No. 13-30077

Filed: September 12, 2014
Before: Diarmuid F. O'Scannlain, Andrew J. Kleinfeld,
and Marsha S. Berzon, Circuit Judges

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL ALLAN DREYER,

Defendant-Appellant.

On Appeal from United States District Court
Western District of Washington at Seattle
District Court No. CR12-119 MJP

The Honorable Marsha J. Pechman, United States District Judge

---

**DEFENDANT-APPELLANT'S RESPONSE
TO SUA SPONTE CALL FOR REHEARING EN BANC**

Erik B. Levin
Law Office of Erik B. Levin
2001 Stuart Street
Berkeley, California 94703
Tel. (510) 978-4778
Fax (510) 978-4422
erik@erikblevin.com

Table of Contents

Table of Authorities ii

I. INTRODUCTION 1

II. REASONS FOR DENYING REHEARING EN BANC 3

A. The panel correctly concluded that the NCIS violated the Posse Comitatus Act restrictions by directly enforcing civilian law. 3

B. The panel correctly concluded that suppression was necessary to deter future violations of the PCA prohibitions. 7

C. The government has forfeited its argument that the exclusionary rules does not apply to PCA violations and the argument has no merit...11

III. CONCLUSION...18

CERTIFICATE OF COMPLIANCE 19

CERTIFICATE OF SERVICE 20

Table of Authorities

Cases

Applewhite v. United States Air Force, 995 F.2d 997 (10th Cir. 1993) 9

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 13

Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986) (en banc),
aff'd, 485 U.S. 264 (1988)..15

Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.,
467 U.S. 837 (1984) 6

Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.,
527 U.S. 308 (1999)..11

Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990)..8

Katz v. United States, 389 U.S. 347 (1967) 16

Laird v. Tatum, 408 U.S. 1 (1972).. 12, 15, 16, 17

Lee v. Florida, 392 U.S. 378 (1968) 17

Payton v. New York, 445 U.S. 573 (1980) 13

People v. Burden, 288 N.W.2d 392 (Mich. App. 1979),
rev'd on other grounds, 303 N.W.2d 444 (Mich. 1981) 9

People v. Tyler, 854 P.2d 1366 (Colo. App. 1993),
rev'd on other grounds, 874 P.2d 1037 (Colo. 1994) 9

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) 16

State v. Pattioay, 896 P.2d 911 (Haw. 1995)...9

Taylor v. State, 645 P.2d 522 (Okla. Crim. App. 1982) 9

United States v. Abdi, 463 F.3d 547 (6th Cir. 2006) 16

United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988)..8

United States v. Banks, 539 F.2d 14 (9th Cir. 1976) 9

United States v. Chon, 210 F.3d 990 (9th Cir. 2000) .... passim

United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985).......................................17

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

United States v. Grubbs, 547 U.S. 90 (2006) 11, 12

United States v. Hitchcock, 286 F.3d 1064 (9th Cir. 2002)......................................7

United States v. Holloway, 531 Fed. Appx. 582 (6th Cir. 2013)....................... 7, 10

United States v. Jones, 565 U.S. __, 132 S.Ct. 945 (2012) 11

United States v. Khan, 35 F.3d 426 (9th Cir. 1994) 4, 8

United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000)....................16

United States v. Montoya, 45 F.3d 1286 (9th Cir. 1995)...11

United States v. Ortiz, __ F.3d __, 2015 WL 294305 (9th Cir. Jan. 23, 2015)......11

United States v. Roberts, 779 F.2d 565 (9th Cir. 1986)..8

United States v. Thompson, 30 M.J. 570 (1990)...9

United States v. Walden, 490 F.2d 372 (4th Cir. 1974)................................ 3, 8, 18

