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Concealing Evidence: "Parallel Construction," Federal Investigations, and the Constitution

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ABSTRACT

Federal law enforcement agencies are increasingly relying on "parallel construction" to pursue criminal cases against U.S. persons. Parallel construction is the process of building a separate — and parallel — evidentiary basis for a criminal investigation. The process is undertaken to conceal the original source of evidence, which may have been obtained unlawfully. Clandestinely used for decades, this process raises serious constitutional questions.

Parallel construction allows law enforcement agencies to capitalize on sensitive or secret national security techniques in the domestic criminal context, without any form of oversight or accountability. The result: parallel construction insulates surveillance techniques from judicial review, undermines checks and balances, and deprives individuals of the privacy benefits that court review would require. It also undermines fundamental principles of due process. Parallel construction enables law enforcement agencies to engage in questionable investigative practices, the concealment of which deprives criminal defendants of any challenges they might raise and prevents courts from reviewing the constitutionality of the practice in the first place.

Addressing parallel construction is a pressing issue, especially in light of current events surrounding the 2013 global surveillance disclosures by Edward Snowden, the ongoing War on Drugs and War on Terror, and the efforts to reform the criminal justice system. As this Article explains, using this process is a deliberate attempt to bypass constitutional guarantees in ways that will unduly prejudice criminal proceedings. There is much to be gained by ensuring that law enforcement refrains from practicing parallel construction in the future.

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INTRODUCTION

After the terrorist attacks of September 11, 2001, the federal government significantly expanded an information-sharing system between intelligence communities, federal agencies, and state, local, and tribal law enforcement agencies. The system was intended to improve law enforcement's ability to detect, prevent, and respond to acts of terrorism — thus enhancing national security and improving public safety.[2] However, the 2013 global surveillance disclosures by Edward Snowden[3] revealed that these agencies, particularly the National Security Agency (NSA), use surveillance tactics on U.S. citizens that are questionable and arguably unlawful.[4] There is no doubt

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[2] ABOUT THE INFORMATION SHARING ENVIRONMENT (ISE), OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, https://www.dni.gov/index.php/who-we-are/organizations/national-security-partnerships/ise/about-the-ise (last visited Sept. 2, 2018).

[3] In 2013, Edward Snowden, former technical assistant for the Central Intelligence Agency (CIA) and employee of the defense contractor Booz Allen Hamilton, disclosed numerous top-secret documents of the U.S. National Security Agency and its international partners to the public. Snowden claimed to have leaked the documents to launch a global debate on the limits of NSA surveillance. He argued that domestic and foreign citizens should be informed of the lack of transparency in government, unequal pardon, and overpowering executive powers that rule the world in which they live. Subsequently, in order to maximize impact, Snowden left the U.S. to avoid legal retribution and reached out to *The Guardian* and several other organizations to reveal his most significant and pertinent discoveries to the world. Glenn Greenwald, Ewen MacAskill, and Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 9, 2013), http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance.

[4] For instance, the disclosures revealed that the NSA had access to information contained within major U.S. technology companies such as Google, Facebook, Microsoft, Yahoo and Apple, and often without individualized warrants. *See, e.g., NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 13, 2013), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order. The documents also provided information on the NSA's mass-interception of data from fiber-optic cables - the backbone of global phone and Internet networks - as well as its work to undermine the security standards upon which the Internet, commerce, and banking rely. *GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications*, THE GUARDIAN (June 21, 2013), https://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa. As a component of the previously undisclosed program called "Prism," NSA officials were permitted to collect material including search history,

that the manner in which government agencies collect information on U.S. citizens is concerning.[5] But the subsequent utilization of information by law enforcement agencies raises even more significant and debilitating concerns. Government intelligence agencies such as the NSA will transfer information, obtained outside of domestic investigative procedures, to law enforcement agencies such as the Drug Enforcement Administration (DEA) to pursue criminal cases against U.S. citizens.[6] The NSA's ability to transfer intelligence was most recently noted to have expanded as the Obama administration left the White House in January 2017.[7] According to a declassified document

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the content of emails, file transfers and live chats from the servers of these U.S. companies. *NSA Prism Program Slides*, THE GUARDIAN (Nov. 1, 2013), http://www.theguardian.com/world/interactive/2013/nov/01/prism-slides-nsa-document. Many companies strongly denied their affiliation with or awareness of NSA espionage. Dominic Rushe and James Ball, *PRISM Scandal: Tech Giants Flatly Deny Allowing NSA Direct Access to Servers*, THE GUARDIAN (June 6, 2014). However, several documents provided evidence of NSA funding of millions of dollars to "Prism providers," as well as confirmation that certain companies, such as Microsoft, had assisted the NSA in circumventing its users' encryption. *Id.*

[5] Snowden's disclosure launched a global debate on privacy and government power. The revelations have raised a series of questions and concerns regarding: growing domestic surveillance, the scale of global monitoring, the securing of private information, trustworthiness in the technology sector, and the quality of the laws and oversight keeping the NSA and other law enforcement agencies in check. *See* OVERVIEW OF CONSTITUTIONAL CHALLENGES TO NSA COLLECTION ACTIVITIES, CONGRESSIONAL RESEARCH SERVICE (May 21, 2015), *available at* https://www.fas.org/sgp/crs/intel/R43459.pdf (providing an overview of the bulk collection of telephony metadata for domestic and international telephone calls and the interception of Internet-based communications, as well as the various constitutional challenges that have arisen in judicial forums with respect to each).

[6] *See* John Shiffman & Kristina Cooke, *Exclusive: U.S. directs agents to cover up program used to investigate Americans*, REUTERS (Aug. 5, 2013), http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805 (arguing that the DEA is "funneling information from intelligence intercepts, wiretaps, informants and a massive database of telephone records to authorities across the nation to help them launch criminal investigations on Americans." The authors also interviewed a prosecutor who discovered that a drug case he was handling did not originate from a tip from an informant, as the DEA initially told him. After pressing the agent further, a DEA supervisor revealed that the tip actually came from an NSA intercept.).

[7] Charlie Savage, *N.S.A. Gets More Latitude to Share Intercepted Communications*, N.Y. TIMES (Jan. 12, 2017), https://www.nytimes.com/2017/01/12/us/politics/nsa-gets-more-latitude-to-share-intercepted-communications.html?_r=0.

containing intelligence sharing procedures,[8] the NSA now enables other law enforcement agencies to "search directly through raw repositories of communications intercepted by the NSA…."[9] Furthermore, the document revealed that if an analyst comes across any evidence implicating a U.S. citizen, the analyst can send the evidence to the Justice Department.[10]

More than just information sharing, federal agencies such as the Federal Bureau of Investigation (FBI) will also provide local law enforcement with sensitive or secret techniques and special equipment, like cellphone surveillance devices, to carry out their criminal investigations.[11] These novel investigative techniques raise questions of legality. Most importantly, law enforcement conceals the use of such techniques by practicing parallel construction — the process of building a parallel and separate evidentiary basis for a criminal investigation.[12] With parallel construction, law enforcement agencies hide the original source of information used to identify a criminal defendant. Then, the agencies provide an alternative, purportedly lawful yet fabricated, evidentiary path that is admissible in court. This alternative path conceals the government's actual investigatory methods and surveillance practices from the public, Congress, or judicial scrutiny.

Remarkably, parallel construction has, to date, eluded serious legal analysis. Yet such analysis is sorely needed, especially in light of current events surrounding the 2013 global surveillance disclosures by Edward Snowden, the ongoing War on Drugs and War on Terror, and the efforts to reform the criminal justice system. As discussed below,

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[8] PROCEDURES FOR THE AVAILABILITY OR DISSEMINATION OF RAW SIGNALS INTELLIGENCE INFORMATION BY THE NATIONAL SECURITY AGENCY UNDER SECTION 2.3 OF EXECUTIVE ORDER 12333 (RAW SIGINT AVAILABILITY PROCEDURES), https://www.documentcloud.org/documents/3283349-Raw-12333-surveillance-sharing-guidelines.html.

[9] Savage, *supra* note 7 (stating that the "move is part of a broader trend of tearing down bureaucratic barriers to sharing intelligence between agencies that dates back to the aftermath of the terrorist attacks of Sept. 11, 2001").

[10] *See id*.

[11] *See generally* Jessica Glenza and Nicky Woolf, *Stingray Spying: FBI's Secret Deal with Police Hides Phone Dragnet from Courts*, THE GUARDIAN (Apr. 10, 2015), https://www.theguardian.com/us-news/2015/apr/10/stingray-spying-fbi-phone-dragnet-police.

[12] Shiffman & Cooke, *supra* note 6.

the process implicates the fairness of criminal trials by concealing the origins of an investigation and insulating the techniques used from judicial review. Even more concerning, parallel construction allegedly disproportionately impacts communities of color, particularly in the drug context.[13] The sooner this practice is evaluated, the sooner we can ensure that criminal investigations follow well-established procedures for fairness, accountability, and judicial supervision.

This Article proceeds as follows: Part I lays out the fundamental principles for understanding parallel construction and provides two recent instances where its use has been disclosed to the public. Part II analyzes various constitutional concerns of concealing information from a criminal trial and subsequently developing an independent evidentiary path to raise in court. These concerns include due process violations: the inability to challenge the legality of a criminal investigation; withholding material information from the defense; lying under oath; the inability to confront witnesses; and the inability to suppress evidence under the exclusionary rule. Part II also focuses on the authorization of parallel construction and discusses the concerns associated with its use from a separation of powers perspective. It then evaluates whether the executive branch has exceeded its constitutional powers to legitimize parallel construction even when considering national security imperatives. Part III addresses law enforcement justifications for using parallel construction and argues that such justifications are unwarranted and do not excuse the concerns raised in Part II. Lastly, Part IV mentions the current modes of advocacy being used to address parallel construction. It also proposes legislative reform, a framework for notice, exclusion, and greater law enforcement oversight to prevent using parallel construction and ensure well-established procedures for fairness in criminal trials.

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[13] Electronic Communication, REQUEST TO THE UNITED STATES COMM'N ON CIVIL RIGHTS TO INVESTIGATE DISPROPORTIONATE IMPACT OF "PARALLEL CONSTRUCTION" ON COMMUNITIES OF COLOR (Oct. 23, 2015), http://thexlab.org/sites/default/files/RequesttoUSCCRonParallelConstruction_0.pdf.

I. THE PRACTICE: PARALLEL CONSTRUCTION

Parallel construction is a law enforcement process of building a separate and *parallel* evidentiary basis for a criminal investigation to conceal how the investigation actually began.[14] The temptation for government officials to employ something like parallel construction should be obvious enough. In the course of trolling for national security threats, these officials stumble upon evidence of ordinary — but still reprehensible — criminal activity. What to do? On the one hand, the officials want to share that information with those positioned to thwart or punish such transgressions.[15] And on the other hand, introducing this information in open court could draw public attention to, and thereby impede, the national security program that yielded the information at issue.[16] Unlike military and intelligence agencies that use information to target suspected foreigners, domestic law enforcement agencies must use information at issue in court to prove to a jury that the suspected individual committed the charged crime.[17] Parallel construction thus allows domestic law enforcement agencies to capitalize on intelligence information, while obscuring sensitive sources and surveillance methods from the prosecution, defense, and the public at large.

There are several identifiable reasons for the government's interest in concealing its secret or sensitive investigative methods, particularly when dealing with new programs or technology. First, by concealing the original source of an investigation, the defense cannot raise any challenges against the methods used, enhancing the government's odds of prevailing at trial.[18] Second, disclosing even one

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[14] *Id.*

[15] Shawn Musgrave, *DEA Teaches Agents to Recreate Evidence Chains to Hide Methods*, MUCKROCK (Feb. 3, 2014), https://www.muckrock.com/news/archives/2014/feb/03/dea-parallel-construction-guides/.

[16] *Id.*

[17] *Id.*; *see also* Legal Information Institute, *Criminal Procedure*, https://www.law.cornell.edu/wex/criminal_procedure (explaining that to comply with due process requirements, the Constitution commands that "the prosecution turn over all evidence that will be presented against the defendant").

[18] Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & The Right to Notice*, 54 SANTA CLARA L. REV. 843, 894–95 (2015), a*vailable at* http://digitalcommons.law.scu.edu/lawreview/vol54/iss4/2/.

instance where a secret or sensitive method is used risks exposing the surveillance technique entirely, whether old or new, both to other targets of similar investigations and to the public generally.[19] When the government develops a new investigative capability — like the NSA's phone tracking program or the widespread adoption of StingRay devices by local law enforcement — the resulting public outcry might be substantial.[20] Public outcry, in turn, can lead to congressional action or judicial review, resulting in new restrictions on surveillance or other investigative techniques. So, public backlash and the potential for newfound restrictions and regulations incentivize government agencies to find alternative means to pursue their law enforcement objectives while also maintaining their intelligence advantage.

Third, by withholding notice of clandestine investigative techniques, the government can evade judicial review altogether, undermining constitutional protections.[21] The government can avoid the process of determining whether there was a Fourth Amendment search, and if so, if it was reasonable or required a warrant. Without judicial review, the government can rely on its own internal analysis of a technique's status under the Fourth Amendment, which can be more favorable to the government's own interests and rarely subject to public disclosure or criticism. Take, for example, the government's long withheld notice of its bulk collection of phone records. In its internal review, the government must have concluded that withholding notice of bulk phone record collection did not trigger Fourth Amendment scrutiny. The issue was not addressed until the tactic became publicly known in 2013.[22]

Lastly, parallel construction ensures that the international public does not learn of the government's surveillance practices used for national security. For the foregoing reasons, government agencies like the DEA and the FBI have a strong incentive to use parallel construction, despite the threats it poses to constitutional rights.

