

IMPLICATED BUT NOT CHARGED: IMPROVING DUE PROCESS FOR UNINDICTED CO-CONSPIRATORS

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I.	Introduction	551
II.	Background.....	555
	A. The Phenomenon of the Unindicted Co-Conspirator ...	555
	B. Due Process Implications.....	557
	i. Reputational Harm.....	558
III.	Pre-Trial Naming of Unindicted Co-Conspirators	
	Violates Due Process	563
	A. An Ineffective and Inconsistent Patchwork of Law	564
	i. Naming in the Indictment	564
	ii. Naming in Pre-Trial Documents or During	
	Hearings.....	567
	iii. Naming at Trial.....	571
	B. Collateral Detriments to Being Named an Unindicted	
	Co-Conspirator.....	572
	C. Remedies Do Not Always Provide Relief	580
IV.	Prophylactic Measures That Better Protect Due Process ..	582
	A. Abandon the Label “Unindicted Co-Conspirator”	583
	B. Improve Prosecutor Guidelines.....	583
	C. All Filings Should Be Done Under Seal	584
V.	Conclusion	585

I. INTRODUCTION

It might surprise many to learn that under our criminal justice system’s guarantee of “innocent until proven guilty,” one could be perceived as being a criminal without being charged with a crime. That, however, can be the consequence when prosecutors publicly name individuals as unindicted co-conspirators in criminal cases where they

are not defendants.¹ What might be even more surprising is that even if the actual defendants in the case are acquitted, publicly named unindicted co-conspirators will have no similar remedial benefits of procedural exoneration. Thus, publicly named unindicted co-conspirators who have not been arrested, indicted, put on trial, nor convicted, will forever be branded with a notorious-sounding moniker that can cause perpetual harm to their reputations and future employment opportunities.

This Comment posits that the practice of publicly naming unindicted co-conspirators before trial violates due process and that unless preventative measures are adopted to halt this practice, such due process violations will continue. This conclusion is buttressed by the text that follows, which surveys the relevant case law on the rights of unindicted co-conspirators, highlights the types of harm that a sample of unindicted co-conspirators have suffered as a result of being publicly named, and proposes procedures and rules that, if adopted, would conform with due process and help prevent these harms.

Publicly naming unindicted co-conspirators, either in an indictment, in pre-trial filings, or during plea hearings, affixes a stigma of criminal culpability upon them. This stigma may result in irreparable harm to their reputations, employment prospects, business interests, and ability to participate in public life. Furthermore, once the label attaches, it is very hard for unindicted co-conspirators to clear their names. There is no trial that could result in acquittal, nor is there a presumption of innocence that protects the rights of unindicted co-conspirators. In the Age of Google, this means that publicly named unindicted co-conspirators—regardless of the disposition of the underlying case—may suffer from a perpetual stigma. Anytime a potential employer, a client, a neighbor, or anyone else types the name of an unindicted co-conspirator into a search engine, the results may include information about the designation, and in turn impart a negative impression in the mind of the inquirer who may restrict, or even altogether forgo, any further interaction with the unindicted co-conspirator.

The U.S. Supreme Court has yet to address the due process dilemma of naming unindicted co-conspirators. Several circuit courts

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1. There is a lack of uniformity as to the spelling of the word co-conspirator. While some courts and commentators hyphenate the word, others do not. I have chosen to use the hyphenated version in the text of the Comment. However, I have retained the unhyphenated spelling (coconspirator) when it is part of a direct quote.

and district courts have addressed the issue, and many have attempted to fashion remedies that mitigate or reverse the reputational—and other—harms suffered by unindicted co-conspirators.² These remedies, however, often provide only token relief devoid of any meaningful restorative/medial effect. This issue is a concern at both the federal and state level. However, the scope of this Comment will be limited to the federal courts.³

Given the negative effects that often accompany the designation, and given that judicial remedies often prove ineffective at providing adequate relief, the practice of naming unindicted co-conspirators can and should be curtailed through the adoption of preventative measures, as recommended below. These preventative measures would strike a better balance between the government's interest in prosecuting alleged criminals, and the unindicted co-conspirator's interest in being protected against the harms that flow from unwarranted governmental stigmatization.

The practice of naming unindicted co-conspirators has gone on for decades, yet there remained a dearth of scholarly writing on the topic until 2004, when Professor Ira Robbins wrote his seminal article in which he gave thorough treatment to the subject.⁴ Professor Robbins was primarily concerned with the naming of unindicted co-conspirators in grand jury indictments, and in turn the reform of the grand jury system.⁵ He argued that “the practice of naming unindicted co-

2. See *United States v. Holy Land Foundation*, 624 F.3d 685, 688-689 (5th Cir. 2010); *United States v. Nixon*, 418 U.S. 683, 688 (1974); *United States v. Briggs*, 514 F.2d 794, 804 (5th Cir. 1975); *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. Unit A Sept. 1981); *United States v. Johnson*, 225 F. Supp. 2d 982, 982 (N.D. Iowa 2002); *United States v. Nachamie*, 91 F. Supp. 2d 565, 565 (S.D. N.Y. 2000); *United States v. Santiago*, 174 F. Supp. 2d 16, 36 (S.D. N.Y. 2001); *United States v. Anderson*, 799 F.2d 1438, 1439 (11th Cir. 1986); *United States v. Anderson*, 55 F. Supp. 2d 1163, 1165 (D. Kan. 1999).

3. Focusing on the federal courts is important, as Article III courts are the ones that set constitutional precedents. Furthermore, surveying the various practices of all 50 states as it relates to the naming of unindicted co-conspirators would require significantly more time than is available to this author.

4. Ira Robbins, *Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators*, 2004 FED. CTS. L. REV. 1 (2004).

5. Professor Robbins's article came out in 2004, and thus it does not analyze many cases from the past decade, especially terrorism cases, where the names of unindicted co-conspirators were made public in one fashion or another. See *United States v. Holy Land Foundation*, 624 F.3d 685, 687 (5th Cir. 2010); *United States v. Al-Arian*, 308 F. Supp.2d 1322, 1322 (M.D. FL 2004); *United States v. Sattar*, 314 F. Supp. 2d 279, 279 (S.D.N.Y. 2004); *United States v. Marzook*, No. 03-CR-0978, 2005 WL 3095543 (N.D. Ill. Nov. 17, 2005); Maryclaire Dale, *Philadelphia Archdiocese Named “Unindicted Co-Conspirator,”* HUFFINGTON POST (Jan. 23, 2012, 3:43 PM), http://www.huffingtonpost.com/2012/01/23/pa-archdiocese-named-unin_n_1224412.html; Patricia Hurtado & Katherine Burton, *Fifth SAC Capital Fund Manager Tied to Insider Trading*,

conspirators should be prohibited because it violates their due process rights,” and that “Congress should bar the use of unindicted co-conspirators’ real names in grand jury indictments.”⁶

In this Comment, I will expand on the work started by Professor Robbins and explore several instances in which unindicted co-conspirators are publicly named—not just when they are named in an indictment. After giving a diagnosis of the problem, I suggest prophylactic measures that can prevent due process violations and minimize harms to unindicted co-conspirators.

Part II provides background on the phenomenon of the unindicted co-conspirator designation, the utility of this tactic to prosecutors, and the due process implications that result from the naming of unindicted co-conspirators.

Part III is divided into two major sections. Part III.A explores the ineffective and inconsistent patchwork of guidelines created by the courts in an effort to balance the due process rights of unindicted co-conspirators against the legitimate interests of the government in prosecuting alleged criminals. Although some of those safeguards and remedies can work, this Comment exposes the ones that do not, as well as the gaps that remain. Part III.B highlights the significance of ineffective safeguards by exploring the collateral detriments that can accompany the public branding of “unindicted co-conspirator.” This will be accomplished by looking at the impact this designation had on the Council on American-Islamic Relations (“CAIR”), a national civil rights group that was among 246 designated unindicted co-conspirators whose names were mistakenly made public by prosecutors in pre-trial filings in a major terrorism case.⁷

Part IV proposes procedural changes that strike a better balance between the needs of prosecutors to effectively try cases and the due process rights of unindicted co-conspirators. This Comment specifically proposes: (1) that the loaded and injurious term of “unindicted co-conspirator” be universally abandoned and replaced with a more benign classification, such as “joint venturer,” “special witness,” or “material actor,” (2) that the Justice Department adopt better procedures for protecting the rights of unindicted co-conspirators by updating the U.S. Attorneys’ Manual to explicitly prohibit the public naming of unindicted

BLOOMBERG NEWS, BLOOMBERG BUSINESSWEEK, Sept. 26, 2012, <http://www.businessweek.com/news/2012-09-25/sac-capital-fund-manager-said-to-be-uncharged-conspirator>.

6. Robbins, *supra* note 4, at *I.3.

7. United States v. Holy Land Foundation, 624 F.3d 685, 687 (5th Cir. 2010).

co-conspirators in an indictment, and (3) that the relevant rules of procedure be changed to require that all pre-trial documents that name unindicted co-conspirators be filed under seal.

II. BACKGROUND

A criminal conspiracy is “an agreement of two or more persons to engage in some form of prohibited conduct.”⁸ The concept of criminal conspiracy is not new to American jurisprudence.⁹ There are dozens of criminal conspiracy statutes in the United States Code, with several of them dating back to the Civil War era.¹⁰ Yet the detection of a conspiracy and the uncovering of the identities of conspirators by prosecutors do not mean that all co-conspirators are treated equally. Some members of a conspiracy might be indicted and prosecuted, while others might escape prosecution (at least for the time being) but nonetheless be publicly named or alluded to by prosecutors as unindicted co-conspirators.

