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Conspiracy Theory: The Use of the Conspiracy Doctrine in Times of National Crisis

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CONSPIRACY THEORY: THE USE OF THE CONSPIRACY DOCTRINE IN TIMES OF NATIONAL CRISIS

INTRODUCTION

Prosecuting those who are alleged to have posed threats to national security presents unique challenges to the legal system, challenges that American jurisprudence frequently appears inadequately equipped to meet. As a result of both the secretive nature of many anti-government and terrorist organizations as well as the difficulty of identifying the exact nature of the threats such groups pose, the government often resorts to the charge of conspiracy when indicting these cases. This practice has resulted in the gradual expansion of the doctrine of conspiracy, most notably in the wake of heightened national security threats.[1]

The conspiracy charge is an especially malleable one and represents something of an anomaly in our system of criminal jurisprudence, which generally affords individuals stringent protections in the face of potential abrogation of their liberty.[2] Although the subject of much criticism, the crime of conspiracy has an established, and undoubtedly warranted, place in American jurisprudence.[3] The purpose of this Note is not to challenge the doctrine of conspiracy as a whole or even to question the specific factors presumed to define the parameters of a conspiracy in the prosecutorial context. Instead, the discussion will revolve around two relatively discrete eras of heightened political and social concerns in American history—the McCarthy Era and the modern, post-9/11 era—and the implications of those concerns for the scope

1. *See* R.S. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 48-49 (1887) (noting a few specific instances of enlargement and stating that "the law of criminal combination has gone somewhat beyond the bounds of the ordinary criminal law").

2. *See* Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (characterizing conspiracy as an "elastic, sprawling and pervasive offense").

3. *Cf.* Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1141 (1973) (arguing that the crime of conspiracy is no longer necessary).

of conspiracy charges made in cases that were emblematic of the particular sensitivities of their respective eras. Through an examination of these two eras, in which political and social pressures coalesced in highly charged prosecutions, this Note will show that because the doctrine of conspiracy is so readily adaptable, it has the potential to become perverted and unduly expanded when political and social stresses are placed upon it.

Conspiracy's central weakness—the potentially over-expansive reach of its scope—creates a quagmire into which events involving political and social threats to national security inevitably become entangled. As Justice Jackson noted in his concurring opinion to *Krulewitch v. United States*,

> [t]he crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that *menaces social stability and the security of the state itself* .... Conspiratorial movements do indeed lie back of the political assassination, the coup d'etat, the putsch, the revolution, and seizures of power in modern times, as they have in all history.[4]

Jackson's candid acknowledgment of the political component of the impetus behind conspiracy law exposes a critical flaw in the system—that it allows courts to give in to the "strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers."[5]

Almost from its inception, the crime of conspiracy has been subject to flagrant abuse. Originally conceived as a method to curb abuse of the legal system,[6] it ballooned into an almost unrecognizable version of its rather humble, and strictly limited, beginnings. It failed to withstand the reactionary pressures against the "Strict Law" in the seventeenth and eighteenth centuries, during which it

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4. *Krulewitch*, 336 U.S. at 448 (emphasis added).

5. *Id.* at 457. Jackson also notes that statutes for substantive crimes eliminate the dangers to individual liberty and the integrity of the judicial process. *Id.*

6. *See* Solomon A. Klein, *Conspiracy: The Prosecutor's Darling*, 24 BROOK. L. REV. 1, 1 (1957); *see also* JAMES WALLACE BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY 23 (Da Capo Press 1970) (1909) (noting that "[t]he action by writ of conspiracy could be brought by a person who had been acquitted upon a false indictment preferred by two or more persons acting in concert").

was transmogrified into a shadowy specter of its former, neatly defined self.[7] In particular, during this period the doctrine of conspiracy failed to ward off evidentiary encroachment, specifically, the admission of acts that are not otherwise criminal into a conspiracy trial.[8] This expansion is one of the more troubling aspects of this doctrine. In more recent judicial memory the law of conspiracy has been the subject of what amounts to a virtual revolution in thought. Conspiracies today are often massive, hulking entities encompassing a broad spectrum of actors, acts, and localities.[9]

The following discussion reviews the traditional scope of conspiracy, followed by an examination of the background circumstances and applications of the conspiracy doctrine in both the McCarthy and post-9/11 eras. Through the juxtaposition of the application of conspiracy in these two eras against the backdrop of the general use of conspiracy, the imprimatur of socio-political pressures on the former becomes apparent. In a global community of intense ideological differences, the threat posed to individual nations' security by collective acts of terrorism and political violence is acutely felt. However, over-reliance on traditional mechanisms for curbing such threats, especially the doctrine of conspiracy, carries the potential for distorting those mechanisms beyond recognition.

I. THE TRADITIONAL SCOPE OF CONSPIRACY

In the first eight words of his explanation of the conspiracy doctrine, Professor LaFave characterizes the crime of conspiracy as "somewhat vague."[10] This characterization is telling and far

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7. *See* Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 400 (1922).

8. *Id.* at 402-03 (indicating that Lord Hawkins' "unfortunately ambiguous statement ... [that]: 'There can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law,'" is the source of this problematic component of conspiracy) (quoting HAWKINS, PLEAS OF THE CROWN, 6 ed., bk. I, ch. 72, § 2, p.348).

9. *See* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 2 (1992) (noting that in the 1970s, no one would have believed possible the now common "mega-trials" for conspiracy, nor would the "dramatic structuring by the Supreme Court of the rules of evidence in conspiracy cases" have been foreseen).

10. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.1 (2d ed. 2003).

from unique.[11] Justice Jackson used exactly the same term in his condemnation of the ever-broadening sweep of conspiracy prosecutions in his concurrence to *Krulewitch v. United States*.[12] The following discussion illustrates how the crime of conspiracy developed into such a vague doctrine.

A. Background

Conspiracy did not begin life in the troubled state it finds itself in today. The crime of conspiracy has a comparatively lengthy history,[13] however, early conspiracy law lacked the flexible flavor of its modern-day counterpart. The original incarnation of the doctrine was as a series of statutes enacted strictly for the purpose of remedying abuses of legal procedure.[14] The strictures of the statutory enactments underwent a gradual permutation process beginning in 1611 with the *Poulterers' Case*, and continued intermittently thereafter.[15] In that case, the Star Chamber declared that the statutory limitations regarding the requirements of a false indictment were immaterial and that confederation constituted the gist of the crime.[16] This sudden expansion of the scope of conspiracy proved to be the flashpoint at which the steadily brewing cauldron of social pressures ignited, producing in 1615 the opinion in *Bagg's Case*, which first proclaimed the criminality of an unexecuted

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11. *See, e.g.*, Sayre, *supra* note 7, at 393 (assessing criminal conspiracy law as "[a] doctrine so vague in its outlines and uncertain in its fundamental nature ... [that it] lends no strength or glory to the law").

12. Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring) ("The modern crime of conspiracy is so vague that it almost defies definition.").

13. Sayre, *supra* note 7, at 394 ("The origin of the crime of conspiracy goes back to the very early pages of the history of our common law.").

14. BRYAN, *supra* note 6, at 11 ("Conspiracy was limited to combinations whose object was to hinder or pervert the administration of justice."); Sayre, *supra* note 7, at 396 ("[I]t was limited to offenses against the administration of justice, and was strictly confined to the precise and definite language of the statutes. Combinations only to procure false indictments or to bring false appeals or to maintain vexatious suits could constitute conspiracies.").

15. *See* Sayre, *supra* note 7, at 398 ("Thus was taken the first step in the long process by which the early rigidly defined crime of conspiracy was, through judicial, analogical extension, gradually expanded into the vague and uncertain doctrine which we know to-day."); *see also* BRYAN, *supra* note 6, at 58-59 ("[T]he Poulterers' Case represents a long step in advance of existing principles."); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 625 (1941).

16. Sayre, *supra* note 7, at 398.

conspiracy.[17] In this case, the King's Bench went so far as to declare the legitimacy of its exercise of extrajudicial power, stating that "to this Court ... belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial, tending to the breach of the peace ... so that no wrong or injury ... can be done, but that it shall be (here) reformed or punished by due course of law."[18] This tendency toward extrajudicial justice is particularly pernicious in the conspiracy context, because it gives rise to gross misuse of the doctrine, especially in the face of social pressures such as those that prevailed in the seventeenth and eighteenth centuries.[19]

The penal codes of European nations governed by civil codes approach conspiracy in a somewhat different manner and provide an interesting counterpoint to this discussion.[20] Rather than using conspiracy as a separate and self-contained offense, these countries generally use conspiracy as the basis for increasing the sentences attached to substantive crimes.[21] Even this approach is subject to the vicissitudes of popular sentiment regarding situations involving national security, and many countries decree that "when no substantive offense has been completed ... certain types of conspiracies are [still] proscribed—notably *those directed against the security of the state*, those involving many participants organized for the purpose of committing numerous crimes, and those contemplating particularly serious offenses."[22] Even judicial systems that have maintained a somewhat more stringent adherence to the definitions of conspiracy detailed in their respective codes[23] carve out a special niche for conspiracies in which national security is implicated,

17. BRYAN, *supra* note 6, at 59.

18. Sayre, *supra* note 7, at 400-01.

19. *Id.* at 400 (noting that "[d]uring the seventeenth and eighteenth centuries a reaction set in, in favor of a broader, more moral law").

20. Note, *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 923 (1959).

21. *Id.*

22. *Id.* (emphasis added); *see also* Wienczyslaw J. Wagner, *Conspiracy in Civil Law Countries*, 42 J. CRIM. L. & CRIMINOLOGY 171, 172 (1951) (noting that "where the security of the state is at stake, the law is more watchful than in other cases; and it creates exceptions").

23. Wagner, *supra* note 22, at 175. In France, the Civil Code has slightly broadened the notion of what constitutes a conspiracy, but "this idea is still not equal to the common law general approach to the problem of conspiracy." *Id.* The first flirtation of the German Civil Code with conspiracy was "only in the field of offenses against the state." *Id.*

highlighting both the gravity of conspiracies against the state and the underlying principle of criminal law, the protection of society.