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[19] *Id.* at 895.
[20] *Id.*
[21] *Id.* at 896.
[22] *Id.* No court has found that there was a Fourth Amendment violation by using the tactic; however, one district court has found that the NSA's bulk collection of phone records is unconstitutional. *See* Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013).

Suppose, for example, the NSA intercepts John Doe's personal emails under Section 702 of the Foreign Intelligence Surveillance Act. The NSA discovers that Doe received a Fed-Ex package with drugs and that he planned to store the drugs in his kitchen cabinet. The NSA provides this information to the DEA, and the DEA then sets out to develop a "lawful" criminal case against Doe. The DEA sends officers to patrol generally the area where Doe resides. The officers witness individuals coming and going from Doe's house, carrying suspicious looking packages. The officers use this information to retrieve a search warrant for the house based on probable cause that drug transactions are occurring within. The DEA officers then search the home and "find" the drugs in the kitchen cabinet — right where the NSA said they would be.[23] In more general terms, the NSA here has collected information showing that Doe has committed a crime. This conclusive information is then passed to the DEA, who, working backwards from the conclusion, formulates an independent, "legal" body of evidence to use against Doe in his prosecution.

To illustrate the prevalence of parallel construction, however, we need not resort to mere hypotheticals. The real world supplies plenty of concrete examples. Two examples are analyzed below: the DEA's Hemisphere program; the FBI's StingRay practice.

A. THE DRUG ENFORCEMENT ADMINISTRATION'S USE OF PARALLEL CONSTRUCTION AND CELL-PHONE RECORDS

The Drug Enforcement Administration (DEA)[24] has been the primary focus of public attention regarding parallel construction. While

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[23] Peter Van Buren, *Parallel Construction: Unconstitutional NSA Searches Deny Due Process*, HUFFINGTON POST (July 21, 2014), http://www.huffingtonpost.com/peter-van-buren/parallel-construction-unc_b_5606381.html.

[24] The Drug Enforcement Administration (DEA) is a United States federal law enforcement agency under the U.S. Department of Justice that was established on July 1, 1973. The Administration is in charge of combating drug smuggling and use within the United States. It is the lead agency for domestic enforcement of the Controlled Substances Act, sharing concurrent jurisdiction with the FBI and Immigration and Customs Enforcement (ICE), and has sole responsibility for coordinating and pursuing U.S. drug investigations abroad. About, *Mission*, DRUG

reports suggest parallel construction has been used for decades and by a number of different law enforcement agencies, the DEA made headlines when news articles revealed the practice. A month later, the public learned of the DEA's Hemisphere program, which demonstrated a concrete application of parallel construction to an investigative program.

1. REUTERS DISCLOSURE, FOIA REQUESTS, AND TRAINING MODULES

On August 5, 2013, international news agency *Reuters* revealed that the DEA's Special Operations Division[25] (SOD) advises DEA agents to practice parallel construction when pursuing criminal cases against U.S. citizens.[26] DEA officials use this process to protect sources— such as undercover agents or informants— or methods of investigation.[27] More particularly, parallel construction has been used to protect the DEA's use of information from intelligence intercepts, wiretaps, and a massive database of telephone records.[28] In other words, the intelligence community (including the NSA) can drop "hints" to the law enforcement community (including the DEA), allowing the latter to conjure up pretenses for its investigations, while allowing the former to conceal its potentially illegal surveillance practices.

Several hours after the *Reuters* disclosure, MuckRock[29] user C.J. Ciaramella filed a Freedom of Information Act (FOIA) request with the

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ENFORCEMENT ADMINISTRATION, http://www.dea.gov/about/mission.shtml (last visited Sept. 2, 2018).

[25] The Special Operations Division is comprised of two-dozen partner agencies, including the FBI, CIA, NSA, Internal Revenue Service (IRS), and the Department of Homeland Security (DHS). It was created in 1994 to combat Latin American drug cartels and has grown significantly since that time. Today, much of the SOD's work is classified. The unit itself is not technically a secret, as it appears in DEA budget documents, but its operations seem covert, especially in its involvement in criminal court cases. Brad Michelson, *DEA's Special Operations Divisions, SOD: Top 10 Facts You Need to Know*, HEAVY (Aug. 9, 2013), http://heavy.com/news/2013/08/deas-special-operations-divisions-sod-justice-department-surveillance-americans/.

[26] Shiffman & Cooke, *supra* note 6.

[27] *Id.*

[28] *Id.*

[29] MuckRock is a U.S.-based organization that assists individuals in filing governmental requests for information through the Freedom of Information Act, then

DEA for its training materials and official policies on parallel construction.[30] On January 23, 2014, Ciaramella received nearly 300 pages of redacted training documents[31] from the DEA. The documents showed that DEA trainers routinely teach parallel construction to field agents and analysts across the country.[32] The documents also showed that the Justice Department's training center has taught parallel construction since at least 2007.[33] The DEA's training module makes it apparent that parallel construction is used to shape evidence chains so that neither the prosecution nor the defense becomes aware of secret or sensitive investigative techniques. Law enforcement use of *classified* information, in particular, would trigger the Classified Information Procedures Act (CIPA).[34] And if the court is alerted of classified evidence and CIPA comes into play, then a squad of prosecutors called

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publishes the returned information on its website and encourages journalism around it. *About MuckRock*, MUCKROCK, https://www.muckrock.com/about/ (last visited Aug. 31, 2018).

[30] C.J. Ciaramella, *DEA Policies on "Parallel Construction,"* MUCKROCK (Aug. 5, 2013), https://www.muckrock.com/foi/united-states-of-america-10/dea-policies-on-parallel-construction-6434/.

[31] Responsive Documents, Drug Enforcement Admin., MUCKROCK, http://www.documentcloud.org/documents/1011382-responsive-documents.html#document/p9 (last visited Aug. 31, 2018) [hereinafter *DEA Training Slides*].

[32] Musgrave, *supra* note 15.

[33] Kevin Gosztola, *How DEA Keeps Defendants in the Dark on Role Intelligence Agencies Play in their Prosecution*, SHADOW PROOF (Feb. 3, 2015), https://shadowproof.com/2015/02/03/how-dea-keeps-defendants-in-the-dark-on-role-intelligence-agencies-play-in-their-prosecution/.

[34] CIPA was enacted on October 15, 1980 and was codified in the U.S. Code, specifically in Title 18, which deals with crimes and criminal procedure. Classified Information Procedures Act, 18 U.S.C. App. 3. §§ 1-16 (2018). The primary purpose of CIPA was to limit the threat of criminal defendants from disclosing classified information during the course of trial. Classified Information Criminal Trial Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025. (1980), *available at* https://www.congress.gov/bill/96th-congress/senate-bill/01482. According to a Senate report, Congress did not intend for CIPA to infringe on a defendant's right to a fair trial or to change the existing rules of evidence in criminal procedure. S. REP. No. 110-442, at 9 (2008), *available at* https://www.congress.gov/congressional-report/110th-congress/senate-report/442. *See also generally* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA CRIMINAL DIVISION DISCOVERY POLICY 28-29 (2010).

the Taint Review Team[35] must consult with the judge to decide which evidence must be turned over to the defense—a time-consuming and costly process. So, parallel construction can decrease prosecutorial labor by ensuring that the trial prosecutor encounters as little classified evidence as possible.

The DEA can conceal sources by discouraging agents from disclosing sensitive or classified information on affidavits or in courtroom testimony, so that the court would never know the origins of an investigation.[36] Agents would be told, "[b]e at a certain truck stop at a certain time and look for a certain vehicle."[37] The agents would then alert the state police to find a pretext to stop that vehicle, and then have a drug dog search it.[38] The government will often use evidence obtained from the traffic stop at trial, without disclosing the information that originally prompted the stop. The released training modules, although heavily redacted, extensively covered traffic stops and drug dog sniffs. They highlighted the huge advantage to law enforcement agencies in pairing "tip information" and "vertical information transfers"[39] with routine traffic stops as a pretext for making an arrest.[40]

According to the training slides, the DEA and other government agencies justify parallel construction by invoking a 1938 U.S. Supreme

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[35] The Taint Review is a procedure developed by the United States Department of Justice (DOJ) to protect unrelated and privileged information from being reviewed after electronic records are obtained. The DOJ normally appoints prosecutors who are not otherwise assigned to the case under investigation and directs them to review all electronic records and identify portions of the record that are classified and should not be disclosed in the case. This group is referred to as the "Taint Team" because their purpose is to protect "the government from a defense motion to suppress electronic record evidence based on an argument that the prosecution and investigating team was 'tainted' by viewing electronic records it had no right to see." Robert Keefe & Stephen Jonas, *Government "Taint Teams" May Open a Pandora's Box: Protecting Your Electronic Records in the Event of an Investigation*, WILMERHALE (May 11, 2004), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94347.

[36] Musgrave, *supra* note 15.

[37] *Id.*

[38] *Id.*

[39] Vertical information transfers refer to the process of law enforcement and government agencies to share information with each other.

[40] Musgrave, *supra* note 15.

Court decision,[41] *Scher v. United States*.[42] There, a prohibition agent had received a tip through surveillance.[43] The agent pursued the tip and found the defendant handling whiskey, violating the Liquor Taxing Act.[44] The Supreme Court reasoned that the defendant had no right to learn of the source of the tip used against him, and that the source of the information was not relevant to his defense.[45] Furthermore, the Court explained that "the legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard what took place in their presence. Justification is not sought because of honest belief based upon credible information…"[46] The DEA and other government agencies seem to interpret *Scher* to justify concealing the original source of information implicating an individual so long as there is independent and lawful evidence to submit to a court. As explained in Part III, however, this interpretation of *Scher* to authorize parallel construction is not persuasive and is arguably invalid.

2. THE HEMISPHERE PROGRAM

The DEA's "Hemisphere" program bore the fruits of parallel construction until its disclosure.[47] Hemisphere is a massive telephone surveillance program that enables DEA agents access to troves of AT&T's historical cell phone records, combined with a sophisticated analytics system.[48] Hemisphere captures every call that passes through an AT&T switch— whether or not it is made by an AT&T customer or

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[41] *DEA Training Slides*, *supra* note 31, at 70.
[42] Scher v. United States, 305 U.S. 251 (1938).
[43] *Id.* at 253.
[44] *Id.* at 252.
[45] *Id.*
[46] *Id.*
[47] The New York Times publicly disclosed the DEA's Hemisphere program on September 1, 2013. Scott Shane & Colin Moynihan, *Drug Agents Use Vase Phone Trove, Eclipsing N.S.A.'s*, N.Y. TIMES (Sept. 1, 2013), http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html. The New York Times relied on PowerPoint slides provided by Drew Hendricks who retrieved the slides through a series of public information requests to West Coast police agencies in Washington. *Id. See also Los Angeles Hemisphere*, OFFICE OF NATIONAL DRUG CONTROL POLICY, https://s3.amazonaws.com/s3.documentcloud.org/documents/782287/database.pdf.
[48] Shane & Moynihan, *supra* note 47.

not — and retains calls dating back 26 years.[49] Approximately four billion call records are added to the database every day.[50] Through the program, AT&T employees aid local law enforcement and the DEA in obtaining and analyzing the database of call records.[51] The call records contain data on numbers dialed and received, the time, date, and length of a call, and even location information in some circumstances.[52] Most significantly, the program instructs agents to engage in parallel construction by using subpoenas to re-obtain call records originally found through Hemisphere. Although a warrant would require magistrate approval, the DEA can issue administrative subpoenas without any court involvement.[53] The DEA thus administers subpoenas to create a separate, lawful evidentiary trail that would be admissible in court, all the while concealing the Hemisphere program from public and judicial scrutiny.

Hemisphere is a government investigative program, and as such, requires Fourth Amendment scrutiny.[54] Accessing cell phone records raises profound privacy concerns. With parallel construction, however, individuals are unaware that they are being subject to the program. They also do not know when and to what extent the government is accessing their cell phone records. As a result, these individuals cannot materialize

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[49] *Id.* The program was paid for by the White House Office of National Drug Control Policy and the Drug Enforcement Administration. *Id.*

[50] *Id.*

[51] *See EPIC v. DEA Hemisphere*, ELEC. PRIVACY INFO. CTR., https://epic.org/foia/dea/hemisphere/ (last visited Aug. 31, 2018). EPIC also obtained key documents and prevailed in a lawsuit against the DEA to uncover more information about the DEA's secret Hemisphere program. *See also Hemisphere: Law Enforcement's Secret Call Records Deal with AT&T*, ELEC. FRONTIER FOUND., (Sept. 2013), https://www.eff.org/cases/hemisphere. The program was reportedly used in Los Angeles, Atlanta, Dallas and Houston, areas of high intensity drug trafficking. Evan Perez, *DEA Program Linked to Vast AT&T Database, Documents Show*, CNN (Sept. 2, 2013), http://security.blogs.cnn.com/2013/09/02/dea-program-linked-to-vast-att-database-documents-show/.

[52] ELEC. FRONTIER FOUND., *supra* note 51.

[53] *Id.*

[54] *See* Kyllo v. United States, 533 U.S. 27 (2001) (holding that government use of thermal imaging of a home constitutes a Fourth Amendment "search" and may be done only with a warrant); Katz v. United States, 389 U.S. 347 (1968) (holding that government use of an electronic eavesdropping device attached to the exterior of a phone booth constitutes a Fourth Amendment "search").

any privacy concerns, raise any objections, or claim Fourth Amendment protections.