A. *The Phenomenon of the Unindicted Co-Conspirator*

Black’s Law Dictionary defines an “unindicted coconspirator” as “[a] person who has been identified by law enforcement as a member of a conspiracy, but who has not been named in the fellow conspirator’s indictment.”¹¹ This definition is a bit misleading because although unindicted co-conspirators are not “named” in an indictment in the sense that they are not formally charged with committing a crime, they certainly might be named in the context of their designation, either by the use of their actual names or by the use of generic pseudonyms like “Unindicted Co-Conspirator One” or “John Doe.” Furthermore, the designation is not limited to individuals. Both for-profit and non-profit corporations, viewed as “persons” under the law, are susceptible to the designation.¹²

There are several ways that an unindicted co-conspirator’s actual identity might be made public by prosecutors in the course of a criminal case. The naming could occur in the body of the indictment, within the

8. Charles Doyle, CONG. RESEARCH SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW, at Summary (2010).

9. *Id.* at 3.

10. *Id.* at 2-3.

11. BLACK’S LAW DICTIONARY 1936 (9th ed. 2009).

12. *See United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994) (holding that “a corporation may be liable for . . . conspiracies entered into by its agents and employees.”).

text of pre-trial documents, such as a bill of particulars, during a pre-trial hearing, or by introducing the unindicted co-conspirator's statements into evidence at trial.¹³ As noted *infra* in *United States v. Holy Land Foundation*, a fifth way may be when the names of unindicted co-conspirators are made public through prosecutorial error.¹⁴

Only identification by the government is at issue here, since it is the government that designates individuals as unindicted co-conspirators in the course of criminal cases. The government's main impetus for naming non-defendants as members of a criminal conspiracy, but without formally charging them, is grounded in their ability to admit at trial evidence that would otherwise be excluded as hearsay. Fed. R. Evid. 801(d)(2)(E) states, "(d) A statement that meets the following conditions is not hearsay . . . (2) The statement is offered against an opposing party and . . . (E) Was made by the party's co-conspirator during and in furtherance of the conspiracy."¹⁵ Under Rule 801(d)(2)(E) of the Federal Rules of Evidence, while an out of court statement by a declarant offered into evidence to "prove the truth of the matter asserted" will generally be treated as hearsay, such a statement made by a co-conspirator "during the course and in furtherance of the conspiracy" will not be considered hearsay, and will be admissible at trial, subject to limitations within the rules of evidence.¹⁶ As with any other admissible evidence, a foundation must be laid for admitting statements of co-conspirators, which means that their identities must be established at trial.¹⁷

Professor Robbins identified eight other reasons why prosecutors might make public the name of an unindicted co-conspirator: (1) because he was charged in a separate case related to the same underlying conspiracy, (2) because the government intends to try him in a military tribunal (i.e., 9/11 co-conspirators), (3) because he is a sitting U.S. president who prosecutors believe, for constitutional reasons, they cannot indict (i.e., President Nixon), (4) because he is deceased, (5) because prosecutors want to punish him for not cooperating with their

13. As discussed *infra* in Part II.B, these categories do not account for instances when the public deduces the identity of a generically identified unindicted co-conspirator from the description of that individual in court papers, nor do they include instances where shielded information is unlawfully leaked by members of a grand jury or prosecutors. See generally, James Fox, Jr., *The Road Not Taken: Criminal Contempt Sanctions and Grand Jury Press Leaks*, 25 U. MICH. J.L. REFORM 505, 505 (1992).

14. *United States v. Holy Land Foundation*, 624 F.3d 685, 693 (5th Cir. 2010).

15. FED. R. EVID. 801(d)(2)(E).

16. FED. R. EVID. 801(a)-(c), 801(d)(2)(E).

17. *Bourjally v. United States*, 483 U.S. 171, 175 (1987).

investigation, (6) because the statute of limitations has run on the crime(s) he allegedly committed, (7) because prosecutors want to punish him for invoking the Fifth Amendment during grand jury testimony, or (8) because he is a member of a disfavored group.¹⁸ “None of [these] reasons,” wrote Professor Robbins, “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.”¹⁹ This argument will be addressed in more detail *infra* in Part III.

While some of the reasons given by Professor Robbins—namely numbers 5, 7, and 8—seem outrageous if they provide the motivation for designating non-parties as unindicted co-conspirators, they sadly are within the realm of possibilities. To ignore these possibilities would be to ignore the very existence of prosecutorial misconduct no matter how seldom it occurs. However, it should also be acknowledged that individual misconduct is an aberration that should not be unfairly imputed to the mainstream of federal prosecutors, who are not only officers of the court, but also officers of the law.

B. Due Process Implications

The Fifth Amendment to the United States Constitution commands 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 . . . nor be deprived of life, liberty, or property, without due process of law.”²⁰ The due process concerns raised by naming unindicted co-conspirators are twofold. First, there is a concern about the government formally implicating someone in a criminal conspiracy without providing him/her a forum to respond. Accusing someone of “criminal conduct without affording him a forum for vindication” works to obliterate the “presumption of innocence,” which is a bedrock of procedural due process.²¹

Second, the collateral detriments caused to reputational, employment, and other interests raise concerns about deprivations of liberty and property interests without due process. As stated succinctly by the American Civil Liberties Union, “Individuals and organizations have a Fifth Amendment right to be free of government-imposed stigma

18. Robbins, *supra* note 4, at *III.A.1-10. While Professor Robbins analyzes these reasons in the context of naming an unindicted co-conspirator in the indictment itself, it seems reasonable to conclude that they equally apply to making names public at any stage of a criminal case. *Id.*

19. *Id.* at *III.A.1.

20. U.S. CONST. amend. V.

21. *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. Unit A Sept. 1981).

against their good names and reputations.”²² It would be unrealistic to deny that an accusation, even if unfounded, that one has committed a serious felony may impinge upon employment opportunities.”²³

i. Reputational Harm

In *Wisconsin v. Constantineau*,²⁴ the Supreme Court held that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”²⁵ *Constantineau* arose out of a state statute that allowed police, without prior notice or hearing, to post on the walls of liquor stores the names of excessive drinkers to whom the sale or delivery of alcohol was forbidden.²⁶ In holding that the statute violated due process, the Court focused on the impact that inclusion on a posting had: “it is a stigma, an official branding of a person . . . [and] [o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.”²⁷

Within five years the Supreme Court took a dramatic turn away from *Constantineau*, holding in *Paul v. Davis*²⁸ that injury to reputation caused by government actors is not enough to invoke the Due Process Clause.²⁹ The plaintiff in that case claimed that his inclusion on a list of “Active Shoplifters” distributed by police to local merchants was defamatory and that it violated his “liberty” interest in his reputation.³⁰ Writing for the majority, then-Justice Rehnquist stated:

[T]he interest in reputation . . . is neither “liberty” nor “property” guaranteed against state deprivation without due process of law . . . [and] reputation alone, apart from some more tangible interests such as employment . . . [is not] sufficient to invoke the procedural protections of the Due Process Clause.³¹

22. *Unindicted Co-Conspirators and the Presumption of Innocence*, AM. CIVIL LIBERTIES UNION, June 18, 2008, www.aclu.org/national-security/unindicted-co-conspirators-and-presumption-innocence.

23. *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975).

24. *Wisconsin v. Constantineau*, 400 U.S. 433, 433 (1971).

25. *Id.* at 437.

26. *Id.* at 434-35.

27. *Id.* at 437.

28. *Paul v. Davis*, 424 U.S. 693, 693 (1976).

29. *Id.* at 712.

30. *Id.* at 697-98.

31. *Id.* at 701, 711.

The Court defined “liberty” and “property” interests comprehended under the Due Process Clause as those that “have been initially recognized and protected by state law.”³² Because the plaintiff’s interest in reputation was not a right guaranteed by state law, he was not entitled to the protections of due process.³³

Justice Rehnquist distinguished *Constantineau* on the grounds that the plaintiff in that case was not only stigmatized by governmental action, but she was also deprived of “a right previously held under state law the (sic) right to purchase or obtain liquor in common with the rest of the citizenry.”³⁴ What emerged from this opinion was a “stigma-plus” test that essentially requires procedural due process when government stigmatization is accompanied by injury to a more tangible harm that would fall under the “liberty” or “property” categories of the Fifth Amendment.³⁵ Stigmatization alone could not be enough.

In his dissent, Justice Brennan wrote that the majority’s holding “has a hollow ring in light of the Court’s acceptance of the truth of the allegation that the ‘active shoplifter’ label would ‘seriously impair (respondent’s) future employment opportunities.’”³⁶ In conducting a thorough review of the Court’s previous holdings, Justice Brennan concluded:

Our precedents clearly mandate that a person’s interest in his good name and reputation is cognizable as a “liberty” interest within the meaning of the Due Process Clause, and the Court has simply failed to distinguish those precedents in any rational manner in holding that no invasion of a “liberty” interest was effected in the official stigmatizing of respondent as a criminal without any “process” whatsoever.³⁷

Justice Brennan took exception with the majority’s reading of *Constantineau*, and its focus on the plaintiff’s loss of her previously held right to purchase liquor as a basis for adopting the stigma-plus test. He reminded his colleagues of the words of the majority in that case:

The Only (sic) issue present here is whether the label or characterization given a person by “posting,” though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural

32. *Id.* at 710.

33. *Id.* at 712.

34. *Paul v. Davis*, 424 U.S. 693, 708 (1976).

35. Eric Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 81 (2009).

36. *Davis*, 424 U.S. at 734 (Brennan, J., dissenting).

