

VIA ELECTRONIC COMMUNICATION

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United States Commission on Civil Rights
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**Request to the United States Commission on Civil Rights
to investigate disproportionate impacts of “Parallel Construction”
on communities of color**

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I. Introduction

Parallel Construction is a broadly defined practice in which law enforcement conceals and/or recreates the origin of an investigation. It was first widely reported by Reuters in August 2013.¹ The term is derived from government documents that reveal guidance on the deliberate masking and falsification of investigative history in order to erase investigations’ origins.² According to the report, the Special Operations Division (SOD), a unit of the Drug Enforcement Administration (DEA), distributes information in partnership with two dozen other agencies, including the Federal Bureau of Investigations (FBI), the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Department of Homeland Security (DHS). Information distributed through this partnership has been used to spark domestic, non-national security related investigations.³ The information and its source are not merely concealed by the government in order to avoid legal challenges and judicial review of controversial surveillance methods. Instead, as described in the Reuters report, “[a]gents are instructed to then use ‘normal investigative techniques to recreate the information provided by SOD.’”⁴ In other words, investigators are told to find a second source for the same information, allowing the government to use evidence in court without ever facing legal scrutiny of its true sources and methods.

Parallel Construction and similar masking techniques create a permeable barrier whereby

¹ 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>

² See *id.* (“After an arrest was made, agents then pretended that their investigation began with the traffic stop, not with the SOD tip, the former agent said. The training document reviewed by Reuters refers to this process as ‘parallel construction.’”)

³ See *id.*

⁴ *Id.*

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information collected under national security authorities can secretly become the basis for domestic prosecution. Successful masking, in turn, renders both the information sharing and the process of disguising investigations’ origins uncontestable. Authorities’ use of information collected on standards more relaxed than the Fourth Amendment requires and then using them for prosecutions without providing notice to defendants eliminates defendants’ opportunity to challenge the legality of that collection and its use against them. The inability to challenge evidence that is masked in such a deliberate manner is of particular concern to the United States Commission on Civil Rights (USCCR) because law enforcement principally uses it in the context of criminal investigations disproportionately targeted at communities of color.

II. The United States Commission on Civil Rights should investigate Parallel Construction

Parallel Construction is designed to mask tips coming from sensitive sources, such as the surveilling technologies, the legal entities conducting the surveillance, and the participation of foreign partners operating under different legal frameworks. The goal is to keep secret, even from the court, the original source of incriminating evidence. Thus, this practice requires further investigation to ensure that putative criminals are protected against exploitative law enforcement investigations, especially in the context of communities already subject to disproportionate law enforcement targeting.

a. Parallel Construction has short-circuited judicial review and the adversarial process in criminal prosecutions

Parallel Construction is designed to evade detection by concealing or creating an alternative history of how an investigation began, even if the true history would otherwise reveal

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that the prosecution is improper. This is precisely why further, independent examination of Parallel Construction is necessary.

In some cases, law enforcement is expressly instructed to lie about how the government obtained information. Guidance on one mass surveillance program, named Hemisphere, specifically instructs agents to conceal when evidence was acquired through it.⁵ The guidance states that “[a]ll requestors are instructed to never refer to Hemisphere in any official document. If there is no alternative to referencing a Hemisphere request, then the results should be referenced as information obtained from an AT&T subpoena.”⁶ This comports with the statements of Robert Litt, General Counsel to the Office of the Director of National Intelligence, during a panel discussion in 2015, when he argued it would be legal for the Intelligence Community to use Parallel Construction to mask evidence that originated through bulk collection.⁷ Litt defined Parallel Construction in the context of confidential informants and specifically argued that the prosecution has the discretion to determine whether evidence is sufficiently attenuated from a tip by, for instance, the NSA, and in turn whether the court or defendant must be notified.⁸ He proceeded to refer to this as standard fruit of the poisonous tree analysis.⁹ When asked if the standards around the fruit of the poisonous tree doctrine apply in the context of bulk surveillance, Litt responded “Why wouldn’t they?” and confirmed that at least

⁵ See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, THE NEW YORK TIMES, Oct. 16, 2013, <http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html>

⁶ *Synopsis of the Hemisphere Project*, THE NEW YORK TIMES, Sep. 1, 2013, <http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html#p12>

⁷ Government Surveillance and Transparency, (2015), available at <http://www.c-span.org/video/?325913-1/discussion-surveillance-transparency> at 1:05:05.