B. THE FEDERAL BUREAU OF INVESTIGATION'S USE OF PARALLEL CONSTRUCTION AND STINGRAYS

More recently, a memo disclosed in early May 2016 from the Federal Bureau of Investigation (FBI) to Oklahoma law enforcement shows the FBI instructing the use of parallel construction to conceal the FBI's covert cell-phone tracking equipment, formally known as cell site simulators, and commonly known as StingRays.[55] The memo provides:

> "Information obtained through the use of the equipment is FOR LEAD PURPOSES and may ***not be used as primary evidence in any affidavits***, hearings or trials. This equipment provides general location information about a cellular device, and your agency understands ***it is required to use additional and independent investigative means and methods***, such as historical cellular analysis, ***that would be admissible at trial to corroborate information concerning the location of the target obtained through use of this equipment***."[56]

Thus, the FBI memo not only permits using StingRays, but also authorizes local law enforcement to manufacture a new chain of evidence that would be admissible in court to conceal the device. In 2015, the Justice Department mandated that federal law enforcement must first obtain a warrant before using StingRays, subject to

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[55] Jenna McLaughlin, *FBI Told Cops to Recreate Evidence from Secret Cell-Phone Trackers*, THE INTERCEPT (May 2016), https://theintercept.com/2016/05/05/fbi-told-cops-to-recreate-evidence-from-secret-cell-phone-trackers/; Jessica Glenza and Nicky Woolf, *StingRay Spying: FBI's Secret Deal with Police Hides Phone Dragnet From Courts*, THE GUARDIAN (Apr. 10, 2015), https://www.theguardian.com/us-news/2015/apr/10/stingray-spying-fbi-phone-dragnet-police.

[56] Letter from James E. Finch, Federal Bureau of Investigation Special Agent in Charge, to Chief William City, Chief of Oklahoma City Police Department (Aug. 7, 2014) (https://assets.documentcloud.org/documents/2825761/OKCPDFBI-MOU.pdf) (emphasis added).

exceptions.[57] This policy, however, did not extend to state or local law enforcement.[58] StingRays were originally designed for military and national security use and have now made their way to local law enforcement agencies, with the aid of the federal government.[59] These devices constitute surveillance technology that imitates a cellphone tower to confuse cellphones, computers with certain types of wireless Internet connections, and other devices into thinking it is a cellphone tower.[60] The StingRay can obtain significant information about a device, including a phone's unique identity number, metadata for calls dialed and received, call duration, text and voice messages and phone location.[61] Furthermore, the devices have the capacity to eavesdrop on incoming and outgoing phone calls.[62]

Civil rights advocates have found using StingRays controversial.[63] StingRays have the potential to collect information from scores of other surrounding cellphone owners, regardless of whether these owners are suspected of a crime.[64] According to Adam Bates of the CATO Institute:

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[57] *Justice Department Announces Enhanced Policy for Use of Cell-Site Stimulators*, DEP'T OF JUSTICE, https://www.justice.gov/opa/pr/justice-department-announces-enhanced-policy-use-cell-site-simulators.

[58] Some states, however, have adopted laws to regulate using StingRays. *See Cell-site Simulators: Frequently Asked Questions*, ELEC. FRONTIER FOUND., https://www.eff.org/node/89287.

[59] Adam Bates, *Stingray: A New Frontier in Police Surveillance*, CATO INSTITUTE (Jan. 25, 2017), https://www.cato.org/publications/policy-analysis/stingray-new-frontier-police-surveillance.

[60] Clifton Adcock, *Oklahoma Authorities Have or Use Controversial Cellphone Tracker*, OKLAHOMA WATCH (Apr. 10, 2016), http://oklahomawatch.org/2016/04/10/okla-authorities-have-or-use-controversial-cell-phone-tracker/.

[61] *Id.*

[62] Kim Zetter*, Turns Out Police StingRay Spy Tools Can Indeed Record Calls*, WIRED (Oct. 28, 2015), https://www.wired.com/2015/10/stingray-government-spy-tools-can-record-calls-new-documents-confirm/.

[63] The U.S. Supreme Court is currently considering *Carpenter v. United States*, concerning warrantless access to cell phone location history. While this case does not directly address using StingRays, it may have a profound impact on whether warrantless use of StingRays is constitutional. *See Carpenter v. United States*, ELEC. PRIVACY INFO. CTR., https://epic.org/amicus/location/carpenter/ (last visited Sept. 2, 2018).

[64] Bates, *supra* note 59, at 2.

> [S]tingrays have moved from military and national security uses to routine police use. Surveillance technology, designed for use on battlefields or in antagonistic states where constitutional concerns are minimal, has increasingly found its way into the hands of local law enforcement, often without any discernible effort to adapt the equipment or the policies governing its tactical use to the home front, where targets are citizens with constitutional rights rather than battlefield combatants.[65]

Also, these owners do not have the faintest idea that the data is being gathered.[66] StingRays are being used with little or no judicial oversight and no public disclosure. As of date, at least 71 agencies in 24 states and the District of Columbia own StingRays.[67] Because many agencies keep the purchase and use of StingRays a secret, however, this information significantly underrepresents the extent to which law enforcement agencies use StingRays nationwide.[68] Additionally, because agencies like the FBI are instructing local law enforcement agencies to conceal the use of StingRays, like the Hemisphere program, its use is skirting public and judicial scrutiny.

II. THE PROBLEM: OVERVIEW OF DUE PROCESS AND SEPARATION OF POWERS CONCERNS

This Article focuses on two critical aspects of parallel construction and discusses the relevant problems associated with each. The two parts consist of: 1) the act of concealing the original source of an investigation, and 2) the creation of a separate and "lawful" evidentiary path from the initial disclosure. Part II examines both the act of concealment and subsequent fabrication of evidence and

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[65] *Id.*
[66] Adcock, *supra* note 60.
[67] *See generally* Bates, *supra* note 59; Multimedia, *Stingray Tracking Devices: Who's Got Them?*, ACLU (Feb. 2017), https://www.aclu.org/map/stingray-tracking-devices-whos-got-them.
[68] *Id.*

discusses how each raises unique and significant constitutional concerns.

A. THE DUE PROCESS CONCERN

Due process is recognized in a number of the Constitution's provisions,[69] but it is explicitly mentioned in the Fifth Amendment. The Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of the law."[70] The Due Process Clause serves two principle objectives: 1) to establish more accurate results through fair procedures, and 2) to ensure that people have been treated fairly by the government.[71] This section provides a brief overview of problematic aspects of parallel construction as it relates to affording criminal defendants due process of the law. It also references due process implications provided for by the Fourth and Sixth Amendments. These concerns relate to both the act of concealment and the subsequent development of a separate evidentiary path. As explained below, both aspects of parallel construction undermine due process objectives.

1. THE INABILITY TO CHALLENGE THE LAWFULNESS OF A CRIMINAL INVESTIGATION

Concealing the source of information being used to convict an individual of a crime violates a defendant's procedural due process right to challenge a criminal investigation's lawfulness. Due process requires that criminal defendants receive a fair trial.[72] Defendants have a right to call their own witnesses, mount their own evidence, and present their

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[69] *See* Richard Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1907-12 (2014) (recognizing that at a minimum due process "requires courts to observe separately codified constitutional procedures for deprivations of life, liberty or property").

[70] U.S. CONST. amend. V.

[71] PROCEDURAL DUE PROCESS, EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/PROJECTS/FTRIALS/conlaw/proceduraldueprocess.html; *see also* Bisonnete v. Haig, 776 F.2d 1384, 1389 (8th Cir. 1985) (stating that "the essence of due process is that no governmental power, civilian or military, may be used to restrain the liberty of the citizen or seize his property otherwise than in accordance with the forms of law, including, in most instances, judicial proceedings").

[72] JUSTIA, http://law.justia.com/constitution/us/amendment-14/57-fair-trial.html (last visited Dec. 15, 2015).

own theory of the facts.[73] To properly mount a defense, however, the prosecution must disclose both the evidence that will be presented against the defendant *and the sources of that evidence*, and must provide the defendant with the opportunity to confront adverse witnesses.[74]

Rule 16(a)(1)(E) of the Federal Rule of Criminal Procedure (FRCP) provides that "the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if…the item is material to preparing the defense."[75] This rule is broader than *Brady v Maryland*, discussed below, which held that disclosures of evidence that is "material" to the preparation of the defense is required.[76] The FRCP Advisory Committee ultimately did not codify the *Brady* rule because "limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is."[77] So, Rule 16 compels discovery even when evidence is not completely "material" to the defense.

As explained in the following section, the origin of an investigation is no doubt "material" to preparing a defense. But even in the case where the evidence withheld, in and of itself is not "material," the defense still has a right to access it in certain circumstances. For instance, Rule 16(a)(1)(E)(ii) and (iii) compel disclosure if the government intends to use the evidence at trial or the evidence "was obtained from or belongs to the defendant."[78] If parallel construction conceals evidence originally belonging to the defendant, then the defendant will not know to compel disclosure of that evidence and prepare her defense accordingly.

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[73] *Criminal Procedure*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/criminal_procedure (last visited Aug. 31, 2018).
[74] *Id.*
[75] FED. R. CRIM. P. 16(a)(1)(E)(i).
[76] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[77] FED. R. CRIM. P. 16, Notes of the Advisory Committee on Rules – 1974 Amendment, *available at* https://www.law.cornell.edu/rules/frcrmp/rule_16.
[78] FED. R. CRIM. P. 16(a)(1)(E)(iii).

Disclosure is crucial because if a defendant can show that the evidence was obtained unlawfully, the defendant may redress the illegal conduct and the harm it created. For example, under the Fourth Amendment, if evidence was obtained through an unlawful search or seizure, the exclusionary rule will often suppress that evidence against the defendant.[79] Law enforcement's use of parallel construction, however, disables a defendant from learning the source of the information that lead to the discovery of the incriminating evidence. Accordingly, the practice denies a defendant the ability to challenge government conduct, as it had actually and originally occurred—thus undermining the defendant's right to due process.

2. BRADY DISCLOSURES

Concealing the original source of an investigation undermines the underlying due process principles of the *Brady* requirement. In *Brady v. Maryland*, the Supreme Court held that when a prosecutor suppresses evidence that is favorable to a defendant who has requested it, the prosecutor has violated the defendant's right to due process.[80] As a result, the Court mandated that the prosecution turn over all exculpatory evidence—that is, anything that might exonerate a person—to the defendant in a criminal case.[81] Enforcing this rule would preclude "an unfair trial to the accused."[82]

Parallel construction can deprive a defendant of her right to know all evidence used against her, even exculpatory evidence. The investigative method used and concealed by parallel construction, in and of itself, can constitute "exculpatory" evidence. If the original evidence was obtained unlawfully, for example, the Fourth Amendment would

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[79] The exclusionary rule is a legal principle in the U.S., under constitutional law, which establishes that evidence collected or analyzed in violation of a defendant's constitutional rights is sometimes inadmissible for criminal prosecution in a court of law. The rule is designed to provide a remedy and disincentive, which essentially works to deter prosecutors and police who illegally gather evidence in violation of the Constitution, most often the Fourth, Fifth, and Sixth Amendments. Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1888-90, 1893-94 (2014).

[80] Brady v. Maryland, 373 U.S. at 87 (noting that the evidence must be material either to guilt or to punishment).

[81] *Id.*

[82] *Id.*

require exclusion of that evidence.[83] So, potentially unlawful investigative techniques are exculpatory because suppression of evidence derived from the investigation may have led to a different outcome in a criminal case. Without that initial investigation, a defendant may have never been indicted for a crime in the first place.

To be sure, an objector could argue that the prosecution is unlikely aware whether law enforcement has handed over the original source of its investigation or a fabricated evidentiary path. So, the argument goes, the prosecutors are complying with *Brady*, as they are turning over all exculpatory evidence that is *personally known* to them. The Supreme Court in *Kyles v. Whitley*, however, has held that the prosecution must also disclose exculpatory evidence that is known *only to the police*.[84] The prosecution has a duty to maintain a relationship with law enforcement to be constantly informed of any evidence that is "material" to the defendant's defense.[85]

Parallel construction undermines the *Brady* requirement because it encourages law enforcement to withhold information both from the prosecution and the defense. In the instance where the prosecution is aware that law enforcement used the practice to conceal "material" information, their knowledge is a direct violation of *Brady*. Also, because the prevalence of parallel construction was exposed in 2013, prosecutors are now aware of its existence. They now have a duty under *Kyles v. White* to ascertain whether law enforcement is actually concealing the original source of an investigation, as well as what the original source actually is. This, in turn, will ensure that the prosecution is aware of all available evidence regarding a criminal case, to then determine which evidence must be turned over to the defense. Turning a blind eye holds the prosecution in direct violation of the *Brady* and *Kyles* requirement, depriving criminal defendants of due process of the law.

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[83] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the Fourth Amendment excludes unconstitutionally obtained evidence from use in criminal prosecutions).
[84] Kyles v. Whitley, 514 U.S. 419, 437-38 (1994).
[85] *Id.* at 438.

