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# A Domestic Consequence of the Government Spying on Its Citizens: The Guilty Go Free

Mystica M. Alexander

William P. Wiggins

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## THE GUILTY GO FREE

*Mystica M. Alexander & William P. Wiggins*[†]

### INTRODUCTION

In recent years, a seemingly endless stream of headlines have alerted people to the steady and relentless government encroachment on their civil liberties. Consider, for example, headlines such as "U.S. Directs Agents to Cover Up Program Used to Investigate Americans,"[1] "DEA Admits to Keeping Secret Database of Phone Calls,"[2] or "No Morsel Too Miniscule for All-Consuming N.S.A."[3] Of concern is not only the U.S. government's collection of data on its citizens, but also how that information is aggregated, stored, and used. The Fourth Amendment protects citizens from unreasonable searches and seizures by the government. While the drafters of the Fourth Amendment could not have foreseen the advent of contemporary electronic surveillance measures, it has been suggested that some forms of electronic surveillance come within the protection of the Amendment and trigger the requirement that such a search be reasonable.[4] When the government violates a citizen's Fourth Amendment rights, what remedies are available? One answer is

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[†] William Wiggins is a Professor at Bentley University. Mystica Alexander is an Assistant Professor at Bentley University. The authors are grateful for the research assistance of Katie Dunn. The authors thank Cheryl Kirschner, David Orozco, Lexi Rubow, and Michael Alexander-Yang for sharing their advice and insights.

[1] John Shiffman & Kristina Cooke, *U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013, 3:25 PM), http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805 [http://perma.cc/8289-VSVH].

[2] *DEA Admits Keeping Secret Database of Phone Calls*, NEWSMAX (Jan. 17, 2015, 7:48 AM), http://www.newsmax.com/Newsfront/dea-admit-phone-database/2015/01/17/id/619172/ [http://perma.cc/PL8H-CHJJ].

[3] Scott Shane, *No Morsel Too Miniscule for All-Consuming N.S.A.*, N.Y. TIMES (Nov. 2, 2013), http://www.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html?pagewanted=all&_r=0 [http://perma.cc/9BRT-BEAR].

[4] CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 4 (2007).

the Court's application of the exclusionary rule, which excludes evidence of guilt that has been obtained as a result of an unlawful search or seizure.[5] A question to consider when assessing the reach of the exclusionary rule is whether it can be used in response to the military's unlawful surveillance of civilians.

Such was the question at issue in the Ninth Circuit's decision in *United States v. Dreyer*, a case involving the conviction of a child pornographer who was first brought to the attention of local authorities through information shared by the military.[6] In September 2014, a three-judge panel of the Ninth Circuit found the military's involvement in civilian affairs to be especially troubling, since such involvement is specifically curtailed by the Posse Comitatus Act (PCA or the Act), and the court ruled in favor of applying the exclusionary rule to suppress the evidence.[7] Although the Ninth Circuit ultimately reversed in an en banc decision, the court's initial ruling remains instructive for its application of the exclusionary rule in a situation of perceived military overreach, and that initial ruling remains the focus of this article as evidence of the need for Congress to provide clear guidance in this area.

In *Dreyer*, the court considered whether an online search of all computers in the State of Washington by a Naval Criminal Investigative Service (NCIS) agent exceeded the permissible limits of military involvement in civilian affairs.[8] While NCIS agent Steve Logan was tasked with conducting an online investigation to identify members of the Navy possessing or distributing child pornography in violation of both federal law and the Uniform Code of Military Justice, he chose instead to investigate all computers in Washington.[9] The defendant was identified during this online search, but since he was a civilian, the investigative report was sent to law enforcement in his hometown.[10] A local detective secured a warrant for the search of the defendant's home, where evidence of child pornography was discovered.[11] The defendant was found guilty of possession and distribution of child pornography and sentenced to 216 months in jail.[12] On appeal, the defendant sought to have the evidence

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[5] Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 310 (1993).

[6] United States v. Dreyer, 767 F.3d 826 (9th Cir. 2014).

[7] *Id.* at 837.

[8] *Id.* at 829.

[9] *Id.* at 827-28.

[10] *Id.* at 828.

[11] *Id.* at 828-29.

[12] *Id.* at 829.

resulting from Agent Logan's online search suppressed on the grounds that the military is prohibited from enforcing civilian laws.[13] Deciding that Agent Logan's action was a PCA-like violation, the Ninth Circuit initially utilized the exclusionary rule to suppress the evidence against the defendant.[14]

This action by the three-judge panel represented a significant departure from existing federal case law. It was the first federal appeals court to invoke the exclusionary rule as a response to a PCA violation since the enactment of the PCA in 1878. Moreover, recent Supreme Court jurisprudence suggests that the exclusionary rule is losing favor.[15] In light of this shift, an important question emerges: Was the Ninth's Circuit's ruling in *Dreyer* simply an anomaly, or was it the beginning of a trend of courts policing government overreach? This article argues that, in a post-9/11 society in which constitutional protections are increasingly uncertain, congressional action is necessary to ensure effective enforcement of the PCA. *Dreyer* indicates that in lieu of legislation clarifying the applicability of the PCA, the judiciary will be forced to assume the role of gatekeeper of individual liberties.[16]

It has been said that "[p]ower tends to corrupt and absolute power corrupts absolutely."[17] The Ninth Circuit's stinging response to the government's defense in *Dreyer* illustrates the court's belief that the judiciary has a responsibility to curtail the government's assertion of a broad set of surveillance powers over its citizens. Against the backdrop of an unprecedented amount of governmental spying on citizens and recent reports of covert sharing of information between the National Security Agency

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[13] *Id.*

[14] *Id.* at 837. Dreyer has been accepted for en banc review by the Ninth Circuit. A decision is forthcoming. *Dreyer*, 767 F.3d 826, *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc).

[15] *See, e.g.*, David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 299-300 (2006) (explaining that the Supreme Court's recent jurisprudence suggests the exclusionary rule is in danger of being overruled); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885 (2014) (indicating that the Roberts Court has drastically limited the circumstances in which the exclusionary rule may be applied).

[16] This is especially troubling since the conflicting results in *Dreyer* indicate that the judiciary is now proceeding with a degree of uncertainty. In the initial ruling, Judge Berzon made clear that she believed the actions of the NCIS agent represented a "widespread" violation of the PCA, and therefore application of the exclusionary rule was necessary. A little over a year later, however, she reversed her view as to whether this would amount to a widespread and repeated violation and agreed with her fellow judges that the application of the exclusionary rule was not proper in this instance.

[17] Letter from John Emerich Edward Dalberg-Acton, Lord Acton, to Bishop Mandell Creighton (Apr. 5, 1887), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 749-50 (Emily Morison Beck ed., 14th ed. 1968).

(NSA) and the Drug Enforcement Agency (DEA), the Ninth Circuit has made clear that absent self-restraint by government agents, it will step in to curtail abuses by rejecting evidence seized through government overreach.

This article argues that Congress should amend the PCA to ensure improved enforcement of the restrictions on the ability of the military to engage in civilian surveillance. Part I explores the history of U.S. government surveillance of its citizens and the permissible limits of such actions in the post-9/11 environment. Part II outlines the legal parameters of permissible military involvement in local law enforcement and discusses the distinction between direct and indirect military involvement. Part III highlights the government's position in *Dreyer* as evidence of the government's firm belief in the broad reach of its surveillance powers. Part IV illustrates how the exclusionary rule has historically been applied in response to Fourth Amendment violations in general and to PCA violations specifically. Part V examines the interests that must be balanced in deciding whether to apply the exclusionary rule and considers what actions can be taken, apart from the suppression of evidence, to address concerns of military overstep. The article concludes with a recommendation that Congress update and expand the PCA. This can be accomplished by legislative changes that clarify that the PCA and its sanctions apply to all branches of the military. In addition, Congress should mandate that the Department of Defense (DoD) promulgate regulations that ensure enforcement of the Act's sanctions so that those who violate the proscription against military involvement in civilian law enforcement will be held accountable.

## I. THE EVOLUTION OF NSA DOMESTIC SPYING: PRE- AND POST-9/11

The notion of government spying is not a new one; it is a concept that has existed for centuries.[18] In the United States, the primary agency that conducts pervasive, highly sophisticated spying operations, both domestically and internationally, is the

[18] Anthony Zurcher, *Roman Empire to the NSA: A World History of Government Spying*, BBC (Nov. 1, 2013), http://www.bbc.com/news/magazine-24749166 [http://perma.cc/VH7R-CLVA] (noting Chinese General Sun Tzu's comments on the need for spying to ensure military success and the elaborate spy network put in place by Julius Caesar).

NSA.[19] President Harry Truman established the NSA on November 4, 1952.[20] He viewed the formation of the NSA as a means of continuing the critically important code-breaking work performed by the Allied nations during World War II.[21] The NSA is both a military agency and a member of the intelligence community. As such, it operates under both the DoD[22] and the Office of the Director of National Intelligence.[23] The Secretary of Defense appoints the NSA's director, who is a commissioned military officer.[24]

On its website, the NSA asserts that it "helps save lives, defend vital networks, and advance [the] Nation's goals and alliances, while strictly protecting privacy rights guaranteed by the U.S. Constitution and laws."[25] The NSA professes to "protect national security interests by adhering to the highest standards of behavior."[26] The operations of the NSA are governed by executive orders and a combination of constitutional, legislative, and regulatory provisions.[27] One of the primary duties of the NSA is to "[c]ollect (including through clandestine means), process, analyze, produce, and disseminate [] intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions."[28]

The terrorist attacks of September 11 heightened the awareness of the vigilance needed to preserve national security and resulted in increasingly expansive surveillance tactics at home and abroad. In 2008, Executive Order 12333 was amended

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[19] Exec. Order No. 12333, 3 C.F.R. 200, 208 (1982). The responsibilities of the NSA shall include "[e]stablishment and operation of an effective unified organization for signals intelligence activities . . . . No other department or agency may engage in signals intelligence activities except pursuant to a delegation by the Secretary of Defense." *Id.*

[20] *Frequently Asked Questions About NSA*, NAT'L SECURITY AGENCY, https://www.nsa.gov/about/faqs/about_nsa.shtml#about1 [http://perma.cc/MYZ6-23S2] (last updated Jan. 13, 2011).

[21] *Id.*

[22] *Frequently Asked Questions Oversight*, NAT'L SECURITY AGENCY, https://www.nsa.gov/about/faqs/oversight.shtml [http://perma.cc/N6DH-UN9P] (last updated Jan. 13, 2011).

[23] *Id.*

[24] *Frequently Asked Questions About NSA*, *supra* note 20.

[25] *Id.*

[26] *NSA/CSS Mission, Vision, Values*, NAT'L SECURITY AGENCY (last updated Jan. 10, 2013), https://www.nsa.gov/about/values/index.shtml [http://perma.cc/JBE6-7YPN].

[27] *Mission*, NAT'L SECURITY AGENCY (last updated Apr. 15, 2011), https://www.nsa.gov/about/mission/index.shtml [http://perma.cc/3PGD-KKA9]. The principal roles, duties, and responsibilities of the NSA are delineated in Executive Order 12333. *Id.*; Exec. Order No. 12333, 3 C.F.R. § 1981 (1981).

[28] *NSA/CSS Mission, Vision, Values*, *supra* note 26.

to include a provision requiring the NSA to "[m]aintain or strengthen privacy and civil liberties protections."[29]

Whether the NSA has been able to strike the appropriate balance between protecting the nation and maintaining or strengthening privacy and civil liberties is unclear, particularly in light of the U.S. government's acknowledgment in 2013 that it used NSA surveillance data to help develop a criminal case against a civilian.[30]

### *A. Spying in a Pre-9/11 World*

The inception of the NSA's overseas intelligence gathering[31] marked the beginning of the government spying on its citizens, enemies, and allies alike. Over time, the NSA's mission evolved, and by the 1970s, it was revealed that the NSA was spying domestically on political dissenters.[32] In response, in 1972, the Supreme Court in *United States v. U.S. District Court* made it clear that warrants would be required for domestic intelligence surveillance.[33]

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[29] *Id.* On December 4, 1981, President Reagan signed Executive Order 12333. The Order summarizes the duties of the NSA and extends the powers and responsibilities of U.S. intelligence agencies. The Amendment to Executive Order 12333 was accomplished through Executive Order 13470. *See* Further Amendments to Executive Order 12333, United States Intelligence Activities, 73 Fed. Reg. 45,325 (July 30, 2008).

