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**The Inspector  
General  
Department of the  
Air Force**

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# **Report of Investigation (S8934P)**

## **RC-26B Operations 1 – 4 June 2020**

*August 2020*

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# REPORT OF INVESTIGATION (Case S8934P)

CONCERNING

## RC-26B OPERATIONS 1 - 4 JUNE 2020

PREPARED BY  
SAF/IGS INVESTIGATING TEAM  
August 2020

### I. INTRODUCTION

The Inspector General of the Air Force directed this investigation in response to SecDef and SecAF concerns about military surveillance activities during civil unrest responses in early June 2020, including use of Air National Guard (ANG) RC-26B aircraft. (Ex 2) Additionally, a letter signed by 35 Members of Congress alleged the improper use of RC-26B aircraft to fly over protests, citing concerns that authorities do not permit surveillance of American citizens or the collection of "vast amounts of personal information." (Ex 3:1)

This investigation examined: 1) Whether or not U.S. person information was collected in violation of law or regulation by RC-26B aircraft conducting civil disturbance support operations over Minnesota, Arizona, California, and Washington, DC<sup>1</sup>; 2) The multitude of overlapping authorities that govern the use and employment of National Guard assets and personnel, and proper circumstances authorized for support to civil authorities; and 3) Collateral procedural issues that came to light which could be addressed by law or policy to improve the process for civil disturbance support and response options in the future.

After some initial background and a description of the RC-26B aircraft and its capabilities, this report discusses the applicable standards and authorities which govern these missions. It then provides an overarching review of the information collected and authorities used, and then examines each flight in detail.

In summary, this investigation determined by a preponderance of the evidence that:

(1) The RC-26B flights flown by the National Guard during recent protests did not collect U.S. person information. The sensors on the RC-26B can only collect infrared and electro-

<sup>1</sup>

[REDACTED]

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optical imagery, and this imagery was not capable of identifying distinguishing personal features of individuals.

(2) Policy interpretations by NGB led to a mistaken belief that SecDef approval for use of the RC-26B was not required by intelligence oversight rules, and also led to a mistaken belief that 32 USC § 502(f) status was an appropriate status for RC-26B aircrew and support personnel.

(3) Vagueness in DoD-level policies substantially contributed to NGB's mistaken conclusion that the RC-26B is not an intelligence resource, and also substantially contributed to the likely misuse of Immediate Response Authority.

The investigating team prepared an Investigation Plan (IP) and presented the IP to the SAF/IGS Director on 24 Jun 20. The team interviewed or gathered information from the following 31 individuals between 18 Jun 20 and 8 Aug 20:

National Guard Bureau

[REDACTED], Pentagon

[REDACTED], NGB, Pentagon

[REDACTED], NGB, Pentagon

[REDACTED], NGB,  
Pentagon

[REDACTED], NGB, Arlington, VA

[REDACTED], NGB, Arlington

[REDACTED], Reserve Integration, Pentagon

[REDACTED], NGB, Arlington

[REDACTED], Arlington

[REDACTED], Air National Guard Readiness  
Center, Andrews AFB, MD

[REDACTED], NGB, Arlington

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[REDACTED] Air National Guard Readiness Center, Andrews AFB

[REDACTED], NGB, Arlington

[REDACTED], NGB, Arlington

For Flights in Minnesota

[REDACTED], Minnesota National Guard (MNNG), St. Paul, MN

[REDACTED], MNNG, St. Paul

[REDACTED], MNNG, St. Paul

[REDACTED], MNNG, St. Paul

[REDACTED], 115<sup>th</sup> Fighter Wing, Wisconsin National Guard, Madison, WI

[REDACTED], Mississippi Air National Guard, Meridian, MS

For Flight in Arizona

[REDACTED], Arizona National Guard (AZNG), Phoenix, AZ

[REDACTED], 162<sup>nd</sup> Fighter Wing, AZNG, Tucson, AZ

[REDACTED], AZNG, Phoenix

[REDACTED], 161<sup>st</sup> Air Reserve Wing, Phoenix

For Flight in California

[REDACTED], 144<sup>th</sup> Fighter Wing, California National Guard, Fresno, CA

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[REDACTED], 144<sup>th</sup> Operations Group, Fresno