37. *Id.* at 734.

due process requires notice and an opportunity to be heard.³⁸

The criticism generated by Justice Rehnquist's opinion was "immediate, extensive, and scathing."³⁹ Regardless, though, of the stigma v. stigma-plus debate that emerged after *Paul v. Davis*, the weight of authority, as detailed in the cases discussed below, establishes that the public naming of unindicted co-conspirators in any pre-trial context is a violation of due process. This view meets Justice Brennan's test since implicating someone as being involved in a criminal conspiracy is certainly governmental stigmatization that can cause reputational harm.

More importantly, the view that naming unindicted co-conspirators violates due process also meets Justice Rehnquist's stigma-plus test because the stigmatization is done by federal prosecutors in the context of a criminal trial where a fundamental liberty interest is impinged—the interest in not being accused of wrongdoing in the course of a criminal proceeding without being formally charged and afforded the guarantees of due process.

The contemporary debate over the propriety and implications of naming unindicted co-conspirators in grand jury indictments dates back to the Watergate scandal and the naming of President Richard Nixon as an unindicted co-conspirator in the grand jury indictment returned against seven defendants.⁴⁰ The seven defendants in *United States v. Nixon* were charged with "conspiracy to defraud the United States and to obstruct justice."⁴¹ The special prosecutor investigating Watergate issued a subpoena *duces tecum* demanding that Nixon hand over certain documents and recordings.⁴² Nixon moved to quash the subpoena but his motion was denied.⁴³

The Supreme Court upheld the district court's denial of Nixon's motion to quash the subpoena. At the same time, the Court refused to address the designation of the President as an unindicted co-conspirator.⁴⁴ As Professor Robbins explains:

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

38. *Id.* at 730 (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)).

39. Mitnick, *supra* note 35, at 81.

40. *United States v. Nixon*, 418 U.S. 683, 687 (1974).

41. *Id.*

42. *Id.* at 683.

43. *Id.*

44. *Id.* at 687 n.2, 702.

claim without ruling on the practice of naming unindicted co-conspirators.⁴⁵

Within a year of the Supreme Court's decision in *Nixon*, the Fifth Circuit issued its landmark opinion in *United States v. Briggs*, a case of first impression in the circuit, holding that the naming of unindicted co-conspirators in a grand jury indictment was "a denial of due process."⁴⁶

The due process concerns raised by *Briggs* and its progeny have had a significant impact on the procedures followed by prosecutors. Subsequent to these cases, the United States Attorneys' Manual ("USAM") was updated with a section titled, "Limitation on Naming Persons as Unindicted Co-Conspirators," which states:

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, for example, 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 and 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.*⁴⁷

These guidelines tacitly recognize the harm that could result from naming an unindicted co-conspirator in an indictment, but they are merely advisory and subject to the discretion of individual federal prosecutors who are free to decide on their own what constitutes "significant justification" for making an exception to the preferred practice.⁴⁸ The lack of clearer guidance and uniform standards may allow for inconsistencies to develop across jurisdictions.⁴⁹

45. Robbins, *supra* note 4, at *II.C.1 (citing *United States v. Nixon*, 418 U.S. 683, 687 n.2 (1974)).

46. *United States v. Briggs*, 514 F.2d 794, 796 (5th Cir. 1975).

47. U.S. DEP'T OF JUSTICE, THE UNITED STATES ATTORNEYS' MANUAL 9-11.130 (1997) (emphasis added).

48. Hypothetically speaking, some U.S. Attorneys might use a categorical approach in determining what qualifies as "significant justification." Allegations of terrorism, public corruption, or organized criminal activity might justify the naming of unindicted co-conspirators. Others might use a case-by-case assessment, looking for particular unusual circumstances to base their decisions upon.

49. Whether actual inconsistencies across jurisdictions in regards to the threshold at which

The preference for not naming unindicted co-conspirators in indictments has given rise to practices that are putatively meant to ensure anonymity, such as the use of generic labels like “John Doe” or “Unindicted Co-Conspirator One.”⁵⁰ Such measures, however, do not always prove successful in protecting the identity—and more importantly the reputation—of the unindicted co-conspirator. While the USAM explains that “it is sufficient, for example, to allege that the defendant conspired with ‘another person or persons known,’”⁵¹ the level of specificity used in describing unnamed unindicted co-conspirators is left to the discretion of prosecutors.

For example, in 2003 the identity of a person labeled as “Unindicted Co-conspirator One” in a major terrorism case was revealed by a journalist who compared descriptions from the indictment about statements that “Unindicted Co-conspirator One” made with a video released by the government showing the exact same statements being made by Fawaz Damra, a high profile Imam from Cleveland, Ohio.⁵²

In 2012, Bloomberg News ran a story identifying Michael Steinberg, a hedge fund manager with SAC Capital, as being one of several unnamed unindicted co-conspirators referenced in an indictment that charged several defendants with securities fraud.⁵³ In pre-trial papers filed with the court, the government wrote that one of the unnamed unindicted co-conspirators in the case was “the portfolio manager to whom [defendant] Jon Horvath reported at his hedge fund.”⁵⁴ That Horvath reported to Steinberg was a fact easily obtainable by journalists armed with such detailed information.

Steinberg was subsequently indicted on conspiracy and securities fraud charges, but whether or not the government intentionally described Steinberg to make his name easily discoverable by the public is

U.S. Attorneys will permit the naming of unindicted co-conspirators in an indictment is a subject that requires surveying all 94 U.S. Attorneys Offices, an effort that is beyond the scope of this Comment, but one that nonetheless can be the topic of future scholarship. United States Attorneys Listing, OFFICES OF THE UNITED STATES ATTORNEYS, DEPARTMENT OF JUSTICE (Feb. 15, 2013), available at <http://www.justice.gov/usao/about/usattorneys.html>.

50. See *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1349 (M.D. FL 2004).

51. U.S. DEP'T OF JUSTICE, *supra* note 47.

52. See Sabrina Eaton, *Imam Here Is Linked to Terror Suspect*, CLEVELAND PLAIN DEALER, Feb. 21, 2003, at A1.

53. Hurtado & Burton, *supra* note 5.

54. Ginger Adams Otis, *SAC Capital Portfolio Manager Steinberg Indicted on Insider-Trading Charges*, NEW YORK DAILY NEWS (Mar. 29, 2013, 3:06 PM), <http://www.nydailynews.com/news/crime/sac-capital-portfolio-manager-steinberg-arrested-ny-article-1.1302415#commentpostform>.

unknown.⁵⁵ On the one hand, prosecutors could have merely been careless about protecting Steinberg's identity. On the other hand, they could have intended for his name to be discoverable, perhaps, to pressure him into cooperating, or to punish him for not cooperating. Either way, the government's actions fueled widespread speculation about Steinberg's culpability in a major insider-trading scandal, and likely contributed to Steinberg's suspension at SAC Capital prior to his indictment.⁵⁶

Steinberg's subsequent indictment should not be used to retroactively excuse the violation of his due process rights by constructively naming him in court papers as a party to a criminal conspiracy. As the court in *In re Smith* noted in discussing the naming of a third party as an unindicted co-conspirator in factual resumes presented at two separate plea hearings:

Regardless of what criminal charges may have been contemplated . . . against the Petitioner for the future, we 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 . . . implicat[ing] the Petitioner in criminal conduct without affording him a forum for vindication.⁵⁷

By failing to impose limits on the level of specificity used in describing unindicted co-conspirators in indictments, the USAM opens the door to undue specificity whose effect is equivalent to naming such individuals. This gap in the guidelines will continue to open the door to breaches of the manual's apparent aspirational standard of not publicly identifying unindicted co-conspirators.

III. PRE-TRIAL NAMING OF UNINDICTED CO-CONSPIRATORS VIOLATES DUE PROCESS

In the absence of any Supreme Court decision on the due process

55. Peter Lattman, *SAC Capital Manager Awaits Word on Charges*, N.Y. TIMES, Feb. 13, 2013, 8:42 PM, <http://dealbook.nytimes.com/2013/02/13/sac-capital-manager-awaits-word-on-charges/>. Steinberg was ultimately tried by a jury in late 2013 and convicted of conspiracy and securities fraud. Christopher Mathews, *SAC's Steinberg Convicted in Insider-Trading Case*, WALL ST. J., DEC. 18, 2013, 9:16 PM, <http://online.wsj.com/news/articles/SB10001424052702304773104579266554036539982>.

56. *Id.* (emphasis added).

57. *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. Unit A Sept.1981).

rights of unindicted co-conspirators,⁵⁸ lower courts have pieced together a patchwork of guiding principles, which can be summarized as follows: (1) the government should not publicly name unindicted co-conspirators in an indictment or information,⁵⁹ (2) the government should not publicly name unindicted co-conspirators in factual resumes read aloud during plea hearings,⁶⁰ (3) the government may name unindicted co-conspirators in pre-trial filings, but those documents should be filed under seal,⁶¹ and (4) the government is free to publicly name unindicted co-conspirators at trial for the purpose of submitting evidence under the hearsay exception for statements of co-conspirators.⁶²

Despite their strengthening over the years, these guidelines fail to provide adequate protection of due process rights, and where adopted, they are often applied inconsistently. Stronger rules and procedures are needed to guarantee that the due process rights of unindicted co-conspirators are better protected. To fully appreciate precisely how due process rights are implicated, it is important to address the ineffective and inconsistent patchwork of law that exists, the collateral detriments suffered by many unindicted co-conspirators, and the difficulty faced by unindicted co-conspirators in obtaining meaningful remedial relief.