[30] Further Amendments to Executive Order 12333, United States Intelligence Activities, 73 Fed. Reg. 45,325 (July 30, 2008); Devlin Barrett, *U.S. Tells Suspect for First Time It Used NSA Surveillance Program in Criminal Case*, WALL ST. J. (Oct. 25, 2013, 10:26 PM), http://www.wsj.com/articles/SB10001424052702304069604579158331267987204 [http://perma.cc/A5NB-W7D5].

> The government suspected the defendant of being a terrorist, believing he had plans to fly from the United States to Turkey and then travel to Syria. The government acknowledged that the defendant was the first terror suspect to be informed that the government used NSA data to help develop its case. Based on the Edward Snowden leaks, however, the government also acknowledged that other defendants would likely be informed of the government's use of NSA data to develop cases against them.

*Id.*

[31] *A Half-Century of Surveillance*, N.Y. TIMES, Dec. 16, 2005, at A16.

[32] *Id.*

[33] United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S. 297 (1972). In a unanimous ruling, the Supreme Court held that when conducting surveillance operations involving domestic threats, the government must comply with the Fourth Amendment.

> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

*Id.* at 314.

Despite the Court's admonishment, an investigation led by Senator Frank Church and the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), revealed that the NSA continued to engage in illegal domestic spying through the widespread use of government wiretaps and eavesdropping.[34] The Church Committee focused its inquiry on the NSA's use of its extensive intelligence-gathering capabilities to target American citizens who were exercising free expression and dissent.[35] The Church Committee discovered that the NSA had developed a project called MINARET to spy on antiwar protesters, civil rights activists, and political opponents.[36] According to Senator Church, "[t]hat capability at any time could be turned around on the American people, and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide."[37]

In response to the abuse of power reported by the Church Committee, the Federal Intelligence Surveillance Act of 1978 (FISA)[38] was enacted to safeguard Americans against domestic spying.[39] To help mitigate the NSA's present or future abuse of power, FISA established the Foreign Intelligence Surveillance Court (the FISA Court).[40] The 11 federal district court judges who comprise the FISA Court are designated by the Chief Justice of the Supreme Court and serve for a maximum of 7 years.[41] Among its other duties, the FISA Court "entertains applications submitted by the United States Government for approval of electronic surveillance, physical search, and other investigative actions for foreign intelligence purposes."[42] Due to the sensitive nature of its subject matter jurisdiction, the FISA Court operates

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[34] *The National Security Agency and Fourth Amendment Rights: Hearing Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Cong. (1975) [hereinafter *Church Committee Hearings*].

[35] *Id.*

[36] *Id.*

[37] *Id.*; James Bamford, *The Agency That Could Be Big Brother*, N.Y. TIMES (Dec. 25, 2005), http://www.nytimes.com/2005/12/25/weekinreview/the-agency-that-could-be-big-brother.html [http://perma.cc/GB29-LX7Q].

[38] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

[39] Charlie Savage & Laura Poitras, *How a Court Secretly Evolved, Extending U.S. Spies' Reach*, N.Y. TIMES (Mar. 11, 2014), http://www.nytimes.com/2014/03/12/us/how-a-courts-secret-evolution-extended-spies-reach.html [http://perma.cc/8QGK-P3VB].

[40] *Church Committee Hearings*, *supra* note 34.

[41] 50 U.S.C. § 1801 (2012); *About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court [http://perma.cc/7LHU-RZ7B] (last visited Feb. 20, 2015).

[42] *About the Foreign Intelligence Surveillance Court*, *supra* note 41.

as a type of "secret" court, conducting much of its work ex parte because of the need to maintain the integrity of classified national security information.[43]

At least one expert has found that FISA and the FISA Court have not been successful:

> Ultimately, the structure of FISA, particularly its flawed vision for shared responsibility among the branches of government, would undermine [FISA] and enable the surveillance crisis that confronts the United States in 2015. So, too, would events that were unimaginable in 1978—some tragic, like 9/11, and others wondrous, like the digital technology revolution that has fundamentally reshaped how we live, work, play, socialize, and engage in politics. Reactions to those catastrophic events—the passage of the USA Patriot Act in September 2001 and the 2008 amendments to FISA, among them—combined with new technologies created possibilities for surveillance that were unimaginable at the time of FISA's passage—would undo critical parts of the original FISA legislation and expose its weaknesses.[44]

The world envisioned by members of the Church Committee has changed dramatically over the past 40 years as spying techniques and technologies have expanded exponentially, while safeguards, such as FISA, have remained relatively static.

### *B. Spying in a Post-9/11 World*

Although the combination of the Supreme Court's ruling in *United States v. U.S. District Court*,[45] the Church Committee hearings, and FISA served as a check against potential NSA abuses, the September 11, 2001, terrorist attacks caused the American public and its representatives in government to see the world through a very different lens.[46] The reverberations of

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[43] *Id.* The USA Freedom Act, signed into law by President Obama on June 2, 2015, responds in part to the secretive manner of FISA Court operations by providing for "a panel of amicus curie at the FISA Court to provide guidance on matters of privacy and civil liberties, communications technology, and other technical or legal matters" and requiring that "[a]ll significant constructions or interpretations of law by the FISA court must be made public." *USA Freedom Act*, JUDICIARY COMMITTEE, http://judiciary.house.gov/index.cfm/usa-freedom-act [http://perma.cc/3AFU-6HMS] (last visited Feb. 26, 2016); *see also* Bill Mears & Halimah Abdullah, *What is the FISA Court?*, CNN (Jan. 17, 2014, 2:21 PM), http://www.cnn.com/2014/01/17/politics/surveillance-court/ [https://perma.cc/FWP9-UF75] (noting President Obama's concern about the potential infringement on the civil liberties of U.S. citizens).

[44] Jeffrey S. Brand, *Eavesdropping on Our Founding Fathers: How a Return to the Republic's Core Democratic Values Can Help Us Resolve the Surveillance Crisis*, 6 HARV. NAT'L SECURITY J. 1, 5 (2015).

[45] United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S. 297 (1972).

[46] *See* Serge Schmemann, *U.S. Attacked; President Vows to Exact Punishment for 'Evil*,*'* N.Y. TIMES (Sept. 12, 2001), http://www.nytimes.com/2001/09/12/us/us-attacked-president-vows-to-exact-punishment-for-evil.html [http://perma.cc/JQ56-SNRZ]; *Blumenthal Delivers Major Policy Address at Harvard Law School on Legislation to*

the Twin Towers' collapse on 9/11 had a dramatic impact on the NSA. The influence of these events on NSA policies and procedures was publicly revealed in a sworn statement by a former NSA employee.

> [E]verything changed at the NSA after the attacks on September 11. The prior approach focused on complying with the Foreign Intelligence Surveillance Act [ ]. The post-September 11 approach was that NSA could circumvent federal statutes and the Constitution as long as there was some visceral connection to looking for terrorists.[47]

Another result of the attacks was Congress's passage of the Patriot Act on October 26, 2001.[48] The concern for America's safety was so great that Congress enacted the legislation quickly and with strong bipartisan support in both chambers of Congress.[49]

The Justice Department's official position regarding the Patriot Act suggests that it made little more than "modest, incremental changes in the law. Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network."[50] But the "Reclaiming Patriotism" report prepared by the American Civil Liberties Union presented a very different assessment.[51] It stated that "in the years since its

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*Reform FISA Courts*, UNITED STATES SENATOR RICHARD BLUMENTHAL (Aug. 8, 2013), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-major-policy-address-at-harvard-law-school-on-legislation-to-reform-fisa-courts [http://perma.cc/6EJC-WAXA]; Glenn Greenwald & James Ball, *The Top Secret Rules that Allow NSA to Use USA Data Without a Warrant*, GUARDIAN (June 20, 2013, 6:59 PM), http://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant [http://perma.cc/F2ER-AFFT].

[47] Declaration of J. Kirk Wiebe in Support of Plaintiffs' Motion for Partial Summary Judgment Rejecting the Government Defendants' State Secret Defense at 3, Jewel v. Nat'l Sec. Agency, 965 F. Supp. 2d 1090 (N.D. Cal. 2013) (No. 3:08-04373-JSW).

[48] Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56, 115 Stat. 272.

[49] *The USA PATRIOT Act: Preserving Life and Liberty*, U.S. DEP'T OF JUST., http://www.justice.gov/archive/ll/highlights.htm [http://perma.cc/2UY6-GU66] (last visited Feb. 20, 2015). It should be noted that although the Patriot Act at its inception had bipartisan support, in more recent years the broad surveillance powers granted under the Patriot Act have been met with increasing skepticism. Such concerns recently caused Congress to curtail some of the powers granted to the NSA under the Act. *See* Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 is Sharply Limited*, N.Y TIMES (June 2, 2015), http://www.nytimes.com/2015/06/03/us/politics/senate-surveillance-bill-passes-hurdle-but-showdown-looms.html?_r=0 [http://perma.cc/5JZU-J397].

[50] *The USA PATRIOT Act: Preserving Life and Liberty*, *supra* note 49.

[51] MICHAEL GERMAN & MICHELLE RICHARDSON, AM. CIV. LIBERTIES UNION, RECLAIMING PATRIOTISM: A CALL TO RECONSIDER THE PATRIOT ACT (2009), https://www.aclu.org/files/pdfs/safefree/patriot_report_20090310.pdf [http://perma.cc/X89T-4E5X].

passage, the Patriot Act has paved the way for the expansion of government-sponsored surveillance including the gutting of [FISA] and a recent revamping of the Attorney General Guidelines to allow law enforcement to conduct physical surveillance without suspicion."[52] One of the conclusions reached in the report is that "numerous expansions of executive authority have worked in tandem to infringe upon our rights."[53] This type of unbridled power in the hands of the NSA erodes public trust and encourages governmental overreach, all in the name of preventing another 9/11-like terrorist attack.

Even before the passage of the Patriot Act, President George W. Bush initiated a secret eavesdropping operation, referred to in official government documents as the "President's Surveillance Program" (PSP).[54] Although the PSP continues to be considered a classified program, information about the program has been acquired from sources like whistleblowers, congressional hearings, and investigative reporting.[55]

The *New York Times* first exposed the PSP in late 2005.[56] Shortly thereafter, President Bush acknowledged the existence of a special surveillance program, which administration officials referred to as the "Terrorist Surveillance Program."[57] The official position of the Bush administration was that "the NSA monitored, without warrants, the communications of between 500-1000 people inside the US with suspected connections to Al Qaeda."[58] As reported by the *New York Times*, however, the NSA "monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years."[59]

Significantly, the decision by the Bush administration to authorize secretive surveillance operations by the NSA inside the United States without court approval represented a major change

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[52] *ACLU Releases Comprehensive Report on Patriot Act Abuses*, AM. CIV. LIBERTIES UNION (Mar. 11, 2009), https://www.aclu.org/news/aclu-releases-comprehensive-report-patriot-act-abuses [http://perma.cc/YS9R-R3YN].

[53] *Id.*

[54] *How the NSA's Domestic Spying Program Works*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/nsa-spying/how-it-works [http://perma.cc/AU29-2FR6] (last visited Feb. 20, 2015) [hereinafter ELECTRONIC FRONTIER FOUND.].

[55] *Id.* As part of the PSP, President Bush authorized the NSA "to conduct a range of surveillance activities inside the United States, which had been barred by law and agency policy for decades." *Id.*

[56] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0 [http://perma.cc/6C5C-FX68].

[57] ELECTRONIC FRONTIER FOUND., *supra* note 54.

[58] *Id.*

[59] Risen & Lichtblau, *supra* note 56.

in NSA policies and procedures.[60] This unprecedented decision may have "stretched, if not crossed, constitutional limits on legal searches."[61] During the first three years of the PSP, minimal controls, if any, were installed to monitor the operations of the program.[62] This level of unbridled power likely led to the NSA engaging in, even if unintentionally, warrantless eavesdropping on solely domestic communications,[63] despite the instruction from the Bush administration "that one end of the intercepted conversations take place on foreign soil."[64]

Fourteen years after the 9/11 attacks, concerns are still being raised by Americans, including the President of the United States, about "the appropriate balance between our need for security and preserving those freedoms that make us who we are."[65]

### *C. A Need for Balance*

In a speech delivered at the National Defense University in May 2013, President Obama emphasized the need for the U.S. government to review the laws and regulations governing the surveillance strategies and techniques used by law enforcement officials to collect information needed to ensure the safety of citizens while at the same time protecting privacy rights and preventing abuse.[66]

> That's why, in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are. That means reviewing the authorities of law enforcement, so we can intercept new types of communication, but also build in privacy protections to prevent abuse.[67]

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[60] *Id.*

[61] *Id.*

[62] Eric Lichtblau & James Risen, *Eavesdropping Effort Began Soon After Sept. 11 Attacks*, N.Y. TIMES (Dec. 18, 2005), http://www.nytimes.com/2005/12/18/politics/18spy.html [http://perma.cc/6LFP-KZTE].