United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979)... 8, 18

United States v. Wright, 215 F.3d 1020 (9th Cir. 2000) 11

United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991)...3

Wilson v. Arkansas, 514 U.S. 927 (1995) 13

Statutes and Constitutions

10 U.S.C. § 375 .... passim

10 U.S.C. §§ 371-82 4

18 U.S.C. § 1385 .... 3, 4, 20, 21

18 U.S.C. § 2252(a)(2) 12

18 U.S.C. § 2252(b)(1) 12

U.S. Const. art 1, § 8 17

U.S. Const. art II, § 2 17

U.S. Const. amend. III 14, 18, 19

U.S. Const. amend. IV 14, 15, 19

U.S. Const. amend. V 18

Rules and Regulations

32 C.F.R. § 182 .... 4, 7

32 C.F.R. § 182.1(b) 7

32 C.F.R. § 182.2(e) 7

32 C.F.R. § 182.3 7

32 C.F.R. § 182.4(b) 7

DoD Directive 5525.5 (Jan. 15, 1986) 4, 5

DoD Instruction 3025.21 (Feb. 27, 2013) 4, 5

SECNAVINST 5430.107 .... 5, 6

SECNAVINST 5820.7B (Mar. 28, 1988) 4, 5

SECNAVINST 5820.7C (Jan. 26, 2006) 4, 5

Fed.R.App.P. 35(a)(1)-(2) 3

Fed.R.Crim.P. 12(b)(3)(C), (c)(3) 13

Other Authorities

58 Fed. Reg. 25776 (Apr. 28, 1993) 4

70 Fed. Reg. 21828 (Apr. 12, 2013) 7

47 Fed. Reg. 14899 (Apr. 7, 1982) 4

H.R. Rep. No. 97-71, Part 2, at 5, 9th Cong., 1st Sess. (June 12, 1981) 21

Act of June 18, 1878, 20 Stat. 152 3

1 Annals of Congress 751-3 (1789) 18

Articles of Confederation art. VI § 4 (1781) 17

The Declaration of Independence (U.S. 1776) 16, 17

David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1 (1971) 18

David E. Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 Indiana L. Rev. 458 (1974) 15

Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 Yale L. & Pol'y Rev. 383 (2003) 3, 16

I. INTRODUCTION

The investigation by the Naval Criminal Investigation Service (NCIS) into child pornography on a civilian peer-to-peer file sharing network is an unprecedented intrusion of the military into civilian law enforcement. The NCIS routinely disregarded the prohibition against the military's direct enforcement of civilian law by targeting all available computers within the civilian file sharing network, without any reasonable likelihood of a Navy affiliation. *United States v. Dreyer*, 767 F.3d 826, 835-6 (9th Cir. 2014). The Navy's pattern of violations and its position that NCIS agents could enforce civilian law – despite controlling case law from this Court and clear Department of Defense regulations to the contrary – compelled the panel to conclude that suppression was needed to prevent future violations.

The government has correctly abandoned many of the arguments it presented to the panel below, including its claim that NCIS agents are exempt from the Posse Comitatus Act (PCA) restrictions. This Court rejected an identical argument in *United States v. Chon*, 210 F.3d 990 (9th Cir. 2000), and the panel below properly concluded that, despite administrative changes within the NCIS, it remains an arm of the Navy, subject to the same limitations that bind all branches of the military.

The government's Brief in Response to December 16, 2014, Order of the Court [Dkt. 51] focuses on a new argument—which it concedes it forfeited below—that the exclusionary rule does not apply to PCA violations no matter how egregious or systematic. This Court should decline to consider the forfeited argument because the government concedes there is no good cause for its failure to raise it in the district court and before the panel below.

The government's forfeited argument also lacks merit. It relies on the false premise that the prohibition against direct military participation in civilian law enforcement is nothing more than a statutory or regulatory prohibition. The panel below rejected this view when it explained that the PCA restrictions have deep roots in American history and reflect "long-standing American concerns about the use of military to keep the civil peace," *Dreyer*, 767 F.3d at 830 n.7, 835 (citations omitted), expressed in this country's founding documents, including the Constitution. The PCA restrictions implicate important constitutional values that warrant application of the exclusionary rule under Supreme Court and circuit law.

The Court should decline en banc review because the panel decision to exclude evidence obtained in violation of the PCA restrictions is consistent with decisions from the Supreme Court and from this and other circuits and because the proceeding does involve a question of "exceptional importance" since PCA violations of this magnitude are extremely rare. *See* Fed.R.App.P. 35(a)(1)-(2).

II. REASONS FOR DENYING REHEARING EN BANC

A. The panel correctly concluded that the NCIS violated the Posse Comitatus Act restrictions by directly enforcing civilian law.