B. Scope

1. Scope Defined

There are many troubling aspects to the crime of conspiracy, but perhaps the most critical is the ill-defined parameters into which a conspiracy must fit. Defining the scope of a conspiracy has extensive evidentiary ramifications and is therefore of particular importance.[24] The scope of a conspiracy is defined by the court that evaluates it, however, and there is no truly systematic and universal process that courts employ to ascertain the precise boundaries of a conspiracy. Therefore, the delineation of the conspiracy is controlled by the central element of the crime—the agreement.[25]

The agreement is the "essence of conspiracy," and the crime of conspiracy "is complete on proof of an agreement between two or more persons to effect an unlawful purpose."[26] As one treatise explains, "[t]he agreement is all-important in conspiracy, for one must look to the nature of the agreement to decide several critical issues," including mens rea and the possibility of multiple conspiracies.[27] Whether an agreement exists depends on the facts and inferences appropriately drawn from them.[28] No degree of formality

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24. *See generally* FED. R. EVID. 801(d)(2)(E).

25. *See* Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 950 (1977) ("The crime of conspiracy is the illegitimate agreement, and the agreement is the crime."); *see also* United States v. Burgos, 94 F.3d 849, 860-61 (4th Cir. 1996) (rejecting the requirement of a specific agreement but agreeing that the "proper contours of conspiracy law" are defined by reference to the agreement).

26. Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 L. Q. REV. 39, 40 (1977); *see also* Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.").

27. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 6.4(d) (1986).

28. *See* Direct Sales Co. v. United States, 319 U.S. 703, 710-13 (1943) (analyzing the facts of the case to find the requisite intent and agreement).

> When the evidence discloses ... a system ... [t]he step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant

is required to prove an agreement, indeed, a "mere tacit understanding" may be sufficient. [29]

The extent of the agreement is defined almost solely by reference to the facts presented to establish it. As noted by the Supreme Court in *Braverman v. United States*, "when a single agreement to commit one or more substantive crimes is evidenced by an overt act ... *the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects.*"[30] With respect to the potential for multiple conspiracy charges to stem from a single agreement, the Court further explained that "[t]he one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."[31]

The Court's semantic distinction merely displaces the factual investigation by analyzing it in the context of the broader agreement—whether the scope of the agreement dictates the scope of the conspiracy or the scope of the conspiracy is examined directly makes little practical difference. The Court's analysis also injects a highly subjective element into considerations of scope, because it requires an evaluation of the evidence that is almost wholly without boundaries[32] and that is predicated on the notion that there is or was a conspiracy to be proven.[33] In practical terms, the prosecution makes the preliminary decision regarding the breadth of the conspiracy by determining how expansive an agreement to prove,

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to the question of conspiracy.

Id. at 713.

29. *See* LAFAVE & SCOTT, *supra* note 27, § 6.4(d).

30. 317 U.S. 49, 53 (1942) (emphasis added).

31. *Id.*

32. Nye & Nissen v. United States, 168 F.2d 846, 857 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949) (noting that "wide latitude is allowed in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged"); *see also Criminal Conspiracy*, *supra* note 20, at 984 ("Evidence of criminal offenses less related to the crime charged is allowed in conspiracy prosecutions [sic] than in the prosecution of crimes other than conspiracy.") (footnote omitted).

33. *See* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("[A] conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed."); *see also* United States v. Twitty, 72 F.3d 228, 231 (1st Cir. 1995) (noting that "more often than not, none of the agreements [comprising a conspiracy] is explicit; agreement is inferred from conduct; and the conceptual tests used to distinguish between one conspiracy and many are not sharp edged").

and the judge or jury makes the ultimate decision based on the evidence presented.

Recognizing the potential for abuse of discretion by factfinders charged with determining the scope of a conspiracy, Alvin H. Goldstein cautions that "[u]nbridled expansion of the scope may result in a prosecution based on guilt by association."[34] Goldstein offers a rather optimistic appraisal of the ability of the doctrine to constrain the scope of the charge, however, stating that "[t]he substantive requirement, that each conspirator know the essentials of and specifically intend the purpose of the common design, limits the defendant's involvement in the conspiracy."[35] In contrast, the contention of this Note is that the link between the knowledge of co-conspirators and the objective of a conspiracy is so loose as to be essentially unbounded, particularly when external pressures are operative.

Addressing the difficulties inherent in making the factually based determination about the appropriate scope of a conspiracy, the court in *Scott v. United States* stated that

> [w]hen forbidden conduct is extended in duration or elaborate in its phases, it is not always easy to determine the proper unit for purposes of prosecution. In some instances each day's action or inaction is made a separate offense; in others a longer course of action constitutes a single offense.... *Where to draw the line, in the absence of clear statutory delineation, presents a problem to one's judgment and sense of fairness.*[36]

Indeed, the problem identified by the court—that the determination of scope is left entirely up to the unbounded and ill-defined "sense of fairness" possessed by the finder of fact—is precisely why courts must exercise caution in rendering decisions regarding the extent of a conspiracy. The *Scott* court also concluded that when actions are "separate and distinct," the defendant is "not entitled to telescope the two offenses into one."[37] What constitutes a "separate and distinct" offense, however, is a wholly discretionary decision based

34. Alvin H. Goldstein, *The* Krulewitch *Warning: Guilt by Association*, 54 GEO. L.J. 133, 145-46 (1965).

35. *Id.* at 146.

36. 255 F.2d 18, 20 (4th Cir. 1958) (emphasis added).

37. *Id.* at 21.

on the evidence. Despite its trepidation, the *Scott* court gave no guidance as to how the evidence may be evaluated to reach a decision, preferring instead to leave such matters to the legislature. Furthermore, the leniency that the court expressed, and, in particular its acknowledgment of the difficulty of line-drawing, suggests a willingness, albeit with misgivings, to accept a conspiracy painted in broad, sweeping strokes for the sake of prosecutorial convenience.

As a basic matter, courts look to three factors to define the scope of a conspiracy: the time frame, geographic scope, and subject matter of the alleged conspiracy.[38] In distinguishing between situations where there are multiple conspiracies and where there is a single conspiracy, the courts have long referred to these factors.[39] Courts also often look to membership as an indicator of the scope of a particular conspiracy.[40]

The temporal aspect of the conspiracy may be one of the more readily manipulated elements in this trio of factors. As the court in *United States v. Therm-All, Inc.* noted, "to prove a conspiracy during

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38. *See* United States v. Portsmouth Paving Corp., 694 F.2d 312, 318 (4th Cir. 1982); *see also* Sayre, *supra* note 7, at 397 (noting that in a 1351 case Justice Shardelowe refused to strain the strict borders of the conspiracy doctrine to convict on a charge that failed to demonstrate the scope of the conspiracy by including the year, day, place, and subject matter of the crime with sufficient specificity).

39. Short v. United States, 91 F.2d 614, 619-20 (4th Cir. 1937) (identifying as chief factors in this analysis the "periods of time covered by the conspiracies as alleged; ... [the] difference in the places charged as the places of conspiring; ... [and] difference in the persons charged as coconspirators"); *see also* Arnold v. United States, 336 F.2d 347, 350 (9th Cir. 1964) (concurring with the treatment in *Short*).

40. Membership in a conspiracy is a factual determination that is complicated somewhat by the existence of several organizational possibilities in the case law. The two generally accepted varieties are the hub-and-spoke model (one central actor who has dealings with multiple others, each of whom knows that the other agreements must exist), and the chain model (successive actors, each performing a particular role necessary to the completion of the object). LAFAVE & SCOTT, *supra* note 27,§ 6.5(d)(2). Determining who falls within the ambit of a particular conspiracy is crucial to protecting a defendant's constitutional rights, however. *See* Kotteakos v. United States, 328 U.S. 750, 772-73 (1946):

> Guilt with us remains individual and personal, even as respects conspiracies.... When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. *Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.*

(emphasis added).

a certain time period, the Government must produce evidence of an overt act that implies the existence of the alleged conspiracy during that time, regardless of whether the act be in furtherance of or an actual part of the conspiracy."[41] This formulation of the time span of a conspiracy, although a practical solution to the problem, is not a particularly elegant one, as it would appear to allow for situations in which otherwise inconsequential acts are used to dramatically expand the life span of a conspiracy.

Geographic considerations are of particular interest in conspiracy cases, because they potentially afford the government a wide variety of venues in which to prosecute. The Court reaffirmed this basic principle in *Hyde & Schneider v. United States*, where the Court stated that "[w]e have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place."[42] With the technological developments in transportation and communications, the location of discrete conspiratorial acts may mark an extremely far-ranging boundary. The ability to portray a conspiracy covering such vast distances could convey to the finder of fact an inflated idea as to actual breadth of the conspiracy.

Both of these factors and the subject matter component find their origin in the criminal agreement, which, because its parameters are not necessarily delineated with any degree of specificity,[43] remains an essentially blank slate upon which the prosecution may write its theory. The court in *United States v. Andolschek*[44] summarized this peculiar phenomenon of conspiracy law well:

> [A] party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its

41. 352 F.3d 924, 929 (5th Cir. 2003), *opinion withdrawn by, substituted opinion at* 357 F.3d 625 (5th Cir. 2003).

42. 225 U.S. 347, 363 (1912).

43. United States v. Burgos, 94 F.3d 849, 860-61 (4th Cir. 1996) ("Because we believe that these precepts set the proper contours of conspiracy law, setting parameters regarding specificity of the agreement is difficult to harmonize with the elastic, ad hoc principles that shape our conspiracy jurisprudence.").

44. 142 F.2d 503 (2d Cir. 1944).

> content and membership, so be it that they fall within the common purposes as he understands them.[45]

The indeterminacy of the standard for defining the scope of a conspiracy creates a terrific opportunity for exploitation by the prosecution.