[63] James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. TIMES (Dec. 21, 2005), http://www.nytimes.com/2005/12/21/politics/21nsa.html [http://perma.cc/7JSL-QFSW].

[64] *Id.*

[65] NAT'L SEC. AGENCY, THE NATIONAL SECURITY AGENCY: MISSION, AUTHORITIES, OVERSIGHT AND PARTNERSHIPS (2013), https://www.nsa.gov/public_info/_files/speeches_testimonies/2013_08_09_the_nsa_story.pdf [http://perma.cc/9TU5-DUSR] [hereinafter NSA: MISSION].

[66] *Id.*

[67] *Id.*

While most Americans would likely agree about the need in a post-9/11 world for the U.S. government to gather data to thwart future terrorist attacks, the use of data gathered about U.S. citizens, particularly when such data are shared with civilian law enforcement agencies, raises longstanding concerns about military involvement in civilian law enforcement activities.[68] Striking the "appropriate balance between our need for security and preserving those freedoms that make us who we are"[69] is a necessary and admirable goal, the achievement of which requires steadfast vigilance and periodic action on the part of the president and Congress.

But without congressional oversight and the direct involvement of our elected officials, civilian government agencies and the military will be called upon to self-regulate their behavior. The failure of the military to self-regulate caused government and civilian interests to clash in *Dreyer*, where the court ultimately stepped in to deter what the court found to be the military's abuse of its surveillance capabilities.

In this era of unprecedented U.S. government spying on its citizens,[70] public sentiment against widespread surveillance of phone, email, and social media communication runs high.[71] In some instances, there have been legal challenges to these practices.[72] And a *Washington Post* survey indicated that nearly two-thirds of the American public is concerned about the collection and use of their data, revealing a slightly above average

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[68] CHARLES DOYLE & JENNIFER K. ELSEA, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 1 (2012), https://www.fas.org/sgp/crs/natsec/R42659.pdf [http://perma.cc/EP2J-WX25].

[69] NSA: MISSION, *supra* note 65.

[70] David Cole, *Secret NSA Program Gives the Agency Unprecedented Access to Private Internet Communications*, NATION (June 7, 2013), http://www.thenation.com/blog/174708/secret-nsa-program-gives-agency-unprecedented-access-private-internet-communications# [http://perma.cc/85FC-TT7A].

[71] *See, e.g.*, Randy Barnett, *Why the NSA Data Seizures are Unconstitutional*, 38 HARV. J.L. & PUB. POL'Y 3 (2015); Mark Jaycox, *Update: Polls Continue to Show Majority of Americans Against NSA Spying*, ELECTRONIC FRONTIER FOUND. (Jan. 22, 2014), https://www.eff.org/deeplinks/2013/10/polls-continue-show-majority-americans-against-nsa-spying [http://perma.cc/EWS8-T9RY]; Bernie King, *NSA Surveillance Scandal: The Polls Are In, and NSA Spying is Really, Really Unpopular*, POLICY.MIC (July 10, 2013), http://mic.com/articles/53767/nsa-surveillance-scandal-the-polls-are-in-and-nsa-spying-is-really-really-unpopular [http://perma.cc/AQ74-R5ZC]; Frank Newport, *Americans Disapprove of Government Surveillance Programs*, GALLUP (June 12, 2013), http://www.gallup.com/poll/163043/americans-disapprove-government-surveillance-programs.aspx [http://perma.cc/JG4F-T2CU].

[72] *See, e.g.*, Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013), *vacated*, 800 F.3d 559 (D.C. Cir. 2015); ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), appeal docket, No. 14-42 (2d. Cir Jan. 6, 2014), *vacated*, 785 F.3d 787 (2d Cir. 2015) (challenging the legality of the NSA's phone metadata collection program on both constitutional and statutory grounds).

interest in a topic that has been underscored by the Edward Snowden leaks.[73]

Particularly disturbing is the extent to which the military conducts spying operations for the government. As discussed in Part II, such extensive surveillance of civilians, coupled with the sharing of data with civilian authorities, violates both the intent and spirit of the PCA and PCA-like restrictions.

## II. APPLYING THE RELEVANT LAW TO MILITARY SURVEILLANCE OF CIVILIANS

The PCA, enacted by Congress over 130 years ago, is the primary law aimed at deterring direct involvement of the U.S. military in civilian law enforcement activities and operations.[74] Legislation passed by Congress in the years following the PCA's enactment,[75] combined with regulations promulgated by the DoD, provide a basis for examining issues associated with the surveillance of U.S. citizens by the military.[76] The PCA limits the extent to which the U.S. Army or the U.S. Air Force may be used in civilian law enforcement activities. The PCA provides that

> [w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[77]

The Act draws a line between the use of military and civilian personnel in civilian law enforcement activities, a distinction that has been part of the U.S. statutory framework since the PCA was passed in 1878.[78]

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[73] Jaycox, *supra* note 71.

[74] *See* Posse Comitatus Act, 18 U.S.C. § 1385 (2006).

[75] *See, e.g.*, 10 U.S.C. § 375 (2012) ("The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.").

[76] JAMES N. MILLER, U.S. DEP'T OF DEF., INSTRUCTION NO. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES, 17-18 (2013), http://www.dtic.mil/whs/directives/corres/pdf/302521p.pdf [http://perma.cc/GKA5-6J7K].

[77] 18 U.S.C. § 1385. The term "posse comitatus," Latin for "power of the county," is defined as "[a] group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations." *Posse comitatus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[78] *Id.*

The original Act referred only to the Army, but the Air Force was expressly added to the language of the statute in 1956.[79] Although the U.S. Navy[80] and Marine Corps[81] are not covered under the PCA, those branches have adopted the policy of the PCA through a self-imposed regulation.[82] Members of the U.S. Navy and Marine Corps may therefore be held liable for PCA-like infractions, which are civil in nature but fall short of creating criminal liability.[83] Likewise, the PCA applies to the members of the National Guard when they are called into federal service.[84] Conversely, the U.S. Coast Guard is expressly excluded from the scope of the PCA.[85]

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[79] DOYLE & ELSEA, *supra* note 68, at 20 n.127.

[80] United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974); *see also* United States v. Yunis, 924 F.2d 1086, 1093-94 (D.C. Cir. 1991) (noting that "[r]egulations issued under 10 U.S.C. § 375 require Navy compliance with the restrictions of the Posse Comitatus Act").

[81] *See Walden*, 490 F.2d at 374-75.

[82] Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. 117, 129 (2008).

[83] 10 U.S.C. § 375 (2012) ("The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, *Navy*, Air Force, or *Marine Corps* in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." (emphasis added)). Department of Defense Directive 5525.5 Enclosure E4.3 issued on January 15, 1986, provides that "DoD guidance on the Posse Comitatus Act . . . is applicable to the Department of the Navy and the Marine Corps as a matter of DoD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis." U.S. DEP'T OF DEF., DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. E4.3 (Jan. 15, 1986), http://fas.org/irp/doddir/dod/d5525_5.pdf [http://perma.cc/YP9E-T7CR]. Department of Defense Instruction 3025.21 Enclosure 3(3), issued on February 27, 2013, incorporates language similar to DoD Directive 5525.5, stating, "[b]y policy, Posse Comitatus Act restrictions (as well as other restrictions in this Instruction) are applicable to the Department of the Navy (including the Marine Corps) with such exceptions as the Secretary of Defense may authorize in advance on a case-by-case basis." JAMES N. MILLER, U.S. DEP'T OF DEF. INSTRUCTION No. 3025.1, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES 23 (2013), http://www.dtic.mil/whs/directives/corres/pdf/302521p.pdf [http://perma.cc/BX9V-QLA8]. On May 13, 2013, the DoD issued regulations relating to participation of DoD personnel in civilian law enforcement activities. The regulations state that "[b]y policy, Posse Comitatus Act restrictions (as well as other restrictions in this part) are applicable to the Department of the Navy (including the Marine Corps) with such exceptions as the Secretary of Defense may authorize in advance on a case-by-case basis." Defense Support of Civilian Law Enforcement Agencies, 32 C.F.R. § 182.6(a)(3) (2012).

[84] 10 U.S.C. § 12406 provides that

> [w]henever (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation; (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) the President is unable with the regular forces to execute the laws of the United States; the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these

### *A. Is a Violation of the PCA also a Violation of the Constitution?*

When considering the parameters of military involvement in the enforcement of civilian laws, it is helpful to remember that the tradition "developed in the early years of [the] nation that abhors military involvement in civilian affairs, at least under ordinary circumstances."[86] The traditional philosophy of limiting the intrusion of the U.S. military in civilian affairs "has deep roots in American history."[87] Indeed, references to this philosophy can be traced back to the Declaration of Independence.[88] The Supreme Court articulated this tradition in *Laird v. Taitum*,[89] a case involving the surveillance of peaceful civilian political activities by the U.S. Army.

> The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities—and indeed the claims alleged in the complaint—reflect a traditional and strong resistance of

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> purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

10 U.S.C. § 12406 (2012).

[85] 14 U.S.C. § 2 (2012) states that

> [t]he Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities.

[86] DOYLE & ELSEA, *supra* note 68, at 1.

[87] United States v. Walden, 490 F.2d 372, 375 (4th Cir. 1974).

[88] *See* United States v. Dreyer, 767 F.3d 826, 829 n.7 (9th Cir. 2014), *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc) (explaining that the Declaration of Independence "criticiz[es] the King of Great Britain for having 'kept among us, in times of peace, Standing Armies without the Consent of our legislatures'; 'affected to render the Military independent of and superior to the Civil power,' and 'Quartering large bodies of armed troops among us'" (quoting THE DECLARATION OF INDEPENDENCE paras. 11, 12, 14 (U.S. 1776) (citation omitted))).

[89] Laird v. Tatum, 408 U.S. 1 (1972).

> Americans to any military intrusion into civilian affairs . . . . [T]here is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.[90]

The American tradition may be one of limited military enforcement of civilian laws; however, the Constitution does not explicitly prohibit the military from engaging in civilian law enforcement activities.[91] Consequently, any form of specific prohibition against using the military to enforce civilian laws necessarily emanates from the legislative process. The PCA, enacted toward the end of Reconstruction, represents the major form of U.S. legislation to prohibit the use of the military to enforce civilian laws unless the Constitution or an act of Congress provides otherwise.[92]

The military is authorized, however, to participate in the preservation of civilian law and order in some circumstances. For example, Congress possesses constitutional authority to use the military "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[93] Furthermore, the Constitution authorizes the use of military power to ensure a republican form of government for each state.[94] Although these provisions serve as a basis for understanding the extent to which the Constitution provides for the use of the military to enforce civilian law, the courts have demonstrated a reluctance to interpret them.

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[90] *Id.* at 15-16.

[91] DOYLE & ELSEA, *supra* note 68, at 5.

[92] 18 U.S.C. § 1385 (2012); DOYLE & ELSEA, *supra* note 68.

[93] U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . .").

[94] U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."). On the other hand, the Constitution may suggest a reluctance to allow the military to engage in civilian law enforcement activities. The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The language of the Second Amendment implies that each of the "free" states comprising the Union has the right to maintain its own civilian militia to assist in the preservation of civilian laws. Arguably, the Second Amendment reflects the belief that a civilian militia, rather than the U.S. military, should be called upon to assist civilian law enforcement activities. The Third Amendment states that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. This language further demonstrates a desire to keep military operations separate and distinct from civilian activities.

Consequently, the constitutional issues associated with the PCA remain largely unexplored.[95]

For example, in *United States v. Walden*, U.S. Marines assisted civilian law enforcement in the conviction of two civilians on federal firearms violations.[96] Because of the involvement of the U.S. military, the defendants argued that the PCA had been violated and all evidence associated with military involvement should be excluded.[97] In its holding, the Fourth Circuit adroitly avoided the question of constitutional authority for the PCA.

> In this case, because the Secretary of the Navy Instruction, viewed alone and in the light of the Posse Comitatus Act, affords a non-constitutional standard for judging the legality of the military action, we do not find it necessary to interpret *relatively unexplored sections of the Constitution* in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws. Nonetheless, our interpretation of the scope and importance of the letter and spirit of the Posse Comitatus Act and the Navy regulation as standards governing primary behavior is influenced by the traditional American insistence on exclusion of the military from civilian law enforcement, *which some have suggested is lodged in the Constitution*.[98]

Given this lack of enthusiasm on the part of the *Walden* court to explore the "constitutional underpinnings" of the PCA,[99] modifications to the Act will likely require a legislative response from Congress.[100]

*Dreyer* may well serve as a spark to reinvigorate a national debate or to pressure Congress to take action. The increasing use of information obtained through military surveillance activities by civilian law enforcement officials may result in other courts following the *Dreyer* court's lead. If courts continue to use the exclusionary rule as a means to address PCA deficiencies, a congressional response is needed. Otherwise, criminal defendants may continue to go free.