⁸ See *id.*

⁹ See *id.*

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“sometimes” neither the judge nor the defendant knows of the existence of the tip – much less the identity of the entity providing it.¹⁰ He further described such determinations as “routine.”¹¹

Conversely, sometimes Parallel Construction entails explicit concealment rather than a falsified backstory. In one case in Baltimore, a police officer refused to reveal how the Defendant was tracked, subsequently resulting in the judge threatening him with contempt of court.¹² In response, the officer cited a “nondisclosure agreement” with the FBI.¹³ Rather than reveal how the evidence was collected, according to The Baltimore Sun, the prosecution “withdrew key evidence,” including the Defendant’s cell phone, thereby inhibiting the defense from further challenging the constitutionality or legality of the evidence’s collection.¹⁴ While the officer denied using a StingRay, which is a proprietary name for a cell site simulator, public records requests reveal that to acquire a StingRay, as the Baltimore Police Department did in 2009, a law enforcement agency must sign a nondisclosure agreement with the FBI.¹⁵ Cell site simulators mimic the cell towers used by all nearby cell phones and, in turn, become intermediaries between cell phones and cell towers -- thereby allowing law enforcement to intercept and track any cell phone that connects to the cell site simulator. This is the most transparent bound of Parallel Construction -- where law enforcement simply conceals

¹⁰ *Id.*

¹¹ *Id.*

¹² See Justin Fenton, *Judge threatens detective with contempt for declining to reveal cellphone tracking methods*, THE BALTIMORE SUN, Nov. 17, 2014, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-officer-contempt-20141117-story.html>

¹³ See *id.*

¹⁴ *Id.*

¹⁵ See *Re: Acquisition of Wireless Collection Equipment/Technology and Non-Disclosure Obligations*, Dec. 12, 2012, https://muckrock.s3.amazonaws.com/foia_files/nda_redacted.pdf; see also MuckRock, *Before deploying StingRays, police departments must sign nondisclosure agreement with FBI*, BEACON, Sep. 22, 2014, <https://www.beaconreader.com/muckrock/before-deploying-stingrays-police-departments-must-sign-nondisclosure-agreement-with-fbi>

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investigative history, but does not appear to recreate it or mislead the defendant or court.

However, deception may not even be deliberate on the part of the prosecutors. In at least one instance, agents lied to a prosecutor about the origin of evidence:

In a Florida drug case he was handling, the prosecutor said, a DEA agent told him the investigation of a U.S. citizen began with a tip from an informant. When the prosecutor pressed for more information, he said, a DEA supervisor intervened and revealed that the tip had actually come through the SOD and from an NSA intercept. The prosecutor never filed charges in the case because he lost confidence in the investigation, he said.¹⁶

In a narrow set of cases, judges may actually review applications for the collection or admission of evidence derived from controversial surveillance techniques. However, judges may still lack the ability to robustly review these techniques given other courts’ similar proceedings being sealed, unclear and outdated law governing such surveillance, differences between the application and the surveillance that is ultimately conducted, and a lack of adversarial proceedings.¹⁷

The above cases make clear that Parallel Construction short-circuits judicial review and the adversarial process. USCCR must investigate the practice.

b. Parallel Construction disproportionately affects communities of color

Parallel Construction is most likely to be used in cases where a tip comes from an undercover or secret source, which in turn strongly suggests that Parallel Construction is most

¹⁶ <http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805>

¹⁷ See Jennifer Valentino-Devries, *Sealed Court Files Obscure Rise in Electronic Surveillance*, THE WALL STREET JOURNAL, June 2, 2014, <http://www.wsj.com/articles/sealed-court-files-obscure-rise-in-electronic-surveillance-1401761770>, e.g. “‘Congress can’t regulate what it can’t see,’ says Stephen Smith, a Houston magistrate judge who has written extensively on electronic surveillance. ‘In fact, it’s difficult for me to find out what’s going on in another district if the case is sealed.’”