3. FABRICATING EVIDENCE AND LYING UNDER OATH

The process of fabricating an evidentiary trail, not to mention lying under oath, also undermines due process rights. Perjury is the criminal offense of lying under oath and can be brought when someone makes a false statement after being sworn in or promising to tell the truth in a legal situation.[86] In criminal cases, law enforcement agents are usually brought in to assist the prosecution and testify against the defendant. The agents also discuss the manner in which they conducted the investigation and discovered the evidence being used against the defendant. Before testifying, a witness must give an oath to testify truthfully.[87] This oath normally includes a witness agreeing to "tell the truth, the whole truth, and nothing but the truth."[88] By employing parallel construction, law enforcement agents are not disclosing the "whole" truth about how they conducted their investigation and discovered evidence against the defendant. As early as 1935, the Supreme Court addressed the combination of perjured testimony and non-disclosure of evidence, stating:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[89]

Because government agents are concealing information from the defense, their testimony of the fabricated evidentiary path brought

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[86] Debora C. England, *Perjury: Laws and Penalties*, CRIMINAL DEFENSE LAWYERS, http://www.criminaldefenselawyer.com/crime-penalties/federal/perjury.htm.
[87] Criminal Procedure Act 51 of 1977, *available at* http://www.justice.gov.za/legislation/acts/1977-051.pdf.
[88] Brendan Koerner, *Where Did We Get Our Oath? The Origin of the Truth, the Whole Truth, and Nothing but the Truth*, SLATE (Apr. 30, 2004), http://www.slate.com/articles/news_and_politics/explainer/2004/04/where_did_we_get_our_oath.html.
[89] Mooney v. Holohan, 294 U.S. 103, 112 (1935).

before the court is a "deliberate deception of the court and jury" and is "perjured" by its presentation of a partial truth. Presenting perjured information contributes toward the defense's inability to challenge the lawfulness of an investigation, thus undermining fundamental fairness as required by due process.

4. THE INABILITY TO CONFRONT WITNESSES

The Sixth Amendment also recognizes due process, providing that a person accused of a crime has the right to confront the witnesses used against her.[90] In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that to fulfill procedural due process requirements inherent in the Confrontation Clause, the accused must have the opportunity to cross-examine testimony that has been made against her.[91] Using parallel construction to conceal informants or witnesses, in particular, deprives a defendant of her right to confront those witnesses. By concealing these sources, however, law enforcement need not produce the witnesses in court.

The purpose for the Confrontation Clause is to ensure that witnesses testify under oath; to allow the accused to cross-examine witnesses who testify against her; and to allow jurors to assess the credibility of a witness by observing the witness's behavior.[92] It also promotes fairness in the criminal justice system.[93] Parallel construction directly undermines these objectives. By withholding witnesses, the government deprives the accused of her right to cross-examine the witness and the jury the ability to assess the reliability of the witness. By concealing informants and witnesses, parallel construction undermines procedural due process obligations required by the Confrontation Clause.

5. THE EXCLUSIONARY RULE AND THE FRUIT OF THE POISONOUS TREE

A defendant has the right to know of the evidence being used against her, and be informed of the source of such evidence, to make sure that the collection was lawful.[94] Because parallel construction

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[90] U.S. CONST. amend. VI.
[91] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).
[92] Mattox v. United States, 156 U.S. 237, 259 (1895).
[93] Lee v. Illinois, 476 U.S. 530, 540 (1986).
[94] LEGAL INFO. INST., *supra* note 73.

conceals the original source of the information used against a defendant in court, a defendant will be unable to determine whether that information was obtained legally. Nor will the defendant be able to unearth what original piece of evidence spawned the current criminal charge. As discussed, concealing evidence undermines fairness and transparency in the criminal process, depriving a defendant of due process. It may also prevent judicial scrutiny of what would otherwise be an unlawful investigative method under the Fourth Amendment — thus denying a defendant the constitutional right to be free from unreasonable searches. So, the act of concealment and the concealment of what could possibly be an unlawful investigative method is, in and of itself, tainted. Finally, because the practice is tainted, subsequent evidence gathered as a result of the original investigation is tainted, too, and should be excluded from trial under the fruit of the poisonous tree doctrine.

The fruit of the poisonous tree doctrine prevents the prosecution from admitting certain evidence in a criminal case after it has been tainted by a primary illegality.[95] The doctrine is meant to remove illegally-acquired evidence from negatively impacting a criminal defendant.[96] It is an extension of the exclusionary rule, which requires excluding evidence illegally obtained from a criminal trial. The doctrine also takes the assessment one step further by excluding evidence that stemmed from the primary illegality—i.e., the poisonous tree. In determining whether evidence is the fruit of a poisonous tree, the trial judge must examine all the facts surrounding the initial illegality and subsequent gathering of evidence as a result of that illegality.[97] This determination is usually made by the judge in a suppression hearing held before trial.[98] As will be discussed in detail in Part IV, concealing evidence and using unlawful investigative methods are tainted. So, any evidence seized because of this process and subsequently used in a criminal proceeding should be suppressed as fruit of the poisonous tree.

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[95] *What Does "Fruit of the Poisonous Tree" Mean in Criminal Proceedings?*, HG.org, http://www.hg.org/article.asp?id=35403 (last visited on Dec. 6, 2015).
[96] *Id.*
[97] *See* Wong Sun v. United States, 371 U.S. 471 (1963); *Fruit of the Poisonous Tree*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Fruit+of+the+Poisonous+Tree (last visited on Dec. 7, 2015).
[98] *Id.*

B. THE UNDERLYING SEPARATION OF POWERS CONCERNS

The extent to which the Executive has the power to conceal information is one that is recognized but limited under the Constitution. And normally, such power is restricted to national security objectives. As Part II.b. will demonstrate, even with a grant of such authority to conceal information, the Executive has exceeded its power by using parallel construction in the domestic criminal context. This section primarily focuses on the act of concealment and the separation of powers concerns related to it.

1. VIOLATION OF THE CONSTITUTIONAL SEPARATION OF POWERS

The primary concern with concealing investigations, let alone using parallel construction in its entirety, is whether the executive branch can authorize the practice without violating the separation of powers. Under the Constitution, the three federal branches — Congress, the President, and the courts — have the power and responsibility to check one another, all in service to preserve liberty and ensure thoughtful, well-reasoned federal action.[99] Congress has the sole power to legislate for the United States.[100] The executive power is vested in the President.[101] Lastly, the judicial power is vested in the Supreme Court, which has the power to interpret the Constitution and apply its interpretation to cases and controversies brought before it.[102]

Section 3 of Article II of the Constitution states that the President "shall take Care that the Laws be faithfully executed."[103] In other words, the President has a duty to enforce the laws of the nation, even if he may disagree with them. In *Youngstown Sheet & Tube Co. v. Sawyer*, Supreme Court Justice Robert Jackson provided a framework for evaluating executive power and determining its validity.[104] Justice

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[99] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 150 (Hornbook Series 8th ed. 2010).
[100] U.S. CONST. art. I.
[101] U.S. CONST. art. II.
[102] U.S. CONST. art. III.
[103] U.S. CONST. art. II, § 3.
[104] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952). In *Youngstown*, the Supreme Court ultimately limited the President's ability to seize private property since the power was neither specifically enumerated under Article II of the Constitution nor conferred upon him by an act of Congress. *Id.* at 585. While

Jackson rejected a strict divide between Congressional and Presidential power, and instead divided Presidential power into three categories of legitimacy. First, Jackson provided that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[105] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[106] Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers…"[107]

There is no specific statute on point that explicitly authorizes the use of parallel construction. But, law enforcement agencies may argue that parallel construction constitutes an administrative act—that is, an action necessary to carry out the intent of some federal statute.[108] Furthermore, such an administrative act is authorized under the Classified Information Protection Act ("CIPA");[109] thus, providing the President with maximum authority under category one of the *Youngstown* framework.[110] The primary purpose of CIPA is to protect the unnecessary disclosure of classified information during the course of a criminal prosecution.[111] As discussed above, parallel construction often aims to protect information and sources, especially in the criminal context. The government may also argue that executive agencies are

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Justice Black wrote the majority opinion, Justice Jackson's concurrence has been utilized repeatedly and significantly throughout history in both case law and legal scholarship to assess the extent of executive power. Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 NOTRE DAME L.S. CONST. COMMENTARY 87, 87–90 (2002).

[105] Youngstown Sheet & Tube Co., 343 U.S. at 635 (1952) (Jackson, J., concurring).

[106] *Id.* at 637.

[107] *Id.*

[108] The Administrative Procedure Act (APA), 5 U.S.C. §§ 500–96 (1946). The APA is a federal statute that governs the way in which federal administrative agencies may propose and establish regulations. *Id.* The Act also provides jurisdiction to courts to review all agency actions. *Id.* at § 706.

[109] 18 U.S.C. App. 3. §§ 1-16 (2018).

[110] Youngstown Sheet & Tube Co., 343 U.S. at 635 (1952) (Jackson, J., concurring).

[111] Classified Information Criminal Trial Procedures Act, *supra* note 34.

granted significant deference in their interpretation of federal statutes and how they choose to administer them.[112] So, federal agencies like the DEA and FBI arguably can use parallel construction in keeping with the purpose of CIPA and should therefore be granted wide deference in their ability to use the procedure.

Nonetheless, while CIPA may seem as though it authorizes parallel construction, parallel construction actually requires different rules and processes that extend beyond the scope of that statute. On the one hand, under CIPA, a defendant is required to notify the prosecution and the court of any classified information that the defendant would like to discover or disclose during the trial.[113] Once notified, the government may object to the disclosures and the courts are required to accept the objection and impose nondisclosure orders.[114] Courts may also issue protective orders limiting disclosure to members of the defense team with adequate security clearances during the discovery phase.[115] The disclosure will often allow the defense to use unclassified redactions or summaries of classified information, which they are normally entitled to receive.[116] But, when the court is required to grant a nondisclosure order, the court can also dismiss the indictment against the defendant or impose other appropriate sanctions.[117]

On the other hand, parallel construction conceals sources of information so that defendants and the courts would never receive notice of the source or the use of parallel construction in the first place, undermining the purpose of CIPA and the court's role to uphold the statute. Parallel construction enables the government to no longer forgo

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[112] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In *Chevron*, the Supreme Court established a legal test for determining whether to grant deference to a government agency's interpretation of a statute. *Id.* at 842-43. The courts must defer to the administrative agency's interpretation of authority granted to them by congress where 1) the intent of Congress was ambiguous, and 2) where the interpretation was reasonable or permissible. *Id.*

[113] Edward C. Liu & Todd Garvey, *Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act*, CONGRESSIONAL RESEARCH SERVICE 1-12 (Apr. 2, 2012), https://fas.org/sgp/crs/secrecy/R41742.pdf.

[114] *Id.* at 2.

[115] *Id.*

[116] *Id.*

[117] *Id.*

any criminal prosecutions or risk dismissal of charges by the courts for failing to disclose classified information. So long as a separate, lawful and unclassified evidentiary path is brought before the court, the defendants and the courts will never know whether some other initial investigation ever occurred. If anything, CIPA serves as another example of why law enforcement agencies cannot practice parallel construction. Even sensitive or classified information cannot be withheld from the courts, which ultimately decide if the information should be handed over to the defense. As a result, the courts are stripped of their obligation to evaluate the original information and determine whether maintaining suit is fair to both parties, undermining the court's role under CIPA to balance national security interests against others.[118] In other words, parallel construction enables law enforcement to circumvent safeguards placed within CIPA, especially those respecting the rights of the accused and having a neutral court determine how to proceed in fairness.[119]

Nor may the executive branch characterize parallel construction as the product of a permissible interpretation of CIPA warranting Chevron deference.[120] According to a Senate report, Congress did not intend for CIPA to infringe on a defendant's right to a fair trial or to change the existing rules of evidence in criminal procedure.[121] And yet, as mentioned earlier, parallel construction deprives a criminal defendant of his right to due process. By concealing the original source of information that lead to the criminal charge, a defendant is denied the opportunity to challenge the source and stripped of his right to a fair trial. So, to the extent that the executive branch purports to derive from CIPA the power to deprive criminal defendants of due process, that interpretation falls outside the bounds of reasonableness and is impermissible.

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[118] *See* Edward C. Liu, *The State Secrets Privilege and Other Limits on Litigation Involving Classified Information*, Congressional Research Service, at 3 (May 28, 2009), https://fas.org/sgp/crs/secrecy/R40603.pdf.
[119] *Id.*
[120] *See id.*
[121] S. Rep. No. 110-442, *supra* note 34. *See also generally* U.S. DEP'T OF JUSTICE, *supra* note 34.

Since CIPA does not authorize parallel construction, its use falls out of the first category under the *Youngstown* framework.[122] The Executive may argue, however, that there is no federal statute authorizing an executive agency like the DEA or FBI to use cars, computers, and the like either. A lack of federal authorization should not prevent the executive from developing its own internal measures to carry out its duties. Also, there is no federal statute prohibiting against the use of parallel construction, pulling its use into the second category of the *Youngstown* framework: the twilight zone.[123]

Law enforcement's employment of cars, computers, and other devices is distinct from parallel construction. Parallel construction is not a device designed to assist law enforcement in detecting crime or ensuring public safety. Rather, it is a process specifically developed and used to ensure criminal convictions by shielding government conduct leading to the conviction from judicial scrutiny. As discussed in Part II, *Brady* and Rule 16 of the Federal Rule of Criminal Procedure provides a framework for when evidence must be disclosed to the defense. But even in the national security context, CIPA requires notice of classified information used against the defense. Again, the legislative history for CIPA demonstrates that Congress did consider the importance of safeguarding constitutional rights of criminal defendants.[124] Individuals should have notice when classified information was used in bringing about their criminal charges.[125] And if they are denied the ability to challenge that information, the court is empowered to dismiss the charge or provide sanctions.[126] This process ensures fundamental fairness between the government and the individual accused of a crime. Therefore, any process that bypasses these minimal guarantees in the use of classified information is incompatible with the implied will of Congress, falling out of *Youngstown*'s category two.[127]

Because Congress seems to have spoken on the issue of parallel construction and advised against it, the only other way in which the

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[122] Youngstown Sheet & Tube Co., 343 U.S. at 635 (1952) (Jackson, J., concurring).
[123] *Id.*
[124] *See* Liu and Garvey, *supra* note 113 and accompanying text.
[125] *Id.*
[126] *Id.*
[127] Youngstown Sheet & Tube Co., 343 U.S. at 635 (1952) (Jackson, J., concurring).

process is legitimate is through the use of the Executive's own constitutional powers, which will be discussed in the following section.