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[95] DOYLE & ELSEA, *supra* note 68, at 23.

[96] United States v. Walden, 490 F.2d 372, 373 (4th Cir. 1974).

[97] *Id.*

[98] *Id.* at 375-76 (emphasis added) (footnote omitted).

[99] DOYLE & ELSEA, *supra* note 68, at 23 (citing *Walden*, 490 F.2d at 376 (finding it unnecessary to interpret "unexplored sections of the Constitution")).

[100] Indeed, Congress reaffirmed its commitment to the provisions of the PCA in 2005 through the enactment of a joint resolution stating that "Congress reaffirms the continued importance of section 1385 of title 18, and it is the sense of Congress that nothing in this chapter should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws." H.R. Res. 274, 109th Cong. (2005) (reaffirming the Continued Importance and Applicability of the Posse Comitatus Act); Sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus Act, 6 U.S.C. § 466 (2002).

### *B. The Significance of the Distinction Between Direct and Indirect Military Involvement*

The PCA is a remarkably concise statute. But the statute's brevity belies the complexities inherent in deciding when the Act should be applied.[101] Although the PCA appears to provide a sweeping prohibition against the use of the military in enforcing civilian laws,[102] not all military involvement is prohibited. The PCA prohibits all *direct* military assistance but permits some indirect military assistance. Accordingly, the distinction between direct and indirect involvement by the military is critical to understanding what the PCA proscribes. Recognizing the need to balance the role of the U.S. military in performing its traditional functions with that of assisting civilian law enforcement agencies, the DoD has stated as a matter of official policy that it "shall be prepared to support civilian law enforcement agencies consistent with the needs of military preparedness of the United States, while recognizing and conforming to the legal limitations on *direct*[103] DoD involvement in civilian law enforcement activities."[104] Although the distinction between direct and indirect military assistance may at times be difficult to ascertain, the DoD's policies and procedures emphasize the importance of recognizing the limitations on its direct military involvement in assisting civilian law enforcement officials.

#### 1. Direct Military Assistance

Congress has instructed the DoD to ensure that any activity undertaken by the Army, Navy, Air Force, or Marine Corps "does not include or permit direct participation . . . in a

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[101] As will be discussed in Section II.B, Congress has enacted a variety of statutory exceptions to the PCA, thereby allowing the U.S. military to participate in civilian law enforcement activities.

[102] Defense Support of Civilian Law Enforcement Agencies, 32 C.F.R. § 182.6(a)(1)(i)(A) (2014).

[103] *See* 10 U.S.C. § 375 (2012) (emphasis added) ("The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit *direct participation* by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." (emphasis added)).

[104] JAMES N. MILLER, U.S. DEP'T OF DEF., INSTRUCTION NO. 3025.1, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES 2 (2013) (emphasis added), http://www.dtic.mil/whs/directives/corres/pdf/302521p.pdf [http://perma.cc/78XL-VMYL].

search, seizure, arrest, or . . . similar activity unless participation in such activity . . . is otherwise authorized by law."[105]

The regulations issued by the DoD in response to this congressional mandate include seven specific prohibitions regarding the use of military personnel in the enforcement of civilian laws.[106] For example, military personnel may not be directly involved in a civilian search or seizure[107] or an arrest or stop and frisk.[108] Likewise, they may not directly "engag[e] in interviews, interrogations, canvassing, or questioning of potential witnesses or suspects; or similar activity."[109] The use of weapons and other forms of physical force are also prohibited.[110] Military personnel may not assist civilian law enforcement officials in the collection of evidence, crowd and traffic control, or in staffing checkpoints.[111] Undercover agents and other forms of direct surveillance are prohibited.[112] Another statutory prohibition precludes the military from conducting tests and other types of analyses of evidence in a civilian investigation.[113] Although a "bright line" does not exist for identifying the presence of direct military involvement in civilian law enforcement activities, most limitations prohibit the military from gathering evidence or managing, controlling, or overseeing the evidence-gathering process.

While at first glance, the PCA appears to limit nearly all types of military involvement in the enforcement of civilian laws,[114] there are numerous statutory exceptions to the PCA that permit forms of indirect military assistance.[115] For example, the Secretary of Defense has the authority to grant permission to civilian law enforcement officials for the use of military equipment and base or research facilities.[116] Additionally, military personnel may be used as expert advisors for civilian law

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[105] *Id.* at 15.

[106] *See* Defense Support of Civilian Law Enforcement Agencies, 32 C.F.R. § 182.6(a)(1)(iii) (2014).

[107] *Id.* § 182.6(a)(1)(iii)(A)(2).

[108] *Id.* § 182.6(a)(1)(iii)(A)(3).

[109] *Id.*

[110] *Id.* § 182.6(a)(1)(iii)(A)(4).

[111] *Id.* § 182.6(a)(1)(iii)(A)(5).

[112] *Id.* § 182.6(a)(1)(iii)(A)(6).

[113] *Id.* § 182.6(a)(1)(iii)(A)(7).

[114] 18 U.S.C. § 1385 (2012).

[115] DONALD J. CURRIER, STRATEGIC STUDIES INST., THE POSSE COMITATUS ACT: A HARMLESS RELIC FROM THE POST-RECONSTRUCTION ERA OR A LEGAL IMPEDIMENT TO TRANSFORMATION? 7-8 (2003), http://www.globalsecurity.org/security/library/report/2003/ssi_currier.pdf [http://perma.cc/ZD6Y-27AL].

[116] 10 U.S.C. § 372 (2012).

enforcement officials[117] and to train civilian law enforcement officials in the use and application of equipment.[118] Along these lines, military personnel may assist civilian law enforcement officials in the maintenance of equipment used for civilian law enforcement purposes.[119]

There are also PCA exceptions that arise in specific situations. For example, the military may be used in instances of insurrection under the Insurrection Act.[120] Furthermore, the military may enforce civilian laws in situations where there are "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States."[121]

Given how differently direct and indirect actions are treated under the PCA, correct categorization of military actions is essential. Otherwise, military agencies will continue to share information with civilian agencies, including, among others, the DEA and the IRS, in an effort to prosecute drug offenders and tax evaders.[122]

2. The Role of the Court

Courts are often tasked with distinguishing between direct and indirect involvement of military personnel in the enforcement of civilian laws. Three judicial tests have emerged,[123] which in some instances align with statutory or regulatory authorities. The first test requires an inquiry into whether civilian law enforcement agents made "direct active use" of military personnel to execute civilian laws.[124] The second test focuses on the extent to which military personnel pervaded the activities of civilian law enforcement officials.[125] The third test examines the use of military power from a regulatory, proscriptive, and compulsory perspective. [126] If any one of these

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[117] *Id.* § 373(2).

[118] *Id.* § 373(1).

[119] *Id.* § 374(a).

[120] *Id.* §§ 331-335.

[121] *Id.* § 332.

[122] Jennifer Stisa Granick & Christopher Jon Sprigman, *NSA, DEA, IRS Lie About Fact That Americans Are Routinely Spied On By Our Government: Time For A Special Prosecutor*, FORBES (Aug. 14, 2013, 2:54 PM), http://www.forbes.com/sites/jennifergranick/2013/08/14/nsa-dea-irs-lie-about-fact-that-americans-are-routinely-spied-on-by-our-government-time-for-a-special-prosecutor-2/ [http://perma.cc/HRJ5-AGXG].

[123] United States v. Dreyer, 767 F.3d 826, 832 (9th Cir. 2014), *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc).

[124] United States v. Red Feather, 392 F. Supp. 916, 921 (D.S.D. 1975).

[125] United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

[126] United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976).

tests is satisfied, the assistance provided by military personnel represents impermissible "direct" participation in the enforcement of civilian laws.[127]

In *Dreyer*, the court applied the relevant statutory provisions, regulations, and case law to the facts and concluded that Agent Logan's "surveillance of all the computers in Washington amounted to impermissible *direct* active involvement in civilian law enforcement" of civilian laws.[128] The court found that Agent Logan "acted as an investigator, an activity specifically prohibited as direct assistance."[129] As noted previously, "direct assistance" includes direct participation by the military in the evidence-gathering process.[130] In *Dryer*, the court concluded that Agent Logan's surveillance activities amounted to direct involvement in gathering evidence against a civilian defendant, and therefore, it was a violation of the Navy's regulations prohibiting such direct involvement.

### *C. Parallel Construction: The NSA and the Inappropriate Sharing of Information*

The NSA's surveillance activities are aimed at protecting the United States against external forces, including terrorists. Although the NSA focuses its surveillance operations on international entities, individuals, and activities, an obvious byproduct of its extensive data gathering is the discovery of planned or committed domestic crimes. The facts in *Dreyer* involved such a discovery. Although *Dreyer* involved a particular incident of the U.S. military spying on citizens, it is indicative of a broader scheme of large-scale government spying. Of increasing concern is the likelihood that the NSA will transfer evidence to civilian law enforcement officials for use in criminal prosecutions,[131] just as the U.S. Navy did in *Dreyer*.

For example, recent admissions by the DEA acknowledging the existence of a highly secretive 15-year NSA program "that collected virtually all data on international calls

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[127] *Dreyer*, 767 F.3d at 832.

[128] *Id.* (emphasis added).

[129] *Id.* (referencing the DoD pronouncements and *Red Feather*, 392 F. Supp. at 925).

[130] *See* Defense Support of Civilian Law Enforcement Agencies, 32 C.F.R. § 182.6(a)(1)(iii)(5) (2014).

[131] Ray McGovern, *How NSA Can Secretly Aid Criminal Cases*, CONSORTIUM NEWS (June 12, 2014), https://consortiumnews.com/2014/06/12/how-nsa-can-secretly-aid-criminal-cases/ [http://perma.cc/PS9V-MTSG].

between the United States and certain countries"[132] confirms military data sharing:

> The program, run by DEA's Special Operations Division, collected international U.S. phone records to create a database primarily used for domestic criminal cases—not national security investigations, according to records and sources involved. DEA shared this information with other law enforcement agencies, including the FBI, IRS, Homeland Security, and intelligence agencies . . . .[133]

Although the DEA's Special Operations Division (SOD) is separate from the NSA,[134] it uses data from partner agencies, such as the NSA, to support civilian law enforcement activities.[135] For example, SOD shares information with civilian law enforcement agencies that it receives from NSA intercepts.[136] Once civilian authorities possess the information, they are instructed to disguise the genesis of the true origin of the investigation.[137] The disguise occurs through the use of parallel construction whereby civilian law enforcement officials "'recreate' the investigative trail to effectively cover up where the information originated."[138]

Surveillance information gathered by the NSA is passed along to the DEA through its SOD program. The information is then used by civilian law enforcement officers to make an arrest and build a criminal case using parallel construction. A former federal agent described receiving such tips from SOD as follows:

> "You'd be told only, 'Be at a certain truck stop at a certain time and look for a certain vehicle.' And so we'd alert the state police to find an excuse to stop that vehicle, and then have a drug dog search it" . . . . After an arrest was made, agents then pretended that their investigation began with the traffic stop, not with the SOD tip . . . .[139]

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[132] John Shiffman, *U.S. Drug Enforcement Agency Halts Huge Secret Data Program*, REUTERS (Jan. 16, 2015, 4:22 PM), http://www.reuters.com/article/2015/01/16/us-usa-dea-data-idUSKBN0KP2DD20150116 [http://perma.cc/SND3-6NGT].

[133] *Id.*

[134] John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013, 3:25 PM), http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805 [http://perma.cc/EYV5-YEM4].

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

A current Harvard Law School professor and former federal judge[140] observed that "[i]t is one thing to create special rules for national security . . . . Ordinary crime is entirely different. It sounds like they are phonying up investigations."[141] As noted by Professor Gertner, a major distinction exists between using NSA surveillance information to thwart a terrorist attack and using it to prosecute an individual for a civilian offense.

Although the NSA conducts the majority of the clandestine surveillance work for the U.S. military, it is not the only military organization that spies on U.S. civilians.[142] As demonstrated in *Dreyer*, branches of the armed forces also perform secretive surveillance operations involving U.S. civilians and transfer resulting evidence to civilian law enforcement officials for use in criminal prosecutions. With the legality of military cyber surveillance now beginning to be adjudicated, the burden falls on the judiciary to determine the consequences.