2. Hypothetical

By way of illustration, assume that there is a group composed of actors X, Y, and Z, all of whom agree to commit fraud on a federally insured financial institution. X is a California banker, Y is a bank manager in Texas, and Z lives in New York. X and Y each order their secretaries, B and C, respectively, to prepare fraudulent loan applications for submission to a bank. B knows that some of the material he is filling in on the applications is falsified, but he nevertheless completes the assignment. C is new at her job and does not know or suspect that she is being used as a conduit for fraud. In preparation for the processing of the falsified loans, Z sets up an offshore account through which to funnel the money after consulting with D, who has been Z's financial adviser for the past twenty-five years and who works in Washington. Z briefly contemplates bringing D into the conspiracy but ultimately decides not to, instead simply utilizing D's talent and resources for his nefarious purposes without ever directly speaking about his true purpose to D. D does not have a strong reason to suspect that Z is engaged in anything that is not wholly above-board, but there have been clues that would suggest that Z may be involved in a dishonest scheme. Z has mentioned to D that he has a new business associate named X who may be interested in availing herself of D's services.

When the cover on this conspiracy is blown, there are a number of possible defendants. As the principals, X, Y, and Z are clear choices for prosecution, having made the initial agreement and executed several overt acts, including setting up the offshore account and causing the fraudulent applications to be submitted. B is also an obvious target as a result of his knowing assent to the preparation of the false documents. The government would have an

45. *Id.* at 507.

even stronger case against B if he had put Y and Z's names on the applications as well. C is clearly not a good choice for prosecution—she simply does not have the requisite mens rea. There is a far less clear case against D. The element of knowing participation in the agreement seems to be lacking in D, but, depending on the vigor of the prosecutors and the weight the jury gives to the "clues" that D might have picked up on, D's marginal position with respect to the conspiracy might cut sufficiently against her to make prosecuting her both feasible and successful.

The purpose of this exercise is to illustrate that, by adding a marginal player to the host of conspiracy defendants, a potentially undue expansion of the conspiracy takes place. By charging D in the conspiracy, the prosecution gains access to an entirely new venue (Washington) and possibly even enlarges the time frame of the conspiracy. For example, if D had proceeded to invest the laundered funds, the conspiracy likely would have continued.

C. Object

The object of the conspiracy is by no means strictly confined, and it is "possible for the object dimension of a conspiracy to include the commission of several substantive offenses" or even to be of "indeterminate scope," encompassing all those crimes that are "in fact undertaken."[46] This degree of indeterminacy reflects the notion that conspiracy is a significantly more flexible crime than suggested by the supposed stringent limitations on the scope of the infraction.

The assessment of the object of the conspiracy as potentially including a vast, and possibly unknown, number of offenses and actions is accurate to the extent explained by Judge Learned Hand in *United States v. Crimmins*: "[i]t is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the

46. An example is a hypothetical group called "Murder Incorporated," which contemplates "the commission of other than a definite number of crimes. Each member of it therefore 'takes his chances,' and is party to a conspiracy whose object dimension includes the offenses in fact undertaken." Note, *supra* note 20, at 929-30. The hypothetical's authors do not offer any further guidance as to the construction of this criminal alliance, but it can be presumed that the name "Murder Incorporated" envisions the commission of homicide and any crimes incidental to it. In this manner, at least, there is some degree of limitation on the potential liabilities of the members.

reasonable intendment of the common understanding."[47] This limitation, although seemingly vital, is likely to be quite flaccid in practice. Judge Hand further explained that

> [w]hile one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.[48]

This conclusion is ultimately unsatisfying, because it runs headlong into the original problem of defining the scope of the conspiracy by reference to an agreement about which typically very little is known.

The evidentiary implications of conspiracy have been critically important in shaping the current doctrine. Due to the clandestine nature of conspiracies, circumstantial evidence is typically the principal, and often only, type of evidence used to establish the requisite agreement and its corresponding scope.[49] In response to the inherent challenges of demonstrating a covert agreement, "courts seem to be overcompensating for the difficulties faced by the prosecution."[50] This overcompensation reaches its pinnacle when courts are presented with an alleged conspiracy that is coupled with socio-political overtones. Indeed, Goldstein acknowledges the breadth of the prosecutor's powers with respect to conspiracy by writing that "[t]he danger of injustice which flows from the hearsay exception increases in proportion to the prosecutor's willingness to carry his case to the full extent authorized by conspiracy law."[51]

By returning to the hypothetical posited in Part I.B.2, it is easy to expose the flexibility of the object component of conspiracy doctrine. If D is brought into the case as a defendant, the prosecution has far greater latitude in developing the object of the conspiracy, because D's alleged involvement may introduce new facets of fraud to the conspiracy. For example, if D was independently

47. 123 F.2d 271, 273 (2d Cir. 1941).
48. *Id.*
49. Note, *supra* note 20, at 984.
50. *Id.*
51. Goldstein, *supra* note 34, at 140.

involved in another scheme that also entailed laundering money through foreign banks, this evidence could potentially be extremely difficult to segregate from the charged scheme and thus could be used to implicate D in this conspiracy as well. The prosecution may also be at an advantage in that the addition of D avails them of a whole host of supplemental overt acts, likely including virtually any work D did for Z after agreeing to join the conspiracy. Additionally, from a prosecutorial standpoint, D's financial prowess is a highly desirable characteristic for a conspiracy defendant involved in a fraud scheme.

As noted by Patrick Broderick in his article addressing the conditional objectives of conspiracies, "[t]he majority of questionable rulings dealing with the object scope of conspiracies expand that scope beyond the dimensions necessary to prevent likely crimes or to apprehend conspirators who are dangerously resolved to commit an object crime."[52] Indeed, as many commentators have suggested, the sole defensible rationale for the conspiracy doctrine is the belief that the prevention of the sort of group danger inherent in a conspiracy can be accomplished only through a mechanism that deters criminal group efforts before they begin.[53] When the boundaries of this somewhat flimsy rationale are breached, the crime of conspiracy becomes increasingly fragile.

II. THE MCCARTHY ERA CASES

A. Historical Underpinnings: The Communist Threat

The growth of organized labor in the 1930s fostered an infrastructure that was rife with possibilities for perceived and actual conspiratorial endeavors.[54] With structural mechanisms in place

52. Patrick A. Broderick, *Conditional Objectives of Conspiracies*, 94 YALE L.J. 895, 902 (1985).

53. *See, e.g.*, Marcus, *supra* note 9, at 3-5 (noting that "[t]he argument for added danger for conspiracies has never been supported by any sort of empirical data, and thus it is extremely difficult to justify the presence of the crime, at least in situations where other offenses could be charged").

54. ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS 8 (2d ed. 2002) (noting that "[t]he most important organizations with which [Communist] party members became involved were trade unions"); *see also* ARTHUR HERMAN, JOESPH MCCARTHY: REEXAMINING THE LIFE AND LEGACY OF AMERICA'S MOST HATED SENATOR 67

and strong Communist leaders at the forefront of the trade unions, the reactionary voice of anti-Communists emerged, disguised in conciliatory overtones.[55] The shroud of secrecy in which most of the Communist leaders cloaked their party affiliation became a liability "when the political climate changed, [because] the Communists' lack of openness took on sinister overtones."[56]

In the 1940s and 1950s, America lived in the throes of a pervasive fear of the unknown. As Joseph A. Beirne announced, "[w]e live in alarming times.... Communism has spread, like a prairie fire, in the old world."[57] Fueled by public outcries such as Beirne's, anxiety about the threat of covert Communist infiltration into U.S. government, trade unions, and countless other elements of society rose to unprecedented levels and culminated in a collective need for reassurance and security.[58] As Arthur Sabin notes, "there was a dread of Communist subversion, spying, and influence in this country; these fears gripped the nation with varying degrees of intensity throughout these decades and generated the era of the Red Scare."[59]

Fear of the intangible menace grew as "[t]he cold war transformed domestic communism from a matter of political opinion to one of national security."[60] As Ellen Schrecker noted, "[p]art myth and part reality, the notion that domestic Communists threatened national security was based on a primarily ideological conception of the nature of the Communist movement."[61] The popular ideological conception of Communism as a monolithic destructive force can

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(2000).

55. SCHRECKER, *supra* note 54, at 9.

56. *Id.*

57. *Communism Is a Criminal Conspiracy: Hearing Before the Task Force of the Senate Subcommittee on Internal Security*, 83rd Cong. 5 (1954) [hereinafter *Hearing, Communism is a Criminal Conspiracy*] (statement of Joseph A. Beirne, President, Communications Workers of Am.).

58. *See* Ellen W. Schrecker, *Archival Sources for the Study of McCarthyism*, 75 J. AM. HIST. 197, 198 (1988) (noting that "far from being a political aberration, much of what we call McCarthyism received wide support from important sectors of American society").

59. ARTHUR J. SABIN, RED SCARE IN COURT: NEW YORK VERSUS THE INTERNATIONAL WORKERS ORDER 2 (1993).

60. SCHRECKER, *supra* note 54, at 20.

61. *Id.* at 21.

largely be attributed to the extensive involvement of the federal government in the anti-Communist crusade.[62]

Although the machinations of the legislature in the interrogations conducted by the House Un-American Activities Committee (HUAC) and other investigatory bodies are often associated with the rise of the Red Scare, "it was the executive branch of the government that wielded the most influence over the development of McCarthyism."[63] While providing the "psychic setting for McCarthyism," the executive branch further influenced popular perception through "[t]he specific steps it took to combat the alleged threat of internal communism."[64]

Societal fear of Communism underscored a series of prosecutions during this period and presented serious substantive and procedural dilemmas for the court system that had long-lasting implications. The criminal justice system became a potent piece of artillery in the battle against Communism, as Schrecker points out:

> Perhaps no single weapon in the federal arsenal was as powerful in the government's construction of the anti-Communist consensus as the criminal justice system. By putting Communists on trial, the Truman administration shaped the American public's view of domestic communism. It transformed party members from political dissidents into criminals—with all the implications that such associations inspired in a nation of law-abiding citizens.[65]

The government achieved this transformation not only in the eyes of the public, but also in the eyes of much of the judiciary.