2. EXCEEDING THE SCOPE OF EXECUTIVE NATIONAL SECURITY POWERS

As demonstrated above, CIPA does not authorize parallel construction. Arguably, CIPA serves as an instrument demonstrating that Congress considered the process of keeping classified information from the defense in criminal cases and decided against authorizing anything like parallel construction. Furthermore, as discussed above, parallel construction, unlike the use of vehicles, mobile devices and computers by law enforcement agencies, requires authorization of some sort because of the extent to which it negatively impacts individuals in the criminal context.[128]

Still, the Executive could argue that parallel construction is authorized under its general, plenary constitutional powers. The President, after all, retains the power to withhold information from the courts and Congress in certain circumstances. For instance, the President has broad powers to manage national affairs and the workings of the government.[129] The President may issue rules, regulations, and executive orders, which have the binding force of law upon federal agencies but do not require congressional approval.[130] Nonetheless, aside from these powers, the President's ability to prevent the judiciary from addressing the constitutionality of a given case or controversy is quite narrow. The executive privilege normally affords the President the ability to withhold information from the public, Congress, and the courts normally only in matters of national security.[131] Parallel construction ensures that novel and clandestine investigative methods would not be revealed to the public, especially since these methods can be used for national security purposes. It also guarantees that the executive branch retains its power to withhold information from the

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[128] *See* discussion of due process violations *infra* Part II.
[129] *Our Government: The Executive Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/1600/executive-branch (last visited on Dec. 6, 2015).
[130] *Id.*
[131] *Id.*

courts, Congress, and the public by justifying the process with national security incentives.

Executive privilege, otherwise known as State Secret Privilege ("Privilege"), is a judicially created evidentiary privilege that was first formally recognized in *United States v. Reynolds*.[132] In *Reynolds*, the Supreme Court held that the executive branch could withhold evidence from the court if it deemed that its release would impair national security.[133] Since 1953, when the case was decided, the Court has continued to recognize executive privilege, even today. Most recently, in 2011, the Supreme Court in *General Dynamics Corp. v. United States* unanimously held that "when litigation would end up disclosing state secrets, courts may not try the claims and may not award relief to either party."[134] Not only would invoking the Privilege prevent the Executive from disclosing information and its sources, but it would also limit the ability to bring and maintain suit. *General Dynamics Corp.* is also noteworthy because the Privilege was invoked in a setting where the government was bringing the case against private contractors. According to the contractors, withholding the information as Privilege prevented them from mounting an effective defense.[135] So, the Executive faced a dilemma when it brought suit and sought to raise the Privilege at the same time. In other words, the Privilege ends up being a double-edged sword, especially when looking at the civil context.

In criminal cases, the Supreme Court has not answered whether the Executive may invoke Privilege in criminal prosecutions. The Second Circuit in *United States v. Aref*, however, has held that state secrets privilege may be asserted in criminal prosecutions, *subject to* the procedures in CIPA, to bar disclosure of classified evidence that is *not*

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[132] Reynolds v. United States, 345 U.S. 1 (1953) (holding that, where military secrets were involved, there was a valid claim of privilege under Rule 34 of the Federal Rules of Civil Procedure).
[133] *Id.*
[134] Gen. Dynamics Corp. v. United States, 563 U.S. 478 (2011) (ruling on facts where the Navy terminated a contract with General Dynamics and McDonnell Douglas and requested return payments, but the contractors refused, arguing that the government kept too much information secret under the State Secret Privilege for there to be adequate progress in the case).
[135] *Id.*

relevant and helpful to the defense.[136] Referring back to the preceding section, CIPA does not authorize parallel construction, let alone any procedure that would deny a criminal defendant of her constitutional rights. Furthermore, CIPA requires courts to access and review the classified information to determine whether privilege may be asserted in the first place.[137] By completely circumventing CIPA review, using parallel construction undermines even the Second Circuit's holding in *Aref*. Therefore, *Aref* demonstrates that even plenary power granted to the Executive in the form of privilege is not sufficient to authorize parallel construction, and is instead cabined by statutes like CIPA. Assuming that *Aref* is not controlling and CIPA does not apply – to differentiate the analysis from Part II.A. – the Executive's inherent ability to pursue prosecution and raise Privilege at the same time is still extremely problematic from a policy perspective.

Using parallel construction, the executive branch need not face the dilemma between Privilege and being able to raise suit. First, concealing the source of information by using parallel construction serves the same purpose as raising Privilege. It prevents the defense from accessing sources or methods that is otherwise sensitive and/or used for national security purposes. Second, by concealing the source and using an independent evidentiary path, the Privilege no longer has to be invoked and does not require court review under statutes like CIPA or the Foreign Intelligence Surveillance Act.[138] As a result, a case will not be dismissed for failure to evaluate evidence in its entirety as is required by *General Dynamics Corp.* because the courts and those who are being subjected to suit will never know that such information existed in the first place. For the executive branch, this is a win-win situation.

In addition to the series of constitutional violations discussed in Part II, it is for these reasons that parallel construction is so inherently problematic from a policy perspective. Even though Executive privilege

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[136] United States v. Aref, 533 F.3d 72, 78-79 (2d Cir. 2008).
[137] 18 U.S.C. §§ 1-16; *see also* Liu, *supra* note 118, at 3.
[138] The Foreign Intelligence Surveillance Act (FISA) of 1978 is a United States federal law that prescribes procedures for the physical and electronic surveillance and collection of foreign intelligence between foreign powers and agents of foreign powers. The Act may also include American citizens and permanent residents suspected of espionage or terrorism. Foreign Intelligence Surveillance Act, 50 U.S. § 1881a (2008).

is recognized and there are a number of circumstances in which the Executive can withhold information from Congress and the courts, invoking the Privilege at least acknowledges that national security or some other justification is at play. In which case, the courts and Congress can respond accordingly upon discovering that certain information is being withheld. For instance, as was the case in *General Dynamics Corp.*, the inability to turn over privileged information resulted in the Court deciding that defendants could not adequately raise their defense, which in turn resulted in the case's dismissal.[139] By raising Privilege, the Court can still evaluate the validity of a claim without the requested information and assess the fairness of continuing suit in light of the Privilege. Parallel construction completely undermines the role of the courts by preventing them from practicing this safeguard, infringing fundamental liberties and fairness to both parties and the court system. Furthermore, parallel construction enables law enforcement to conceal sources that are not even sensitive or used for national security purposes, exacerbating the inherently problematic policy concerns.

Parallel construction also significantly implicates defendants in domestic criminal cases, which are attenuated from issues related to national security that normally justify using Privilege. The President, even if invoking Privilege, has exceeded any power granted to him or her by the Constitution. For instance, the President does not have the power to keep secret his or her implementation of national security surveillance measures on U.S. citizens in purely domestic realms if it intends to use those measures to subsequently prosecute them.[140] Such authorization in this case would further violate the separation of powers doctrine and undermine the Constitution's system of checks and balances, especially since the courts have the ability to review any case or controversy that implicates the Constitution, particularly the rights of U.S. citizens. So, the courts, at a minimum, should be able to determine whether the President has the power to authorize parallel construction against U.S. citizens under the Constitution, and if not, to determine whether the practice is constitutional in and of itself. However, because

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[139] Gen. Dynamics Corp., 563 U.S. at 492.

[140] *See generally* U.S. Const. Art. II; *see also United States v. United States District Court*, 407 U.S. 297 (1972) (the *Keith* case) (holding that in the case of intelligence gathering involving domestic security surveillance, prior judicial approval was required to satisfy the Constitution).

the act of concealment inhibits the courts from ever scrutinizing these investigative methods in the domestic criminal context, it is a violation of the separation of powers, specific to inherent Executive national security powers, too.

III. THE ANALYSIS: CRITIQUE OF THE LIKELY JUSTIFICATIONS FOR PARALLEL CONSTRUCTION

Law enforcement agencies have raised several justifications for parallel construction, despite separation of powers and due process concerns. For instance, in instructing local law enforcement agencies to conceal using StingRays, the FBI has justified secrecy by insisting that public revelation will compromise the efficacy of the device.[141] Once criminals become aware of the device, they will adjust their behavior accordingly to avoid being swept up by its surveillance capabilities. These devices were also deemed necessary to prevent terrorist attacks and capture drug kingpins, the latter of which are likewise deemed (rightly or wrongly) threats to national security.[142] As Part. III.a. will discuss, using StingRays has expanded beyond the scope of terrorism and drug trafficking into the domestic criminal context. It further argues why a national security justification is unwarranted when dealing with parallel construction.

Other law enforcement agencies, like the DEA, have also attempted to provide a legal basis for parallel construction. In the DEA's training modules, agents cite to Supreme Court case *Scher v. United States* as enabling law enforcement to practice parallel construction.[143] As Part IV.B. will demonstrate, *Scher* is outdated and was likely never intended to justify parallel construction. Taking a closer look at each justification in turn, Part III argues that there is no legal justification for parallel construction.

A. NATIONAL SECURITY JUSTIFICATIONS

[141] Bates, *supra* note 59, at 3.
[142] *Id.*
[143] *DEA Training Slides*, *supra* note 31, at 55.

Law enforcement agencies justify parallel construction by asserting that revealing sensitive sources and investigative methods would impose great risks on national security. Even if evidence is directly related to a criminal conviction, law enforcement agents are trained to think "the interests of national security outweigh the relevance of the information to the defendant."[144] Take, for example, StingRays. Local law enforcement agencies acquired StingRays to aid in addressing national security threats domestically, namely drug trafficking and terrorism prevention.[145] Revealing the use of these devices, however, would compromise its efficacy. Targeted individuals will adjust their behavior to avoid the StingRay's surveillance capabilities.[146] To ensure national security and the efficacy of national security methods at the local law enforcement level, concealing sources and information is warranted, enabling the lawful use of parallel construction.

This argument fails for two reasons. First, courts are equipped to balance national security interests against other interests, and do so all the time.[147] Parallel construction directly circumvents this process. In the domestic criminal context, the U.S. Constitution prohibits the government from performing unreasonable searches or seizures.[148] The warrant requirement ensures that investigative power is balanced against individual liberties. This balance may frustrate government efficiency and investigative efficacy, but is necessary to limit privacy intrusions and guard against abuse. So, using and subsequently concealing StingRays must be evaluated and weighed against established legal principles, such as the right to privacy, the separation of powers, and a criminal defendant's due process rights. Parallel construction deprives the courts of its duty to engage in this balancing analysis—thus violating the checks and balances of our current legal structure.

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[144] *Id.*
[145] Bates, *supra* note 59, at 3.
[146] *Id. See* N.Y. Civil Liberties Union v. Erie Cnty. Sheriff's Office, 15 N.Y.S. 3d 713 (Sup. Ct. 2015) (holding that the non-disclosure agreement itself states the concern, providing that disclosure would enable targets to "employ countermeasures to avoid detection").
[147] *See* discussion on CIPA *infra* Part III.
[148] U.S. CONST. amend. IV.

Second, court review of StingRays, as it is currently being used, would likely find that other interests trump any national security interests. The facts surrounding the current use of StingRays do not support the government's argument. Through state freedom of information litigation, several data releases revealed little on the use of StingRays to combat terrorism or drug trafficking.[149] Instead, the devices have been reportedly used for countless routine law enforcement actions without using a warrant.[150] As discussed in Part II, there are certain instances where law enforcement can withhold evidence from the defense, particularly in the national security context under the State Secrets Privilege doctrine. It's possible that a court might consider using StingRays to combat drug trafficking and terrorism a sufficient national security basis to withhold revealing the device. But that is not what is happening here. The StingRay is repeatedly and routinely being used in the domestic criminal context, far removed from any national security imperatives.[151] So, national security is not a legitimate basis for using parallel construction.

B. LAW ENFORCEMENT'S USE OF SUPREME COURT CASE *SCHER*

In its training module, the DEA relied on Supreme Court precedent, *Scher v. United States*, to justify parallel construction.[152] In *Scher*, the Court found that a defendant had no right to learn of the source of a tip based on surveillance that was used against him.[153]

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[149] Bates, *supra* note 59, at 8. One release, in particular, of the Tallahassee Police Department showed that the StingRay was used in hundreds of routine law enforcement practices, without a single showing of any terrorism investigation. *See* Master list of Stingray Deployments by the Tallahassee Police Department, FUSION (Mar. 27, 2014), https://fusiondotnet.files.wordpress.com/2015/02/03.27.2014_-_master_ce_log.pdf.

[150] For instance, in Baltimore, one detective estimated that StingRays have been used more than 4,300 times in the course of routine law enforcement activities. *See* Justin Fenton, *Baltimore Police Used Secret Technology to Track Cellphones in Thousands of Cases*, BALTIMORE SUN (April 9, 2015), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-case-20150408-story.html.

[151] Bates, *supra* note 59, at 8.

[152] *DEA Training Slides*, supra note 31; Scher v. United States, 305 U.S. 251 (1938)..