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likely to be used with drug and international terrorism investigations -- the intersections of intelligence and prosecution. This is supported both by the cases and programs discussed above, as well as by how information masked by Parallel Construction passes through the government.¹⁸ For instance, the DEA is the parent agency of SOD -- and also ran at least one bulk telephone metadata collection program for decades.¹⁹ Similarly, the agencies connected to SOD also suggest that Parallel Construction’s nexuses are drugs and terrorism.²⁰ As an example, the NSA has no prosecutorial arm, is primarily focused on intelligence collection, but nonetheless is part of SOD’s information sharing system.²¹

Drug enforcement and terrorism investigations are in turn loci of unequal targeting of people of color. Drug law enforcement has long been known as a hotbed of unequal and racially biased activity.²² This is no different in the post-9/11 era of mass surveillance.²³ For instance, while marijuana usage is similar between white and black populations, according to research by the American Civil Liberties Union, “Blacks are 3.73 times as likely to be arrested for marijuana possession.”²⁴ Meanwhile, leaked information about mass surveillance points to a system with decided racial bias. As reported by The Intercept, Dearborn, Michigan, with only 96,000 residents, is the second-most represented city on the watch list of “known or suspected terrorists”

¹⁸ See Shiffman, *supra* note 1.

¹⁹ Brad Heath, *U.S. Secretly Tracked Billions of Calls for Decades*, USA TODAY, Apr. 8, 2015, <http://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/>

²⁰ See Shiffman, *supra* note 1.

²¹ See *id.*

²² See e.g., American Civil Liberties Union, *The Drug War Is the New Jim Crow*, Jul./Aug. 2001, available at <https://www.aclu.org/drug-war-new-jim-crow>

²³ See e.g., Nick Wing, *Marijuana Prohibition Was Racist From the Start. Not Much Has Changed.*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html

²⁴ American Civil Liberties Union, *The War on Marijuana in Black and White*, June 2013, available at <https://www.aclu.org/report/war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white>

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-- second only to New York City.²⁵ Despite this, Dawud Walid, executive director of the Michigan chapter of the Council on American-Islamic Relations, told *The Intercept*: “To my knowledge, there have been no Muslims in Dearborn who have committed acts of terrorism against our country.”²⁶ However, 40 percent of Dearborn’s population is of Arab descent.²⁷ Indeed, this targeting was stated explicitly by an FBI field office in Detroit, which, in seeking permission to conduct even more surveillance in Michigan, wrote that “[b]ecause Michigan has large Middle-Eastern and Muslim population[sic], it is prime territory for attempted radicalization and recruitment by these terrorist groups.”²⁸ Local law enforcement targeting also continues, and threatens to infringe on the civil rights of communities of color through Parallel Construction. The NYPD operated an infamous “Demographic Unit,” which, according to *The New York Times*, “dispatched plainclothes detectives into Muslim neighborhoods to eavesdrop on conversations and built detailed files on where people ate, prayed and shopped.”²⁹ Today, according to the Brennan Center, “NYPD officers are still infiltrating mosques and other community spaces, coercing informants to spy on their own communities, and adhering to a misguided theory of ‘conveyor-belt radicalization’ to identify potential terrorists.”³⁰ The FBI has

²⁵ See Jeremy Scahill & Ryan Devereaux, *Watch Commander: Barack Obama’s Secret Terrorist-Tracking System, by the Numbers*, Aug. 5, 2014, *THE INTERCEPT*, <https://theintercept.com/2014/08/05/watch-commander/>

²⁶ *Id.*

²⁷ *Id.*

²⁸ Federal Bureau of Investigation, *Case ID #: 806H-DE-104073*, July 6, 2009, available at <https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>; see also Jerry Markon, *ACLU says FBI uses racial profiling against Muslims, other minorities*, Oct 20, 2011, *THE WASHINGTON POST*, https://www.washingtonpost.com/politics/aclu-says-fbi-uses-racial-profiling-against-muslims-other-minorities/2011/10/20/gIQAN3Ob1L_story.html