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62. *Id.* at 25-26 (noting that it was not the plausibility of the Communist threat but the government's involvement that helped to generate the national obsession); *see also* EDWIN R. BAILEY, JOE MCCARTHY AND THE PRESS 180-81 (1981) ("The Republican landslide of 1952 made the Republicans the majority party in the Senate and installed McCarthy as chairman of the Senate's Committee on Government Operations and of its Permanent Subcommittee on Investigations.").

63. SCHRECKER, *supra* note 54, at 26.

64. *Id.* at 27. *See generally* Athan Theoharis, *The Truman Administration and the Decline of Civil Liberties: The FBI's Success in Securing Authorization for a Preventive Detention Program*, 64 J. AM. HIST. 1010 (1978) (describing the increasing anti-Communist sentiment under the Truman administration and FBI director J. Edgar Hoover).

65. SCHRECKER, *supra* note 54, at 27.

The inherent danger in prosecutions of political dissidents is the threat that the politically unpopular views of defendants will be used against them in inappropriate ways. This possibility is magnified in the case of conspiracy prosecutions but has proven to be a stumbling block in other cases as well.[66] The threat of improper consideration of political views surfaced in the McCarthy Era trial of the International Workers Order (IWO), a "fraternal benefit insurance organization" characterized as "the largest left-wing organization in U.S. history."[67] The strategy of the prosecution was to affiliate the Communist party with the IWO and insinuate guilt by association.[68] Judge Greenwood eagerly accommodated this line of argument. He appeared "interested—in fact, evidently anxious—to get at the facts of the political side of the IWO," making it imperative that the defense "focus the Judge's attention on the operation of the Order as an insurance company and on the legal issues ... not on the IWO's politics."[69] This attempt failed, however, because "[i]n the supercharged political atmosphere of early 1951, maintaining a clear line of separation [between the professional duties of the witnesses and their political views] was simply impossible."[70]

The IWO trial further illustrates the pitfalls inherent in prosecutions that prey on the public's emotional turmoil and fear of breaches of national security. Sabin notes that, "[r]emoved from the passions of the times, the interpretations Judge Greenberg made of relevant statutes and case law appear unfounded, and reflect a

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66. *See, e.g.*, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1352 (1983) (discussing the possibility that political and social turmoil may impact the judiciary in the context of the First Amendment):

> Restrictive Supreme Court decisions construing the Espionage Act of 1917 during the "Red Scare" following World War I and the Smith Act during the early 1950's, at the height of the virulent anti-Communism personified by Senator Joseph McCarthy, promote understandable skepticism about the ability of the judiciary to withstand periods of national hysteria.

67. SABIN, *supra* note 59, at 10-11 (distinguishing the IWO from the Industrial Workers of the World, a union that predated the non-union IWO); *see also* Application of Bohlinger, 106 N.Y.S.2d 953, 959 (N.Y. Sup. Ct. 1951) ("The organization writes life, accident and health insurance.").

68. SABIN, *supra* note 59, at 115 (noting that the government's lead witness was George E. Powers, a former Vice-President of IWO, "who had credentials bridging the Order and the Communist Party over a number of years").

69. *Id.*

70. *Id.* at 116.

willingness—if not an eagerness—to use existing law for the 'higher' purpose of liquidating the perceived political threat posed by the continued operation of the IWO."[71] Judge Greenberg's conclusions illustrate that if the judicial system is to retain its integrity in the face of external pressure, it cannot condone such arbitrariness based solely on the context of the case.

B. Scope of Conspiracy in the McCarthy Era Cases

Prosecutions of alleged and overt Communists in the McCarthy Era encountered a special difficulty not regularly seen in criminal trials—they were highly politicized. The furor of the era fostered, if only indirectly, a highly polarized courtroom climate that is evidenced in court opinions.[72] The criminal justice system faltered when faced with the prospect of being forced to adjudicate issues that ostensibly pertained more to political affiliations than to genuine criminal behavior.

As Schrecker noted, "using the criminal justice system to reinforce the government's contention that communism was outside the law had its drawbacks. There were few laws under which the offenders could be tried, because being a Communist was not a crime."[73] Even the staunchly anti-Communist camp could not contest this point. While conceding that "[i]t is not yet illegal for a person simply to be a Communist in the United States," labor leader Joseph A. Beirne issued one of the most excoriating critiques of Communism: "[It] is a criminal conspiracy directed against our way of life."[74]

It is perhaps unsurprising that the essentially political charges that were brought against this subset of defendants exhibited some noticeable stretch marks, as the charged crimes—sometimes genuine but always infused with a distinctly inapposite aura of

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71. *Id.* at 308.

72. *See* Dennis v. United States, 341 U.S. 494, 510 (1951) (noting the gravity of the situation by stating that the Court in *Gitlow v. New York*, 268 U.S. 652 (1925), a case that also dealt with free speech, "[was] not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis").

73. SCHRECKER, *supra* note 54, at 28.

74. *Hearing, Communism Is a Criminal Conspiracy*, *supra* note 57, at 7 (statement of Joseph A. Beirne, President, Communication Workers of Am.).

political persecution—were pursued with a fairly broad disregard for their statutory limitations. The charges "often bore little relation to the presumed offense for which [the Cold War defendants] were on trial," at least in part because of the difficulties inherent in prosecuting cases involving national security threats and the intelligence it generated.[75] Indeed, the government apparently turned to the conspiracy charge as something of a last resort: "[a]fter scouring the statute books in search of an appropriate prosecution tool, the Justice Department's attorneys settled on a conspiracy charge under the 1940 Smith Act."[76] This strategic decision marked a critical turning point in the development of prosecutorial theories employed against those accused in connection with threats to national security.

The difficulty of finding a grounds for prosecution manifested itself in the trial strategy that the government adopted. To an extent, the prosecutors abandoned pretext altogether. As a matter of practicality, however, the prosecution was forced to base its case on something more substantial than mere alliance with the Communist party, and they frequently used the vehicle of a broadly sketched conspiracy to prosecute defendants. In this respect, the precedent that the conspiracy prosecutions set was of particular importance. As Richard Arens notes, "the political conspiracy of the *Dennis* type confronts us as a judge-made law of substantive crime on an *ad hoc* basis. Its vagueness provides unlimited possibilities for abuse."[77]

As the pivotal case of the era, *Dennis v. United States*[78] furnishes a discrete portal through which to view the theoretical foundations and the reception of these admittedly quasi-political prosecutions. The defendants in *Dennis* were charged with various Smith Act violations, including:

> wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and

75. SCHRECKER, *supra* note 54, at 28 (noting that "it was hard to obtain the evidence necessary for a conviction," because the government faced the possibility of having to disclose highly sensitive intelligence information contained in intercepted KGB communications).

76. *Id.* at 49.

77. Richard Arens, *Conspiracy Revisited*, 3 BUFF. L. REV. 242, 267 (1954).

78. 341 U.S. 494 (1951).

> assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government.[79]

As evidenced by the "broad conclusions" that the Supreme Court avowed that the record supported,[80] the prosecutorial theory in *Dennis* had as its lynchpin a widely cast conspiratorial net.

The broadly painted picture of the defendants in *Dennis* as operatives in a sinister society advocating overthrow of the government and all manner of political upheaval surely contributed to the psychological impact of the trial, both upon its immediate participants and the national psyche.[81] The Court's characterization of the gravity of the impending Communist threat reflects the popular attitude:

> The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified.... If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.[82]

This attitude was fostered in part by the trial itself, which was plagued by a judge who was wholly lacking in impartiality and by excessive showmanship by the lawyers for both sides.[83] Moreover, the political climate had an effect on the Supreme Court, and "the justices had come to believe that communism endangered the

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79. *Id.* at 497.

80. *Id.* at 498. Chief Justice Vinson cited to the court of appeals in his opinion for its finding that "the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence." *Id.*

81. *See* SCHRECKER, *supra* note 54, at 51 (describing the atmosphere at trial).

82. *Dennis*, 341 U.S. at 510-11.

83. *See* SCHRECKER, *supra* note 54, at 51 (noting that "[b]oth sides hoped to score political as well as legal points").

nation's existence and that, in the words of Justice Felix Frankfurter, it would be wrong to treat the party's advocacy of communism 'as a seminar in political theory.'"[84] Indeed, Judge Learned Hand even found a veritable necessity in examining the context in which the case arose, stating that "[w]e must not close our eyes to our position in the world at that time."[85]

At trial Judge Medina unequivocally charged the jury with finding a single conspiracy. In his instructions, Medina stated that

> [w]hile [the indictment] refers to a conspiring to organize as the Communist Party a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence and also a conspiring to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, I charge you that but a single conspiracy is alleged.[86]

Medina then paused to comment that "[p]robably the prosecution could have urged me to construe the indictment as charging a single conspiracy with two separate objects or as charging two separate conspiracies."[87] This somewhat gratuitous soliloquy reflects the fluid construction that the court gave to the conspiracy doctrine. Additionally, Medina contended that the single conspiracy "is adopted because [it is] plainly in the interest of defendants and not conceivably prejudicial to them."[88] This formulation of the conspiracy is somewhat curious, because in most conspiracy cases defendants find it to their distinct advantage to divide the allegations into a succession of conspiracies.[89] Judge Medina's conclusion that "[a]s there is a single conspiracy alleged, this will also simplify your [the jury's] labors," similarly calls into question the propriety of charging a single, expansive conspiracy inasmuch as it suggests, in an

84. *Id.* at 52.

85. *Dennis*, 183 F.2d 201, 213 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

86. United States v. Foster, 9 F.R.D. 367, 375-76 (S.D.N.Y. 1949), *aff'd* 183 F.2d 201 (2d Cir. 1950).

87. *Id.* at 376.