The Posse Comitatus Act, 20 Stat. 152 (June 18, 1878), as amended and codified at 18 U.S.C. § 1385, was enacted as a rider to an Army Appropriations Bill[1] in response to the use of federal troops to occupy the South during Reconstruction, and particularly during the hotly-contested 1876 presidential election.[2] The PCA criminalizes using "any part the Army or Air Force as a posse comitatus or otherwise to execute the laws" except where "expressly authorized by the Constitution or an act of Congress[.]" 18 U.S.C. § 1385. In 1981, Congress amended the Posse Comitatus Act to permit certain limited military assistance in the war on drugs. *See* 10 U.S.C. §§ 371-8. Congress also directed the Secretary of Defense to promulgate regulations barring direct participation in civilian law enforcement by any member of the Army, Navy, Air Force, or Marine Corps.[3] 10 U.S.C. § 375. Both the Department of Defense (DoD) and the Navy issued rules

---

[1]*See United States v. Walden*, 490 F.2d 372, 374 (4th Cir. 1974). Congress added the Air Force to the statute in 1956, consistent with the creation of that new branch of the military. *See United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (citations omitted).

[2]*See* Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 Yale L. & Pol'y Rev. 383, 394 (2003).

[3]Subject to exceptions inapplicable here. *See* 10 U.S.C. §§ 372-4, 379-82.

extending the PCA restrictions to Department of Navy personnel.[4] *See Dreyer*, 767 F.3d at 830 (citing *Chon*, 210 F.3d at 993; and *United States v. Khan*, 35 F.3d 426, 431 (9th Cir. 1994)).

The panel below unanimously held that the NCIS violated the PCA restrictions when it targeted civilian filing sharing networks throughout the state of Washington. *See Dreyer*, 767 F.3d at 835; *Id.* at 837 (concurrence); *Id*. at 839 (partial concurrence and partial dissent). Although the government initially challenged several aspects of this ruling, in tacit recognition that the decision was correct, the government has now abandoned its prior claims.

The government no longer contends that NCIS agents are exempt from the PCA restrictions, and rightly so. This Court previously rejected that argument in *United States v. Chon*, 210 F.3d 990.[5] *Chon* concluded that NCIS agents are bound

---

[4]*See* DoD Directive 5525.5, Enclosure 4.3 (Jan. 15, 1986); SECNAVINST 5820.7B (Mar. 28, 1988). The Department of Defense replaced DoD Directive 5525.5 with DoD Instruction 3025.21 (Feb. 27, 2013) and the Navy replaced SECNAVINST 5820.7B with 5820.7C (Jan. 26, 2006).

The regulations mandated by 10 U.S.C. § 375 also appeared in parallel form in the Code of Federal Regulations, 47 Fed. Reg. 14899 (Apr. 7, 1982), codified at, 32 CFR pt. 213, removed, 58 Fed. Reg. 25776 (Apr. 28, 1993). The current regulations are at 32 C.F.R. § 182 (Apr. 12, 2013).

[5]In *Chon*, the government based these arguments on SECNAVINST 5820.7B(9)(b)(3) and DoD Directive 5525.5, Enclosure 4.2.3. *Chon*, 210 F.3d at 993. The Department of Defense and Navy later superseded the directives. *See* Note 4, *supra*. The relevant provisions remain unchanged. *Compare* DoD Directive 5525.5, Enclosure 4.2.3 *with* DoD Instruction 3025.21, Enclosure 3(2); *and compare* SECNAVINST 5820.7B(9)(b)(3) *with* SECNAVINST 5820.7C(8)(e)(3).

by the PCA restrictions because they operate "under the auspices of the military" and because of the "direct reporting relationship" between the NCIS Director and the Chief of Naval Operations, a military officer. *Id.* at 993-4. The panel below saw no reason to revisit *Chon* because "the same status-based exemptions are maintained in the regulations and policies today." *Dreyer*, 767 F.3d at 831.