For Flights in Washington, DC

[REDACTED], DC National Guard, Washington, DC

[REDACTED], Bridgeport, WV

[REDACTED], Bridgeport, WV

[REDACTED], DC National Guard

[REDACTED], DC National Guard

**II. BACKGROUND**

**CHRONOLOGY**

| DATE       | EVENT  |
|------------|--|
| 25 May 20  | Mr. George Floyd dies in police custody in Minneapolis, MN. (Ex 5)   |
| 26 May 20  | Protest activities begin in Minneapolis, MN and spread in various US cities. (Ex 6)  |
| 1-4 Jun 20 | Air National Guard RC-26B aircraft conduct overhead imagery Incident Awareness and Assessment (IAA) missions in support of law enforcement and/or National Guard units responding to destruction of property and violence. A total of seven (7) RC-26B flights are flown over Minneapolis MN, Phoenix AZ, El Dorado County CA, and Washington DC. (Ex 7:3-6) |

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|  |   |
|--|---|
| <p>3 Jun 20, 18:56L<br/>CNGB e-mail,<br/>subject: "Civil<br/>disturbance 502f<br/>memo elements"</p> | <p>[REDACTED], sends request to SecDef's [REDACTED], for authorization for the following missions:<br/>Law enforcement; security and presence patrols; crowd control; traffic management, C2, authorization to train, build and stage reaction force, air and ground transportation, IAA [Incident Awareness and Assessment] and UPAD [Unclassified Processing Analysis and Dissemination] support, force support functions (including sustainment, maintenance, admin, chaplain support, medical and behavioral health), engineer support and public affairs.<br/>Other elements/authorities required:<br/>- Ability to move interstate to surge reaction forces between states<br/>- Ability to extend orders due to COVID exposure IAW CDC guidelines<br/>- Arming limitations IAW state law, including less than lethal<br/>- RUF [Rules for the Use of Force] IAW state law (Ex 8)</p> |
| <p>3 Jun 20, 19:38L</p>  | <p>[REDACTED] replied to [REDACTED] "The Secretary requested Policy lead a coordinated effort with the Joint Staff, NGB, OGC, and Comptroller to ascertain what the missions should look like and get it over to OMB in an expedited manner." (Ex 9:1)</p>  |
| <p>4 Jun 20</p>  | <p>[REDACTED] signs Info Memo (coordinated with OSD/GC) to SecDef, Re: NGB request (above). Determination is that "DoD has no statutory authority to fund a state's use of State National Guard to execute State missions," citing 31 USC § 1301 (Purpose Statute). Alternatives offered: State funded; Fed funded under 32 USC § 502(f) if another Federal dept or agency requested DoD assistance; or Fed assistance under 10 USC §251-255 (Insurrection Act, requires POTUS invocation) (Ex 10)</p>  |
| <p>5 Jun 20</p>  | <p>[REDACTED], directs cessation of the RC-26B flights. (Ex 11:1-2)</p>   |
| <p>17 Jun 20</p>   | <p>[REDACTED], US Air Force, appoints SAF/IGS to investigate. (Ex 2:1)</p>  |
| <p>19 Jun 20</p>   | <p>Office of Secretary of Defense Senior Intelligence Oversight Official (OSD SIOO) reports the RC-26B flights as a Significant/Highly Sensitive Matter. (Ex 12)</p>  |

### ***RC-26B Aircraft and Capabilities***

The originally designated C-26 aircraft is a modified Fairchild Metro 23 acquired to support the Operational Support Airlift (OSA) mission of Air Mobility Command (AMC). AMC ceased using the C-26 for that role in 1996. At that time, the Air National Guard modified 11 C-26s with sensors to provide day and night full motion video and re-named the aircraft