88. *Id.*

89. *See* United States v. Abraham, 541 F.2d 1234, 1237 (7th Cir. 1976) ("In nearly every conspiracy case the claim is made that a variance exists because multiple conspiracies were shown.").

extremely subtle manner, that the work of the jury in reaching a conviction is made easier by the consolidation of the criminal activity into a single charge.[90]

Judge Medina likewise seemed very amenable to the suggestion that a conspiracy's scope was not inhibited by great distances of time or place, as is indicated by his charge to the jury that

> where an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end, knowingly work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although his part therein be a subordinate one, *or be executed at a remote distance from the other conspirators.*[91]

Consistent with the conventional wisdom regarding conspiracy cases, the court, in its explanation of the application of evidence to the charges in the indictment, charged the jury that "[i]n conspiracy cases there is necessarily considerable latitude of admissible evidence."[92] To be sure, a scathing reproach of the wide evidentiary latitude given to conspiracy charges would have been inappropriate in the context of a jury instruction, but the comfort with which the court acknowledged this fact is indicative of the general judicial acceptance of a broadly constructed scope, particularly in a setting in which concerns over national security were prevalent.

The Supreme Court's discussion of the limitations placed on the government in its constant vigil of self-preservation is revealing, and contradictory. While maintaining that the First Amendment's guarantees are sacrosanct, even in the face of a serious threat to the continued vitality of the United States, the Court allowed an even more egregious infringement upon liberty to occur. The Court sat idly by, and even occasionally looked on with approval, as the prosecution pursued a theory of conspiracy that was so expansive as to render almost meaningless the statutory confines of the crime. Recounting the necessities created by threats to national security, the Court stated that

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90. *Foster*, 9 F.R.D. at 376.
91. *Id.* at 377 (emphasis added).
92. *Id.* at 379.

> [o]ur whole history proves even more decisively than the course of decisions in this Court that the United States has the powers inseparable from a sovereign nation.... The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty.... But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations.... Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.[93]

In *Yates v. United States*,[94] a case that bore an uncanny factual resemblance to *Dennis*, the defendants' convictions were reversed, and the Red Scare was effectively eliminated from the judicial radar. But serving as an historical bookend to McCarthyism was not the sole significance of *Yates*. In his opinion, Justice Harlan writes at length about the "familiar rule that criminal statutes are to be strictly construed," in the context of defining the word "organize" in the Smith Act.[95] Justice Harlan's lengthy recitation of this century-old rule serves as an overture, suggesting that this precept has been abrogated in other instances in the McCarthy Era prosecutions and, in particular, in the overarching use of the conspiracy doctrine.[96] Furthermore, the Court noted that

> both the record and the Government's brief ... make it clear that the Government's thesis was that the Communist Party ... constituted the conspiratorial group, and that membership in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party's affairs and thus inferentially parties to its tenets.[97]

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93. Dennis v. United States, 341 U.S. 494, 519-20 (1951).

94. 354 U.S. 298 (1957); *see* SABIN, *supra* note 59, at 5-6 ("[T]he 1957 Supreme Court's decision in *Yates v. U.S.* signaled the end of prosecutions of Communist Party members.").

95. *Yates*, 354 U.S. at 310.

96. *Id.* at 310-12.

97. *Id.* at 320.

The Court's rejection of this connection between organizational membership and criminal conduct in the context of the Smith Act illustrates the judiciary's increasing distaste for aligning itself with the government's demands regarding Communism.

As the shockwaves of the Red Scare reverberated throughout the country, jolting even the federal courthouses, conspiracy became the sanctioned all-purpose mechanism for stemming subversion. Although the courts were perhaps the last bastions to fall victim to fear of the Communist threat, the judiciary's dramatic shift in the interpretation of the conspiracy doctrine during the course of the McCarthy Era is telling. When, as in *Dennis*, the external pressures on the courts rose to a critical level—one in which national security seemed jeopardized—the courts responded by loosening the reigns on the construction of conspiracies. When the threat subsided, however, the courts were equally quick to retreat from their formerly permissive position.

III. THE POST-9/11 CASES

A. Historical Underpinnings: After 9/11

Although typically summarily addressed and disposed of by the courts currently adjudicating the fallout from September 11,[98] it is undeniable that the charges against and detentions of admitted and suspected members of al Qaeda, particularly those of Zacarias Moussaoui, are firmly rooted in the context of the attacks.[99] The horror of the attacks was broadcast repeatedly on television networks across the world and described in detail in the newspapers in the days following the attacks.[100] Escaping the deluge of informa-

98. *See* United States v. Moussaoui, 333 F.3d 509, 512 (4th Cir. 2003), *vacated by* 365 F.3d 292 (4th. Cir 2004) (summarizing the events of September 11, 2001 in two sentences); Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 529 (E.D. Va. 2002), *rev'd* 316 F.3d 450 (4th Cir. 2004) (noting that "[o]n September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities").

99. *See* Indictment of Zacarias Moussaoui, United States v. Moussaoui, 333 F.3d 509 (4th Cir. 2003) (No. Crim. 01-455-A).

100. *See, e.g.*, Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1.

tion and emotions in the early hours and days after the attacks was impossible.

The events of September 11 shook the American psyche and had repercussions around the world. As noted by Christopher Hewitt, "[t]he American response was ... unprecedented. All commercial air traffic was grounded for two days.... The Justice Department launched 'the most massive and intensive investigation ever conducted in America.'"[101] *The Washington Post* commented on September 12th that "[i]t was terrorism of a scope once unimaginable."[102] It did not take a team of noted psychologists to understand that "[i]n a matter of moments, the United States had become a gravely disoriented country tottering on the brink of chaos."[103] As aptly noted by the editorial writers of *The Washington Post*, "[t]he horrific terrorist attacks yesterday in New York and Washington will rank as one of the greatest calamities in American history, and will confront the United States with one of its most demanding challenges."[104]

In a study commissioned by the American Psychological Association, several psychologists noted that "[t]errorism, as the word implies, capitalizes on the human capacity to experience terror. Terror is, in turn, a uniquely human response to the threat of annihilation."[105] The ramifications of that terror were immediate and pronounced. The national mood swung like a pendulum, "from panic to patriotism."[106] Within ten days, President George W. Bush had announced that "[o]ur war on terror will not end until every terrorist group of global reach has been found, stopped, and defeated," setting in motion a multifaceted campaign against terrorism.[107]

Riding on mercurial public emotions, the PATRIOT Act was passed just over a month after the attacks amidst a great deal of

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101. CHRISTOPHER HEWITT, UNDERSTANDING TERRORISM IN AMERICA: FROM THE KLAN TO AL QAEDA 1 (2003).

102. Editorial, *Washington's Response*, WASH. POST, Sept. 12, 2001, at A30 [hereinafter *Washington's Response*].

103. But such a group did record that observation. TOM PYSZCZYNSKI ET AL., IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR 4 (2003).

104. *Washington's Response*, *supra* note 102, at A30.

105. PYSZCZYNSKI, *supra* note 103, at 8.

106. HEWITT, *supra* note 101, at 4.

107. John Kelly, *The Man Behind the Terror*, WASH. POST, Sept. 27, 2001, at C12.

bipartisan support and sharp criticism.[108] The unsettled state of American emotions manifested itself in the form of bumper stickers emblazoned with stars-and-stripes and continued, largely unabated, even through Thanksgiving 2003.[109] Patriotic songs that were formerly reserved for the Fourth of July and Memorial Day became common in a wide variety of venues.[110] Video game developers retooled their products to eliminate any potential overtures to terrorist attacks.[111] President Bush acknowledged the pervasive fears in his September 20, 2001, address: "I know many citizens have fears tonight, and I ask you to be calm and resolute, even in the face of a continuing threat. I ask you to uphold the values of America and remember why so many have come here."[112]

B. Scope of Conspiracy in Post-9/11 Cases

A significant theme in the debate over alleged "twentieth hijacker" Zacarias Moussaoui's prosecution concerns the scope of the conspiracy to be charged. Although a point of contention in all but the most commonplace conspiracies, the scope of the conspiracy charged in *United States v. Moussaoui* is of particular importance because of the socio-political pressures operative upon the case.[113] As this Part will show, due to the extraordinary external pressures exerted on the judicial system, the scope of the charged conspiracies in the Moussaoui prosecution has been widened far beyond that which is typical, setting a dangerous precedent for future civilian trials of alleged terrorists.

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108. *See* Dana Milbank, *House Bill Would Expand Federal Detention Powers*, WASH. POST, Oct. 2, 2001, at A1 (describing the proposed bill).

109. For a bit of humor, see Reilly Capps, *Free to Strut His Stuffing*, WASH. POST, Nov. 25, 2003, at C01 (noting that "pardoned" turkeys were named Stars and Stripes by popular consensus).

110. Tim Page, *'God Bless America,' The Song in a Nation's Heart*, WASH. POST, Sept. 21, 2001, at C01.

111. Mike Musgrove, *Reality-Based Rethinking: Sept. 11 Altered Landscape for Video-Game Makers, Players*, WASH. POST, Sept. 21, 2001, at E12.

112. Transcript of President Bush's Address to a Joint Session of Congress, WASH. POST, Sept. 21, 2001, at A24.

113. 333 F.3d 509, 512 (4th Cir. 2003); *see also* United States v. Moussaoui, 382 F.3d 453, 457-58 (4th Cir. 2004) ("Simultaneously with its prosecution of Moussaoui, the Executive Branch has been engaged in ongoing efforts to eradicate al Qaeda and to capture its leader, Usama bin Laden.").

Per the government's own admission, "Moussaoui is charged in six broad conspiracy counts that include as overt acts, *inter alia*, the preparation for and execution of the terrorist attacks of September 11."[114] The prosecutorial theory specifically rests on the proposition that Moussaoui was connected with and agreed to the conspiracy to carry out the attacks and therefore can properly be charged with the overt acts committed by his co-conspirators in furtherance of the conspiracies.[115] However, the government specifically, and somewhat speciously, contends that "Moussaoui is not charged, as standby counsel and the defendant repeatedly have phrased it, with 'September 11.'"[116] This claim seems suspect when considered in the context of the Death Notice submitted concurrently with the indictment, which effectively alleges that Moussaoui's actions caused the deaths on September 11.[117] Indeed, the courts that have handled Moussaoui's case appear to see little practical distinction between the specifically enumerated crimes[118] and "September 11th."[119]

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114. Government's Opposition to Defendant's Motions for Access at 8, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. 01-455-A), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69021/1.pdf.