A. *An Ineffective and Inconsistent Patchwork of Law*

i. Naming in the Indictment

In *United States v. Briggs*, the Fifth Circuit declared it a violation of due process to name unindicted co-conspirators in indictments. This was a landmark decision that sparked a broader discussion about the constitutional rights of third parties who are named participants in a criminal conspiracy, but for whom there is no forum for vindication.⁶³

The particular issue in *Briggs* was collateral to a highly publicized case where several individuals were indicted for, among other things, violating a slew of federal criminal conspiracy statutes in connection with political demonstrations and disruptions that took place at the 1972

58. The Supreme Court has considered whether a sitting President can be named as an unindicted coconspirator in an indictment, but it has not heard cases specifically addressing the due process rights of ordinary citizens who are named as unindicted co-conspirators. See *United States v. Nixon*, 418 U.S. 683, 683 (1974).

59. See *United States v. Briggs*, 514 F.2d 794, 796 (5th Cir. 1975).

60. See *In re Smith*, 656 F.2d at 1101.

61. See *United States v. Holy Land Foundation*, 624 F.3d 685, 693 (5th Cir. 2010); *United States v. Anderson*, 55 F. Supp. 2d 1163, 1166 (D. Kan. 1999).

62. *Briggs*, 514 F.2d at 805; *Anderson*, 55 F. Supp. 2d at 1169; FED. R. EVID. 801(d)(2)(E).

63. *Briggs*, 514 F.2d at 806; Robbins, *supra* note 4, at *II.B.5.

Republican Party National Convention in Miami.⁶⁴ In addition to naming more than a half-dozen criminal defendants as alleged co-conspirators, Count One of the indictment identified, by name, three unindicted co-conspirators.⁶⁵ Two of the three unindicted co-conspirators filed a pre-trial petition with the court “seeking entry of an order expunging the references to them in . . . the indictment.”⁶⁶ The judge denied the petition, accepting the government’s argument that “since petitioners were not named as defendants they lacked standing to object to the contents of the indictment.”⁶⁷ While the petitioners’ case was pending on appeal, the defendants in the underlying conspiracy case were tried, and were all acquitted.⁶⁸

The Court of Appeals reversed the denial of the motion and directed the lower court to issue an order expunging petitioners’ names from the indictment.⁶⁹ In balancing the injuries suffered by the petitioners against the importance to the government of having the ability to name unindicted co-conspirators within an indictment, the court struggled to “discern what legitimate interests of the government are served by stigmatizing private citizens as criminals while not naming them as defendants or affording in this case, indeed, affirmatively opposing access to any forum for vindication.”⁷⁰

In deciding that the petitioners did in fact have standing to challenge their being named in the indictment, the Court of Appeals stated:

The government’s position . . . is founded upon its argument that since the appellants were not indicted, and particularly since those named as defendants were acquitted, the formal branding of appellants as alleged felons and as participants in a distasteful conspiracy is a mere chimera, neither substantial nor injurious. This is at least disingenuous.⁷¹

The court emphasized the constitutional implications of the petitioners’ “complaint of injury to their . . . reputations and impairment of their

64. Briggs, 514 F.2d at 794, 796.

65. *Id.* at 797; *see generally*, Greg Bruno, *4 of the Gainesville Eight Reunite After 30 Years*, GAINESVILLE SUN, Aug. 31, 2003, <http://www.gainesville.com/article/20030831/LOCAL/208310337>.

66. Briggs, 514 F.2d at 797.

67. *Id.* at 797 n.2.

68. *Id.* at 797.

69. *Id.* at 808.

70. *Id.* at 804.

71. *Id.* at 797 (emphasis added). The government argued that there was no justiciable case or controversy, that appellants did not have standing, and that the acquittal of all defendants who were indicted under Count One rendered the appellants’ petition moot. *Id.*

ability to obtain employment” as a result of being implicated in a criminal conspiracy without being offered a forum to be heard. It reasoned that personal reputation and employment are, “substantial and legally cognizable interests entitled to constitutional protection against official governmental action that debases them.”⁷²

The court critically observed that “[t]he government defies common sense with its theory that one’s interests are not adversely affected to any extent by being publicly branded as a felon so long as he is not named as a defendant for trial,” and that the theory that the “media” was to blame, rather than the government, for any injuries suffered by the petitioners is “frivolous.”⁷³ Furthermore, the court dismissed as “mere speculation” the government’s theory that the exoneration and vindication of the defendants in the criminal trial by way of their acquittal “rubs off” on the petitioners and “ameliorates their injury,” especially given the fact that an unindicted co-conspirator could be indicted at any time, regardless of the acquittal of previously indicted co-conspirators.⁷⁴

The government argued that “the interest of justice may on occasion require that [unindicted co-conspirators] be named in the indictment,” but without giving concrete examples of what exactly those interests were.⁷⁵ On its own, the court hypothesized about what those interests might be, and upon weighing each putative government interest against the injury caused to named unindicted co-conspirators, the court concluded, “The balance tips wholly in favor of the adversely affected appellants. The scope of due process afforded them was not sufficient.”⁷⁶

In considering the petitioners’ sought-after remedy (e.g., deletion of their names from the record), the court held that it was well within the power of federal courts to “expunge unauthorized grand jury actions,” and that such orders were not without precedent.⁷⁷ Treating the case as a

72. Briggs, 514 F.2d at 797. “The public ignominy of being accused of a crime is one of the factors underlying the Sixth Amendment right to speedy trial,” and “[o]ne’s right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.” *Id.* at 799.

73. *Id.*

74. *Id.* The court used a play on words in describing this theory as “innocence by association.” *Id.*

75. *Id.* at 804.

76. *Id.* at 806. In considering what arguments the government might have made to support its position, the court reasoned that there was no “necessity” in naming unindicted co-conspirators to prove the existence of a criminal conspiracy since the conspiracy could be proved with evidence.” *Id.*

77. *Id.* at 806-07.

petition for a Writ of Mandamus, the court not only vacated the district court's denial of equitable relief, it instructed the lower court to "order that the Clerk of the United States District Court for the Northern District of Florida expunge from Count One of the indictment . . . all references to appellants."⁷⁸

ii. Naming in Pre-Trial Documents or During Hearings

While today, the naming of unindicted co-conspirators in an indictment is both universally disfavored and rare in application, there exists uncertainty, as well as inconsistency, regarding the naming of unindicted co-conspirators in pre-trial documents or hearings—most notably, but not exclusively, the bill of particulars. When *Briggs* was decided in 1975, the Fifth Circuit was of the view that naming unindicted co-conspirators in a bill of particulars did not implicate due process rights the way that naming someone as such in an indictment did because the bill of particulars is a "statement of the prosecutor and does not carry the imprimatur of credibility that official grand jury action does."⁷⁹ The court seemed satisfied that the risk of a serious "public impact" upon an unindicted co-conspirator's reputation could be "tempered by protective orders entered by the court."

Since *Briggs*, the circuits have split on the question of whether to grant motions for bills of particulars that name unindicted co-conspirators.⁸⁰ The Second Circuit, for example, has affirmed both decisions granting such motions and decisions denying such motions.⁸¹ In *United States v. Nachamie*, for example, a district court judge held that defendants were entitled to discover the names of unindicted co-conspirators after considering several factors used by other courts in deciding whether to grant a motion for a bill of particulars that seeks to uncover the identities of unnamed unindicted co-conspirators.⁸² These factors included: (1) the total number of alleged co-conspirators, known and unknown, (2) the duration and breadth of the alleged conspiracy, (3) whether the government has otherwise provided adequate notice of particulars, (4) the volume of pre-trial disclosures, (5) the potential danger to co-conspirators from revelation of their identities, and (6) the potential harm to the government's investigation that might result if

78. *Briggs*, 514 F.2d at 808.

79. *Id.* at 806.

80. *See United States v. Johnson*, 225 F. Supp. 2d 982, 997 (N.D. Iowa 2002) (discussing the split in authority).

81. *United States v. Nachamie*, 91 F. Supp. 2d 565, 572 (S.D. N.Y. 2000).

82. *Id.*

certain identities are revealed.⁸³

In more complex cases, where “a seemingly unprecedented and unique burden [is placed] on the Defendants and their counsel in trying to answer the charges that have been made against them,”⁸⁴ other courts have considered factors such as the “geographical scope”⁸⁵ of the conspiracy, “the large number of schemes alleged,”⁸⁶ “the wide-ranging nature of the predicate acts of the co-conspirators,”⁸⁷ and allegations within the indictment of the use of “numerous aliases, code names, and coded communications” by the co-conspirators.⁸⁸

The Fifth Circuit applied the *Briggs* balancing test in *In re Smith*, a case in which a third party to two related bribery cases, who was neither indicted nor formally designated as an unindicted co-conspirator, was nonetheless named by the government during a plea hearing as having participated in a criminal conspiracy.⁸⁹ Smith was the head of the Army and Air Force Exchange Service (“AAFES”), headquartered in Dallas.⁹⁰ Federal prosecutors had launched an investigation into an alleged bribery scheme involving “AAFES employees, government contractors, and military sales representatives.”⁹¹ The investigation led to dozens of arrests and some 26 convictions.⁹² Among those convicted were two corporations, each of which pleaded guilty to charges of bribing an AAFES purchasing agent.⁹³

At each of the separate plea hearings for the corporate defendants, the federal prosecutor read into the record and filed with the court a factual resume that identified Smith, by name, as someone other than the AAFES purchasing agent named in the felony information who received bribe money from the defendants.⁹⁴

The allegation that Smith, the head of a military agency, was accepting bribes resulted in months of adverse media coverage, and led

83. *Id.*

84. *United States v. Bin Laden*, 92 F. Supp. 2d 225, 235 (S.D. N.Y. 2000).

85. *Id.* at 234. In this pre-911 indictment, the government accused Usama Bin Laden and others of being involved in a conspiracy, the geographical scope of which spanned 4 continents, 12 countries, and 4 U.S. states. *Id.*

86. *United States v. Santiago*, 174 F. Supp. 2d 16, 36 (S.D. N.Y. 2001).