²⁹ Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, Apr. 15, 2014, *THE NEW YORK TIMES*, <http://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html>

³⁰ Meghan Koushik, *NYPD Targeting of New York Muslims Continues*, Aug. 20, 2014, *BRENNAN CENTER FOR JUSTICE BLOG*, <https://www.brennancenter.org/blog/nypd-targeting-new-york-muslims-continues>

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similar programs that disproportionately target Latinos and Muslims.³¹ Requesters can provide more research on the racial biases that are part and parcel with drug and terrorist investigations upon request by the Commission.

The Reuters report revealed that the SOD’s role as a clearinghouse is profound and poses a unique risk to frequently targeted communities:

Today, the SOD offers at least three services to federal, state and local law enforcement agents: coordinating international investigations such as the Bout case; distributing tips from overseas NSA intercepts, informants, foreign law enforcement partners and domestic wiretaps; and circulating tips from a massive database known as DICE.

The DICE database contains about 1 billion records, the senior DEA officials said. The majority of the records consist of phone log and Internet data gathered legally by the DEA through subpoenas, arrests and search warrants nationwide.³²

The potential impact of these programs, in particular on already targeted communities, would be unprecedented.

The use of Parallel Construction therefore threatens to critically exacerbate drug and terrorist investigations’ existing, disproportionate impact on communities of color by incentivizing mass, invasive surveillance and adding a fundamentally different set of legal rules to investigations and prosecutions.

c. There is national uncertainty, confusion, and alarm regarding Parallel Construction

³¹ See Marcy Wheeler, *FBI in Detroit Profiles Muslims and Arabs in Spite of 12 Whites Engaged in Terrorism*, Oct. 21, 2011, EMPTYWHEEL, <https://www.emptywheel.net/2011/10/21/fbi-in-detroit-profiles-muslims-and-arabs-in-spite-of-12-whites-engaged-in-terrorism/>

³² See Shiffman, *supra* note 1.

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In the years since the Edward Snowden leaks, few processes have remained as opaque to the public as Parallel Construction and other intelligence sharing activities. Because of how little is known, Parallel Construction’s relationship to intelligence collected by the Intelligence Community and to other sharing practices is unknown. This has crippled the public’s ability to engage the issue.

In the initial Reuters report, perceptions of the program were in diametric opposition depending on the observers’ proximity to the programs. One Harvard Law professor and former federal judge, Nancy Gertner, told Reuters that she had “never heard of anything like this at all,” and that “[i]t sounds like they are phonying up investigations.”³³ James Felman, a vice chairman of the criminal justice section of the American Bar Association similarly called it “outrageous” and “indefensible.”³⁴ Meanwhile, one anonymous senior DEA official told Reuters that “Parallel [C]onstruction is a law enforcement technique we use everyday,” and that “[i]t’s decades old, a bedrock concept.”³⁵ However, “the Department of Justice, which oversees the DEA, declined to comment.”³⁶

Indeed, this confusion continues to this day, and is inhibiting the ability of the public to have critical conversations about civil liberties and Parallel Construction’s impact on Americans’ civil rights. In August 2014, The Intercept published a lengthy investigation into ICREACH, yet another intelligence-sharing program run by the NSA, with participation from both the DEA and

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

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FBI.³⁷ Reporter Ryan Gallagher found continuing evidence of this confusion and concern:

A key question, according to several experts consulted by The Intercept, is whether the FBI, DEA or other domestic agencies have used their access to ICREACH to secretly trigger investigations of Americans through a controversial process known as ‘parallel construction.’³⁸