### *D. Consequences of Military Overreach*

Although the PCA has been in existence for over 130 years, the government has yet to prosecute anyone for violating it.[143] Consequently, as explained by the concurrence in the initial ruling in *Dreyer*, "Without . . . [an effective] criminal penalty, the exclusionary rule is about all that the judiciary has to deter such widespread and repeated [PCA] violations as we have here. Letting a criminal go free to deter national military investigation of civilians is worth it."[144] *Dreyer* represented a departure from a century-old precedent. Nonetheless, the court was compelled to use the exclusionary rule in light of an ineffective statute and as a method of curtailing improper military involvement in civilian law enforcement activities.

## III. THE GOVERNMENT'S EXPANSIVE VIEW OF ITS SURVEILLANCE AUTHORITY

In *Dreyer*, the U.S. Navy's actions—and the government's arguments in defense of those actions—reveal the extent to which the government believes it possesses the authority to conduct

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[140] Nancy Gertner is a Harvard Law School professor and was a federal judge from 1994 to 2011. *Id.*

[141] *Id.*

[142] Exec. Order No. 12333, 3 C.F.R. 200 (1981).

[143] DOYLE & ELSEA, *supra* note 68, at 62.

[144] United States v. Dreyer, 767 F.3d 826, 837-38 (9th Cir. 2014), *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc).

broad surveillance of the cyber activities of all U.S. civilians. Agent Logan of the NCIS launched a cyber search to identify Navy personnel engaged in online distribution and sharing of child pornography.[145] Rather than limiting the scope of the search to areas in close proximity to naval bases, Agent Logan instead used a well-known software program to search all computers in Washington State[146] regardless of whether the computers' owners had any connection to the military.[147] Agent Logan identified a computer in Washington that was sharing child pornography files.[148] After determining that the computer belonged to civilian Michael Dreyer, Agent Logan transferred the evidence of Dreyer's criminal activity to the local NCIS office, which then transferred the information to local law enforcement officials in the town of Algona, Washington.[149]

An officer with the Algona police department obtained a search warrant based on Agent Logan's evidence, and along with police officers from the Seattle police department, conducted a search of Dreyer's home and computer files.[150] After determining that Dreyer's computer files included images of child pornography, the Algona police department contacted a special agent at the U.S. Department of Homeland Security.[151] The special agent obtained a warrant and performed a forensic examination of Dreyer's computer files, which revealed the presence of child pornography images and videos.[152] Thereafter, Dreyer was arrested and charged with one count of distributing child pornography and one count of possessing child pornography.[153] Dreyer moved to suppress the evidence seized during the search of his home and his computer files, and the district court denied the motion.[154]

After a jury trial, Dreyer was convicted of both charges, and he subsequently appealed.[155] In his appeal, Dreyer argued that "the fruits of the NCIS investigation into his online file sharing should have been suppressed because military enforcement of civilian laws is prohibited"[156] under the PCA.[157]

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145 *Id.* at 827-28.
146 *Id.*
147 *Id.* at 827.
148 *Id.* at 828.
149 *Id.*
150 *Id.*
151 *Id.* at 829.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*

The Court of Appeals noted with a sense of alarm the government's response that "the military may monitor for criminal activity all the computers anywhere in any state with a military base or installation, regardless of how likely or unlikely the computers are to be associated with a member of the military."[158] To demonstrate the extremity of the government's position, the court offered the following analogy:

> The government's position that the military may monitor and search *all* computers in a state even though it has no reason to believe that the computer's owner has a military affiliation would render the PCA's restrictions entirely meaningless. To accept that position would mean that NCIS agents could, for example, routinely stop suspected drunk drivers in downtown Seattle on the off-chance that a driver is a member of the military, and then turn over all information collected about civilians to the Seattle Police Department for prosecution.[159]

Directly rebutting the government's expansive view of its ability to spy on U.S. citizens, the court observed that "[t]he extraordinary nature of the surveillance here demonstrates a need to deter future violations [of PCA-like regulations]. . . . This is squarely a case of the military undertaking the initiative to enforce civilian laws against civilians."[160]

To reinforce its rejection of the government's view of its broad surveillance powers, the court stated that "[s]uch an expansive reading of the military's role in the enforcement of the civilian laws demonstrates a profound lack of regard for the important limitations on the role of the military in our civilian society."[161] The court held that an "exceptional reason" must exist "to invoke the exclusionary rule for violation[s] of [PCA]-like regulations," and it concluded that "the broad use of military surveillance of overwhelmingly civilian populations is an exceptional reason."[162]

The U.S. government, primarily through the spying operations of the NSA, is engaged in exceptional use of military expertise and technology in conducting broad surveillance of U.S. citizens. Unchecked powers of this magnitude underscore the need to protect civil liberties and Fourth Amendment rights. As a result of the *Dreyer* decision, the judicial application of the

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157 18 U.S.C. § 1385 (2012).
158 *Dreyer*, 767 F.3d at 836.
159 *Id.* at 834.
160 *Id.* at 836.
161 *Id.*
162 *Id.* (quoting United States v. Harrington, 681 F.2d 612, 615 (9th Cir. 1982)).

exclusionary rule to Fourth Amendment violations by overzealous government agents may serve as a necessary deterrent to such actions in the future.[163]

## IV. THE NINTH CIRCUIT'S EXPANSION OF THE EXCLUSIONARY RULE IN *DREYER* IS INCONSISTENT WITH RECENT JUDICIAL PRACTICE

While the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,"[164] it does not provide a remedy for violations of this right. The right to exclude evidence that was obtained unconstitutionally is thus a judicial remedy.[165] Courts have applied the remedy—known today as the exclusionary rule—with varying degrees of vigor.

### *A. The Development of the Exclusionary Rule*

When the Founders drafted the Fourth Amendment, they were drawing on their experiences in the colonies—specifically, the use of the king's "writs of assistance," which allowed the bearer of a writ to enter a premise to search for and seize goods.[166] In the period before professional police forces were established, only minimal investigative activities were carried out prior to a criminal prosecution.[167] At the time, courts routinely admitted

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[163] In fact, the initial ruling may have already had some of its intended effect. During the rehearing of the case, the government testified that this decision was "more than sufficient to deter NCIS agents from engaging in future investigate efforts of this type." United States v. Dreyer, 804 F.3d 1266, 1280 (9th Cir. 2015).

[164] U.S. CONST. amend. IV. The Fourth Amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

[165] Davis v. United States, 131 S. Ct. 2419, 2423 (2011) ("To supplement the bare text [of the Fourth Amendment], this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.").

[166] CONG. RESEARCH SERV., No. 112-9, CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: CENTENNIAL EDITION 1371 (2013), http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf [https://perma.cc/D875-A9DF] [hereinafter CONSTITUTION: ANALYSIS AND INTERPRETATION].

[167] Re, *supra* note 15, at 1919 & n.166 ("Professional police departments did not exist in the eighteenth century, and Framing Era constables did not investigate crimes." (quoting Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 447-48 (2010))).

evidence that was obtained unconstitutionally, but a government agent who acted in violation of a party's Fourth Amendment rights risked being held personally liable for trespass.[168] As the criminal justice system evolved, however, so too did the form of criminal proceedings.[169] Once professional police forces became routinely responsible for the collection of evidence, that collection process became part of the criminal proceedings.[170]

An early Supreme Court case that recognized the privilege against self-incrimination was *Boyd v. United States*.[171] There, the Court found that compelling an individual to produce evidence against himself was both a violation of the Fifth Amendment privilege against self-incrimination and a violation of the Fourth Amendment's protection against unreasonable search and seizure.[172] It soon became clear, however, that the judiciary intended to limit *Boyd* to its facts, and the Court ultimately reverted back to its longstanding application of the common law rule that evidence is admissible no matter how it is acquired.[173]

But by 1914, the Court once again moved away from the common law rule of admissibility, and in *Weeks v. United States*,[174] it excluded evidence against a defendant that was acquired by law enforcement as a result of two warrantless searches.[175] In *Weeks*, police officers searched the defendant's home and discovered private correspondence that contained evidence of his guilt.[176] The defendant sought to have such evidence suppressed.[177] The Court ruled that the government's use of the letters at trial was a prejudicial error,[178] finding that

> [i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such

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168 *Id.* at 1919-20.

169 *Id.* at 1920.

170 *Id.*

171 Boyd v. United States, 116 U.S. 616, 630 (1886).

172 *Id.* at 634-35 ("[W]e are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.").

173 *See, e.g.*, Wilson v. United States, 221 U.S. 361 (1911); Adams v. New York, 192 U.S. 585, 594 (1904).

174 Weeks v. United States, 232 U.S. 383, 398 (1914).

175 *Id.* at 386.

176 *Id.* at 386, 393.

177 *Id.* at 393.

178 *Id.* at 398.

> searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[179]

*Weeks*, therefore, is considered to be the first case to invoke the exclusionary rule.[180]

Other Supreme Court decisions made clear that the exclusionary rule could be tied to the Fourth Amendment in order to suppress illegally obtained evidence.[181] In *Wolf v. Colorado*, the Court stated that the Fourth Amendment right to immunity from unreasonable search and seizure was applicable to both state and federal actions.[182] But it was not until 1961, in *Mapp v. Ohio*,[183] that "the Court imposed the exclusionary rule on the states, holding that the failure to exclude evidence that state officers had obtained by an unreasonable search and seizure violated the defendant's rights under the due process clause of the fourteenth amendment."[184] In so holding, the Court noted that treating the exclusionary rule as a protection of Fourth Amendment rights was not only in accordance with prior cases, but was also "very good sense."[185]

Later decisions moved away from treating the exclusionary rule as a constitutional right and instead pointed to the rule's judicial origins.[186] As courts grappled with the proper characterization of the rule, they also disagreed on its rationales. Some courts considered the rule's rationales to be two-fold—deterring violations of the Fourth Amendment[187] and safeguarding judicial integrity (e.g., by ensuring that the judiciary is not

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[179] *Id.* at 393.

[180] *See, e.g.*, Crocker, *supra* note 5, at 313 (noting that "[t]he Fourth Amendment exclusionary rule in the federal courts is traditionally traced back to *Weeks v. United States*"); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L., 525, 527 (2013) (noting the *Weeks* case as the first time the Court adopted the exclusionary rule for federal prosecutions); Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be*?, 10 OHIO ST. J. CRIM. L., 341 (2013).

[181] *See, e.g.*, United States v. Jeffers, 342 U.S. 48, 54 (1951); McDonald v. United States, 335 U.S. 451, 453 (1948); Goldstein v. United States, 316 U.S. 114, 120 (1942).

[182] Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

[183] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[184] Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 668 (1970).

[185] *Mapp*, 367 U.S. at 657. Justice Black's concurrence elaborated, "[W]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662 (Black, J., concurring).

[186] *See* United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

[187] *Mapp*, 367 U.S. at 643, 648, 656.

complicit in unconstitutional actions by the executive branch).[188] Other courts have de-emphasized the importance of the judicial integrity rationale and focused instead on the objective of deterrence.[189] In instances where the costs to law enforcement and public safety outweigh the benefits of excluding evidence, courts have been willing to carve out exceptions to the exclusionary rule: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."[190] As will be shown in the next section, this "de-constitutionalization" of the exclusionary rule increased the Court's ability to carve out major exceptions to the rule in cases of Fourth Amendment violations.[191]

### *B. Limitations on the Scope of the Exclusionary Rule*

The exclusionary rule is not without its detractors—indeed, it has been called "the most controversial rule in all of criminal law."[192] In fact, by the 1980s, judges began to call either for the rule's abolishment or its significant curtailment;[193] those opinions that upheld the rule did so on the ground that the rule had deterrent value.[194] Some even doubted the rule's effectiveness as a deterrent and questioned whether public safety and effective law enforcement demanded its curtailment.[195] The Supreme Court has emphasized that excluding evidence that results from technical violations or violations made in good faith might

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[188] *See* United States v. Janis, 428 U.S. 433, 458 n.35 (1976) (stating that "[t]he courts must not commit or encourage violations of the Constitution" and that the integrity issue is answered by whether exclusion would deter violations by others).

[189] *See* Stone v. Powell, 428 U.S. 465, 485 (1976) (arguing that extending the judicial imperative "justification would require that courts exclude unconstitutionally seized evidence despite lack of objection" or assent by the defendant); *Janis*, 428 U.S. at 446 ("[T]he 'prime purpose' of the rule, *if not the sole one*, 'is to deter future unlawful police conduct.'" (emphasis added) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974))).

[190] Elkins v. United States, 364 U.S. 206, 217 (1960).

[191] Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 261 n.222 (2012) ("Justice Brennan, a proponent of the exclusionary rule, lamented that its deconstitutionalization 'left [him] with the uneasy feeling that . . . a majority of [his] colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases.'" (quoting United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting))).

[192] Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1065 (1982).