87. *Id.*

88. *United States v. Fariz*, No. 8:03-CR-77-T-30TBM, 2005 WL 3499043 (M.D. Fla. Sept. 5, 2005).

89. *In re Smith*, 656 F.2d 1101, 1105 (5th Cir. Unit A Sept. 1981).

90. *Id.* at 1103.

91. *Id.*

92. *Id.* at 1102.

93. *Id.*

94. *Id.*

Smith to file motions with each of the judges in the two separate cases seeking that either his name be stricken from the record of the plea hearings and the factual resumes, or that those portions of the record be placed under seal.⁹⁵ Smith argued that naming him was irrelevant to the plea hearing, that it harmed his reputation, and that the government was singling him out only for “publicity purposes.”⁹⁶ The government opposed the motions, arguing essentially that irreparable damage was already done to Smith’s reputation, and that granting relief would be a “fruitless gesture.”⁹⁷

Both judges denied Smith’s motions without issuing an opinion.⁹⁸ Smith retired from AAFES three days after being denied relief.⁹⁹ In addition to his retirement pay, he was supposed to receive an annuity on account of his participation in AAFES’s Executive Management Program (“EMP”), but he was informed that he was suspended from EMP because of the allegations made against him in the government’s factual resumes, and that the annuity would be “held in abeyance pending further AAFES proceedings.”¹⁰⁰

Smith then petitioned for a Writ of Mandamus from the Court of Appeals, asking that it order the two district court judges to either strike the record of his name or seal those portions of the record where his name appeared.¹⁰¹ The Court of Appeals granted the petition and ordered that the District Clerk for the Northern District of Texas “permanently obliterate and strike from the records of the pleas of guilty . . . any and all identifying reference to or name of Mr. Smith,” and that “all pleadings, records, documents, orders and other papers concerning Petitioner’s Motion to Strike and Seal . . . [and] Petition for Writ of Mandamus be sealed.”¹⁰²

The Fifth Circuit Court of Appeals relied heavily on *Briggs* in finding that “the inclusion of Mr. Smith’s name in the factual resumes were a violation of his liberty and property rights . . . [and] that Petitioner’s motions to strike and seal should have been granted in the proceedings below.”¹⁰³ The court stated that there was “no reason to distinguish between an official defamation originating from a federal

95. *In re Smith*, 656 F.2d at 1104.

96. *Id.*

97. *Id.* at 1105.

98. *Id.*

99. *Id.*

100. *Id.*

101. *In re Smith*, 656 F.2d at 1105.

102. *Id.* at 1107.

103. *Id.* at 1106-07.

grand jury or an Assistant United States Attorney.”¹⁰⁴

To the government’s insistence that “*Briggs* only forbids the naming of unindicted coconspirators by a federal grand jury,” the court responded:

The point made in the *Briggs* decision is 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 The *Briggs* decision would be rendered meaningless if it could be so easily circumvented by the actions of an Assistant United States Attorney.¹⁰⁵

In attempting to balance the interests of the government against the harm done to Smith, the court could find no legitimate basis for naming Smith in the factual resumes: Smith appeared before the grand jury, he was never charged with a crime, he was not implicated during either court’s determination of the factual basis for the defendants’ guilty pleas, and neither of the corporate defendants’ representatives testimony included any mention of bribing Smith.¹⁰⁶

Not only did the Fifth Circuit follow *Briggs*, it expanded it by holding that, just as in the case of an indictment, the naming of an unindicted co-conspirator in a factual resume filed by prosecutors and read aloud during a plea hearing tramples upon the Fifth Amendment’s guarantee of due process.¹⁰⁷

In *United States v. Anderson*, three healthcare lawyers referenced in an indictment as “unnamed, unindicted coconspirators,” had their names made public in pre-trial papers filed by prosecutors.¹⁰⁸ The lawyers were well known, and their being named as unindicted co-conspirators in a high-profile Medicare fraud case was “notoriously reported in the legal and healthcare community.”¹⁰⁹

Petitioners, claiming injury to their reputations as a result of the public disclosure of their names, sought an order to expunge the record of any references to them by name as unindicted co-conspirators.¹¹⁰ The

104. *Id.* at 1106.

105. *Id.*

106. *Id.*

107. *In re Smith*, 656 F.2d at 1107.

108. *United States v. Anderson*, 55 F. Supp. 2d 1163, 1165 (D. Kan. 1999).

109. *Id.* at 1165-66.

110. *Id.* at 1165. Petitioner Kaiser sought other relief, including a finding that her due process rights were violated, and a finding that the evidence in the case proved that she acted in good faith and was not a member of an illegal conspiracy. *Id.* Petitioners Holden and Queen, apart from Kaiser, asked for a finding that not only did they not participate in an unlawful conspiracy, they in fact acted appropriately and legally. *Id.*

district court adopted the balancing test from *Briggs* and concluded that “movants suffered a violation of due process when the government publicly named them in its moving papers,” and that “[t]he very real stigmatization suffered by the movants from this government action far outweighs the nonexistent government interest in publicly naming them as coconspirators.”¹¹¹ Granting only part of the relief sought by petitioners, the judge ordered that all references to petitioners’ names be expunged from pre-trial records.

The judge denied the petitioners’ request for declaratory relief, but did, however, make explicit reference to statements he made from the bench during trial: “Certainly . . . there was no evidence that led this court to believe they were involved in criminal activity These transcript excerpts reflect the court’s views concerning the evidence at trial better than any post hoc findings ever could.”¹¹² These statements effectively exonerated the petitioners from any criminal conduct, albeit in a roundabout fashion that was less authoritative and formal than the petitioners might have hoped for.

iii. Naming at Trial

While the court in *Briggs* saw no valid reason for naming unindicted co-conspirators in the context of a grand jury indictment, it did state that “wholly different, and valid, governmental interests [justified] naming the private citizen . . . in trial testimony.”¹¹³ The *Briggs* court reasoned that the reputational harm done to a named unindicted co-conspirator in these situations was tolerable, as the testimony at trial of an unindicted co-conspirator “makes no formal adjudication regarding criminality.”¹¹⁴

In accordance with the opinion in *Briggs*, the court in *Anderson* found no impropriety in naming unindicted co-conspirators at trial for purposes of presenting evidence under the hearsay exception for co-conspirators, stating, “The government clearly had a substantial interest in identifying these coconspirators for 801(d)(2)(E) purposes [This] interest outweighed the movants’ private injuries because their private injuries, while important, must yield to the proper administration of criminal justice under these circumstances.”¹¹⁵

111. *Id.* at 1168 (emphasis added).

112. *Id.* at 1170-71.

113. *United States v. Briggs*, 514 F.2d 794, 805 (5th Cir. 1975).

114. *Id.*

115. *United States v. Anderson*, 55 F. Supp. 2d 1163, 1169 (D. Kan. 1999).

The court drew what it called an “important distinction” between being “unqualifiedly” labeled as an unindicted co-conspirator in moving papers verses being labeled as such for evidentiary purposes, reasoning that “[an] 801(d)(2)(E) coconspirator is not necessarily a criminal. All that is required is that he or she be a ‘joint venturer’ in a common plan.”¹¹⁶ It was the court’s view that identifying co-conspirators at trial for 801(d)(2)(E) purposes under the assertion that the co-conspirators are really joint venturers “does not allow for the reasonable inference that they are criminals,” whereas “the government’s unqualified identification of the movants as unindicted coconspirators in its pretrial moving papers allows for the reasonable inference that they have been labeled criminals.”¹¹⁷

While courts have made distinctions about when the naming of an unindicted co-conspirator is and is not a violation of due process, there is no denying that the violation of an unindicted co-conspirator’s due process rights is in-and-of-itself a harm. This harm can, and often does, lead to other harms that have serious and tangible consequences for unindicted co-conspirators.

B. Collateral Detriments to Being Named an Unindicted Co-Conspirator

The *Briggs* balancing test of weighing the government’s interests against the interests of unindicted co-conspirators necessarily takes into account both the harms that have occurred as well as the harms that still may occur after an unindicted co-conspirator is publicly named. These harms can be both unpredictable and substantial.

Being publicly named as an unindicted co-conspirator in a criminal case can have far-reaching consequences, especially if the case involves terrorism. *United States v. Holy Land Foundation*,¹¹⁸ for example, is a high profile and multifaceted case involving the naming of unindicted co-conspirators. The Holy Land Foundation for Relief and Development (“HLF”) was a Texas-based charity that distributed millions of dollars a year in humanitarian relief across the globe.¹¹⁹ On Dec. 3, 2001, the Treasury Department’s Office of Foreign Assets Control listed HLF as a Specially Designated Terrorist organization amid accusations that the charity provided unlawful financial support to the Palestinian group

116. *Id.* at 1169 (citing *United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988)); *United States v. Saimiento Rozo*, 676 F.2d 146, 149 (5th Cir. 1982); *United States v. Regilio*, 669 F.2d 1169, 1174 n.4 (7th Cir. 1981).

117. *Anderson*, 55 F. Supp. 2d at 1169-70.

118. *United States v. Holy Land Foundation*, 624 F.3d 685, 685 (5th Cir. 2010).

119. *United States v. El-Mezain*, 664 F.3d 467, 483 (5th Cir. 2011).