The panel also unanimously and correctly rejected that government's argument that "the 'reporting relationship' between the NCIS director and the Chief of Naval Operations 'was eliminated in 2005' when the Secretary of the Navy issued instruction 5430.107." *Dreyer*, 767 F.3d at 826. The panel observed that under Instruction 5430.107(5)(a) the NCIS director is a Special Assistant for Naval Investigative Matters and Security to the Chief of Naval Operations and NCIS strategy and operations are overseen by a Board of Directors which includes several senior military officers. *See* SECNAVINST 5430.107(5)(c) (establishing Board of Directors including the Vice Chief of Naval Operations and the Assistant Commandant of the Marine Corps). For these reasons, the panel concluded that the NCIS "continues to be a unit of, and accountable to, the Navy" *Dreyer*, 767 F.3d at 831 (quoting *Chon*, 210 F.3d at 994).

Moreover, as the panel observed, the government's argument the civilian employee are exempt from the PCA prohibitions is foreclosed by recently-enacted

Department of Defense regulations, mandated by 10 U.S.C. § 375,[6] that declare all DoD personnel (including civilian employees) bound by the PCA restrictions. 32 C.F.R. §§ 182.4(b), 182.2(e) (regulation applies to "civilian employees of the DoD"), 182.3 (DoD personnel includes "civilian employees"). To the extent there was any ambiguity whether 10 U.S.C. § 375 applied to civilian Navy employees, *see* Govt. Pet. Reh'g. [Dkt. 45] at 8, these regulations remove any doubt and are entitled to substantial deference. *See Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-5 (1984).

The government has also wisely abandoned its previous claim that investigating child pornography serves an independent military purpose. The panel unanimously rejected this argument citing to a "lack of any reasonable connection between the military and the crimes [NCIS] Agent Logan was investigating" *Dreyer*, 767 F.3d at 835. The panel found that accepting the government's argument "would render the PCA's restrictions meaningless[.]" *Id.* at 834.

Finally, the government has dropped its previous argument that NCIS surveillance of civilian filing sharing networks was merely indirect assistance to civilian law enforcement. The panel unanimously rejected this argument as inconsistent with DoD regulations and contrary to test for direct assistance set forth

[6]*See* Defense Support of Civilian Law Enforcement Agencies, 70 Fed. Reg. 21828 (Apr. 12, 2013) (codified at 32 C.F.R. § 182); 32 C.F.R. § 182.1(b) (Section 182 "Prescribes the regulation *required* by 10 U.S.C. § 375.") (emphasis added).

in *United States v. Hitchcock,* 286 F.3d 1064 (9th Cir. 2002). *Dreyer*, 767 F.3d at 832-3.

B. The panel correctly concluded that suppression was necessary to deter future violations of the PCA prohibitions.

The record demonstrated that NCIS agents "routinely carry out broad surveillance activities that violate the restrictions on military enforcement of civilian law." *Dreyer*, 767 F.3d at 836. NCIS Agent Logan testified he was assigned to conduct child pornography investigations and that it was "standard practice to 'monitor[ ] any computer IP address within a specific geographic location,'" and not to isolate military service members, or military or government computers. He had conducted at least twenty other child pornography investigations. *Id.* at 836; ER 360-1. And Logan did not act alone. He conducted the investigations along with other NCIS agents. *Dreyer*, 767 F.3d at 836; ER 337. The panel also took notice of a 2008 NCIS investigation that similarly targeted civilians. *See Id.* at 836, n.14 (citing *United States v. Holloway*, 531 Fed. Appx. 582 (6th Cir. 2013)).

The panel majority concluded that based on the "extraordinary nature" of the NCIS's "'widespread and repeated violations'" "'a need to deter future violations is demonstrated.'" *Dreyer*, 767 F.3d at 835-6 (quoting *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986), superseded by statute on other grounds as recognized in *United States v. Khan*, 35 F.3d 426, 432 n. 7 (9th Cir. 1994)). The

panel's conclusion was consistent with the rule from several other circuits. *See Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir. 1990) (per curiam) (noting that "even if the petitioner could establish that the evidence was seized in violation of § 375, he has not alleged sufficiently widespread violations to justify the suppression of evidence in this instance."); *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988) (per curiam) ("aggravated or repeated instance of violations" of the Posse Comitatus Act could justify application of the exclusionary rule.) (citation omitted); *United States v. Walden,* 490 F.2d 372, 377 (4th Cir. 1974) (declining to suppress due to lack of "any other violation, let alone widespread or repeated violations.") *Cf. United States v. Wolffs,* 594 F.2d 77, 85 (5th Cir. 1979) ("If this Court should be confronted in the future with widespread and repeated violations of the Posse Comitatus Act an exclusionary rule can be fashioned at that time").