[153] *Id.*

Furthermore, the source of the information was not relevant to a defendant's defense. The Court emphasized that "the legality of the officers' actions does not depend upon the credibility of something told but upon what they saw and heard what took place in their presence. Justification is not sought because of honest belief based upon credible information."[154] In other words, the manner in which the agent discovered the evidence did not matter, so long as the agent subsequently saw the illegal acts with his own eyes. And so, the Supreme Court "enabled" the idea of parallel construction. *Scher* has been used to ultimately inform law enforcement agents to expect information derived from intelligence sources, but agents should try their best to never find out why and how they obtained that information.[155]

Using *Scher* to justify law enforcement's use of parallel construction is no longer warranted — and likely never was — given the current surveillance state and development in technology.[156] First, the source of information relied upon in *Scher* was by an informant: an individual who provides information to officers that is otherwise unknown.[157] Even today, the Supreme Court in *McCray v. Illinois* has held that when an informant's testimony is to probable cause, and not to guilt or innocence, there is no need to disclose the informant's identity, as long as the officers relied in good faith upon credible information supplied by a reliable informant.[158] The government may argue that, oftentimes, defendants want access to information about informants to examine their background, motive, and credibility — ultimately to impeach any substantive testimony and to challenge the basis for the original search. Despite these interests, the Supreme Court still allowed using anonymous informants in criminal prosecutions, as established by *Scher* and *McCray*.[159] Parallel construction is no different. While defendants may want access to the original source of information used

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[154] *Id.*
[155] *DEA Training Slides*, supra note 31.
[156] *Scher*, 305 U.S. at 251.
[157] *See id.*
[158] McCray v. Illinois, 386 U.S. 300 (1967) (holding that the government need not identify an undercover informant whose testimony goes only to probable cause).
[159] *Id.* at 300; *Scher*, 305 U.S. at 251.

against them, their ability to challenge the independent trail of evidence implicating their case should be sufficient.

Revealing the identity of an informant, however, is significantly distinguishable from revealing the surveillance methods used in an investigation. An informant is oftentimes a private third party to the investigation and so her conduct, in terms of conducting surveillance or investigations, does not run afoul of the Fourth Amendment or federal laws, such as the Foreign Intelligence Surveillance Act (FISA).[160] Even more so, informants are usually anonymous, so law enforcement is *incapable* — as opposed to *unwilling* — to provide such information if required to do so.[161] The Fourth Amendment protects U.S. persons from unreasonable searches and seizures *by state actors*. Since parallel construction is concealing investigative methods practiced by the government itself, and not private third parties, *Scher* and *McCray* are perhaps less relevant. Also, technology and surveillance capabilities cannot be considered third party informants to an investigation; otherwise, the Fourth Amendment would be futile.

Almost all contemporary government investigations are assisted by technology, whether through tracking devices, binoculars, or

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[160] For purposes of this analysis, it is important to clarify here that the Fourth Amendment does not cover a private third party's actions in conducting surveillance. The Fourth Amendment has a state action requirement. However, the informant relevant to the government action is scrutinized under the Fourth Amendment, which is not the point being discussed here. For instance, where an anonymous tip is corroborated with actual police findings, a totality of the circumstances approach is appropriate to determine probable cause for purposes of facilitating searches, seizures, and/or obtaining warrants under the Fourth Amendment. Illinois v. Gates, 462 U.S. 213 (1983). Here, I am referring to the individual conduct of the informant in retrieving the information that is then being used in a police investigation. The Fourth Amendment applies to governmental searches and seizures, but not those done by private citizens who are not acting on behalf of the government. *See* Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 261.

[161] Furthermore, requiring law enforcement to provide the identity of an informant would render anonymous tips useless. Additionally, less individuals would report findings to law enforcement that would assist in their investigation if they had to disclose their identity, especially if that information was then presented to the court and the Defendant the information is implicating. These concerns are not relevant to parallel construction and the concealment of sources of information that involve no third-party actors.

computers. If such capabilities were justified by cases like *Scher*, what is to differentiate the government from using a computer to access publicly available information online and using a computer to intercept emails and the contents of private communications? Does it really matter whether the information discovered is extremely reliable? *Scher* was decided long before the Supreme Court decided *Wong Sun* and other "Fruit of the Poisonous Tree" cases.[162] In the latter case, the crucial question was not whether the underlying information was *reliable*, but rather whether it was obtained through a search that was itself *unreasonable*.[163] A line must be drawn between *reliability* and *legality*, and it has: the Fourth Amendment has played a pivotal role in securing privacy by regulating government conduct. So, while cases like *Scher* and *McCray* may still be good law, they are not applicable in justifying parallel construction, particularly in its use to conceal government use of technology from judicial scrutiny. There is no justification to conceal sources of information that would clearly fall under Fourth Amendment scrutiny in the domestic criminal context, demonstrating further the immediate necessity to address the legality of parallel construction.

Second, in *Scher*, the fact that there was an informant involved at the inception was information made readily available to the defendant and the court, despite not revealing the informant's identity.[164] At least, the defendant could raise the argument that she is entitled to know the identity of the informant and the court can deliberate the issue. There are instances like *Scher* where the court deliberates whether such information should be required and ultimately decide in the negative.[165] In the alternative, the court may also find that the lack thereof of

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[162] *See* Scher, 305 U.S. at 251 (decided in 1938); Wong Sun, 371 U.S. at 471 (decided in 1963); Nix v. Williams, 467 U.S. 431 (1984).

[163] Wong Sun, 371 U.S. at 477.

[164] *Scher*, 305 U.S. at 251.

[165] *See, e.g.*, Roviaro v. United States, 353 U.S. 53, 62 (1956) (employing a balancing text, weighing the public interest in protecting the flow of information to the Government against the individual's right to prepare her defense); Miller v. United States, 273 F.2d 279, 279 (5th Cir. 1959) (holding that "where informer was not an active participant in crime, or person with whom accused had been dealing, it was not error to refuse to require Government to divulge his identity"); Cannon v. United States, 158 F.2d 952, 954 (5th Cir. 1946)(emphasizing that it is settled in the Fifth Circuit that "public policy forbids disclosure of an informer's identity unless essential to the defense").

revealing information would unduly prejudice the defendant and adjudicate the case accordingly, like dismissing the case or sanctioning the prosecution.[166] Parallel construction completely circumvents these safeguards. It enables law enforcement to bring the independent evidentiary path against a defendant without notifying the defense or the court that such evidence was originally derived from an alternative source. So, the original source is never subject to defense and/or court scrutiny. Parallel construction ensures that there will never be a situation where the court would hold otherwise than it did in *Scher*.

Third, it seems unlikely that the Supreme Court in 1938 could have fathomed that its opinion would authorize the concealment of government agency's bulk data acquisition and intercept of U.S. citizens' email content, phone records, search history, live chats and so forth in criminal cases. Most, if not all, of these capabilities did not exist in 1938. The opinion itself is terse, only a page in length. And its lack of depth suggests that the Court did not expect the opinion to establish anything other than the outcome of the specific facts of that case. In *Scher*, the government sought to withhold the identity of an informant;[167] here, it is seeking to withhold information about surveillance intruding upon the privacy of the defendant and the lawfulness of the government's investigation. *Scher* is attenuated from addressing the legality of parallel construction.

The development of caselaw post-*Scher* provides more appealing alternatives to determine this legal question. Since *Scher*, the Supreme Court has held that a U.S. person has a reasonable expectation of privacy in the contents of sealed packages during transmission[168] and in a telephone booth from a listening device.[169] Also, the Sixth Circuit has held a person has a reasonable expectation of privacy in the content of emails stored with or sent and received by an Internet Service Provider (ISP).[170] Most relevant, the federal district court in Washington, D.C., has held that the NSA's Bulk Telephony Metadata

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[166] For examples, refer to cases dealing with CIPA and State Secrets Privilege under Part II, such as General Dynamics Corp. v. United States, 563 U.S. 478 (2011) and United States v. Aref, 533 F.3d 72 (2nd Cir. 2008).
[167] *Scher*, 305 U.S. at 251.
[168] Ex Parte Jackson, 96 U.S. 727 (1877).
[169] Katz v. United States, 389 U.S. 347 (1967).
[170] United States v. Warshak, 631 F. 3d 266 (6th Cir. 2010).

Program[171] violates a reasonable expectation of privacy.[172] Lastly, the Foreign Intelligence Surveillance Act Court (FISC) held that the NSA's procedures for filtering out and handling purely domestic communications were not reasonable and violated the Fourth Amendment since, despite the NSA's targeting of foreign communications, the agency was still collecting approximately 56,000 Americans' emails a year.[173]

Although the Supreme Court has yet to decide whether the NSA's surveillance practices after the 2013 global surveillance disclosures constitute an unlawful infringement upon privacy, these cases suggest that the Court will find that intercepting an individual's emails, phone records, and text messages without a warrant is either an unreasonable search or in violation of federal statutory law.[174] Furthermore, as established by the Fruit of the Poisonous Tree Doctrine,

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[171] In 2006, the Foreign Intelligence Surveillance Court (FISC) adopted a broader and unprecedented interpretation of section 215 of the PATRIOT Act. This decision led to the creation of the NSA's Bulk Telephony Metadata Program. The FISC judges issued orders under section 215 directing specified telephone service companies to turn over to the NSA, regularly and on an ongoing basis, huge quantities of telephone meta-data involving the phone records of millions of Americans, none of whom are themselves suspected of anything. The meta-data at issue includes information about phone numbers (both called and received), but it does not include information about content of the calls or identities of the participants. The NSA has been authorized to keep this information for five years. Geoffrey R. Stone, *The NSA's Telephone Meta-data Program: Part I*, The Huffington Post (Dec. 24, 2013), http://www.huffingtonpost.com/geoffrey-r-stone/nsa-meta-data_b_4499934.html.

[172] Klaymon v. Obama, No. 13-0851 (RJL), 2013 WL 6571596 (D.D.C. Dec. 16, 2013).

[173] FISA Ct. (mem.) at 59-63, 67-80 (Oct. 3, 2011); *See also Section 702 of the Foreign Intelligence Surveillance Act (FISA): Its Illegal and Unconstitutional Use*, ELEC. FRONTIER FOUND., *available at* https://www.eff.org/files/filenode/702_one_pager_final_adv.pdf; *See also* OVERVIEW OF CONSTITUTIONAL CHALLENGES TO NSA COLLECTION ACTIVITIES, CONG. RESEARCH SERV. (May 21, 2015), *available at* https://www.fas.org/sgp/crs/intel/R43459.pdf (providing an overview of the bulk collection of telephony metadata for domestic and international telephone calls and the interception of Internet-based communications, as well as the various constitutional challenges that have arisen in judicial forums with respect to each).

[174] The U.S. Court of Appeals for the Second Circuit has already found that the NSA's bulk phone record collection exceeded authorization of Section 215 of the U.S.A. Patriot Act. ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015).

evidence gathered with the assistance of illegally obtained information must be excluded at trial.[175] So the subsequent investigation in the process of parallel construction to create a separate evidentiary path is likely the fruit of a tainted source (unlawful surveillance practices). Such use of tainted evidence violates the defendant's due process rights. Therefore, given the current state of surveillance technologies and the extent to which individual liberties are violated while using parallel construction, the government's reliance on *Scher* to justify parallel construction is misplaced.

IV. THE SOLUTION: WHAT HAS BEEN DONE AND HOW DO WE MOVE FORWARD?

A. CURRENT EFFORTS FOR TRANSPARENCY AND OVERSIGHT

Since the *Reuter*s disclosure in 2013, journalists and advocacy groups have played a significant role in disseminating information about law enforcement using parallel construction. An illustrative list of websites covering this issue include: Washington's Blog, Blacklisted News, The Daily Dot, Tech Dirt, and the Electronic Frontier Foundation (EFF). Most of these websites have informed their readers what the process of parallel construction consists of and, briefly, why it can be a problem. Since the *Reuter*s disclosure, individuals like Ciaramella have filed FOIA requests regarding the DEA's training materials and official policies on parallel construction.[176] Over 300 pages of redacted documents had been received in the form of PowerPoint presentations and embedded speaker notes.[177] These documents have enhanced transparency of the DEA's use of parallel construction. Still, there is

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[175] Robert M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 580 CAL. L. REV. 579, 588 (1968).
[176] Ciaramella, *supra* note 30.
[177] Mike Masnick, *Parallel Construction Revealed: How the DEA is Trained to Launder Classified Surveillance Info*, TECHDIRT (Feb. 3, 2014), https://www.techdirt.com/articles/20140203/11143926078/parallel-construction-revealed-how-dea-is-trained-to-launder-classified-surveillance-info.shtml.

much to learn about parallel construction and its prevalence in routine criminal proceedings.

The Electronic Privacy Information Center, American Civil Liberties Union, EFF, Brennan Center for Justice, and many other organizations have also signed a coalition letter to James R. Clapper, Jr., the Director of National Intelligence, seeking transparency on Section 702 of the Foreign Intelligence Surveillance Act (FISA).[178] The Act requires the government to notify U.S. citizens if it intends to use information derived from Section 702 against them in legal proceedings.[179] The Administration did begin notifying criminal defendants of the use of Section 702-derived information in October 2013; but it did so in only eight cases, and there has not been a single notification in the last eighteen months.[180] Agencies like the DEA, which engage in parallel construction, reconstruct Section 702-derived information using less controversial methods in order to avoid disclosing the use of Section 702. The ACLU asserted in its coalition letter that "individuals should know whether they are being given a fair opportunity to challenge Section 702 surveillance when the fruit of such surveillance is used against them."[181] The ACLU seeks information about how the Department of Justice and other agencies interpret the statutory notification requirement, including the legal interpretations that control when those agencies consider evidence to be derived from Section 702 surveillance. However, the coalition letter has yet to receive a response.