"RC-26B."<sup>2</sup> However, the RC-26B did not transition into the active duty inventory for use as a dedicated ISR platform. After modification in 1996, the aircraft primarily supported National Guard Counterdrug missions. Later, the aircraft provided support to various Homeland Security agencies such as the Customs and Border Protection (CBP), the Federal Emergency Management Agency (FEMA), and the Drug Enforcement Agency (DEA). The RC-26B provided a stopgap measure for a limited time surge in support of overseas military operations. While performing deployed overseas missions, the aircraft was fitted with a complement of classified sensors. Before performing missions again stateside, these classified capabilities and associated wiring were removed and the aircraft only has the capability to record infrared and electro-optical imagery. (Ex 13a; Ex 13b)



The 11 RC-26B aircraft are located at ten operating locations in the following states: Alabama, Arizona, California, Iowa, Mississippi, New Mexico, Texas, Washington, Wisconsin, and West Virginia. The aircraft is flown by two pilots with one Mission Systems Officer (MSO, pictured above right) who operates the onboard sensor equipment and ground communications suite. (Ex 13a)

### *National Guard*

The National Guard has a unique dual mission, with both federal and state responsibilities. There are Army National Guard and Air National Guard units and personnel in each of the 50 States, the territories of Puerto Rico, The Virgin Islands, and Guam, and the District of Columbia. When not called for federal active service, the governors serve as the Commanders-in-Chief for the National Guard in their respective states and territories (with the exception of the DC National Guard, as discussed below). The governor can call the Guard into action during local or state-wide emergencies, such as storms, droughts, and civil disturbances.

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<sup>2</sup> Air Force rules on aircraft designation drives the "R" designator when an aircraft is "modified for photographic or electronic reconnaissance missions." Air Force Instruction 16-401, Army Regulation 70-50, NAVAIRINST 13100.16, *Designating and Naming Defense Military Aerospace Vehicles*, 16 May 2014, paras. A2.1.2.1. and Table A3.4.

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In addition, the President can activate the National Guard to participate in federal missions, both domestically and overseas. When federalized, Guard units fall under the same military chain of command as active duty and reserve personnel. (Ex 14)

The senior military commander for each state and territory is The Adjutant General (TAG) and in most cases reports directly to their Governors (32 U.S. Code § 314. Adjutants general). Under the District of Columbia Code, The President of the United States (POTUS) serves as the Commander in Chief of the District of Columbia National Guard when it is in its militia status. By Executive Order 11485, October 1, 1969, the President delegated almost all authorities over the DCNG to the Secretary of Defense, who subsequently delegated certain authorities to the Secretary of the Army (SecArmy) and the Secretary of the Air Force (SecAF). Consequently, the authorities normally exercised by a state governor have been divided among the SecArmy, SecAF, and the Commanding General (CG) of the DCNG. The SecArmy has additional delegated authority to execute POTUS' authority to order the DCNG to aid civil authorities at the request of the Mayor of the District of Columbia, the United States Marshal for the District of Columbia, or the National Capital Service Director. Unique to the DCNG is that when called to militia service, National Guard members will serve in a federal militia status and not State Active Duty due to the unique governmental construct of the District of Columbia. (Ex 79)

The National Guard Bureau (NGB) is a joint activity of the Department of Defense and is led by the Chief, National Guard Bureau (CNGB). NGB is not a command so it has no command authority over the National Guard in the several states. DODD 5105.77 says, "The NGB is the focal point at the strategic level for non-federalized National Guard matters that are not the responsibility of the Secretary of the Army, the Secretary of the Air Force, or the CJCS, in law or DoD policy." (Ex 28:2) More specific to this investigation, this same issuance speaks to NGB's role in coordinating the use of the National Guard for domestic missions as it "Assists the Secretary of Defense in facilitating and coordinating with other federal agency heads, the Adjutants General of the States, and the Commanders of United States Northern Command and United States Pacific Command, the use of National Guard personnel and resources for operations conducted, in accordance with [Title 32, United States Code] or in support of State missions. The Chief, NGB, coordinates such matters with the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)), the CJCS, and the Secretary of the Army or the Secretary of the Air Force as they pertain to their respective Military Departments." (Ex 29:7)

### III. STANDARDS AND AUTHORITIES

The "Militia Clauses" in the U.S. Constitution, Article I, Section 8, Clauses 15-16, describes how the state militias (now National Guard) may be used for federal service with some control reserved for the states. This complex federal and state governance of the National Guard for modern day training, deployments, and domestic responses has not become easier. This

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investigation is somewhat unusual in that much of the focus centers on a high volume of overlapping standards, particularly for Defense Support of Civil Authorities (DSCA). The interpretations and implementations of these varied authorities differ across the operations, intelligence, intelligence oversight, and legal communities.