While the government claims this case is an outlier as the only federal court decision[7] to have suppressed based on a PCA violation, as the unanimous opinion of the panel noted, what truly sets this case apart was the "lack of any reasonable

[7]Several state courts have suppressed evidence obtained in violation of the PCA. *See Dreyer*, 767 F.3d at 837, n.15 (citing *State v. Pattioay*, 896 P.2d 911, 912-14 (Haw. 1995); and *People v. Tyler*, 854 P.2d 1366 (Colo. App. 1993), rev'd on other grounds, 874 P.2d 1037 (Colo. 1994); and *Taylor v. State*, 645 P.2d 522 (Okla. Crim. App. 1982)); *People v. Burden*, 288 N.W.2d 392 (Mich. App. 1979), rev'd on other grounds, 303 N.W.2d 444 (Mich. 1981).

connection between the military and the crime that Agent Logan was investigating[.]" *Dreyer*, 767 F.3d at 835.[8]

The panel criticized the NCIS Agent's and the government's position that the "military may monitor for criminal activity all the computers anywhere in any state with a military base or installation, regardless of how likely or unlikely the computers are to be associated with a member of the military" as demonstrating "a profound lack of regard for the important limitations on the role of the military in our civilian society" particularly in light of "prior cautions by our court and others that military personnel, including NCIS agents, may not enforce the civilian laws." *Dreyer*, 767 F.3d at 836-7.

In its Petition for Rehearing [Dkt. 45], the government cites to a single unpublished decision that, it contends, gave the NCIS a good faith belief that it could directly participate in civil law enforcement. *Id.* at 10 (citing *United States v. Holloway*, 531 Fed. Appx. 582 (6th Cir. 2013)). The government fails to articulate how *Holloway* provides a good faith basis for the NCIS investigation since it was issued two years *after* the investigation here. Moreover, *Holloway* does not even

[8]In fact, the overwhelming majority of PCA cases involve proper military investigations that ultimately lead to civilian targets. *See, e.g., Chon,* 210 F.3d at 994 (protection of military equipment); *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (drug transactions by active duty military personnel); *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976) (on-base violations of civil law); *United States v. Thompson*, 30 M.J. 570, 574 (1990) (theft of military property); *See Dreyer*, 767 F.3d at 835 (citing additional cases).

support the NCIS's purported belief that it was exempt from the PCA restrictions (and it did not even concern the use of the RoundUp, as the government now claims). *Holloway* held that the PCA restrictions did apply to the NCIS, but that the investigation did not violate the prohibitions because the NCIS did not participate directly in the seizure of evidence. 531 Fed. Appx. at 583. In this case, NCIS Agent Logan *did* seize evidence, which he testified about at trial and which formed the basis of Count One of the Indictment,[9] and led to the seizure of the evidence underlying Count Two. ER 482-3. He also caused to be issued an administrative subpoena for internet subscriber data. *Dreyer*, 767 F.3d at 828. It was for these reasons, among others, that the panel below unanimously held that the NCIS directly enforced civilian law. *Id.* at 832-3.

Finally, the government argues that exclusion is not needed since merely identifying the violation is enough to deter any future investigations of this type. Govt. Pet. Reh'g [Dkt. 45] at 16. Experience teaches otherwise. The NCIS's disregard for *United States v. Chon*, 201 F.3d 990, and Navy and DoD regulations, demonstrates there is a need for suppression in this case to prevent future violations.

///

---

[9]Which resulted in a 15-year mandatory minimum sentence. *See* 18 U.S.C. § 2252(a)(2) and (b)(1).

C. The government has forfeited its argument that the exclusionary rules does not apply to PCA violations and the argument has no merit.