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[178] Coalition Letter Seeking Transparency on Section 702 to Hon. James R. Clapper (Oct. 29, 2015) [hereinafter "Coalition Letter"], *available at* https://www.aclu.org/letter/coalition-letter-seeking-transparency-section-702.

[179] Section 702 specifically prohibits intentionally targeting an American through government surveillance. However, while targeting others, the NSA routinely acquires innocent Americans' communications without a probable cause warrant. When the FISA Court approves a Section 702 order, which it does more often than not, the NSA is allowed to work with telecoms to copy, scan, and filter Internet and phone traffic coming through their physical infrastructure. Most importantly, however, the ACT requires that the government notify U.S. citizens if it intends to use information derived from Section 702, which it has oftentimes not done so. Foreign Intelligence Surveillance Act § 702, 50 U.S.C. § 1881a (2008).

[180] Coalition Letter, *supra* note 178, at 3-4.

[181] Coalition Letter, *supra* note 178, at 4.

Sean Vitka, co-founder of the Civil Liberties Coalition,[182] also wrote a request to the United States Commission on Civil Rights (USCCR) to investigate disproportionate impacts of parallel construction on communities of color.[183] Vitka, similar to other public interest organizations addressing this issue, argues that parallel construction should be scrutinized insofar as it conceals tips from sensitive sources and authorizes acts that might prove unlawful under the Fourth Amendment. Still, his primary focus for the request is to ensure that alleged criminals are protected against exploitative law enforcement investigations, particularly in the context of communities already subject to disproportionate law enforcement targeting.[184] Parallel construction is principally used in the context of drugs, gangs, and terrorism investigations, all of which disproportionately target communities of color.[185] For these reasons, Vitka has requested the USCCR to investigate and publish more information on parallel construction.

The ACLU and Federal Public Defender attorneys also filed a joint motion for notice of the surveillance techniques employed by the government in its investigation of defendants Jamishid Muhtorov and Bakhtiyor Jumaev.[186] The motion argues that notice of the government's reliance on surveillance techniques in securing evidence against the defendants is essential to the due process rights of the defendants.[187] Furthermore, by engaging in parallel construction to conceal the nature of the government's underlying investigation, the government is refusing to give notice of the derived evidence as due process requires. No developments regarding this case have been made since the motion was submitted in October of 2014.

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[182] The Civil Liberties Coalition is one of the largest coalitions in the United States calling for an end to mass government surveillance. LIBERTY COAL., http://www.libertycoalition.net [website is not functioning – please provide appropriate link].
[183] Electronic Communication, *supra* note 13.
[184] *Id.*
[185] *Id.*
[186] Mot. for Notice of the Surveillance Techniques Utilized, 1, *United States v. Muhtorov and Jumaev*, No. 12-cr-00033-JLK (Dist. Ct. D. Colo. 2014).
[187] *Id.*

Aside from the dissemination of information, FOIA requests, media commentary, and further attempts by the ACLU for greater transparency, minimal steps have been taken to address the constitutionality of parallel construction and advocate for reform. The DOJ Inspector General Michael Horowitz reportedly had been investigating the DEA's use of parallel construction, particularly with regard to the "Hemisphere" program.[188] There have been no developments or results, however, from this initial investigation. Furthermore, the government has never publicly or formally defended parallel construction, nor has it publicly outlined the legal theories on which it relies to justify the practice.

B. MOVING FORWARD: PROPOSALS AND OBSTACLES

Eliminating parallel construction will be no easy feat. One possible solution is to address parallel construction through a broad based constitutional challenge in court. These challenges are commonly known as "law reform" litigation, a type of public interest lawsuit designed to advance social change.[189] But, in order to litigate a case, especially in a criminal prosecution, the court must establish that the defendant has standing to challenge the legal issue at hand. Finding an individual who has standing will be the greatest obstacle in using litigation as a mechanism for change here.

To tee up a challenge to parallel construction, a defendant would first have to show that the evidence used against him was not derived merely by accident. The defendant would have to somehow show that the DEA or other local law enforcement agencies concealed the original source of the information used in subsequently creating the criminal case against her. How can one really tell whether evidence being used against the accused is from a separate evidentiary path to conceal a source or from an original source itself? The difficulty of answering

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[188] *See generally DOJ Inspector General Investigating DEA's Use of Parallel Construction Under Hemisphere*, EMPTYWHEEL (Apr. 18, 2014), https://www.emptywheel.net/2014/04/18/doj-inspector-general-investigating-deas-use-of-parallel-construction/.

[189] Lori Turner, *Using Impact Litigations as a Tool for Social Change: Jimmy Doe: A Case Study*, HARV. C.R. L. REV. 1 (Aug. 2010), *available at* http://harvardcrcl.org/using-impact-litigation-as-a-tool-for-social-change-jimmy-doe-a-case-study-by-lori-turner/.

this question yields yet another issue: How can we regulate law enforcement's use of parallel construction if we do not even know when they are using it? Only in the off-chance that a defendant has discovered some sort of information that has revealed law enforcement's use of parallel construction in creating a criminal case against her, could the defendant be able to challenge the practice's constitutionality. Because the process of parallel construction has become somewhat publicly known, the chances of this occurring has increased.

But even if a defendant with standing could pursue the issue, and even if parallel construction was deemed unconstitutional, how would we subsequently regulate the DEA and other law enforcement agencies to ensure that they are no longer practicing it? Government agencies have kept this practice a secret for quite some time now. Although the practice has been leaked to the public, it remains unclear when and to what extent the process has been used in criminal prosecutions. One win in one case may not effectively eliminate using parallel construction in its many different forms and contexts. Say the Supreme Court declared that using subpoenas to conceal the DEA's Hemisphere program is unlawful. It is unlikely that that ruling will also eliminate using parallel construction to conceal law enforcement using StingRays. A completely different program or technology is being challenged, so the government may think it's entitled to specific adjudications for each investigative method used. The result: a never-ending cycle of challenges every time a new investigative method is discovered.

This Article proposes two primary solutions to eliminate using parallel construction and redress its harms. The first requires Congress to address the practice through legislation by mandating disclosure of the origins of an investigation and developing a framework for notice in exceptional cases. In the alternative, should law enforcement not heed such disclosure and notice requirements, courts must require exclusion of evidence obtained through parallel construction. This not only guarantees fundamental fairness in criminal proceedings, but also ensures Congress and the courts uphold its role in maintaining checks and balances on overreaching executive power.

1. Broad Disclosure Requirements and a Framework for Notice in Criminal Cases

Given how difficult it would be to raise the claim that law enforcement has engaged in parallel construction, the legislature may

be the best equipped to address this issue. Congress can effectively terminate, or at a minimum regulate, law enforcement's use of parallel construction through legislation. While *Brady* and Rule 16 of the Federal Rules of Criminal Procedure provide for broad disclosure requirements,[190] Congress should develop a comprehensive law that ensures disclosure of the origins of an investigation, too. For classified information or information retrieved through sensitive techniques or special equipment used for national security, Congress should also incorporate a framework for notice.[191]

In criminal cases, Congress must require disclosure of complete information regarding the origins of the investigation. This will ensure that defendants can challenge the lawfulness of the investigation and any evidence derived from that investigation. There will be certain times when the origins of an investigation or evidence cannot be disclosed for national security purposes or concerns. In these instances, Congress should craft a broad-based solution, requiring notice of new investigative technologies that may produce new incentives for law enforcement agencies to withhold disclosure from defendants.[192] This framework for notice should provide a criminal defendant the opportunity to challenge both longstanding and new and sensitive investigative methods used by the DEA, FBI, and other law enforcement agencies. Additionally, the framework should address the defendant's due process interest and require notice of both evidence acquired directly from the investigative method and evidence subject to a claim that it was derived from such method.[193] The latter will ensure that "courts resolve close or disputed questions of law or fact, rather than permitting the government to do so unilaterally."[194] Even the Supreme Court has determined that where "derived" evidence is at issue, the courts do not have to accept the government's unilateral determination

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[190] *See* Section I.A.
[191] A similar framework for notice was suggested by Patrick Toomey, staff attorney in the National Security Project at the ACLU, and Brett Max Kaufman, a teaching fellow and staff attorney in the Technology Law & Policy Clinic at the New York University School of Law. Toomey & Kaufman, *supra* note 18, at 897.
[192] *See* 50 U.S.C.A § 1825 (West); 18 U.S.C.A. §2703 (West); Fed. R. Crim P. 31. Many of the existing notice requirements have been imposed by statute or rule.
[193] *See* Toomey & Kaufman, *supra* note 18, at 897 n. 230.
[194] *Id.*

concerning which evidence is "derived" from an illegal search.[195] In its place, a defendant has the right to an adversarial hearing to address that question.[196] Overall, this framework for notice will enable criminal defendants to have the opportunity to raise colorable claims that the investigation violated her legally protected interest she had standing to litigate.[197]

Additionally, one other key principle is relevant to government disclosure requirements and notice determinations: the rule of lenity. Generally, in criminal law, the rule of lenity states that when interpreting an ambiguous criminal law, the court should resolve the ambiguity in favor of the defendant.[198] In the context of disclosure and notice in

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[195] *See* Alderman v. United States, 394 U.S. 165, 168 (1969) (recounting, in wiretapping challenge, Supreme Court refusal to accept the ex parte determination of relevance by the Department of Justice in lieu of adversary proceedings in the District Court); Kolod v. United States, 390 U.S. 136, 136-37 (1968).

[196] Toomey & Kaufman, *supra* note 18, at 897.

[197] That legally protected interest will likely present itself as a defendant's Fourth Amendment privacy interest – but that is not necessarily the sole ground for finding an investigative method unlawful. *See* Nix v. Williams, 467 U.S. 431, 442 (1984) (observing that "the 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation."). Other grounds for finding an investigative method unlawful can include procedural interests created by statute, such as the rules for obtaining a particular type of data pertaining to the defendant. Toomey & Kaufman, *supra* note 18, at 897. Additionally, in certain other cases, it might be a First Amendment interest that has been intruded upon. *Id.* Regardless, a defendant has the right to litigate the lawfulness of government surveillance when there is a likelihood that investigators have not complied with any one of these protections. *Id.* at 898.

[198] *See* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2441 (2006). When interpreting criminal laws, courts oftentimes recite the maxim that "penal statues should be strictly construed against the government." 3 Norman J. Singer, Statutes and Statutory Construction §59:3, at 125 (6th ed. 2001). This canon of construction has been applied in the United States since at least 1820, when Chief Justice Marshall described it as "perhaps not much less old than construction itself." United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820). Modern courts recognize the rule as "venerable" and "well-recognized." United States v. R.L.C., 503 U.S. 291, 305 (1992); United States v. Rodgers, 466 U.S. 475, 484 (1984). After the 2013 surveillance disclosures by Edward Snowden, Orin Kerr proposed that Congress could dictate a similar principle to that of the rule of lenity for courts called on to interpret the FISA. *See* Orin Kerr, *The Rule of Lenity as a Tool to Regulate National Security Surveillance,* LAWFARE (Nov. 5, 2013, 3:20 PM), https://www.lawfareblog.com/rule-lenity-tool-regulate-national-security-surveillance. In the court's interpretation of FISA, if the scope of the statute is

parallel construction cases (or surveillance cases in general), the government should be required to disclose the origins of an investigation, and in the alternative, provide notice to defendants in close or novel cases. These close or novel cases consist of situations where law enforcement may have engaged in sensitive surveillance techniques or used special equipment that is not readily known to the public. Also, close cases can include instances where law enforcement attempts to conceal such investigative methods used against a defendant in a criminal proceeding. In these circumstances, it is the court's role to determine a favorable outcome and ensure fairness in the criminal proceeding. As discussed in the following section, exclusion of the evidence may be one such remedy. Most importantly, a defendant must have the opportunity to litigate difficult legal issues. The government should not be allowed to resolve these issues unilaterally in secret.

With the Fourth Amendment, in particular, the rule of lenity is applicable in two scenarios: 1) where evidence *may* be the fruit of a poisonous tree,[199] but it is a close question; and 2) where courts have not considered whether a particular investigative method constitutes a "search."[200] The latter is particularly significant for both defendants and the public; it enables the law to keep pace with developing technology — like the wiretapping in *Katz*, the thermal imaging in *Kyllo*, the GPS tracking in *Jones*, or the NSA's bulk collection of phone records

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ambiguous, the directive would state, courts should interpret the law narrowly in favor of the persons monitored, as opposed to the state. As technology changes, potentially allowing new programs that were not contemplated by Congress and do not fit within the confines of the statute, the Executive branch would have to go to Congress and seek approval of the new program. *Id.*; *see also* Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513 (2014).

[199] Return to Part IV for a discussion of parallel construction as a tainted fruit for purposes of the exclusionary rule and circumstances in which the Fruit of the Poisonous Tree doctrine applies. To substantiate this claim, the Supreme Court has held that defendants are entitled to adversarial hearings to resolve whether evidence is "derived from" unlawful wiretap. *Alderman*, 394 U.S. at 168. The Court in *Alderman* rejected the government's effort to resolve that issue without defense participation. *See also* Kastigar v. United States, 406 U.S. 441 (1972) (holding an equivalent hearing where a defendant has provided testimony under a "use" immunity agreement but is subsequently prosecuted to determine if evidence is derived from the immunized testimony or is free of any taint).