[193] CONSTITUTION: ANALYSIS AND INTERPRETATION, *supra* note 166, at 1265 n.201.

[194] *Id.* at 1265 n.202.

[195] Stone v. Powell, 428 U.S. 465, 490-91 (1976).

"generat[e] disrespect for the law and administration of justice"[196] and result in the freeing of guilty defendants.[197]

The effectiveness of the exclusionary rule has been reduced in recent decades through the adoption of various exceptions.[198] The most significant curtailment was the Supreme Court's adoption of a "good faith" exception[199] in *United States v. Leon*.[200] In *Leon*, the Court considered an exception to the exclusionary rule that would allow courts to admit evidence obtained by a police officer acting in good faith reliance on a warrant issued by a magistrate, even if that warrant later proved to be defective.[201] The Court adopted the exception, stating that suppression would only be an appropriate deterrent "if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[202] Acknowledging concerns about the potential social costs of applying the exclusionary rule,[203] the Court ultimately concluded that the value of suppressing evidence retrieved with an invalid search warrant was minimal compared to the substantial social cost of excluding that evidence at trial.[204]

Interestingly, around the time of *Leon*, a young John Roberts Jr., working as a lawyer in the Reagan administration, wrote a memorandum on the need to abolish or amend the exclusionary rule.[205] As a Justice of the Supreme Court, Roberts seems to have carried that sentiment with him. Soon after joining the Court, Justice Roberts joined in the majority opinion in *Hudson v. Michigan*,[206] finding that a police violation of the knock

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196 *Id.*

197 CONSTITUTION: ANALYSIS AND INTERPRETATION, *supra* note 166, at 1265 n.205.

198 These include the admission of information that is received from an independent source (*see, e.g.*, Maryland v. Macon, 472 U.S. 463, 467-68 (1985) (evidence discovered during an unlawful search and seizure may be admissible if the evidence is later obtained through a constitutionally valid search or seizure)), the inevitable discovery rule (*see, e.g.*, Nix v. Williams, 467 U.S. 431, 443 (1984) (evidence is admitted if it would have been discovered even without the unconstitutional search)), and the attenuation doctrine (*see, e.g.*, Hudson v. Michigan, 547 U.S. 586, 586 (2006) (the relationship between the evidence and the unconstitutional search or seizure is too remote for the exclusionary rule to apply)).

199 CONSTITUTION: ANALYSIS AND INTERPRETATION, *supra* note 166, at 1267.

200 United States v. Leon, 468 U.S. 897, 920 (1984).

201 *Id.* at 913.

202 *Id.* at 926.

203 *Id.* at 907.

204 *Id.* at 922.

205 Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES (Jan. 30, 2009), http://www.nytimes.com/2009/01/31/washington/31scotus.html [http://perma.cc/C3D7-C3J7].

206 Hudson v. Michigan, 547 U.S. 586 (2006).

and announce requirement[207] of the Fourth Amendment was not an adequate basis on which to invoke the exclusionary rule.[208]

David Moran, attorney for the *Hudson* defendant, has referred to the decision as "a major shift in the Court's jurisprudence."[209] In fact, Justice Scalia's comments during oral argument in *Hudson* suggested that the Court might take a fresh approach to the exclusionary rule.[210] During that argument, Justice Scalia asked why a threat of internal police discipline would not be adequate to force compliance with the knock and announce rule.[211] When attorney Moran replied that such an idea contradicted the premise of *Mapp*, Justice Scalia responded, "*Mapp* was a long time ago."[212] For Moran, the importance of *Hudson* cannot be underestimated, because it was the first time the Court had seriously called into question the viability of the exclusionary rule, thus suggesting that *Hudson* could be a harbinger of the Court's approach to Fourth Amendment violations in the years to come.[213]

Moran correctly predicted that the scope of the exclusionary rule would continue to narrow in the years following *Hudson*. In 2009, the Court decided *Herring v. United States*.[214] Writing for the majority, Chief Justice Roberts ruled that negligent police behavior that caused a computer database to fail to recall an arrest warrant was not sufficient grounds for the exclusionary rule to apply because the police behavior in the case was neither reckless nor deliberate.[215] In support of its holding, the Court reasoned that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence,'"[216] and it acknowledged that exclusion of evidence "has always been our last resort, not our first impulse."[217]

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[207] The Court acknowledged that "[t]he common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one." *Id.* at 589. Further, the court noted in *Wilson v. Arkansas*, 514 U.S. 927 (1995), that this knock and announce rule was considered to be "a command of the Fourth Amendment." *Hudson*, 547 U.S. at 589 (citing *Wilson*, 514 U.S. at 931-36).

[208] *Hudson*, 547 U.S. at 594.

[209] Moran, *supra* note 15, at 284.

[210] *Id.* at 299-300.

[211] Transcript of Oral Argument at 31-32, Hudson v. Michigan, 547 U.S. 586 (2006) (No. 04-1360), http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-1360b.pdf [http://perma.cc/8X79-PUT7].

[212] *Id.* at 32 (emphasis added); Moran, *supra* note 15, at 300.

[213] Moran, *supra* note 15, at 284.

[214] Herring v. United States, 555 U.S. 135 (2009).

[215] *Id.* at 144.

[216] *Id.* at 141 (quoting United States v. Leon, 468 U.S. 897, 909 (1984)).

[217] *Id.* at 140 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

Two years later, in *Davis v. United States*,[218] the Supreme Court once again limited the application of the exclusionary rule by allowing police to rely on controlling case law at the time of an arrest,[219] despite the Court's later finding in another case that such a search was unconstitutional.[220] In *Davis*, a search of a defendant's vehicle uncovered a firearm.[221] This search was conducted after the defendant had already been removed from the vehicle and placed under arrest.[222] At the time of the incident, the search was legal under existing case law.[223] During the defendant's appeal, the Supreme Court, in an unrelated case,[224] ruled that a search of a defendant's vehicle once a defendant no longer had access to that vehicle was unconstitutional.[225] Relying on this new precedent, Davis unsuccessfully sought to have the evidence against him suppressed.[226]

As the Court narrows the types of police conduct that will be treated as illegal, the result is that the "'exclusionary rule' is, case by case, excluding less and less evidence from trials."[227] These more recent cases indicate that the use of the exclusionary rule to suppress evidence obtained in violation of the Fourth Amendment has been declining. This fact highlights the significance of the *Dreyer* court's decision to invoke the exclusionary rule for a PCA violation.

### *C. Application of the Exclusionary Rule in Cases with Alleged PCA Violations*

Prior to *Dreyer*, federal appeals courts had been consistent in the application of the exclusionary rule to cases involving PCA violations. *Dreyer* was the first PCA case in which a federal appeals court suppressed evidence against a

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[218] Davis v. United States, 131 S. Ct. 2419 (2011).

[219] *Davis*, 131 S. Ct. at 2434.

[220] In *Arizona v. Gant*, 556 U.S. 332 (2009), Rodney Gant was arrested for driving with a suspended license. At the time of his arrest, he was handcuffed and placed in a patrol car. While he was in the patrol car, the police searched his vehicle and found cocaine in the pocket of his jacket, which was on the backseat. The Supreme Court ruled that since Mr. Gant no longer had access to the vehicle, this was an unconstitutional search.

[221] *Davis*, 131 S. Ct. at 2425-26.

[222] *Id.* at 2425.

[223] *Id.* at 2426.

[224] *Gant*, 556 U.S. 332.

[225] *Id.* at 351.

[226] *Davis*,131 S. Ct. at 2434.

[227] Lyle Denniston, *Opinion Analysis: The Fading "Exclusionary Rule*," SCOTUSBLOG (June 25, 2011, 8:58 AM), http://www.scotusblog.com/2011/06/opinion-analysis-the-fading-exclusionary-rule/ [http://perma.cc/SY64-T4GT].

defendant because that evidence was obtained as a result of a PCA violation.

It was not until 1948—70 years after the passage of the PCA—that the scope of the Act was called into question.[228] In that year, the First Circuit considered, in *Chandler v. United States*, a claim that a defendant's arrest violated the PCA because the arrest was made by the U.S. Army in Germany after World War II.[229] In rejecting the claim, the court concluded that there was nothing in the history of the PCA to suggest that the Act was intended to have an extraterritorial effect.[230] Interestingly, the court applauded the industry of counsel in "turning up . . . this obscure and all-but-forgotten statute."[231]

While the PCA might have been considered an "all-but-forgotten statute" in 1948, that began to change soon after the Supreme Court's 1961 decision in *Mapp*, which applied the exclusionary rule to state criminal law proceedings.[232] After that decision, the number of cases in which defendants challenged the inclusion of evidence as a result of an alleged violation of the PCA began to increase.[233]

In *United States v. Walden*, active-duty Marines were used as primary investigators of a civilian crime outside of the military base at Quantico, Virginia.[234] In *Walden*, the Fourth Circuit was faced with two concerns, including (1) whether the PCA, which by its legislative terms did not apply to the Navy (and therefore, the Marine Corps, which was under the jurisdiction of the Navy), could be violated by actions of the Marines,[235] and (2) if there was such a violation, whether the exclusionary rule applied.[236]

With regard to whether the PCA could be violated by actions of the Marines, the court found that since the DoD and the Navy had adopted regulations that encompassed the spirit of the PCA, in this instance, the actions of the Marines had violated those regulations.[237] But the court then considered

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[228] Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 155 (2014).

[229] Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (holding that the arrest in Germany by U.S. troops of a U.S. national charged with treason committed there during World War II and bringing him back to the United States did not violate a statute prohibiting the use of any part of the Army as a posse comitatus to execute the laws).

[230] *Id.* at 936.

[231] *Id.*

[232] Nevitt, *supra* note 228, at 154-55.

[233] *Id.*

[234] United States v. Walden, 490 F.2d 372 (4th Cir. 1974).

[235] *Id.* at 373-74.

[236] *Id.* at 373, 376-77.

[237] *Id.* at 376.

whether this de facto violation meant that the exclusionary rule should be applied. The Fourth Circuit ruled that it did not.[238] The court based its conclusion in part on the fact that self-imposed Naval regulations that apply the spirit of the PCA to the Navy and Marines "express[] a policy that is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants."[239] The court indicated that the adoption of the extraordinary remedy of the exclusionary rule would only be warranted in situations that indicated a repeated pattern of military behavior that may require a judicial deterrent, which was not present in *Walden*.[240]

Several years after *Walden*, the Fifth Circuit considered a similar question in *United States v. Wolffs*.[241] In *Wolffs*, Douglas Pugh, a member of the U.S. Army, was sent undercover to ask defendant Michael Wolffs to arrange a marijuana purchase for him.[242] Following the exchange of drugs for cash, Wolffs and his coconspirators were arrested.[243] Wolffs sought to have the evidence against him suppressed, in part on the grounds that the Army Criminal Investigation Command agent's involvement was a violation of the PCA.[244] The Fifth Circuit refused to delve into the complex question of whether the Army's actions constituted a violation of the PCA.[245] Rather, the court stated that even if it assumed that a PCA violation had occurred, the exclusionary rule would not be the appropriate remedy. "If this Court should be confronted in the future with widespread and repeated violations of the [PCA] an exclusionary rule can be fashioned at that time."[246] The Ninth Circuit followed the path of the Fifth Circuit in *United States v. Roberts*.[247]

In *Roberts*, the Ninth Circuit was asked to exclude evidence that was secured against a drug runner because the U.S. Navy cooperated with the Coast Guard in intercepting and searching a marijuana-laden civilian vessel.[248] Despite finding

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238 *Id.* at 372.
239 *Id.* at 377.
240 *Id.*
241 United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).
242 *Id.* at 78.
243 *Id.* at 79.
244 *Id.* at 85.
245 *Id.*
246 *Id.* The court ruled that the district court did not err in denying the motion to suppress under the exclusionary rule. *Id.* The case was, however, remanded to the district court due to an erroneous jury instruction regarding Wolffs's entrapment defense. *Id.* at 83.
247 United States v. Roberts, 779 F.2d 565 (9th. Cir. 1986).
248 *Id.* at 566.

that the Navy's actions were in violation of PCA-like restrictions, the court refused to apply the exclusionary rule.[249] As explained by Judge Wallace, "[b]ecause the [PCA] and sections 371-378 of Title 10 embody similar proscriptions against military involvement in civilian law enforcement, we consider it significant that courts have uniformly refused to apply the exclusionary rule to evidence seized in violation of the [PCA]."[250] The court instead adopted the holding of *Wolffs* that exclusion would be inappropriate unless "'widespread and repeated violations' of the [PCA] demonstrated the need for such a remedy."[251] This holding was consistent with the Supreme Court's ruling in *Leon* a few years prior, which limited the application of the exclusionary rule to those circumstances in which the police had acted with a reckless disregard for the rules, since in those situations the deterrent effect of the rule would outweigh the costs to society.[252]

A more recent decision adopting the spirit of the above cases is the Fourth Circuit's opinion in *United States v. Johnson*.[253] In *Johnson*, the defendant argued that evidence against him should be suppressed because military personnel performed a drug test on the defendant's blood in violation of the PCA.[254] Although the court did not find evidence that the military had, in fact, conducted the blood test, the court nonetheless opined that even if the blood test had been conducted in violation of the PCA, the court would deny the motion to suppress because, "despite the important function of the Act in 'uphold[ing] the American tradition of restricting military intrusions into civilian affairs,' '[a]s a general matter, the exclusionary rule is not a remedy for violations of the [Act].'"[255] Echoing the decisions in *Walden*, *Wolffs*, and *Roberts*, the court reiterated that it would remain open to the adoption of the exclusionary rule should it find repeated violations of the PCA.[256]

When faced with alleged violations of the PCA, courts have routinely stated that they would consider applying the

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[249] *Id.* at 568.