The government argues that the exclusionary rule does not apply to PCA violations, but concedes that it forfeited the argument below and offers no reason for its omission. Govt. Pet. Reh'g [Dkt. 45] at 12. The Court should decline to consider the government's forfeited argument. *See, e.g., United States v. Ortiz,* __ F.3d __, 2015 WL 294305, at *2 (9th Cir. Jan. 23, 2015) ("we do not reach this argument as Ortiz waived it by failing to raise it before the district court and failing to show good cause for its omission during trial in his Opening Brief.") (citing Fed.R.Crim.P. 12(b)(3)(C), (c)(3); *United States v. Wright,* 215 F.3d 1020, 1026 (9th Cir. 2000); and *United States v. Montoya,* 45 F.3d 1286, 1300 (9th Cir. 1995) (issues not raised and argued in the opening brief are deemed waived)). The Supreme Court also frequently refuses to consider forfeited arguments. *See, e.g., United States v. Jones*, 565 U.S. __, 132 S.Ct. 945, 954 (2012); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n. 3 (1999).

The government relies on *United States v. Grubbs*, 547 U.S. 90 (2006), to argue that consideration of its forfeited argument is appropriate, but *Grubbs* is distinguishable. In *Grubbs*, the Court considered an "antecedent question" neither party had raised: "whether anticipatory search warrants are categorically unconstitutional." *Id.* at 94. Here, the remedy of exclusion is not antecedent to the

PCA violation, it is a consequence of the violation, and one which is firmly established in the case law of this and other circuits. *See* Discussion at page 8, *supra*.

The government's argument is also fatally flawed because it relies on the counterfactual claim that the limitation on direct military enforcement of civilian law is a mere creature of statute or regulation and does not implicate any constitutional interests. Govt. Pet. Reh'g [Dkt. 45] at 10, 15-16. The government argues the exclusionary rule is not available to enforce statutes or regulations that fail to implicate constitutional concerns. *Id.* at 13.

Circumscribing military involvement in civilian affairs is an important constitutional interest, embodied in the separation of powers and the privacy rights of the Third and Fourth Amendments. More essentially, it is one of the founding principles of this country. As the panel noted, the PCA restrictions are not merely statutory, but reflect the "'traditional and strong resistance of Americans to any military intrusion into civilian affairs.'" *Dreyer*, 767 F.3d at 835 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). The "traditional abhorrence of military measures for dealing with domestic civil and political problems . . . has roots that run more than seven centuries deep in Anglo-American history." David E. Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 Indiana L. Rev. 458, 582 (1974) (citation omitted).

In reading the Fourth Amendment bar against "unreasonable searches and seizures" this Court is "guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing,'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Common law includes the "law judicially derived" as well as "the whole body of law extant at the time of the framing[.]" *Atwater*, 532 U.S. at 327. *See also Payton v. New York*, 445 U.S. 573, 591 (1980) ("An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable") (footnote omitted).

Concerns about military involvement in civilian affairs were at the forefront at the founding of this country when "the results of routine military involvement in civilian affairs were a fresh and painful memory." Kealy, *supra* at 389. The British military occupation of Boston (1768-1770) and civilian deaths during the Boston Massacre (1770) provided fodder for the revolution and shaped the Declaration of Independence, which cited the improper use of troops and standing armies as examples of King George's tyranny "totally unworthy . . . of a civilized nation."[10] The Declaration of Independence decried the King's use of military

[10]The Declaration of Independence para. 27 (U.S. 1776).

forces to "compleat the works of death"[11] against civilians; maintain "in times of peace, Standing Armies without the Consent of our legislatures"[12] "render the military independent of and superior to the Civil powers"[13] and "quarter[] large bodies of armed troops among us."[14]

Following the revolution, the Articles of Confederation sought to limit the threat to civil society posed by a standing military by restricting the states' ability to keep one during peacetime. *See* Articles of Confederation art. VI § 4 (1781). The Constitution similarly sought to limit the role of the military largely through the separation of powers; it delegated to Congress the power to raise an army[15] and declare war,[16] but made the Executive its commander in chief.[17] The Bill of Rights sought to limit the role of the military in civil society as well. "The Third

---

[11]*Id.* para. 27.

[12]*Id.* at para. 13.

[13]*Id.* at para. 14.

[14]*Id.* at para. 16.

[15]U.S. Const. art 1, § 8, cl. 12. ("To raise and support Armies, but no Appropriations of Money to that use shall be for a longer Term that two Years.")

[16]*Id.* at art 1, § 8, cl. 11.