[200] Toomey & Kaufman, *supra* note 18, at 898.

today.[201] The government cannot withhold notice of new investigative techniques just because courts have not determined whether such techniques constitute "searches" under the Fourth Amendment. This action is clearly a self-serving policy for withholding notice and evading judicial review.[202]

Legislation that requires broad disclosure requirements with an additional framework for notice for exceptional cases should guide courts, defense attorneys, and government actors in cases moving forward. Reform, however, will not come easy. There will need to be transparency and oversight. It is crucial to remember that parallel construction was hidden from the public in the first place. For a new disclosure and notice framework to work, there needs to be effective regulation to ensure compliance with the new law. In an area clouded with secrecy about new investigative technologies and even methods to conceal using such technologies, especially in the national security context, the incentives for the government to keep such technologies hidden remains powerful. Most importantly, defense attorneys should aggressively raise complete disclosure issues, prosecutors should be diligent in uncovering law enforcement's complete investigative path, and judges should vigorously police complete disclosures and notice rights in applicable cases. Courts play crucial roles; they are in the best position to extract details about hidden investigative techniques when defendants are kept in the dark. So, judges should press the government for those details *sua sponte* to ensure that due process rights are protected in criminal prosecutions and notice is given when necessary.

2. IN THE ALTERNATIVE, EXCLUSION OF THE EVIDENCE

In the absence of disclosure or providing notice when required, any evidence derived from using parallel construction should be excluded. As discussed in Part II, because concealing evidence undermines fairness and transparency in the criminal process and prevents judicial scrutiny of the origins of an investigation, parallel construction is tainted. And because the practice is tainted, subsequent evidence gathered as a result of the original investigation is tainted, too, and should be excluded from trial under the fruit of the poisonous tree

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[201] *Id.* at 899. *See also Katz*, 389 U.S. at 361; Kyllo v. United States, 553 U.S. 27 (2001); United States v. Jones, 565 U.S. 400 (2012).
[202] Toomey & Kaufman, *supra* note 18, at 899.

doctrine. The exclusionary rule remedies and deters law enforcement misconduct by excluding evidence gathered in violation of the Constitution. The rule has predominately been recognized to redress Fourth Amendment violations.[203] But it has also been used in Fifth and Sixth Amendment cases, too.[204] The fruit of the poisonous tree doctrine prevents admitting evidence after it has been tainted by a primary illegality. [205]

As discussed in Part II, there are a number of due process violations that arise from using parallel construction. Some of these violations, such as the inability to challenge the lawfulness of an investigation, recognize additional constitutional violations therein. Due process requires the ability to challenge an investigation because the investigation itself may be unlawful. The Fourth Amendment states that a person has a right to be free from unreasonable searches and seizures.[206] The interrelationship between due process requirements and other constitutional guarantees, such as the Fourth Amendment, provide the foundation for determining when exclusion should apply.[207] Law enforcement action that deprives an individual of "life, liberty, or property, without due process of law," requires court scrutiny. In any instance where government investigative methods are concealed, depriving the court of practicing such scrutiny and undermining due process rights, evidence derived from those methods should be excluded. Again, this is much easier said than done. Defense lawyers, prosecutors, and judges will have to be vigilant to discern when such methods are being concealed in the first place. But in due course, there will be greater transparency and oversight over the practice.

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[203] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment, which protects against "unreasonable searches and seizures," may not be used in criminal prosecutions).
[204] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (establishing that the exclusionary rule applies to improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment, and to evidence gained in situations where the government violated the defendant's Sixth Amendment right to counsel).
[205] HG.ORG, *supra* note 95.
[206] U.S. CONST. amend. IV.
[207] *See* Re, *supra* note 79, at 1887 (arguing that the exclusionary rule is not grounded solely in the Fourth Amendment, but rather "from the historically evolving interrelationship between the Fourth Amendment and the Due Process Clause").

a. THE ACT OF CONCEALMENT AS TAINTED

Parallel construction conceals the origins of a law enforcement investigation. Concealing the investigation serves as the poisonous tree—undermining due process rights, and as explained in Part III, violating the Separation of Powers. Neither Congress nor the judicial branch has authorized parallel construction; thus, the only possible justification for the practice's authorization is under the executive's constitutional powers. As explained in Part III, the executive branch wields the ability to withhold information from the other two branches of federal government under the privilege doctrine. This power, however, is traditionally cabined by national security imperatives. In the purely domestic criminal context, national security does not warrant parallel construction. The criminally accused are afforded a number of constitutional rights that would otherwise be infringed by concealing sources. So, any evidence seized because of this process and subsequently used in a criminal proceeding should be suppressed as fruit of the poisonous tree. In other words, the subsequent investigation carried out by law enforcement officials to create the separate evidentiary path is tainted, so any evidence derived from it and used in court against a criminal defendant should be inadmissible under the exclusionary rule.

Law enforcement agents engaging in parallel construction may argue that *Whren v. United States*[208] allows them to bring cases against individuals solely on a pre-textual basis. So long as there is legitimate evidence implicating an individual, the original source for an investigation cannot taint subsequent evidence for suppression to apply. In *Whren*, the court held that "the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective." [209] In the drug-based context, it would not matter if the traffic stop was set up specifically for a drug bust, so long as there was independent justification for the stop. So, even if parallel construction concealed the fact that law enforcement learned of someone dealing drugs through some other source, subsequent and independent evidence is sufficient to

[208] Whren v. United States, 517 U.S. 806 (1996).
[209] *Id.* at 806.

justify criminal charges and is not tainted for purposes of the exclusionary rule.

Whren is distinguishable from using parallel construction and does not justify its use in criminal investigations. In *Whren*, police officers had a lawful basis to perform a traffic stop: the violations of traffic regulations.[210] Proponents against the holding in *Whren* argued that individuals commit traffic violations on a regular basis, so allowing pre-textual stops would encourage profiling and justify targeting practices.[211] The fear in *Whren* was not using potentially unlawful surveillance methods or programs, such as the DEA's Hemisphere program or the use of special equipment, like StingRays.[212] The fear was discriminatory motives. Concealing one's intent is a far cry from concealing a surveillance program or investigative device from the defense or judicial scrutiny. Discriminatory intent is not a violation of the Fourth Amendment and cannot require suppression of evidence. Also, in *Whren*, the court was made aware of the entire investigative path,[213] whereas parallel construction would conceal a significant part of how an investigation actually began. The court was able to evaluate both the original reason for the stop and the pre-textual basis for the investigation before finding that a pre-textual basis for a spot is justified under the Fourth Amendment's reasonable search and seizure standard. Parallel construction withholds information and sources form the courts completely, so that courts forfeit scrutinizing the investigative process. It is this act of concealment, not some original motive to engage in a traffic stop, that is so inherently problematic. Because of the series of violations parallel construction raises in relation to the separation of powers and due process, any pre-textual evidence derived from it is tainted and should be suppressed under the exclusionary rule.

b. THE USE OF UNLAWFUL INVESTIGATIVE METHODS AS TAINTED

There is also a subsequent claim to be made here regarding the initial investigation concealed through the use of parallel construction. Since the reason for concealing the initial investigation may often result from its unlawful execution, the exclusionary rule and the fruit of the

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[210] *Id.* at 808.
[211] *Id.* at 810.
[212] Whren, 517 U.S. at 806-19.
[213] *Id.* at 808.

poisonous tree are applicable under these circumstances as well. Professor of Law Albert W. Alschuler asserts that the appropriate question for applying the exclusionary rule is one of "contributory" causation.[214] Courts should not focus on whether a constitutional violation enabled law enforcement to obtain evidence they would not have obtained otherwise,[215] but rather on whether a constitutional violation facilitated the discovery of evidence either by improving the likelihood of its discovery or by reducing the work required to obtain it.[216] Regardless of the approach taken, the application of the exclusionary rule on parallel construction is straightforward. In the first instance, parallel construction can most definitely enable law enforcement to obtain evidence they would not have obtained otherwise. As discussed earlier, the concealed initial investigation could have been conducted through unlawful surveillance methods. These methods may capture information regarding individuals whom law enforcement agents did not have the slightest clue to suspect or begin investigating in the first place. So, under the more traditional approach to the exclusionary rule, evidence obtained through the initial investigation concealed by parallel construction should be inadmissible.

In the alternative view, that of "contributory" causation, the use of unlawful investigative practices clearly and significantly improves the likelihood of discovering incriminating evidence, and reduces the work of law enforcement agencies to obtain it. While one could argue

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[214] Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV 1741 (2007), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1989&context=journal_articles.

[215] The proposition that the exclusionary rule should focus on whether a constitutional violation enabled law enforcement to obtain evidence they would not have obtained without it is commonly known as the "but-for" requirement. This approach to the exclusionary rule was used in Hudson v. Michigan, which held that evidence need not be excluded even in the face of a constitutional violation if the evidence could have been obtainable without the violation. In *Hudson*, the police had violated the Fourth Amendment by failing to knock and announce their presence before conducting a search. Hudson v. Michigan, 126 S. Ct. 2159 (1975). However, because the court determined that the police would still have obtained the evidence even if they had knocked, the exclusionary rule did not apply. Professor Albert W. Alschuler disagrees with this approach and feels that there is an alternative approach, that of "contributory" causation, that is more appropriate for Fourth Amendment analysis. Alschuler, *supra* note 214.

[216] *Id.*

that parallel construction actually provides agencies with more work to initiate a subsequent investigation to create a separate evidentiary path and conceal the original source of information, this argument misses the mark. The focus of the analysis is on the initial point of investigation and not the manner in which law enforcement attempts to conceal the investigation. Also, the work of law enforcement agencies is significantly reduced because the constitutionality of the initial investigation, the one being concealed, will not be addressed in a court of law. Accordingly, law enforcement agencies will not have to defend the initial investigation's validity in court. The clandestine use of advanced investigative techniques deprives courts of any Fourth Amendment analysis to determine whether evidence was obtained lawfully and is admissible. Furthermore, such methods reduce using traditional and lawful investigative practices that would need to be conducted otherwise to obtain such information in the first place. That is why using parallel construction should not only be excluded from law enforcement practice through traditional notions of the exclusionary rule, but also for its "contributory" causation of facilitating unconstitutional short cuts in the investigatory role of law enforcement.

Even under the more commonly recognized deterrence-based approach, exclusion is justified. In *United States v. Leon*, the Supreme Court held that to exclude evidence, the police misconduct must have been "substantial and deliberate" that exclusion would deter future similar conduct. And, the deterrence would also have to justify any costs to the justice system.[217] Using parallel construction is no doubt a deliberate attempt to bypass constitutional guarantees that undermine procedures for fairness and accountability. Even in the national security context, when investigative methods are sensitive or deal with classified information, there are already procedures in place that provide notice to both defendants and the courts to find a solution moving forward. Parallel construction undermines these efforts by completely circumventing these safeguards used to ensure fairness in criminal proceedings. Parallel construction enables law enforcement agencies to engage in questionable investigative practices, to evade any challenges the criminal defendant might raise against the practice, and to prevent judicial review of the practice by concealing its source in the first place. Parallel construction thus undermines the legal system and process of

[217] United States v. Leon, 468 U.S. 897, 909 (1984).

checks and balances. So, using parallel construction is no doubt "sufficiently deliberate" to warrant exclusion.

It is also important to mention that there needs to be greater mobilization on this issue. But given the focus of securing a criminal defendant's due process rights in the criminal justice system, how can we mobilize or organize the general public when is seems that the majority is not being subjected to parallel construction? Even in the case where we were to argue that the root of the problem is widespread — oftentimes, illegal searches/surveillance practices — how do we encourage public participation when the focus of reform is specifically to safeguard the rights of convicted individuals, especially in the cases for drug offenses? The issue should not be framed specifically to the criminal justice system and a defendant's due process of the law, but rather on the right to privacy in general; a right that transcends the criminally accused and carries implications for the public at large. If we allow our government to engage in unlawful and clandestine surveillance practices against criminal defendants, we have to remember that these practices were conducted before any incriminating evidence was discovered in the first place. By addressing the situations where unlawful government practices are more readily apparent, like in criminal procedures, we can ensure that the practice is not subjecting U.S. persons in general.

CONCLUSION

As this Article demonstrates, law enforcement's use of parallel construction poses a series of concerns to the community and our Constitution. First, it challenges the utility of our Fourth, Fifth, and Sixth Amendment jurisprudence. If law enforcement conceals the origins of an investigation, the defense cannot challenge the investigation and the courts cannot scrutinize its legality to warrant suppression of the evidence if necessary. Second, parallel construction undermines the bedrock doctrine of separation of powers. As discussed, parallel construction is not limited for use in the national security context. Rather, it prevents judicial scrutiny of any investigative method, including national security measures, used in the domestic criminal context that would otherwise impede the efficacy of law enforcement practices. Third, parallel construction exposes a lack of

accountability and transparency among our law enforcement agencies. And fourth, it raises serious questions about the security of our individual rights as the government's technological capabilities rapidly advance. Without a doubt, there is much to be gained from ensuring that law enforcement refrains from practicing parallel construction in the future.

Perhaps for many, it is not much of a concern when the police conduct an investigation that leads to the discovery of reliable, tangible evidence of a defendant's guilt. Nonetheless, the principles that immunize government investigations of a criminal's behavior from judicial scrutiny also immunizes such investigations when it is directed at the citizen who has never committed a crime in her life. The criminal defendant can challenge the evidence being used against her if the police transgressed constitutional restraints during their investigation. As a result, judicial scrutiny of an investigation will set the level of privacy and freedom for the nation. Suppression of illegally obtained evidence protects us all, not just those suspected of criminal activity. The diminution of constitutional guarantees in the criminal context, such as Fourth Amendment protections or Due Process, also lessens the quality of life for all U.S. persons, not just for the criminally inclined.[218]

[218] Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549 (1990), *available at* http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1295&context=ilj.