115. *Moussaoui*, 282 F. Supp. 2d at 483.

116. Government's Opposition to Defendant's Motions for Access at 7-8, *Moussaoui* (No. 01-455-A).

117. *See* Standby Counsel's Response to the Government's Opposition to Defendant's Motions for Access at 2 n.1, *Moussaoui* (No. 01-455-A), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69045/1.pdf. The defendant himself, from what can be gathered from his semi-coherent ramblings, fails to appreciate the distinction, as he noted: "So Let's me get it Right, Now 'Moussaoui is Not Charged-with September 11.'" Motion by Zacarias Moussaoui at 2, *Moussaoui* (No. 01-455-A), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69094/1.pdf.

118. The Second Superceding Indictment charges Moussaoui with (1) conspiracy to commit acts of terrorism transcending national boundaries, (2) conspiracy to commit aircraft piracy, (3) conspiracy to destroy aircraft, (4) conspiracy to use weapons of mass destruction, (5) conspiracy to murder United States employees, and (6) conspiracy to destroy property. Second Superceding Indictment at 1, *Moussaoui* (No. 01-455-A), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66826/0.pdf.

119. *See* United States v. Moussaoui, No. 03-4870 (4th Cir. Jan. 23, 2004) (denying appeal of vacation of order granting Moussaoui leave to represent himself, stating that "Zacarias Moussaoui is charged with multiple offenses stemming from his acknowledged membership in the terrorist organization al Qaeda and his alleged involvement in the September 11, 2001 terrorist attacks"); United States v. Moussaoui, 333 F.3d 509, 512 (4th Cir. 2003).

The government's semantic hair-splitting[120] was both recognized and criticized by Judge Brinkema in her October 2, 2003, ruling:

> [A]pproximately seventy-five percent of the Indictment concerns the activities of the nineteen alleged hijackers on and before September 11, 2001. Nevertheless, the United States maintains that the charged conspiracies are not conspiracies to carry out the September 11 attacks. Instead, the United States has, at times, broadly characterized the underlying unlawful agreement as "al Qaeda's conspiracy to attack the United States," al Qaeda's "war on the United States" in which its members would "use virtually any means available to murder Americans en masse," and "a coordinated plan of attack upon the United States that included flying planes into American buildings."[121]

In this opinion Brinkema acknowledged the government's obvious upper hand, in that "it need not prove the defendant's participation in the September 11 attacks to obtain a conviction in this case."[122] In fact, according to the theory promulgated by the government, the conspiracy that is alleged is significantly broader than the events of September 11 alone and includes "the dissemination of *fatwahs* regarding attacks against American personnel in Somalia, the use of training camps to prepare legions of al Qaeda adherents for the holy war Bin Laden declared against the United States, and al Qaeda's efforts to obtain components of nuclear weapons."[123] The advantage of the conspiracy charge is readily apparent, as evidenced by the government's own admission: "even if al Qaeda never intended to put Moussaoui on one of the four planes on September 11, he would nonetheless be guilty of the charges specified ... if he otherwise participated in the broad conspiracies charged."[124] This application of the Fourth Circuit's reasoning in *United States v.*

120. Government's Opposition to Defendant's Motions for Access at 7-8, *Moussaoui* (No. 01-455-A) ("Moussaoui is not charged ... with 'September 11.' ... Moussaoui is charged in six broad conspiracy counts [including] ... the preparation for and execution of the terrorist attacks of September 11.").

121. United States v. Moussaoui, 282 F. Supp. 2d 480, 483-84 (E.D. Va. 2003) (citations omitted).

122. *Id.* at 484.

123. Government's Opposition to Defendant's Motions for Access at 8, *Moussaoui* (No. 01-455-A).

124. *Id.*

Burgos,[125] which explicated the boundaries of the conspiracy doctrine, is technically correct, but the government's broad construction of the conspiracies to which they linked Moussaoui pushes the boundaries of the doctrine.

As a comparison, consider that, in the prosecution of *United States v. Rahman*, the government made no attempt to distinguish between the actual events that had occurred, particularly with respect to the bombing of the World Trade Center on February 26, 1993, and the charged conspiracy.[126] Charged with seditious conspiracy under 18 U.S.C. § 2384, the defendants in *Rahman* had both the benefit and the misfortune of a prosecutorial theory that actively embraced a broadly construed agreement but that also contained a less fluid standard than the regular conspiracy charge.[127] As observed by Suzanne Babb, "[t]he *Rahman* case demonstrates a certain judicial pragmatism in reaching the end goal of obtaining convictions involved in subversive activities."[128] Babb's analysis suggests that a conspiracy charge may be preferable to treason, even where the stringent requirements of treason can be met, for the sole reason that it is an easier crime to digest.[129] The seditious conspiracy charge, however, is relatively rare in current judicial parlance.[130] As either a matter of expediency or simplicity, prosecutors tend to employ more commonplace offenses against terrorists and other political offenders.[131] Babb's suggestion that the

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125. 94 F.3d 849, 857-62 (4th Cir. 1996).

126. 189 F.3d 88, 104 (1999) (noting that "the Government sought to prove that the defendants and others joined in a seditious conspiracy to wage a war of urban terrorism against the United States and forcibly to oppose its authority").

127. *See* John Alan Cohan, *Seditious Conspiracy, The Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government*, 17 ST. JOHN'S J. LEGAL COMMENT. 199, 227 (2003) ("The prosecution in seditious conspiracy cases must convince the jury that the defendant's utterances issued a strong enough warning to meet the 'imminent lawless action' standard.").

128. Suzanne Kelly Babb, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721, 1741 (2003).

129. *Id.*

130. Cohan, *supra* note 127, at 202-03 (noting that "[e]xcept for the prosecution of Sheik Rahman and his co-defendants, modern-day sedition trials are almost unheard of").

131. *See Combating Domestic Terrorism: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 108, tbl.B-1 (1995) [hereinafter *Hearing, Combating Domestic Terrorism*] (statement of Brent L. Smith, Professor and Chairman, Dep't of Criminal Justice, Univ. of Ala.) (indicating that between 1982 and 1989, the principal

right result was reached even though the charges might not have been completely in synch with the crime committed is reminiscent of the threat Justice Jackson warned of in his famous condemnation of the expansion of the conspiracy doctrine in *Krulewitch*: "[h]owever, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."[132] Over fifty years later this cautionary instruction now seems almost prescient. The legal history of conspiracy surely indicated to Jackson and his colleagues the relative rapidity with which change in this particular arena could occur, but they surely could not have foreseen the magnitude of the changes in and applications of conspiracy that were to come.

In order to obtain a conviction against Moussaoui, the government must prove the two essential conspiracy elements: that there was an agreement to engage in unlawful conduct and that Moussaoui knowingly and willfully aligned himself with the conspiracy.[133] In *Burgos*, the Fourth Circuit explicitly restated these fundamental conspiracy requirements, such that "the Government must prove the existence of the conspiracy and the defendant's connection to it beyond a reasonable doubt."[134] Implicit in these requirements is the proof of the scope of the conspiracy. To demonstrate the agreement, its terms must necessarily be proven, and a prerequisite of proving a defendant's affiliation is demonstrating the aspect of the conspiracy in which he was involved. Questions of scope, however, are almost wholly fact-intensive and are largely defined by reference to the agreement.[135] This reality gives the prosecution wide latitude in both framing the central issues in the case and determining what evidence will be offered.

The opinion in *Burgos* emphasized that "a conspiracy can have an elusive quality and that a defendant may be convicted of conspiracy

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charges brought against terrorists were: racketeering; possession of machine guns, destructive devices, and certain other firearms; conspiracy; and RICO violations).

132. Krulewitch v. United States, 336 U.S. 440, 449 (1949) (Jackson, J., concurring).

133. United States v. Moussaoui, 282 F. Supp. 2d 480, 484-85 (E.D. Va. 2003).

134. United States v. Burgos, 94 F.3d 849, 861 (4th Cir. 1996).

135. JOSEPH F. MCSORLEY, A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW 151 (2d ed. 2003) (noting the consequences of not thoroughly considering the scope of the agreement).

with little or no knowledge of the entire breadth of the criminal enterprise,"[136] a tenet of conspiracy law that may prove highly applicable to Moussaoui's prosecution. Consistent with established law, in Moussaoui's case Judge Brinkema declared that the "scope of the charged conspiracies ultimately are questions for the jury to resolve."[137] The theory upon which the government prosecutes Moussaoui will therefore have a significant impact on the scope of the conspiracy. The grand jury has essentially drawn the initial demarcations of the conspiracy in the allegations of the indictment, irrevocably setting the stage for the jury's final determination.

To be sure, the prosecution of Moussaoui departs in some rather significant ways from both the traditional deficiencies of the crime of conspiracy as well as from the flaws in the McCarthy Era cases. First, Moussaoui is the sole defendant in the case, which renders much of the criticism leveled at mass prosecutions moot.[138] Second, the inchoateness of the conspiracy is less troubling here, because Moussaoui's indictment alleges involvement in the criminal attacks that actually occurred on September 11.[139] The success of at least one of the conspiracy's objects somewhat allays concerns as to the true scope of the conspiracy inasmuch as it tends to show in more concrete terms the actual outline of the action intended. The fact that the object of the conspiracy came to fruition, however, does not necessarily make the determination of the conspiracy's scope any less troubling, as pointed out by Judge Learned Hand in *United States v. Compagna*.[140] Hand noted that

> [m]y brothers think that ... it was relevant to show that the scheme proved successful as part of the proof that there had been a scheme at all. They believe that there is a rational connection between the existence of the criminal agreement—the "partnership in crime"—and the fact that the acts

136. *Burgos*, 94 F.3d at 858.