Further, Parallel Construction makes even after-the-fact review of law enforcement investigations extremely difficult. This became a point of contention during one Supreme Court case focused on Section 702 of the FISA Amendments Act, *Clapper v. Amnesty International USA*. There, petitioners sought to challenge mass government surveillance conducted under Section 702, codified at 50 USC § 1881a, but the Supreme Court ultimately held, 5-4, that they lacked standing due to the petitioners’ reliance on a “speculative chain of possibilities that does not establish that their potential injury is certainly impending or is fairly traceable to § 1881a.”³⁹ However, this decision was informed by the Solicitor General’s assertion that other petitioners would satisfy standing -- namely defendants against whom Section 702 evidence would be used at trial, which, he argued, would come with notification. Indeed, this was expressly stated in the majority opinion: “if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition.”⁴⁰ However, upon reviewing his own claims, the Solicitor General later learned that at least national security prosecutors were not giving such notice, and since then an internal debate within the

³⁷ See Ryan Gallagher, *The Surveillance Engine: How the NSA Built Its Own Secret Google*, THE INTERCEPT, Aug. 25, 2014, <https://firstlook.org/theintercept/2014/08/25/icreach-nsa-cia-secret-google-crisscross-proton/>

³⁸ *Id.*

³⁹ *Clapper v. Amnesty Int’l*, 133 S. Ct. 1140, 1141 (2013).

⁴⁰ *Id.* at 1154.

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DOJ about how much notice is necessary continues.⁴¹ This attracted the attention of three Senators, who wrote the Solicitor General, urging him to correct the record.⁴² However, even expanded notice from the Department of Justice would apply specifically to evidence that the DOJ determines is derived from Section 702 surveillance -- not necessarily the evidence that has a trail recreated via Parallel Construction, where collection was conducted pursuant to other authorities, or where the DOJ has, on its own and without judicial review, determined the evidence is too far attenuated to be considered derived from the surveillance.

The public and the courts cannot adequately understand the impact of Parallel Construction on communities of color without a clearer understanding of how collected intelligence is ultimately shared among domestic law enforcement and national security agencies and how it is in turn utilized in the courts. But if this technique is targeted at crimes used by law enforcement to disproportionately target communities of color, it threatens to impose a different legal standard with dire consequences on them.

III. Conclusion

This request is principally concerned with discovering facts about investigative and prosecutorial techniques predisposed to ethnic and racial bias. One former federal prosecutor

⁴¹ See Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, THE NEW YORK TIMES, Sep. 1, 2013, <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html>

⁴² See Ron Wyden et al., *Udall, Wyden, Heinrich Urge Solicitor General to Set Record Straight on Misrepresentations to U.S. Supreme Court in Clapper v. Amnesty*, Nov. 21, 2013, <https://www.wyden.senate.gov/news/press-releases/udall-wyden-heinrich-urge-solicitor-general-to-set-record-straight-on-misrepresentations-to-us-supreme-court-in-clapper-v-amnesty> (“In *Clapper v. Amnesty*, the government represented to the Court that it provides notice to a defendant of evidence obtained or derived under the FAA, a statement that was then incorporated into the majority opinion in the case. It has become clear, however, that this was not actually the policy practiced in the Justice Department and that the government misrepresented its policy and practice to the Court.”).

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described the illusory nature of these programs’ legal authorities to Reuters, referencing the alleged uses of shared information in domestic drug prosecutions: ““You can’t game the system,” said former federal prosecutor Henry E. Hockeimer Jr. ‘You can’t create this subterfuge. These are drug crimes, not national security cases. If you don’t draw the line here, where do you draw it?’”⁴³ What the public does know about Parallel Construction confirms that it involves sharing, at a minimum, across the CIA, DEA, FBI, and NSA, that said sharing results in prosecutorial uses that present grave threats to defendants’ Constitutional rights, and that it is principally used in the context of drugs, gangs, and terrorism investigations -- all of which disproportionately target communities of color.⁴⁴

For the reasons described above, it is imperative that the USCCR investigate and publish more information about Parallel Construction.

Respectfully submitted,



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American-Arab Anti-Discrimination Committee
Arab American Institute
Bill of Rights Defense Committee
Council on American-Islamic Relations
Defending Dissent Foundation
Demand Progress
Fight for the Future

⁴³ *Id.*

⁴⁴ *See id.*

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Government Accountability Project
National Association of Criminal Defense Lawyers
National Security Counselors
OpenTheGovernment.org
Restore the Fourth
X-Lab