Hamas, which itself had been designated by the government as a foreign terrorist organization in 1995.¹²⁰ The government shut down HLF by blocking its bank accounts, seizing its assets, and making transactions with the organization illegal.¹²¹

In 2004, a grand jury returned a 42-count indictment against HLF and seven of its directors, employees, and volunteers, accusing them of, inter alia, conspiring to provide financial support to Hamas.¹²² Two months prior to the start of the 2007 trial, the government filed a brief giving its theory of the case, and describing the breadth of the alleged conspiracy as follows:

[T]he focal point of this case is the designated terrorist group Hamas Although the indictment in this case charges the seven named individual defendants and the Holy Land Foundation for Relief and Development, it will be obvious that the defendants . . . were operating in concert with a host of individuals and organizations dedicated to sustaining and furthering the Hamas movement. A list of unindicted coconspirators is attached to this . . . brief.¹²³

The above-referenced attachment to the pre-trial brief (Attachment A) listed, by name, 246 individuals and organizations as unindicted co-conspirators. Among the listed unindicted co-conspirators were three organizations: the Islamic Society of North America (“ISNA”),¹²⁴ the North American Islamic Trust (“NAIT”),¹²⁵ and the Council on

120. *Id.* at 483, 488.

121. *Id.* at 541; *Al Haramain Islamic Found. v. U.S. Dep’t of the Treasury*, 660 F.3d 1019, 1033 (9th Cir. 2011) (“By design, a designation by OFAC completely shuts all domestic operations of an entity. All assets are frozen. No person or organization may conduct any business whatsoever with the entity, other than a very narrow category of actions such as legal defense.”) (citation omitted).

122. *Prepared Remarks of Attorney General John Ashcroft: Holy Land Indictment*, U.S. DEP’T OF JUSTICE (July 27, 2004), <http://www.justice.gov/archive/ag/speeches/2004/72704ag.htm>. The indictment, despite Attorney General Ashcroft’s speech, did not accuse the defendants of funding violent activities. *Id.* Only five of the men charged were arrested and tried; the other two were declared fugitives. *Id.* The theory was that by providing humanitarian support to charities in Palestine that were allegedly controlled by Hamas, HLF was helping the organization bolster its standing among the Palestinian people, and helping to free up Hamas resources that could be redirected toward violent resistance of the Israeli occupation of Palestinian territories. *Id.*

123. *United States v. Holy Land Foundation*, 624 F.3d 685, 688 (5th Cir. 2010) (emphasis added).

124. ISNA is the largest association of Muslims in North America. *Islamic Society of North America* (Nov. 21, 2012), <http://www.isna.net/ISNAHQ/pages/About-ISNA-HQ.aspx>.

125. NAIT is an endowment that holds in trust the deeds of more than 325 mosques and Islamic schools across 42 states. *NAIT Waqf Services*, NORTH AMERICAN ISLAMIC TRUST (Nov. 21, 2012), <http://www.nait.net/waqfservice.htm>.

American-Islamic Relations (“CAIR”).¹²⁶

The HLF case was tried in the Northern District of Texas, which is within the Fifth Circuit. Publicly filing Attachment A violated the rule adopted by the Fifth Circuit in *In re Smith* that pre-trial filings that name unindicted co-conspirators must be filed under seal to protect the due process rights of those not charged in the indictment.¹²⁷ The government would later concede that not filing Attachment A under seal was an “unfortunate oversight.”¹²⁸

After the first case ended in a mistrial, and before the second trial began, ISNA and NAIT petitioned the trial court for equitable relief, citing the government’s violation of their due process rights by publicly naming them as unindicted co-conspirators.¹²⁹ The demands for relief included: (1) a public declaration that the organizations’ constitutional rights had been violated, (2) an order expunging from all public government filings any mention of the organizations as unindicted co-conspirators, and (3) an injunction preventing the government from further naming the organizations as unindicted co-conspirators without judicial leave.¹³⁰ CAIR joined the suit as amicus and requested expungement of the names of all 246 unindicted co-conspirators from Attachment A.¹³¹

The district court found that the government’s publication of Attachment A violated the organizations’ due process rights and ordered that “Attachment A and ‘all pleadings, records, documents, orders, and other papers . . . including this Order’” be sealed.¹³² Despite the finding

126. CAIR is the largest Muslim civil rights organization in the United States. *Homepage. COUNCIL ON AMERICAN-ISLAMIC RELATIONS* (Nov. 21, 2012), <http://www.cair.com/AboutUs/VisionMissionCorePrinciples.aspx>.

127. Holy Land Foundation, 624 F.3d at 688, 692 (citing *In re Smith*, 656 F.2d 1101 (5th Cir. Unit A Sept. 1981)).

128. Holy Land Foundation, 624 F.3d at 688.

129. *Id.* at 688-89 n1. This was the largest terrorism-financing case in the history of the U.S., with the first trial ending in a hung jury. Greg Krikorian, *Weak Case Seen in Failed Trial of Charity*, L.A. TIMES, Nov. 4, 2007, <http://articles.latimes.com/2007/nov/04/nation/na-holyland4>. The government came under criticism from several of the jurors, as well as outside experts and observers, for the weakness of the government’s case, which followed a 15-year, multimillion-dollar investigation of Holy Land and a high-profile announcement of the charity’s blacklisting by President George W. Bush himself. *Id.* The government pressed ahead with a second trial, securing convictions against all defendants. *United States v. El-Mezain*, 664 F.3d 467, 484 (5th Cir. 2011). The defendants appealed, claiming that, among other things, the trial judge’s allowing of two Israeli security agents to testify under complete anonymity (identities were kept secret from the defendants and their lawyers) violated the Confrontation Clause. *Id.* The Fifth Circuit affirmed, and the Supreme Court denied defendants’ petition for a writ of certiorari. *Id.*

130. Holy Land Foundation, 624 F.3d at 688-689.

131. *Id.* at 689 n.1.

132. *United States v. Holy Land Foundation*, No. 3:04-CR-0240-P, *20 (N.D. Tex. July 1,

of a due process violation, the court denied the motion to expunge.¹³³

NAIT appealed, claiming that the lower court abused its discretion by “sealing its order, by refusing to expunge NAIT’s name from [Attachment A], and by engaging in an irrelevant and erroneous analysis of NAIT’s connections to the [HLF] defendants and other entities.”¹³⁴ The Fifth Circuit held that the district court judge abused his discretion by sealing his opinion and order. By finding that NAIT’s due process rights were violated, while at the same time sealing that declaration, along with the rest of his opinion and order, the district court judge left “NAIT hamstrung in its ability to mitigate the damage done by its public identification as a possible coconspirator in the activities of the HLF Defendants.”¹³⁵

Sealing the opinion and order was the only act of reversible error found by the Court of Appeals. In upholding the denial of the motion to expunge, the court looked at two factors: (1) “the degree to which the inclusion of the name is merely repetition of allegations raised by the Government and subjected to judicial scrutiny in other proceedings,” and (2) “the particular context in which an accusation was made.”¹³⁶ The court concluded that even though NAIT did not have “the opportunity to vindicate itself in formal criminal proceedings . . . proceedings at trial did include some context for NAIT’s inclusion, in the form of evidence tending to support some past ties between NAIT and the HLF.”¹³⁷

It is worth recalling that the government had accused NAIT, as well as all of the other unindicted co-conspirators in the case, as being “dedicated to sustaining and furthering the Hamas movement.”¹³⁸ The court, however, reasoned that since the government did not attempt to enter hearsay statements by NAIT at trial, no judicial opinion as to the weight of the government’s accusations took place, meaning that “NAIT’s inclusion in the brief was simply an untested allegation of the Government, made in anticipation of a possible evidentiary dispute that never came to pass.”¹³⁹

The Court of Appeals asserted that the district court went outside

2009) (Investigative Project on Terrorism), *available at* http://www.investigativeproject.org/documents/case_docs/1425.pdf.

133. *Id.*

134. Holy Land Foundation, 624 F.3d at 688. Neither CAIR nor ISNA joined the appeal. *Id.* at 689, n.1.

135. *Id.* at 690.

136. *Id.*

137. *Id.* at 691.

138. *Id.* at 688.

139. *Id.* at 693.

the bounds of both what was required to resolve the Fifth Amendment and Rule 801(d)(2)(E) questions, but nonetheless declined to “‘vacate’ the analysis of the opinion and order, because our review is of its holding, not every step of its reasoning or its choice of words.”¹⁴⁰

By ignoring the lower court’s foray “outside the bounds” of the appropriate inquiries, the Court of Appeals allowed the same type of ex post facto dismissal of due process violations that a previous panel of the Fifth Circuit in *In re Smith* refused to condone.¹⁴¹ What concerned the court in *In re Smith* was the violation of due process when it occurred at the pre-trial stage, and not whether those whose rights were violated may in fact have been involved in criminal activity.¹⁴² The court’s concern was that implicating someone “in criminal conduct without affording him a forum for vindication” works to obliterate the “presumption of innocence,” which is a bedrock of procedural due process.¹⁴³ Furthermore, the unsealing of the district court judge’s opinion and order provided mere illusory relief. The Court of Appeals, however, found an actual constitutional violation. On the other hand, the court found that the point was moot because prosecutors would have met their burden of establishing petitioners as co-conspirators/joint-venturers during an evidentiary hearing at trial.

Putting aside the procedural battles over whether and what kind of relief the unindicted co-conspirators in the HLF case were due, it is important to look at the reputational damage and other injuries that resulted from being publicly accused of criminal involvement in such a high profile terrorism-financing case. It is without question that CAIR has suffered the most harm.

In its order to seal those pre-trial documents that listed the names of the unindicted co-conspirators, the district court summarized the impact that the designation had on CAIR:

[T]he release of the List subjected CAIR to annoyance, ridicule, scorn, and loss of reputation in the community. CAIR has been subjected to violent threats and has been made the subject of news stories and articles. It is reasonable to surmise that donations to CAIR have and will suffer as a result of the designation.¹⁴⁴

140. Holy Land Foundation, 624 F.3d at 694.

141. *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. Unit A Sept. 1981) (“[W]e completely fail to perceive how the interests of criminal justice was advanced at the time of the plea hearings by such an attack on the Petitioner’s character.”).