The purpose of this section is not to resolve many of the overlapping authorities that come into play when examining a topic as vast as this. Rather, the intent here is to set forth and demonstrate the complexities involved, while creating a logical and usable framework with which to structure the analysis that will follow. The authorities that appear on the pages that follow are organized along three major considerations: 1) Intelligence Oversight considerations and whether or not personal information of U.S. persons was collected in violation of law or policy; 2) An examination of the process by which mission approval should rightfully flow; and 3) The matter of National Guard members operating in a correct duty status.

### **Intelligence Oversight**

Defense Intelligence Components must follow SecDef and Attorney General approved procedures for the conduct of DoD intelligence activities. This includes National Guard intelligence resources. If specifically authorized by SecDef, Defense Intelligence Components may conduct non-intelligence missions under the authorities that apply to those missions.

DODM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*, August 8, 2016, states as follows:

1.1. APPLICABILITY. This issuance applies to...all other organizational entities within the DoD, including...the National Guard, or anyone acting on behalf of those components or elements, when conducting intelligence activities under DoD's authorities (referred to collectively in this issuance as the "DoD Components").

1.2. POLICY.

b. In carrying out intelligence activities, the DoD Components:

(1) Are authorized to collect, retain, and disseminate information concerning U.S. persons and conduct other activities only in accordance with the procedures in this issuance.

1.3. PROCEDURES.

b. Procedures 11 through 15 of DoD 5240.1-R will remain in effect until incorporated and cancelled by other DoD guidance.

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### 3.1. PROCEDURE 1. GENERAL PROVISIONS.

#### a. Scope.

(1) The Defense Intelligence Components provide necessary information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents. The procedures in this issuance govern the conduct of Defense Intelligence Components and non-intelligence components or elements, or anyone acting on behalf of those components or elements, when conducting intelligence activities under DoD's authorities.

...

(3) Activities not governed by this issuance will be carried out in accordance with other applicable policies and procedures, including Presidential directives that govern those particular missions or functions. When specifically authorized by the Secretary of Defense or delegee to perform missions or functions other than foreign intelligence or CI, Defense Intelligence Components will comply with DoD policy applicable to DoD non-intelligence organizations and any specific operational parameters specified by the Secretary of Defense for that mission or function. Examples of such activities are:

(a) Law enforcement or civil disturbance activities conducted under DoD authorities or activities of individuals executing a law enforcement, physical security, or force protection mission.

(b) Defense support of civil authorities, when directed by the Secretary of Defense. Defense support of civil authorities activities is conducted consistent with the National Response Framework, and includes the provision of humanitarian assistance; disaster readiness, response, and recovery activities; and environmental and security vulnerability studies. (Ex 16:5-8)

DoD 5240.1-R, Change 2, *Procedures Governing Activities of DoD Intelligence Components That Affect US Persons*, 26 Apr 17, states as follows:

#### Chapter 12

#### Procedure 12. Provision of Assistance to Law Enforcement Authorities

C12.1. Applicability - This procedure applies to the provision of assistance by DoD intelligence components to law enforcement authorities. It incorporates the specific limitations on such assistance contained in E.O. 12333 (reference (a)), together with the general limitations and approval requirements of DoD Directive 5525.5 [replaced by DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, CH1 (2019)].