[250] *Id.*

[251] *Id.* (quoting *Wolffs*, 594 F.2d at 85).

[252] United States v. Leon, 468 U.S. 897, 898 (1984). The Eleventh Circuit has also weighed in on this issue. In *United States v. Mendoza-Cecelia*, 963 F.2d 1467 (11th Cir. 1992), the court reiterated earlier findings in the circuit that the exclusionary rule would not be an appropriate remedy for an alleged PCA violation "until such time as widespread and repeated violations of the [PCA] demonstrate a need for such sanction." *Id.* at 1478 n.9 (citing *Wolffs*, 594 F.2d at 77, 85).

[253] United States v. Johnson, 410 F.3d 137 (4th Cir. 2005).

[254] *Id.* at 142.

[255] *Id.* at 149 (quoting United States v. Al-Talib, 55 F.3d 923, 930 (4th Cir. 1995)).

[256] *Id.* (quoting United States v. Walden, 490 F.2d 372, 377 (4th Cir. 1974)).

exclusionary rule if, in fact, they had evidence of "widespread or repeated" violations of the Act.[257] In the initial ruling, the Ninth Circuit judges were at odds as to whether Agent Logan's activities in *Dreyer* amounted to widespread or repeated violations. Writing for the majority, Judge Berzon found the search of every computer in the State of Washington to be a widespread violation.[258] The concurring opinion of Senior Circuit Judge Kleinfeld amplified this conclusion: "The offense is to the people in Washington whose computers were hacked by the Navy, not to this Court. The repetition that matters is the repeated invasions of Washingtonians' privacy, as the Navy software went from civilian computer to civilian computer."[259] Judge O'Scannlain, dissenting in part, disagreed, stating,

> I fail to see how evidence that four agents committed violations—three of whom were part of the same investigative team—demonstrates a widespread problem. Such anecdotal evidence falls far short of what our precedents require before we will resort to the "extraordinary remedy" of exclusion, especially considering the cost of doing so in this case.[260]

Not only did Judge O'Scannlain disagree that the actions of four agents could amount to the type of repeated violations that would be a cause for concern, but his dissent also highlighted what is lacking in the decisions of his fellow judges—the consideration of the effects of applying the exclusionary rule in this case.

In its en banc decision, the Ninth Circuit acknowledged that the application of the exclusionary rule comes with a social cost and ultimately found that the facts did not demonstrate that suppression was necessary to deter future violations.[261] In reaching this conclusion, the court considered whether the NCIS's actions were of the "widespread" nature that the exclusionary rule would ordinarily seek to address and found that the search of all computers in the State of Washington merely resulted from "institutional confusion" and a situation in which the "NCIS misunderstood the scope of its authority" rather than from intentional abuse.[262] The judges were convinced by the government's testimony that the initial decision in *Dreyer* was

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[257] *Johnson*, 410 F.3d 137; *Wolffs*, 594 F.2d at 85; *Walden*, 490 F.2d at 377.

[258] United States v. Dreyer, 767 F.3d 826 (9th Cir. 2014), *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc).

[259] *Id.* at 838 (Kleinfeld, J., concurring). Note Justice O'Scannlain's consideration of the cost of suppression. This relates to the cost-benefit analysis courts undertake when deciding whether to exclude evidence. *See supra* Section IV.C.

[260] *Dreyer*, 767 F.3d at 841 (O'Scannlain, J., dissenting).

[261] United States v. Dreyer, 804 F.3d 1266, 1278 (9th Cir. 2015).

[262] *Id.* at 1280.

"more than sufficient to deter NCIS agents from engaging in any future investigative efforts of this type"[263] and concluded that providing the government with an opportunity to self-correct was more appropriate than application of the exclusionary rule.[264] In her concurrence to the en banc decision, Judge Berzon addressed her reversal on this issue. While she continues to believe that the NCIS actions were extreme in their scope, she now agrees that these actions were not "repeated" in the manner that would warrant application of the exclusionary rule.[265] Should similar violations occur in the future, however, Judge Berzon made clear that she believes suppression would be the appropriate remedy.[266]

Protecting Fourth Amendment rights through the suppression of evidence is not without costs—in this case, absent the reversal by the en banc court, the potential social cost of letting a child pornographer go free.

## V. STRIKING THE BALANCE: PRIVACY, THREATS TO SOCIETY, AND PRESERVING NATIONAL SECURITY

The exclusionary rule has long been considered an extraordinary remedy.[267] No doubt this is so, in part, because one of the costs of suppressing illegally obtained evidence may be that the guilty go free, thereby posing an increased threat to public safety. In contemporary society, threats to our safety have also arrived in a different form—that of terrorism. Without question, the American public, although still wary of government intrusions, has become more tolerant of government surveillance, such as NSA spying, at the cost of sacrificing certain liberties.[268] This part explores the considerations that go into striking this balance, both in the general context of privacy concerns and more specifically in relation to *Dreyer*.

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[263] *Id.*

[264] *Id.*

[265] *Id.* at 1283.

[266] *Id.*

[267] State v. Herr, 828 N.W.2d 896, 899 (Wis. Ct. App. 2013) ("The exclusionary rule is an extraordinary remedy that exacts 'substantial social costs,' including potentially releasing guilty and dangerous criminals into our communities and impairing the truth-seeking objectives of our legal system." (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006))).

[268] *See, e.g.*, *Majority Views NSA Phone Tracking as Acceptable Anti-terror Tactic*, PEW RES. CTR. (June 10, 2013), http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/ [http://perma.cc/J5BG-78DZ].

### *A. The Social Cost of Setting the Guilty Free*

In our adversarial system, a court's effectiveness is optimized when the parties on both sides make the most compelling arguments possible.[269] In the context of exclusionary rule cases, it is the role of government to represent the public's need to be shielded from crime, and it is the role of the defense attorney to seek to keep the government's power in check.[270] While the parties advocate for their positions, it is the judiciary that is the ultimate watchdog with the authority to exclude evidence. Time and again case law has indicated an understanding that the exclusionary rule should "pay its way," meaning that the social cost of suppressing evidence must be outweighed by the deterrent effect on law enforcement actions.[271] According to Albert Alschuler, "[w]hen the Supreme Court describes the costs of the exclusionary rule, it places at the top of its list 'the grave adverse consequence . . . of releasing dangerous criminals into society.'"[272] But evaluating those consequences is not always easy. In fact, one of the most well-known and oft-cited studies on the deterrent effect of the exclusionary rule found the deterrent effects to be indeterminate.[273]

Those who urge the application of the exclusionary rule to privacy violations must overcome the fact that the rule not only impedes the function of truth seeking (meaning that the jury does not have an opportunity to consider a full set of facts), but also that its application runs contrary to the goals of law enforcement.[274] Recall that in *Herring*, the Court pointed out that negligent police behavior that was neither reckless nor deliberate was not enough to require suppression of evidence obtained in violation of the Fourth Amendment.[275] In reaching its conclusion, the Court considered the "cost" of setting the defendant free. As pointed out by Chief Justice Roberts, the deterrence gained from suppression must be "worth the price paid by the justice system"[276] that results from letting "possibly

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[269] Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1089 (2011).

[270] *Id.*

[271] Re, *supra* note 15, at 1897.

[272] Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1374 (2008) (citing *Hudson*, 547 U.S. at 595).

[273] Re, *supra* note 15, at 1901 n.71 (citing Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970)).

[274] Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL'Y 951, 1020-21 (2011).

[275] *See supra* Section IV.B; Herring v. United States, 555 U.S. 135, 147 (2009).

[276] *Herring*, 555 U.S. at 144.

dangerous defendants go free."[277] The courts, however, must temper this potential threat to society with concern for the protection of citizens against abuses of law enforcement.

Similar sentiments were expressed by the Court in *Leon* and more recently in *Davis*. When *Leon* introduced the good faith exception to the exclusionary rule, the Court acknowledged that "[t]he substantial social costs exacted by the exclusionary rule . . . have long been a source of concern."[278] Citing *Payner*,[279] the Court went on to state that a rigid application of the exclusionary rule to enforce Fourth Amendment ideals "would impede unacceptably the truth-finding functions of judge and jury."[280] The *Leon* decision incorporated a footnote containing "a plethora of scholarship and empirical research showing that the exclusionary rule has a detrimental effect on the prosecution of crimes."[281]

In *Davis*, Justice Alito also focused on the substantial social costs of the exclusionary rule on both the judicial system and society, stating that this rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence . . . and set[s] the criminal loose in the community without punishment."[282] The Court's focus on the social cost of excluding evidence has "led it, for example, to bring into the analysis a form of cost/benefit analysis, with the weight heavier on the cost side."[283]

Interestingly, in the initial *Dreyer* ruling, neither the majority opinion nor the concurrence made any mention of an attempt to balance deterrence with the social cost to society that could result from letting a child pornographer go free. Instead, the court focused solely on the objective of deterring future misconduct by the military.[284] This is consistent with Justice

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[277] *Id.* at 141.

[278] United States v. Leon, 468 U.S. 897, 907 (1984).

[279] In *United States v. Payner*, 447 U.S. 727, 734 (1980), the defendant was accused of falsifying his tax return by failing to indicate that he had a foreign bank account. To prove that such an account in fact existed, the government introduced evidence that Payner had used the money in this account as collateral for a loan. This evidence was obtained by the government illegally from a third party. Payner was unsuccessful in his attempt to have the Court suppress the evidence. The Court ruled that since Payner was not subject to an unconstitutional search, society's interest in presenting complete evidence to the jury outweighed the deterrent value of suppressing the evidence.

[280] *Leon*, 468 U.S. at 907 (citing *Payner*, 447 U.S. at 734).

[281] Blackman, *supra* note 274, at 1021 ("Notwithstanding that the 'impact of the exclusionary rule is insubstantial . . . [,] the small percentages with which [researchers] deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures.'" (quoting *Leon*, 468 U.S. at 908 n.6)).

[282] Davis v. United States, 131 S. Ct. 2419, 2427 (2011).

[283] Denniston, *supra* note 227.

[284] United States v. Dreyer, 767 F.3d 826 (9th Cir. 2014), *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc).

Breyer's view of how the exclusionary rule should be applied, as indicated in his dissent in *Hudson* in which he "disputed Justice Scalia's balancing approach" and argued instead that the need for deterrence should be the Court's focus.[285] Justice Breyer was "opposed to limiting the liberty interest, notwithstanding the social costs that may result from his opinion."[286] So too, it seems, were the judges of the Ninth Circuit, who ruled in favor of Dreyer's motion to suppress. The court's ire at the government's presumption that it could monitor computers "anywhere in any state with a military base or installation"[287] is palpable. The court described the government's actions and attitude as having a "profound lack of regard for the important limitations on the role of the military in our civilian society."[288]

Perhaps for the judges in *Dreyer*, the Navy's action was the proverbial straw that broke the camel's back. In a post-9/11 world, the surveillance landscape has changed dramatically,[289] and *Dreyer* represented the first significant volley in the federal courts' attempts to deter or turn back this tide of military overstep into civilian affairs, even if it is at the high cost of setting criminal defendants loose upon society.

### *B. Sacrificing Liberty for Security*

*Dreyer* does not exist in a vacuum. It is a case that fits squarely within the broader question of how to balance the preservation of constitutional rights with the willingness of society to forfeit some of those rights to preserve national security. It brings to light a question that is crucial at this point in the history of the nation. Do we chip away at the Fourth Amendment and entrust the government to self-regulate and ensure that its surveillance powers are used reasonably?[290] In the interest of thwarting acts of terrorism on American soil, government authority has seemingly come to take precedence over individual rights.[291] This is alarming because expanded governmental

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[285] Blackman, *supra* note 274, at 1023.