142. *See id.*

143. *Id.*

144. United States v. Holy Land Foundation, No. 3:04-CR-0240-P, *10 (N.D. Tex. July 1,

The designation also produced an adverse reaction from law enforcement. The FBI instituted a policy banning its agents from holding meetings with CAIR officials or collaborating with CAIR, as it had in the past, on community outreach, terrorism-prevention, and civil rights. When asked during congressional hearings about the impetus behind the FBI's anti-CAIR policy, then-FBI Director Robert Mueller confirmed that the policy was triggered by CAIR's designation as an unindicted co-conspirator in the HLF case.¹⁴⁵

The FBI's dramatic policy shift on CAIR drew the attention of CAIR's opponents in Congress. Representative Frank Wolf, the then Ranking Member on the House Commerce, Justice, Science Appropriations Subcommittee, delivered a lengthy floor speech on June 12, 2009 dedicated solely to the subject of CAIR, the naming of the organization as an unindicted co-conspirator in the HLF case, and the FBI's blacklisting of the organization.¹⁴⁶ Rep. Wolf cited court filings in which the government described CAIR as "having conspired with other affiliates of the Muslim Brotherhood to support terrorists . . . [and] used deception to conceal from the American public their connections to terrorists . . ."¹⁴⁷ Rep. Wolf further cited the government's response to CAIR's court challenge to the unindicted co-conspirator designations in the HLF case: "CAIR has been identified by the government at trial as a participant in an ongoing and ultimately unlawful conspiracy to support a designated terrorist organization, a conspiracy from which CAIR never withdrew."¹⁴⁸

As Chairman of the House Commerce, Justice, Science, and Related Agencies Subcommittee of the House Appropriations Committee, Rep. Wolf attached a report to a 2012 appropriations bill that supported the FBI's anti-CAIR policy.¹⁴⁹ A section titled "Liaison partnerships" reads:

Liaison Partnerships - The Council on American-Islamic Relations (CAIR) was listed as an unindicted co-conspirator in a case in which the Holy Land Foundation was found guilty of material support of a terrorist organization. The Committee acknowledges the Attorney

2009) (Investigative Project on Terrorism), available at http://www.investigativeproject.org/documents/case_docs/1425.pdf.

145. *Fiscal Year 2013 Budget for the Fed. Bureau of Investigation: Hearing of the Commerce, Justice, Science, and Related Agencies Subcomm. of the H. Appropriations Comm.*, FEDERAL NEWS SERVICE, Mar. 7, 2012.

146. 155 CONG. REC. H6669 (daily ed. June 12, 2009) (statement of Rep. Wolf).

147. *Id.* at *6672.

148. *Id.*

149. H.R. REP. NO. 112-463, at Committee Reports (2011-2012).

General's refusal to attend certain meetings knowing that CAIR officials would be present, as indicated in testimony before the Committee The Committee understands that the Federal Bureau of Investigation (FBI) has an existing policy prohibiting its employees from engaging in any formal non-investigative cooperation with CAIR. The Committee encourages the Attorney General to adopt a similar policy for all Department officials.¹⁵⁰

In spring 2011, Rep. Peter King, then Chairman of the House Homeland Security Committee, conducted his first in a series of hearings on "Islamic radicalization." Although no member of CAIR testified at the hearing, CAIR itself was repeatedly mentioned in the context of its unindicted co-conspirator designation in the HLF case, and members of Congress openly accused CAIR of being a terrorist organization. Washington Post reporter Glenn Kessler investigated the accusations and insinuations made against CAIR during that hearing, summarizing his column this way: "The repeated references to CAIR being an 'unindicted co-conspirator' is one of those true facts that ultimately gives a false impression."¹⁵¹

Of the numerous organizations listed as unindicted co-conspirators in the HLF case, CAIR is the only one that the FBI has taken an official stance against. The following is an exchange between FBI Director Mueller and Rep. Frank Wolf during a March 7, 2012 hearing:

REP. WOLF: Well, as I understand it, that one of the reasons why FBI has a specific policy regarding CAIR is that CAIR was listed as an unindicted co-conspirator in the Holy Land Foundation case.

MR. MUELLER: That's correct.

REP. WOLF: Yeah. Do you have other non-engagement policies with others who were unindicted co-conspirators in the Holy Land Foundation case?

MR. MUELLER: At this juncture, I don't think so.¹⁵²

It is important to note that CAIR has never been charged with a crime,

150. *Id.*

151. Glenn Kessler, *The King Hearings: Is CAIR a "Terrorist Organization?"*, WASH. POST, Mar. 10, 2011, 4:25 PM, http://voices.washingtonpost.com/fact-checker/2011/03/the_king_hearings_is_cair_a_te.html.

152. *Fiscal Year 2013 Budget for the Fed. Bureau of Investigation: Hearing of the Commerce, Justice, Science, and Related Agencies Subcomm. of the H. Appropriations Comm.*, FEDERAL NEWS SERVICE, Mar. 7, 2012.

and to this day, it retains its IRS status as a 501(c)(3) tax-exempt organization.¹⁵³ One would assume that if the FBI had the evidence to back up its assertions as well as the innuendo emanating from its action that CAIR is somehow involved in supporting terrorism, that it would have brought criminal charges against CAIR. However, it has not done so.

By not being able—or willing—to indict CAIR, the FBI has chosen to take the extraordinary step of publicly turning CAIR into a pariah because of its designation as an unindicted co-conspirator. That some congressional leaders have encouraged the FBI's blacklisting of a law-abiding, tax-exempt, civil rights organization without ever holding a proper hearing regarding the matter or giving CAIR officials a chance to respond, underscores the necessity for providing unindicted co-conspirators better due process protections and remedies.

Indeed, the FBI's anti-CAIR policy, along with congressional support for that policy, would likely have come about whether or not the unindicted co-conspirators list was made public before trial since CAIR was named an unindicted co-conspirator during the trial. Thus, it was not just the public naming, but also the designation itself that led to CAIR being selectively targeted for blacklisting. This result reasonably leads to the conclusion that as far as the government and Congress are concerned, CAIR is guilty until it proves itself innocent.

Such a public condemnation by two of the three federal branches fails to conform with the constitutional guarantee 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 . . . without due process of law”¹⁵⁴ As the late journalist Edward R. Murrow stated so poignantly during the height of the anti-communist McCarthyism era, “It is necessary to investigate before legislating, but the line between investigating and persecuting is a very fine one We must remember always that accusation is not proof and that conviction depends upon evidence and due process of law.”¹⁵⁵

In sharp contrast to its approach to CAIR, the government dropped its initial opposition to ISNA and NAIT's petition for equitable relief, and went a step further in announcing that it not only made a mistake by

153. *CAIR at a Glance*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Feb. 16, 2013), <http://www.cair.com/AboutUs/CAIRataGlance.aspx#TaxID>.

154. U.S. CONST. amend. V.

155. Edward R. Murrow, *See It Now: A Report on Senator Joseph R. McCarthy* (CBS television broadcast Mar. 9, 1954), transcript available at <http://www.lib.berkeley.edu/MRC/murrowmccarthy.html>.

not filing the list of unindicted co-conspirators in the HLF case under seal, but that it made a mistake in listing ISNA and NAIT as unindicted co-conspirators in the first place. According to a press release issued by the American Civil Liberties Union, which represented the organizations in their petition to the court,

The government conceded . . . that it had absolutely no evidence proving that either ISNA or NAIT had engaged in a criminal conspiracy. The lead prosecutor in the case told lawyers for the two organizations “that ISNA and NAIT were not subjects or targets in the HLF prosecution or in any other pending investigation.” The prosecutor also acknowledged that the public labeling was simply a “legal tactic” intended to allow the government to introduce hearsay evidence against HLF later at trial.¹⁵⁶

That prosecutors made mistakes in both listing ISNA and NAIT as unindicted co-conspirators and in making the unindicted co-conspirators list public underscores the need for strengthening due process protections.

C. Remedies Do Not Always Provide Relief

It is a fundamental tenet of common law jurisprudence that “for every right there is a remedy.”¹⁵⁷ Surprisingly, however, few remedies are available to individuals whose due process rights have been violated by being publicly named as unindicted co-conspirators. The courts in the cases cited *supra* in Parts III.A-B, did not hesitate to identify due process violations when they believed such violations occurred. What is apparent from those cases, however, is the fact that even after a court determines that an unindicted co-conspirator’s due process rights were violated, judicial relief has neither been automatic, nor has it always been meaningful.

While better remedies are needed to redress harm after the fact, the focus of this Comment is on prevention of the harm in the first instance. This is because no remedy can truly place an unindicted co-conspirator in the position that she was in before she was publicly named.

156. Press Release, *ACLU Challenges Government’s Stigmatizing of Mainstream Muslim Groups in Holy Land Case*, AMERICAN CIVIL LIBERTIES UNION (June 18, 2008), <http://www.aclu.org/national-security/aclu-challenges-governments-stigmatizing-mainstream-muslim-groups-holy-land-case>.

157. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Chief Justice Marshall, in his survey of the common law, quoted Justice Blackstone, who wrote, “[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Id.*

Named unindicted co-conspirators who demonstrate that their due process rights were violated may petition the court to strike from the pre-trial record all references to their names. Such relief was sought, and ultimately granted, to petitioners in *Briggs*, where the court ordered that the district court clerk “expunge from Count One of the indictment . . . all references to appellants.”¹⁵⁸ Expungement was also granted in *In re Smith*, where the Court of Appeals ordered the district court clerk to “obliterate and strike from the records . . . any and all identifying references to or name of Mr. Smith, the Petitioner, so that such references may not be used as a public record to impugn the reputation of Petitioner.”¹⁵⁹

Relief is not automatic though, as the decision of whether or not to order expungement is within the discretion of the court.¹⁶⁰ The court in *Anderson*, in accord with its finding of a denial of due process for naming unindicted co-conspirators in pre-trial filings, ordered that the names of the unindicted co-conspirators be stricken from the pre-trial record.¹⁶¹ At the same time, the court denied a motion to strike two of the petitioners’ names from the entire record, holding that they “did not suffer a due process deprivation in connection with the government’s identification of them as coconspirators for 801(d)(2)(E) purposes at trial.”¹⁶² The distinction made by the court between naming unindicted co-conspirators before as opposed to during trial, was that

[T]he government’s identification of the movants as 801(d)(2)(E) co-conspirators at trial does not allow for the reasonable inference that they are criminals. In contrast to the trial identification, however, the government’s unqualified identification of the movants as unindicted coconspirators in its pretrial moving papers allows for the reasonable inference that they have been labeled criminals.¹⁶³

A similar conclusion was reached by the Court of Appeals in *Holy Land Foundation*, where the offending pre-trial document naming all unindicted co-conspirators was ordered sealed, while the petitioners’

158. *United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975).

159. *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. Unit A Sept. 1981).

160. *United States v. Int’l Harvester Co.*, 720 F.2d 418, 419 (5th Cir. 1983) (“We review decisions on requests to expunge by an abuse of discretion standard granting a range of latitude to the district court.”); *United States v. Holy Land Foundation*, 624 F.3d 685, 691 (5th Cir. 2010) (“A district court has broad discretion to consider the circumstances of each case, and a decision not to expunge will not necessarily be an abuse of that discretion.”).

161. *United States v. Anderson*, 55 F. Supp. 2d 1163, 1169 (D. Kan. 1999).

162. *Id.*

163. *Id.* at 1169-70.

motion to expunge the record was denied.¹⁶⁴ “Just as the context of a party’s naming as a possible co-conspirator in a criminal case is relevant to whether the naming was wrongful and whether it should be sealed, context is relevant to whether the naming of a party should be expunged.”¹⁶⁵ The court appeared to be emphasizing the point that each type of relief requested by NAIT had to be evaluated in light of “both the source and method of the accusation” made against it.¹⁶⁶

By placing emphasis on context, the court was able to reach the conclusion that on the one hand, unsealing the district court’s opinion was warranted because it contained a judicial finding that NAIT’s due process rights were violated as a result of its being publicly named as an unindicted co-conspirator in pre-trial papers. On the other hand, however, the appeals court held that expunging the record was not warranted since “[t]he allegation was offered in furtherance of a legitimate purpose-albeit a purpose that could have been equally well-served by filing Attachment A under seal.”¹⁶⁷

Having identified the constitutional concerns with publicly naming unindicted co-conspirators and the attendant harms that may result from such a designation, it is important to explore solutions that might strike a better balance between the legitimate interests of the government in trying criminal cases, and the equally legitimate interest of unindicted co-conspirators in their due process rights.

IV. PROPHYLACTIC MEASURES THAT BETTER PROTECT DUE PROCESS

Having highlighted several instances in which unindicted co-conspirators have been injured by the public disclosure of their names, this Comment now turns to solutions. If adopted, these proposed solutions may go a long way toward preventing future harm to unindicted co-conspirators, while at the same time preserving the ability of federal prosecutors to effectively prosecute criminal cases.

The due process rights of unindicted co-conspirators will be better protected if the label “unindicted co-conspirator” is abandoned and replaced with a more value-neutral designation, if the USAM is updated to explicitly prohibit the naming of unindicted co-conspirators in indictments, and if procedural rules are changed to require, as a matter of

164. *United States v. Holy Land Foundation*, 624 F.3d 685, 685 (5th Cir. 2010). It is worth noting that the court order sealing the pre-trial document came two years after it was made public and after the two trials in the underlying criminal matter. *Id.* at 689.

165. *Id.* at 692.

166. *Id.* at 691.

167. *Id.* at 693.

course, that all pre-trial filings naming unindicted co-conspirators be done under seal.

A. Abandon the Label “Unindicted Co-Conspirator”

One of the most potent, yet simple, ways that the reputational and economic interests that underpin the due process rights of unindicted co-conspirators can be preserved is by abandoning the use of the term “unindicted co-conspirator,” and replacing it with a term that is more value-neutral and innocuous, such as “joint venturer,” “special witness,” or “material actor.”

Federal Rules of Evidence § 801(d)(2)(E) already applies to joint venturers in the same way that it does to unindicted co-conspirators.¹⁶⁸ Rule 801’s legislative history includes a report from the Senate Judiciary Committee that states, “[I]t is this committee’s understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.”¹⁶⁹ If there is no practical difference between using the term joint venturer instead of co-conspirator for purposes of the Hearsay Exception Rule, then the government should not object to a revision of the Rule that fully embraces the former while discarding the latter.

“Special witness” and “material actor” are examples of new labels that could be adopted. Such labels are preferable, as they do not carry the stigma that “co-conspirator” does. Thus, even if the name of a “special witness” or “material actor” is made public, either before or during trial, the use of such a benign-sounding designation may greatly reduce the risk of stigmatization, as well as the harms that flow from that stigmatization.

B. Improve Prosecutor Guidelines

Over time, the Justice Department has moved from defending the naming of unindicted co-conspirators in an indictment—its position in *Briggs*—to later citing *Briggs* as the major authority underlining its present policy that “[i]n the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments.”¹⁷⁰

168. See FED. R. EVID. 802(d)(2)(E); Notes of Committee on the Judiciary; S. REP. NO. 93–1277.

169. *Id.*

170. U.S. DEP’T OF JUSTICE, *supra* note 47.

Despite the strength of its sentiment, the policy falls short of making an outright ban on the naming of unindicted co-conspirators, while at the same time failing to explain what exactly constitutes a “significant justification,” or to whom the decision to publicly name someone should be justified. Such a gap opens the door to inconsistency, mistake, and misuse. Instituting an outright ban on the naming of unindicted co-conspirators in indictments will close this gap and provide Assistant U.S. Attorneys across the country with a uniform standard that can be applied equally in all situations.

While developing such a uniform standard, the Justice Department should also detail disciplinary penalties that prosecutors would face for violating this standard. It is prosecutors who draft the text of indictments. Therefore, they should be the ones who are held accountable for violating a policy whose purpose is to protect the constitutional rights of unindicted persons.

C. All Filings Should Be Done Under Seal

The concerns for due process that are raised in the naming of unindicted co-conspirators in indictments do not change when the context is shifted to pre-trial filings and hearings. The court in *Briggs* did make a distinction between naming in an indictment and naming in a bill of particulars or at trial. The latter two situations would not violate due process, according to the *Briggs* court, because “in the process of balancing private injury and governmental interests . . ., wholly different, and valid governmental interests apply.”¹⁷¹ At the same time, the court conceded that the impact of publicly naming an unindicted co-conspirator in a bill of particulars “may be tempered by protective orders entered by the court.”¹⁷²

The trend in this regard has shifted as more recent decisions reveal that unlike in *Briggs*, the distinction is made between making public the name of an unindicted co-conspirator in any pre-trial context, and making the name public at trial, with the former constituting a violation of due process, and the latter constituting a necessary burden placed upon the co-conspirator in the interests of justice. From this bright-line distinction flows the logical conclusion that rules should be adopted requiring that, as a matter of course, pre-trial documents naming unindicted co-conspirators be filed under seal.

More than 90 percent of federal criminal cases end in pre-trial plea

171. United States v. Briggs, 514 F.2d 794, 805 (5th Cir. 1975).

172. *Id.*

bargains.¹⁷³ This means that in the overwhelming majority of cases where prosecutors have designated unindicted co-conspirators so that they may later introduce evidence under the hearsay exception, they will never have to actually make the names of those unindicted co-conspirators public at a Rule 801 evidentiary hearing. Therefore, the reputational, economic, and other interests of unindicted co-conspirators may receive maximum protection by requiring that any pre-trial filings that would otherwise make their names public be filed under seal. If this prescription is adopted, there likely will be little-to-no public association made between the unindicted co-conspirators and the alleged criminal acts of the defendants. Such an outcome would achieve the desired effect of preserving the status quo ante while avoiding personal injury and threats to due process.

V. CONCLUSION

Avoiding violations of the Constitution is a duty of all officers of the court—prosecutors, defense counsel, and judges.¹⁷⁴ By working together to strengthen the due process rights of unindicted co-conspirators, judges and lawyers will necessarily strengthen our legal system and add a modicum of fairness and justice that has been lacking. Doing more to protect the due process rights of unindicted co-conspirators will also promote judicial efficiency by reducing “the generation of collateral appeals and the draining of resources best spent more productively.”¹⁷⁵

Undoubtedly, prosecutors are no more interested in violating the rights of citizens than are citizens interested in having their rights violated, for “[i]t is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”¹⁷⁶

To be sure, not every unindicted co-conspirator is free from culpability. Yet, the only ways, generally speaking, that our system of justice allows for a person to be found guilty of a crime is if that person admits guilt or if the government proves as such beyond a reasonable

173. *How Courts Work, Criminal Cases*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, (Feb. 23, 2013), <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx>.

174. *Preamble*, MODEL RULES OF PROF’L CONDUCT § 1 (“A lawyer, as a member of the legal profession, is . . . an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

175. *United States v. Int’l Harvester Co.*, 720 F.2d 418, 420 (5th Cir. 1983).

176. *Berger v. United States*, 295 U.S. 78, 88 (1935).

doubt before a tribunal where the accused can be heard. Unindicted co-conspirators do not fit into either category. Hence, if the law presumes that the indicted are innocent until proven guilty, then the unindicted must be presumed to be innocent—period.