C12.2.2. Types of Permissible Assistance. DoD intelligence components may provide the following types of assistance to law enforcement authorities:

C12.2.2.4. Personnel who are employees of DoD intelligence components may be assigned to assist Federal law enforcement authorities, and, when lives are endangered, State and local law enforcement authorities, provided such use is consistent with, and has been

approved by an official authorized pursuant to, Enclosure 4 of [DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, CH1 (2019)]. Such official shall ensure that the General Counsel of the providing DoD Component concurs in such use. (Ex 18:8-9)

DoDD 5240.01, *DoD Intelligence Activities*, August 27, 2007, Incorporating Change 2, March 22, 2019, states as follows:

5.4. The Secretaries of the Military Departments with IC elements shall:

5.4.1. Organize, staff, train, and equip the intelligence assets of the Military Departments, including CI, signals intelligence, geospatial intelligence, measurement and signatures intelligence, and human intelligence assets, to support operational forces, national-level policy-makers, and the acquisition community. (Ex 17:4)

DODD 3025.18, *Defense Support of Civil Authorities (DSCA)*, December 29, 2010, Incorporating Change 2, March 19, 2018, states in relevant part:

4.u. Use of intelligence assets for DSCA purposes must be in accordance with DoD Directive 5240.01, "DoD Intelligence Activities," August 27, 2007, as amended. (Ex 15:7)

CNGBI 2000.01C, *National Guard Intelligence Activities*, 14 August 2018, states in relevant part:

4a. Federal intelligence and intelligence, surveillance, and reconnaissance (ISR) equipment as defined in the glossary is not used for activities other than authorized foreign intelligence or counterintelligence (CI) activities and associated training unless approved by the Secretary of Defense (SecDef) or his or her designee IAW references a through d. (Ex 19:1)

Glossary:

Federal Intelligence and Intelligence, Surveillance, and Reconnaissance Equipment: Equipment purchased with Military Intelligence Program or National Intelligence Program monies.<sup>3</sup> (Ex 19:20)

CNGBM 2000.01, *National Guard Intelligence Activities*, 11 April 2019, states:

ENCLOSURE A

PROCEDURES

12.a.3. Use of Federal Intelligence and Intelligence, Surveillance, and Reconnaissance (ISR) Equipment. When the request for support to a civilian LEA involves the use of Federal intelligence or ISR equipment, it will be processed for SecDef approval IAW this procedure.

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<sup>3</sup> The appropriateness of this definition will be examined later in the report.

...

12.d. Requests for support requiring SecDef approval under this procedure will be staffed from the NG JFHQs-State J2 to NGB-J2. The following documents are required: a request for assistance from the LEA, a request for SecDef approval from TAG, a legal review by the State JA validating the legality of providing NG intelligence component support, a concept of operations for the support, and a memorandum of agreement between the NG JFHQs-State and the supported LEA.

...

## ENCLOSURE E

### DOMESTIC OPERATIONS

3.b. IAA [Incident Awareness and Assessment]. NG intelligence component personnel and non-intelligence equipment may be used for IAA to fulfill TAG requirements for situational awareness or planning purposes, or upon receipt of an NG JFHQs-State or NGB-validated primary agency or lead Federal agency request for assistance. IAA activities will not be used to collect USPI without consent. The agency must be operating within its lawful function and authority, such as at the request of the office of the Governor, the primary or lead Federal, State, or tribal agency for the event; an Emergency Management Assistance Compact (EMAC)<sup>4</sup> request; or a Mission Assignment from the Federal Emergency Management Agency (FEMA).

(1) When authorized by the SecDef or delegatee, or directed by the President, NG intelligence capabilities may support Federal, State, local, and tribal agencies in certain IAA mission sets, including situational awareness; SAR; damage assessment; evacuation monitoring; chemical, biological, radiological, nuclear, and explosives (CBRNE) assessment; hydrographic survey; and dynamic ground coordination.

(2) Processing, assessment, and dissemination. During domestic operations, the NG T-32 intelligence component may use unclassified equipment to process, assess, and disseminate final products based on that analysis of:

(a) Imagery, geospatial data, and information collected from cameras, video, electro-optical sensors, IR, and forward-looking infrared radar (FLIR) collected by NG assets.