[17]*Id.* at art II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States")

Amendment's explicit prohibition against quartering soldiers in private homes without consent and … the constitutional provisions for civilian control of the military . . . . [reflect] our traditional insistence on limitations on military operations in peacetime." *Laird*, 408 U.S. at 15. And one scholar has argued that the Fifth Amendment due process clause "inherently implied subjection of the military to civilian power." David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 43 (1971) (citing 1 Annals of Congress 751-3, 767 (1789)).

It was for these reasons that the Eight Circuit, sitting en banc in *Bissonette v. Haig*, held that "[a] seizure in violation of the Posse Comitatus Act . . . was 'unreasonable' within the meaning of the Fourth Amendment, in view of the long American tradition limiting the military's internal and domestic activities." 800 F.2d 812, 813 (8th Cir. 1986) (en banc), aff'd, 485 U.S. 264 (1988). In *Bissonette*, the Eight Circuit rejected many of the same arguments the government presents here, including that a "search or seizure otherwise permissible . . . cannot become unconstitutional simply because it violates a statute." 800 F.2d at 814. While recognizing that "it is not the law that any search and seizure that violates a federal statute also violates the Fourth Amendment[,]" the Eight Circuit held that "the Posse Comitatus Act is a special case, justifying the result we have reached." *Id.* at 814.

The Third Amendment also protects the privacy of citizens from military intrusion, another constitutional interest implicated by the PCA. *See Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (noting that the Third Amendment "prohibition against the unconsented peacetime quartering of solders protects another aspect of privacy from government intrusion."); *Laird*, 408 U.S. at 15-16 ("traditional and strong resistance of Americans to any military intrusion into civilian affairs . . . found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.")

In light of the constitutional concerns underlying the PCA restrictions, suppression is an appropriate remedy. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006) (noting that the Court has suppressed evidence where the excluded evidence was obtained in violation of statutes implicating important constitutional interests); *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) (same); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir. 2000) (en banc) (exclusionary remedy available for violations of provisions of law other than the Constitution); *United States v. DiCesare*, 765 F.2d 890 (9th Cir. 1985) (same).

Finally, in another forfeited argument, the government claims suppression is not available for violations of 10 U.S.C. § 375 because Congress prescribed a remedy other than exclusion (in 18 U.S.C. § 1385) and did not include suppression

as a remedy in 10 U.S.C. § 375. *See* Govt. Pet. Reh'g [Dkt. 45] at 14. *But see Lee v. Florida*, 392 U.S. 378 (1968) (applying exclusionary rule to violations of the Federal Communications Act of 1934 that included a criminal penalty). The government is flat wrong. Congress prescribed criminal penalties for Army and Air Force violations of the Posse Comitatus Act, *see* 18 U.S.C. § 1385, but not for Navy violations of the Posse Comitatus Act limitations. *See* 10 U.S.C. § 375. As a result, exclusion is the only remedy available to further the congressional and constitutional interests in limiting the military's involvement in civilian affairs by removing any incentive to disregard the law. *Cf. Laird*, 408 U.S. at 16 ("nothing in our Nation's history . . . can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.")

The congressional record reveals that when 10 U.S.C. § 375 was enacted, Congress was aware of the emerging rule that exclusion was a potential remedy for systematic violations of the PCA. *See* H.R. Rep. No. 97-71, Part 2, at 5, 9th Cong., 1st Sess. (June 12, 1981) (citing *Wolffs*, 594 F.2d at 85; and *Walden*, 490 F.2d at 376-77). Despite being aware of this developing law (or perhaps because of it), Congress took no steps in § 375 to limit the application of the exclusionary rule.

For these reasons, application of the exclusionary rule is entirely appropriate for widespread and repeated violations of the Posse Comitatus Act restrictions.

III. CONCLUSION

Mr. Dreyer respectfully requests this Court decline a rehearing en banc.

Respectfully submitted this 30th day of January, 2015.

s/ Erik B. Levin
Erik B. Levin

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 and 40-1

I certify, pursuant to Circuit Rules 35-1 and 40-1, the attached Defendant-Appellant's Response to *Sua Sponte* Call for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 4197 words.

DATED this 30th day of January, 2015.

s/ Erik B. Levin
Erik B. Levin

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System. I have also mailed a copy of this document to Defendant-Appellant Michael Dreyer.

DATED this 30th day of January, 2015.

s/ Erik B. Levin
Erik B. Levin