137. *See Moussaoui*, 282 F. Supp. 2d at 484; MCSORLEY, *supra* note 135, at 159-60 (noting that the question of scope is submitted to the jury where the evidence would permit a finding of multiple conspiracies).

138. *See* Marcus, *supra* note 9, at 36-44.

139. *See* Krulewitch v. United States, 336 U.S. 440, 450 (1949) (Jackson, J., concurring) (expressing concern that "the conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges only lie when an act which is a crime has actually been committed").

140. 146 F.2d 524, 528-29 (2d Cir. 1945).

> upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed.[141]

Hand demurred from the majority's conclusion, finding that "[i]t seems to me, on the other hand, that the only evidence relevant to the existence of a conspiracy are facts which come, or at least might have come, to the knowledge of the conspirators."[142] Richard Arens echoed this sentiment nearly a decade later, noting that "[s]ince the standard of proof of agreement is thus admittedly subjective and hence unpredictable, *the conspiracy doctrine operates, in effect, to repress completed yet undefined activities.*"[143] What the conspirators knew or should have known, in other words, should dictate the scope of the criminal activity, evidence of an ostensibly completed object notwithstanding.

Hand's reluctance to consider the success of the conspiracy in determining its scope is not exclusive, however. In a prior opinion, Hand noted that "[i]t is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding."[144] This basic tenet of conspiracy law is deceptively simplistic in that it presupposes that, in the course of unraveling the original conspiracy, there will be no residual taint from the subsequent actions, thus exculpating those conspirators who were not party to the enlargement. As a result, even if Moussaoui's defense team is successful in proving that his involvement extended no further than preliminary ruminations about the possibility of undertaking massive attacks against the United States, the inclusion of proof respecting the September 11 plot will almost certainly influence the jury's ultimate decision.

The prosecutorial decision reflected in the indictment has significant ramifications both in and outside the courtroom. By placing the events of September 11 on center stage, the government's theory satisfies the public demand that the perpetrators of the attacks be made to answer for their misdeeds and also fulfills

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141. *Id.* at 528.
142. *Id.* at 529.
143. Arens, *supra* note 77, at 267 (emphasis added).
144. United States v. Crimmins, 123 F.2d 271, 273 (2d Cir. 1941).

the quasi-judicial role of prosecutors in determining what acts to punish.

Speaking before the House Judiciary Committee in the aftermath of the Oklahoma City bombing on April 19, 1995, Professor Brent Smith noted that "[f]ederal prosecutors basically have two options [with respect to terrorism cases]. They can choose to pursue these cases as traditional offenders under conventional criminal cases or to explicitly politicize the case by emphasizing the terroristic goals and motives of the perpetrator. Clearly, injecting the terrorist motives creates prosecutorial problems."[145] Smith characterizes the attempt to use explicitly political offenses as the grounds for prosecution as a "much less fruitful strategy" and concludes that "prosecutors have been correct in choosing to minimize political motives in most terrorism cases."[146] Underlying Smith's condemnation of overtly political criminal statutes is a suggestion that prosecutions that are even partly predicated on potentially unpopular political viewpoints—even when those viewpoints are manifested in actions that run afoul of the criminal law—are fundamentally distasteful to the American judicial system.

Observing that September 11 altered the balance of institutional power relationships in American politics, Allan J. Cigler noted that "[i]n times of international crisis Americans typically 'rally around the flag,' enhancing the power of the executive branch vis-à-vis both Congress and the judiciary."[147] There can be no question that the prosecution of Moussaoui and other terrorists intimately involves concerns about public welfare. Indeed, in addressing the issue of whether an interlocutory appeal could be taken from an order directing the deposition of an enemy combatant, the Fourth Circuit acknowledged that "we are cognizant that this case involves substantial national security concerns."[148]

In the first World Trade Center bombing case, *United States v. Salameh*, the government introduced fairly extensive evidence of "terrorist materials" seized from one of the co-conspirators, includ-

145. *Hearing, Combating Domestic Terrorism, supra* note 131, at 102 (statement of Brent L. Smith, Professor and Chairman, Dep't of Criminal Justice, Univ. of Ala.).

146. *Id.*

147. PERSPECTIVES ON TERRORISM: HOW 9/11 CHANGED U.S. POLITICS 3 (Allan J. Cigler ed., 2002).

148. United States v. Moussaoui, 333 F.3d 509, 516 (4th Cir. 2003).

ing a document entitled "Facing the enemies of God terrorism is a religious duty and force is necessary."[149] The court held that the admission of this book, in conjunction with a number of bomb-making manuals and video tapes, was appropriate in part because "evidence that provides background information necessary to the jury's understanding of the nature of the conspiratorial agreement properly is admitted 'to furnish an explanation of the understanding or intent with which certain acts were performed.'"[150] Without question, the prosecution's theory relied on proof that the defendants were connected through their religious and anti-American beliefs, and this publication, found to be in the possession of two of the conspirators,[151] was used to show the intent with which the criminal acts were performed. However, the court's willingness to admit such evidence raises serious questions as to how much "background information" the government should be allowed to provide.

To be sure, in *Salameh*, the materials admitted as background information bore strong indicia that they would shed light on the issue of intent. As the court noted, "[t]he materials possessed by both [Defendants] Ajaj and Abouhalima bristled with strong anti-American sentiment and advocated violence against targets in the United States."[152] There can be relatively little doubt that the conspirators joined together in criminal enterprise with the intent to commit an offense against an *American* target. The court correctly contemplated the possible prejudicial effect of the materials, noting that "[t]he sulphurous anti-American sentiments expressed in the terrorist materials no doubt threatened to prejudice the jury," but the court failed to consider the potentially deleterious precedent that it was establishing by throwing open the door to "background information necessary to the jury's understanding of the nature of the conspiratorial agreement."[153]

The court in *Salameh* further explained that these materials were properly admitted for the dual purposes of providing background

149. 152 F.3d 88, 110 (2d Cir. 1998).

150. *Id.* at 111 (quoting United States v. Daly, 842 F.2d 1380, 1388 (2d Cir. 1988)).

151. *Id.* at 110-11 (noting that a copy was seized from defendant Ajaj and another was found at defendant Abouhalima's residence).

152. *Id.* at 111.

153. *Id.*

information for establishing the scope of the conspiracy and establishing the motive and intent of the conspirators.[154] Without overly parsing the court's phraseology, it seems important to note that the use of background information in establishing the scope of a conspiracy is entirely inappropriate. The scope of a joint criminal enterprise is typically used as the framework upon which a prosecutorial theory is built, and the scope therefore serves as the backbone of the case. For the court to admit background evidence as to scope in order to support the framework of the case is contrary to the general purpose of background evidence.

Semantics aside, the *Salameh* opinion is evidence of courts' highly receptive attitude toward broadly construed conspiracies in situations of politically tinged violence. The opinion expresses no doubt about the appropriateness of an expansively constructed scope. In fact, the panel noted that "the government argued to the jury that the defendants engaged in a conspiracy to bomb buildings, vehicles and property in the United States and the World Trade Center bombing was one act committed in furtherance of the overall conspiracy."[155] In addition, the court dismissed the defendants' objections to the charge—that a more specific conspiracy to bomb the World Trade Center had been constructively alleged—as not clearly supported by the evidence.[156]

Although clearly understated, implicit in the context of the *Salameh* proceedings was the sense that the court was not merely dealing with conspirators but with terrorists. The court noted that

> [t]he most definitive proof of the broad scope of the conspiracy and the defendants' intent to commit additional bombings after the World Trade Center was the letter sent to the *New York Times* claiming responsibility for the bombing and the similar draft letter retrieved from an erased file on Ayyad's computer disk, both of which speak to future acts of terrorism.[157]

As history unfolded, so too did the future acts of terrorism that the court had predicted. In August 1998, bombs exploded in the U.S.

154. *Id.* at 116.
155. *Id.* at 146.
156. *Id.* at 147.
157. *Id.*

embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania, killing more than 260 people, including twelve Americans, and leaving more than 5,000 injured.[158] The resulting prosecution of Osama Bin Laden and fourteen other members of al Qaeda ran headlong into the problem of how to address charges of "numerous offenses arising out of [the defendants'] alleged involvement in an international terrorist organization ... and [in] that organization's alleged involvement in the August, 1998 bombings."[159]

At the time of Judge Sand's March 30, 2000 opinion, the indictment named fifteen defendants and "accuse[d] them of participating in several long-lasting, wide-ranging conspiracies to attack United States personnel (including civilians) and property."[160] Defendant Al-'Owhali made a motion to dismiss the indictment on the grounds that it "labels a decade-long international political and religious movement involving dozens of countries, scores of organizations, and thousands of persons as a single 'conspiracy.'"[161] Perhaps unwittingly, Al-'Owhali delivered an almost exact recital of the traditional elements used to define the scope of a conspiracy as applied to his case by claiming that the conspiracy charged was too sprawling to be taken seriously. The court, however, refused to entertain his argument in a rather tellingly dismissive tone.[162]

Judge Sand's hesitance to review extensively the scope of the charged conspiracy is indicative of the willingness of courts to accept a broader construction of conspiracy than might be allowed in the case of other criminal offenses. Sand reiterates that "it appears to be well settled that a conspiracy 'may be alleged as broadly as the conspiracy really was'" and that the government is due great deference in its good-faith construction of the conspiracy and its

158. John J. Goldman, *Kenya Bombing Suspect Admits Bin Laden Link*, L.A. TIMES, Aug. 29, 1998, at A1.

159. United States v. Bin Laden, 91 F. Supp. 2d 600, 604 (S.D.N.Y. 2000).

160. *Id.* at 606-07 (noting further that "[t]he indictment charges the 15 named Defendants with 267 discrete criminal offenses" and that "[e]ach of the Defendants is also charged with participating in at least five distinct criminal conspiracies," but that the allegations with respect to each conspiracy significantly overlapped).