[286] *Id.* at 1024.

[287] *Dreyer*, 767 F.3d at 836.

[288] *Id.*

[289] Sudha Setty, *Surveillance, Secrecy, and the Search for Meaningful Accountability*, 51 STAN. J. INT'L L. 69, 72 (2015) (discussing the increased surveillance efforts after 9/11).

[290] Sejal H. Patel, *Sorry, That's Classified: Post-9/11 Surveillance Powers, the Sixth Amendment, and Niebuhrian Ethics*, 23 B.U. PUB. INT. L.J. 287, 295 (2014).

[291] *Id.*

powers can ultimately weaken democratic ideals as citizens cede their civil liberties in the quest to ensure national security.[292]

For some, a sacrifice of privacy is essential to national security.[293] For example, as explained by William Stuntz, the late Harvard Law School professor, "in the face of social disorder and transnational threats, continuing support for privacy is a 'disease' that undermines public safety and national security."[294] For others, that is a view worth challenging as the justice system "strain[s] to understand what we are afraid of and what we are protecting. It is time we remove this public blindfold and ask questions about what sort of democracy we have made for ourselves in the wake of 9/11."[295] Times of crisis are often the times of greatest threats to individual liberty, and any decision to curtail rights should be made with an abundance of caution.[296]

> No less than freedom of speech or the press, protection from unwarranted government surveillance ranks among these core liberties that are essential to democracy. . . . Through [the] requirement of accountability, it gives legitimacy to essential law enforcement powers and aims to ensure they are not used so loosely that they needlessly intrude on law-abiding citizens. In this respect . . . an effective Fourth Amendment fosters the [same] sense of personal security that is necessary for individual autonomy and political liberty in a free society.[297]

In the interest of preserving national security, are courts more apt to turn a blind eye to surveillance overreaches? Because the exclusionary rule is no longer routinely used, *Dreyer* represents an exception to the trend, but it also signifies much more than that—it was an opportunity for the judiciary to reinvigorate the application of the exclusionary rule. *Dreyer* was decided at a time in history in which we began to ask: "[I]n the modern world, [what] can 'privacy' really mean? Against the background of electronic data collection that now enters nearly every corner of modern life, how much privacy can we expect?"[298]

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[292] *Id.*

[293] *See, e.g.*, SHANE HARRIS, THE WATCHERS: THE RISE OF AMERICA'S SURVEILLANCE STATE (2010); Lara Jakes & Darlene Superville, *Obama Defends NSA, Says America Has to Make Choices Between Privacy and Security*, HUFFINGTON POST (June 7, 2013, 11:36 PM), http://www.huffingtonpost.com/2013/06/07/obama-defends-nsa_n_3406448.html [http://perma.cc/K9GR-9N4V].

[294] STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 5 (2012) (citing William J. Stuntz, *Against Privacy and Transparency*, NEW REPUBLIC (Apr. 17, 2006), http://www.newrepublic.com/article/against-privacy-and-transparency [http://perma.cc/7WZ9-E9NH]).

[295] Patel, *supra* note 290, at 311.

[296] DANIEL J. SOLOVE, NOTHING TO HIDE THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 60-61 (2011).

[297] SCHULHOFER, *supra* note 294, at 13, 15.

[298] *Id.* at 4.

One popular argument is that in this era of foiling terrorist plots at home and abroad, the "relaxation of Fourth Amendment safeguards should give no cause for concern because good citizens have 'nothing to hide.'"[299] The risk of this attitude is, of course, that we would come to view a defendant such as Michael Dreyer without any concern that that his privacy may have been invaded by the Navy's violation of PCA-like restrictions. After all, if he were not engaging in distributing child pornography, he would have nothing to hide from the military's search. In effect, Dreyer has brought these troubles upon himself, and one does not have much sympathy for his case.

To conclude thus, however, misses the point, because "the nothing-to-hide argument stems from a faulty premise that privacy is about hiding a wrong."[300] But privacy is about much more than hiding a wrong; it is about the ability to keep one's private affairs and affiliations out of the public. Surveillance, for example, "can inhibit such lawful activities as free speech, free association, and other First Amendment rights essential for democracy."[301] "Even [if] our thoughts and actions are innocuous, we may not want others to know every detail."[302] Perhaps the court in *Dreyer* was influenced by the fallacy of the nothing-to-hide argument when it took a strong position against what it perceived to be military overreach.

### *C. What's Next?*

The Ninth Circuit's initial decision in *Dreyer* signaled that despite a long judicial history of allowing PCA and PCA-like restrictions to remain unchecked, courts may apply the exclusionary rule to suppress evidence as a means of deterring abuses of power. As government surveillance methods become more intrusive and the need to combat terrorism continues to increase, the number of defendants seeking courts' suppression of evidence obtained via PCA or PCA-like infractions will also increase. The key question that remains is, "What is to be done?"

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[299] *Id.* at 11; *see also* SASCHA KLEIN, "I'VE GOT NOTHING TO HIDE": ELECTRONIC SURVEILLANCE OF COMMUNICATIONS, PRIVACY AND THE POWER OF ARGUMENTS (2012); Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 746-47 (2007); Alex Abdo, *You May Have 'Nothing to Hide' But You Still Have Something to Fear*, AM. CIV. LIBERTIES UNION (Aug. 2, 2013, 10:17 AM), https://www.aclu.org/blog/national-security/you-may-have-nothing-hide-you-still-have-something-fear [http://perma.cc/YZ44-82AB].

[300] SOLOVE, *supra* note 296, at 27.

[301] *Id.*

[302] SCHULHOFER, *supra* note 294, at 11.

*Dreyer* illustrates a need for a national conversation and consensus on the role of the military in the new world order.[303] At a minimum, the PCA must be reassessed in the context of contemporary challenges.[304] When the PCA was enacted in 1878, Congress could not have envisioned the government's current surveillance capabilities or the expanded role of the military in domestic affairs.[305] Information gathering has been transformed, and the laws that guide the military's involvement in such activities should reflect that transformation. While some may assert that the PCA excludes the military from civilian law enforcement and safeguards civil liberties, the PCA has not proven to be an effective tool in assessing the parameters of the NSA's domestic surveillance.[306] Despite the fact that the NSA operates under the direction of a four-star military officer, it is seemingly unfettered by the PCA's restrictions.[307]

The complexities of military intelligence, which include a DoD employing over three million people,[308] put us at a crossroads in which we can choose one of two paths: (1) the courts can follow the Ninth Circuit and continue to serve as gatekeepers by wielding the socially costly weapon of the exclusionary rule to defend constitutional liberties; or (2) Congress can intervene to transform and streamline the PCA and related regulations to better address the proper role of the military and the intelligence community in civilian affairs in a post-9/11 society. Congressional action is preferable, because absent congressional action and guidance, it is likely that courts will make ad hoc use of the exclusionary rule in varying degrees, circuit by circuit, which will only add to the current lack of consistency and clarity in judicial interpretations of the exclusionary rule.

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[303] In fact, a concurrence in the November 2015 ruling further highlighted the necessity of congressional action and the need for national consensus. In that concurrence, authored by Judge Owens and joined by Judges Silvermann and Callahann, the judges disagreed with the reasoning of the majority based on their belief that PCA violations could never warrant suppression since it is the role of Congress, and not the courts, to authorize suppression for PCA violations. United States v. Dreyer, 804 F.3d 1266, 1285 (9th Cir. 2015).

[304] Nevitt, *supra* note 228, at 172.

[305] As explained by Maj. Daniel Sennott, the PCA was enacted in the Reconstruction era to prevent Southern states from contesting a close election between Samuel Tilden and Rutherford Hayes in which Tilden had won the popular vote but Hayes prevailed by one electoral vote. The PCA resulted from a negotiation process and was drafted to appease Southerners who were concerned about the heavy presence of federal troops in the South and the ability of those troops to interfere with elections. DANIEL J. SENNOTT, HOW THE POSSE COMITATUS ACT RESTRICTS DEPARTMENT OF DEFENSE INFORMATION SHARING (2010).

[306] Nevitt, *supra* note 228, at 173.

[307] *Id.*

[308] *Id.* at 174.

First and foremost, Congress should mandate that the PCA and its criminal sanction apply to the Army, Navy, Air Force, and Marines. This would address the concern pointed out in Judge Kleinfeld's concurrence in *Dreyer* that "[i]f the military chooses to become a national police force to detect civilians committing civilian crimes, the Navy would be the branch to use, because the criminal penalty does not apply to Navy personnel."[309] But applying the law and its restrictions to these branches of the military is only the first step. Action must be taken within the military to ensure that it actually implements and executes the PCA and imposes the Act's criminal sanctions to deter violations.[310] This could be accomplished, for instance, by including within the proposed legislation the following mandate: "The Department of Defense shall issue guidance to ensure the enforcement of civil and criminal sanctions for violations of the PCA and enabling regulations." This authoritative guidance and consequential punishment would serve to deter federal agents like Agent Logan from continuing to take actions that violate the PCA.

Civilian-military collaborations are inevitable in the fight against terrorism, both domestically and abroad.[311] Cyber surveillance, such as that conducted by the NCIS in *Dreyer* and routinely conducted by the NSA, creates numerous opportunities for the sharing of information with civilian authorities. Explicit statutory guidance on the permissible parameters of how information about civilians is gathered, used, and shared by the military that takes into account modern technological advances would remove uncertainties for military and civilian authorities alike.

Congressional action that provides clear guidance to address current surveillance methods and cooperation between military and civilian authorities, coupled with the enforcement of the criminal sanctions for PCA violations, would deter behavior such as that engaged in by the NCIS in *Dreyer*. This would eliminate the need for a court to step in and utilize the

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[309] United States v. Dreyer, 767 F.3d 826, 838 (9th Cir. 2014), *reh'g granted*, 782 F.3d 416 (9th Cir. 2015) (en banc).

[310] This is especially important since "the military has been accused of taking a slack approach to PCA compliance." Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 407 (2003). Although the "Secretary of the Navy forbade naval and Marine personnel from enforcing or executing local, state, or federal civil law except when specifically approved by either the Secretary of Defense or the Secretary of the Navy," Agent Logan of the NCIS nonetheless engaged in impermissible military activity seemingly without sanction under the Act. *Id.* at 408.

[311] This point is expanded upon by Daniel Sennott, *supra* note 305. As an example, he points out that terrorists are being tried in civilian courts based on military intelligence.

exclusionary rule as a deterrent. But should Congress choose to allow the status quo to continue and turn a blind eye to the need to curb abuses of power, other courts may follow the lead of the Ninth Circuit in *Dreyer* and apply the exclusionary rule in order to send a clear message that military overreach that violates the spirit of the PCA will no longer be tolerated.

## CONCLUSION

In *Dreyer*, the Ninth Circuit has sparked a conversation on the role of the judiciary as gatekeeper and protector of civil liberties in instances of military involvement in civilian affairs. This approach recognizes that in an era of technological advances and unprecedented grants of power to government-surveillance operations, many of which may involve members of the military, the time has come to revisit the long history of the judiciary allowing military overstep on constitutional liberties. While the courts' role as a check on the power of the other branches cannot be understated, court decisions other than those of the Supreme Court represent an ad hoc approach to justice that provides an inconsistent application of the exclusionary rule and will lead to uncertainty and continued abuses.

In a post-9/11 world with increasing threats from terrorist groups such as ISIS,[312] cyber surveillance of U.S. citizens by the NSA, the NCIS, and other military units within the DoD will continue for many years to come. The question prompted by the *Dreyer* decision is how much intrusion into the private affairs of ordinary citizens the courts and the general public will be willing to accept, especially when the results of such surveillance activities are used by civilian law enforcement to prosecute crimes.

In employing the exclusionary rule in response to PCA-violating military action, the *Dreyer* court expressed its refusal to accept the unbridled military surveillance of U.S. citizens when the fruits of such surveillance are used by civilian law enforcement officials to prosecute crimes. While we applaud the court's willingness to limit government overreach, leaving this task to the judiciary is certain to result in inconsistent outcomes as evidenced by the Ninth Circuit's reversal on rehearing in *Dreyer*. As the need to "strike the appropriate balance between our need for security and preserving those freedoms that make us

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[312] Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/ [http://perma.cc/BCE6-7HKD].

who we are"[313] becomes more pressing, the need for Congress to enact new legislation or amend existing laws becomes increasingly central to the national debate on the protection of civil liberties. Congressional action that provides clarity on the parameters of permissible military involvement in civilian surveillance efforts and certainty that violators of those limits will be held accountable under the civil and criminal sanctions of the PCA will serve as the most effective deterrent against government overreach in the use of the military in civilian law enforcement activities.

[313] NSA: MISSION, *supra* note 65.