(b) Information collected from government agencies operating within their lawful functions and authorities.

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<sup>4</sup> “The EMAC is a federal statute, nationally accepted by all states, to allow interstate mutual-aid agreement that enables states to share resources and certifications during times of disaster.” Joint Publication 3-28, *Defense Support to Civil Authorities*, p. I-7. “The purpose of this compact is to provide for mutual assistance between the states entering into this compact in managing any emergency disaster that is duly declared by the Governor of the affected state, whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.” Public Law 104–321.

(c) Analysis of baseline imagery for operational planning (for example, to determine probable hurricane landfall and post-landfall damage and to assess damage).

(3) Upon SecDef approval, the NG T-32 intelligence component may use Federal intelligence equipment to process, assess, and disseminate final products within the parameters set by the SecDef.

JP 3-28 – *Defense Support Of Civil Authorities*, states as follows:

Chapter IV - Other Domestic Activities And Special Events:

#### 9. Incident Awareness and Assessment

IAA may be requested to support first responders and decision makers in the following eight mission areas: situational awareness, damage assessment, evacuation monitoring, SAR, CBRN assessment, hydrographic survey, dynamic ground coordination, and cyberspace incident response. SecDef approval of the DSCA EXORD may authorize traditional intelligence capabilities to conduct DSCA missions for non-intelligence purposes. ... While the use of intelligence assets by the NG requires SecDef approval, the use of non-intelligence assets in a Title 32, USC, or state active duty status for IAA requires approval of the governor. NG complies with procedures and restrictions established in the CNGB Manual 2000.01, *National Guard Intelligence Activities*. (Ex 27:69)

DOD Dictionary of Military and Associated Terms (as of June 2020)

2. Purpose. This publication supplements standard English-language dictionaries and standardizes military and associated terminology to improve communication and mutual understanding within DOD with other US Government departments and agencies and among the United States and its allies.

3. Application. This publication applies to the Office of the Secretary of Defense, the Services, the Joint Staff (JS), combatant commands, DOD agencies, and all other DOD components. It is the primary terminology source when preparing correspondence, to include policy, strategy, doctrine, and planning documents.

intelligence — 1. The product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations. 2. The activities that result in the product. 3. The organizations engaged in such activities.

surveillance — The systematic observation of aerospace, cyberspace, surface, or subsurface areas, places, persons, or things by visual, aural, electronic, photographic, or other means. (JP 3-0)

reconnaissance — A mission undertaken to obtain, by visual observation or other detection methods, information about the activities and resources of an enemy or adversary, or to secure data concerning the meteorological, hydrographic, or geographic characteristics of a particular area. (JP 2-0)

intelligence, surveillance, and reconnaissance — 1. An integrated operations and intelligence activity that synchronizes and integrates the planning and operation of sensors, assets, and processing, exploitation, and dissemination systems in direct support of current and future operations. 2. The organizations or assets conducting such activities. Also called ISR.

### **Approval Authority**

Defense Support of Civil Authorities by National Guard personnel in Title 32 status requires approval of SecDef and concurrence of the relevant Governors, and is provided consistent with the Defense Support to Civil Authorities Execute Order (“DSCA EXORD”). However, the DSCA EXORD was not used here, so that authority was not reached. Other activities require tailored approval and coordination with multiple offices across DoD as specified in policy. There is a limited exception for federal commanders and other DoD officials to use Immediate Response Authority, on request from civil authorities, to save lives, prevent human suffering, or mitigate great property damage. DoD policy recognizes the use of state Immediate Response Authority when “State officials” approve National Guard personnel in State Active Duty status, or Title 32 status to respond under certain conditions.

DODD 3025.18, *Defense Support of Civil Authorities (DSCA)*, December 29, 2010, Incorporating Change 2, March 19, 2018, states as follows:

2. Applicability. This Directive:

b. Applies to the Army National Guard and the Air National Guard (hereafter referred to collectively as the “National Guard”) personnel when under Federal command and control. Also applies to National Guard personnel when the Secretary of Defense determines that it is appropriate to employ National Guard personnel in title 32, U.S.C. (Reference (f)), status to fulfill a request for DSCA, the Secretary of Defense requests the concurrence of the Governors of the affected States, and those Governors concur in the employment of National Guard personnel in such a status.

c. Applies to all DSCA (except the specific forms of DSCA listed in paragraph 2.d. of this section) ...