161. *Id.* at 608 (quoting Al-'Owhali's Notice of Motion at ¶ 1).

162. *Id.* ("[O]nce the discrete legal issues he raises are separately identified and examined in accordance with settled principles of law, it becomes clear that they cannot withstand scrutiny. Despite the force of his rhetoric, Mr. Al-'Owhali is plainly not entitled to the relief he requests.").

contemplated objectives.[163] Sand adopted a wholly practical approach to conspiracy composition and scope issues during the course of the *Bin Laden* trial, and his decisions in that respect generally seem to have reached a just result.[164] Nonetheless, a system that is wholly reliant on judicial pragmatism in reigning in over-broad conspiracy charges creates serious doubt as to its ability to protect defendants' constitutional rights.

From the foregoing it is clear that one of the principal attractions of the conspiracy charge in cases that arouse concerns about national security is the ability of the conspiracy doctrine to sweep into its net a vast array of evidence and background information that might not otherwise be available. The immense potential for even the appearance of impropriety should give prosecutors pause in deciding how broadly to cut the swath of conspiracy and define its scope.

CONCLUSION

In the post-9/11 era, criminal conspiracy in particular and the civilian judicial system in general have emerged as important enforcement mechanisms in the government's war on terrorism.[165] As a result of this perhaps misplaced reliance on the deterrent effect of the criminal justice system, new pressures have been exerted on relatively old concepts, a process that has produced hairline fractures in otherwise stable, if rather expansively interpreted, doctrines. The danger posed by the continued over-use of conspiracy statutes is to widen those fractures into gaping chasms into which both individual rights and the integrity of the judicial system may be swallowed.

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163. *Id.* at 610 (quoting Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949)).

164. United States v. Bin Laden, 2001 U.S. Dist. LEXIS 15484, at *20-21 (S.D.N.Y. 2001) (noting that the "broad scope of the conspiracy charges led the Court to believe that it was appropriate to permit such wide ranging inquiry by defense counsel" during direct and cross-examination).

165. *See* NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 1 (2003) (noting that "[a] regimen of crimes and special approaches to criminal procedure (including investigation and detention) is being used in the government's effort that differs from much of ordinary criminal process").

The use of conspiracy in wartime prosecutions is not novel, nor is it inappropriate in many cases.[166] Unfortunately, however, the "elasticity of its substantive and procedural attributes" creates "serious dangers of abuse and oppression."[167] That historically the most pronounced expansion of the doctrine came at a time of social unrest should serve as a cautionary sign of the government's tendency to use conspiracy to address social issues in a judicial forum.[168] To preserve judicial integrity, it is imperative that history not be repeated. Where conspiracy once "clearly became a powerful weapon of public policy, and its expansion promptly reflected the infusion of morals into law,"[169] it should today be construed as strictly as all other crimes, and all potential moral infusions should be vigorously guarded against.

At least one scholar has challenged the notion that historical examples of extraordinary measures taken during times of national crisis constituted "overreactions to the threats to national security," citing as examples Lincoln's unconstitutional suspension of habeas corpus and the internment of Japanese-Americans during World War II.[170] Richard A. Posner asserts that a "fluid approach [to civil liberties] is only common sense."[171] Posner explains that the proper mechanism for understanding our legal rights is through bifurcation of our collective interests into the "public-safety interest and the liberty interest."[172] On balance, argues Posner, neither interest should trump the other, although there will be times when one is clearly dominant.[173] Significantly, Posner also writes that:

> I want to emphasize something else, however: the malleability of law, its pragmatic rather than dogmatic character. The law is not absolute, and the slogan "*Fiat iustitia ruat caelum*" ("Let

166. *See* Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 276-77 (1948) (noting the "recent application of the doctrine in the war crimes trials").

167. *Id.* at 277.

168. *Id.* at 277 n.5.

169. *Id.*

170. Richard A. Posner, *Security Versus Civil Liberties*, *in* PERSPECTIVES ON TERRORISM, *supra* note 147, at 59, 60-61.

171. *Id.*

172. *Id.* at 60.

173. *Id.* ("They are both important, and their relative importance changes from time to time and from situation to situation.").

> justice be done though the heavens fall") is dangerous nonsense. The law is a human creation rather than a divine gift, a tool of government rather than a mandarin mystery. It is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so must it change.[174]

The evolution of the conspiracy doctrine indicates just such a dynamic approach to the law; however, even the most thoroughly pragmatic approach cannot sanction the wholesale evisceration of basic doctrinal principles on the basis of an altered public opinion. The solution to promoting social welfare in the face of terrorism lies not in disrupting the foundational elements of our penal code but in utilizing the code in a disciplined way, and perhaps even creating new laws narrowly tailored to prohibit such extreme anti-social behavior.[175]

The political and social interests at stake in the McCarthy Era and post-9/11 trials are reflected in the theories of prosecution during those time periods.[176] Writing nearly two years after the September 11 attacks, Professor David Cole elaborated on historical analogies that had been made as early as a few weeks after the

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174. *Id.* at 61-62.

175. *But see Hearing, Combating Domestic Terrorism, supra* note 131, at 103 (statement of Brent L. Smith, Professor and Chairman, Dep't of Criminal Justice, Univ. of Ala.):

> With regard to some recommendations, I would recommend that we avoid the temptation to create terrorism-specific statutes. Because terrorism by definition includes motive as an essential element of the crime, such statutes are fraught with constitutional problems.... I would continue efforts to prosecute terrorists for traditional offenses. Such a strategy minimizes the notion of political persecution, as well as preventing trials from becoming mired in ideological debate. A caveat is in order, however. Severity of punishment continues to be largely affected b[y] presentence investigations. Safeguards must be established to ensure that political motive does not become the major criterion of sentence length for persons convicted of terrorism-related activities.

See also Leon Friedman, *Constitutional Limits to the Fight Against Terrorism*, 19 TOURO L. REV. 97, 100 (2002) ("Moussaoui, who allegedly was the twentieth highjacker on September 11, was charged with regular U.S. crimes. The shoe bomber, who pleaded guilty this morning, was charged only with regular U.S. crimes.").

176. *See* Second Superceding Indictment at 2, 4, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. 01-455-A) (noting that "Bin Laden and al Qaeda violently opposed the United States for several reasons" and that "camps [in Afghanistan] were used to conduct operational planning against United States targets around the world and experiments in the use of chemical and biological weapons"), *available at* http://notablecases.vaed.uscourts.gov/1:01-Cr-00455/docs/66826/0.pdf.

attack:[177] "[t]oday's war on terrorism has already demonstrated our government's remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist that it is not repeating history."[178] Indeed, although the excesses of the McCarthy Era have not been repeated per se, the social and political climate following the September 11 attacks was so similar that it could not have helped but breed a sense that some procedural, and even substantive, alterations in the system were acceptable. An atypically introspective and calm response to the attacks came in the form of a *Washington Post* editorial on the day after the attacks: "[t]he challenge ahead will require strengthening U.S. defenses and intelligence at home in ways consistent with American values."[179] This drive for consistency with American values must extend beyond the military and intelligence arenas—it must inhere in the judicial system as well.

Distinguishing between conspiracies that are fundamentally economic and those that are political, Richard Arens, writing in the wake of the Red Scare, noted that

> [u]nder the strain and stress of the bipolarization of world power, Communists ... have indeed come to be viewed as "sinister persons" who, if not "meeting by twilight with pointed hats" can be counted on at all hours to be engaged in more mischief with less melodrama.
>
> In increasing measure public attitudes have tended toward the identification of the Communist as a threat toward the internal as well as the external security of the non-Communist nation.[180]

This explicit recognition of the particular tension that accrues in times of both perceived and actual political instability surfaces again in Arens' further observations that "it is elementary that

177. John Lancaster & Jonathan Krim, *Ashcroft Presents Anti-Terrorism Plan to Congress; Lawmakers Promise Swift Action, Disagree on Extent of Measures*, WASH. POST, Sept. 20, 2001, at A24 (quoting Shari Steele, Executive Director and President of Electronic Frontier Foundation, as saying that Attorney General John Ashcroft's plan was "almost McCarthyesque").

178. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 1-2 (2003).

179. Editorial, *September 11, 2001*, WASH. POST, Sept. 12, 2001, at A30.

180. Arens, *supra* note 77, at 263-64.

every organized government will seek to secure its authority against organized violence" and that "[n]one can question, therefore, the reasonableness of the superimposition of the general prohibition against conspiracy over the various overt crimes against security."[181] Arens' unquestioning acceptance of the government's use of conspiracy reveals a judicial double-standard of sorts: when a defendant is clearly guilty in the court of public opinion, it hardly matters how much doctrinal deviation is required to produce a conviction. For these purposes, there is no more reliably pliable doctrine than that of conspiracy.

In a rather ironic twist of legal historical development, the doctrine of conspiracy, originally conceived as a strictly circumscribed mechanism whereby the perversion of justice was remedied,[182] today stands as one of the most expansive and sprawling offenses in the criminal lexicon. The dangers inherent in the conspiracy doctrine have not gone unnoticed, however, as the opinion in *United States v. Falcone* suggested: "[t]hat there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided."[183] Indeed, although penned almost 200 years ago, the words of Chief Judge Cranch in *United States v. Bollman* are still applicable today:

> In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives.[184]

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181. *Id.* at 264-65.

182. BRYAN, supra note 6, at 25 n.2, 26 (noting that the "Definition of Conspirators ... was confined in its terms almost exclusively to combinations to pervert justice" and further that "unless the complainant's case could be brought within the words of these standard writs, he was obliged to seek another remedy or, failing in this, go without legal redress altogether"). The Definition of Conspirators was promulgated by Edward III, who reigned from 1327-1377. *Id.* at 25.

183. 109 F.2d 579, 581 (2d Cir. 1940).

184. 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622).

The precedents that may be established under the influence of the unusually strong political and social pressures aroused by the threat of terrorist attacks could rank among the worst as a result of their corrosive effect on jurisprudential stability.

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