



Domestic Political Surveillance: How Deep Is DoD Involvement?

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In the wake of George Floyd's murder and the nationwide protests it sparked over two years ago, among the other alarming developments that eventually came to light was the level of government surveillance of Americans protesting Floyd's death at the hands of the Minneapolis Police Department. Not only was the surveillance carried out by federal, state, and local law enforcement in Minneapolis, but apparently in every state where protest activity occurred, based on prior reporting by the *New York Times*, *The Intercept*, the ACLU of Northern California, Citizens for Responsibility and Ethics in Washington (CREW), the Reporters Committee for Freedom of the Press, and others.

Federal players involved in the surveillance included Customs and Border Protection, the U.S. Marshals Service, and the DEA. But one particular US government department's involvement sparked even greater concern: the Department of Defense.

It's been just less than two years ago that an United States Air Force Inspector General (USAF IG) report on the use of National Guard RC-26B surveillance aircraft against protesters was made public. The propellor driven, twin engine aircraft has been in US military service for many years as an intelligence collection platform, which is precisely the role in which it was used to track Americans engaged in marches and rallies after Floyd's murder. The USAF IG's June 2020 report on the RC-26B incidents was contradictory in terms of exactly how much potentially personally identifying data on protesters might have been collected and shared with federal, state, or local law enforcement.

The USAF IG report claimed (pp. 1-2) that "The sensors on the RC-26B can only collect infrared and electro-optical imagery, and this imagery was not capable of identifying distinguishing personal features of individuals." Yet deeper in the report (p. 21), the investigators conceded that "Although it is difficult in an urban environment, it appears it would be possible to connect activities to an individual. One witness described developing a 'pattern of life' which is a term-of-art in intelligence practice for following a person or object to discern patterns that allow forecasts of movements of that person or object... That requires some amount of discernibility among objects. For instance, a flight could observe suspicious activity, follow the person, and law enforcement on the ground could be vectored by a control center or by a law enforcement

officer on-board to the individual...It is important to emphasize here, though, that there is no evidence that such a risk manifested in any of these RC-26B flights."

Yet a National Guard Bureau white paper on RC-26B capabilities notes that "RC-26B records evidence-quality full motion video, and high resolution still frame imagery for use by the law enforcement community, host nations, and other government agencies." And as the USAF IG report itself noted (p. 50), a plan to use a Phoenix-based RC-26B to collect full motion video on protesters to "deter planned/unplanned demonstrations, protests or looting" did not go as planned because of software compatibility issues between the RC-26B and the Phoenix Multi-Agency Coordination Center (MACC). The USAF IG report described the Arizona National Guard operations plan's counterprotest language as "in-artfully worded," it conceded that "Deterring protests and demonstrations, assuming they are lawful, is not consistent with constitutional rights." In fact, planning a military operation to disrupt First Amendment protected protests was, in fact, a violation of the rights of Phoenix protesters – contrary to the USAF IG's assertions at the time.

There are good reasons to question the thoroughness of the USAF IG's investigation and conclusions in this case, as the Defense Department and its components have a history of spying on domestic protesters.

During the administration of President George W. Bush, the Pentagon's Counterintelligence Field Activity (CIFA) was caught running a de facto domestic surveillance program known as Threat and Local Observation Notice (TALON) that, among other things, monitored antiwar or other protests. The Defense Department regulation that was used to authorize that program, DOD Directive 5200.27, has been in effect since at least the late Vietnam War era. While CIFA was allegedly disestablished towards the end of the Bush 43 administration, DOD Directive 5200.27 remains on the books, and thus available to authorize potential domestic surveillance against those engaged in First Amendment protected protests.

To determine the extent of the continued use of that authority since the George Floyd protests, in May 2021 the Cato Institute filed a Freedom of Information Act (FOIA) lawsuit against multiple Department of Defense components for records on DOD Directive 5200.27. As of this writing, the Pentagon continues to refuse to even search for such records, claiming Cato's request was "not reasonably described."

The directive in question **requires** DOD components to maintain such records on protest incidents for at least 90 days, and in some cases far longer with official authorization. DoD's legal tactics have one objective – to try to prevent the American public from learning the exact scope of any ongoing DOD or component surveillance of US citizens engaged in peaceful, constitutionally protected activities.

Just over a week after Cato filed its FOIA lawsuit against the Pentagon, Senator Ron Wyden (D-OR) revealed that DOD components – including the Defense Intelligence Agency (DIA) – had been buying commercially available data on American citizens, including geolocation data. The fact that the practice is apparently ongoing, combined with DOD's refusal to cough up any information about its use of the directive at issue in Cato's FOIA suit, should be a cause of

concern for every American – and a call to action for Congress to intervene and mandate the release of the data in question.

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