taken some steps toward eliminating the practice through rulings highlighting the fact that no legitimate reason exists for it.¹⁵⁷ The Department of Justice has also taken preliminary steps in the direction of disallowing naming by encouraging United States Attorneys to name individuals only in the most extreme circumstances.¹⁵⁸ While many prosecutors and grand juries have generally followed this trend away from naming, continued use of the practice threatens the due process rights of persons tried in the courts of the United States. Reformers should seize the opportunity that recent cases provide to convince Congress that, because any persons tried in the United States — including alleged terrorists — must be afforded due process of law, naming any individual as an unindicted co-conspirator violates this right and, therefore, should be prohibited.

¹⁵⁴ FRANKEL & NAFTALIS, *supra* note 104, at 93.

¹⁵⁵ *See Briggs*, 514 F.2d at 805.

¹⁵⁶ *Id.* On the other hand, the Department of Justice stated in the *Briggs* litigation that “the interest of justice may on occasion require that [unindicted conspirators] be named in the indictment,” *id.*, but it did not identify those interests.

¹⁵⁷ *See supra* Part II.B (examining current case law on naming unindicted co-conspirators).

¹⁵⁸ *See supra* Part II.E (analyzing the Department of Justice’s advice to United States Attorneys on naming unindicted co-conspirators).