4. Policy. It is DoD policy that:

c. DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities or is authorized by the President or Secretary of Defense.

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d. All requests for DSCA shall be written, and shall include a commitment to reimburse the Department of Defense in accordance with sections 5121, et. seq., of Reference (g) (also known as “The Stafford Act”), section 1535 of title 31, U.S.C. (also known as “The Economy Act” (Reference (y))), or other authorities except requests for support for immediate response, and mutual or automatic aid ... Unless approval authority is otherwise delegated by the Secretary of Defense, all DSCA requests shall be submitted to the office of the Executive Secretary of the Department of Defense. For assistance provided according to paragraph 4.i of this section, civil authorities shall be informed that oral requests for assistance in an emergency must be followed by a written request that includes an offer to reimburse the Department of Defense at the earliest available opportunity...

e. All requests from civil authorities and qualifying entities for assistance shall be evaluated for:

- (1) Legality (compliance with laws).
- (2) Lethality (potential use of lethal force by or against DoD Forces).
- (3) Risk (safety of DoD Forces).
- (4) Cost (including the source of funding and the effect on the DoD budget).
- (5) Appropriateness (whether providing the requested support is in the interest of the Department).
- (6) Readiness (impact on the Department of Defense’s ability to perform its other primary missions).

i. Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials (hereafter referred to collectively as “DoD officials”) have IMMEDIATE RESPONSE AUTHORITY as described in this Directive. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.

(1) DoD officials must exercise judgment based on available information and resources in determining the maximum allowable distance from the installation or facility the immediate response may take place. DoD officials should consider challenges such as sustainment, transportation, communications, mission impact, and increased risk (see Reference (e)).

...

(3) The civil authority’s request for immediate response should be directed to the installation commander or other appropriate DoD official responsible for the installation, with further dissemination as needed.

j. The authority of State officials is recognized to direct a State immediate response using National Guard personnel under State command and control (including personnel in a title 32,

U.S.C. (Reference (f)) (hereafter referred to as “Title 32”) status) in accordance with State law, but National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.

10. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments, in addition to the responsibilities in section 9 of this enclosure, shall:

c. In coordination with the relevant geographic Combatant Commander, direct relevant DoD officials under that Secretary’s supervision, direction, and control to take appropriate actions to share information on DSCA capabilities with civil authorities at all levels. DoD officials should share information prior to need, when appropriate, to facilitate requests for assistance, including under immediate response authority, when a need arises. This capability information should not list specific units or assets.

13. CHIEF, NGB. The Chief, NGB, under the authority, direction, and control of the Secretary of Defense, consistent with paragraphs 5a, 5b, and 5c of DoDD 5105.77 (Reference (an)), and in addition to the responsibilities in Reference (ao), shall:

b. Report National Guard support of civil authorities or qualifying entities when using Federal resources, equipment, and/or funding to the NJOIC.<sup>5</sup> (Ex 15:1-19)

DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies*, February 27, 2013, Incorporating Change 1, Effective February 8, 2019, states as follows:

1. PURPOSE.

a. Establishes DoD policy, assigns responsibilities, and provides procedures for DoD support to Federal, State, tribal, and local civilian law enforcement agencies, including responses to civil disturbances within the United States ...

2. APPLICABILITY. This Instruction:

d. Applies to National Guard (NG) personnel in Reference (d) [specific Title 10 sections] status only.

f. Does not apply to:

(3) The Defense Intelligence and Counterintelligence Components, when providing intelligence assistance to civilian law enforcement activities in accordance with paragraph 2.6. of Executive Order 12333 ... and Procedure 12 of DoD 5240.1-R ...

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<sup>5</sup> Note: This is a policy gap in either the DoDD or NGB policy considerations. Immediate Response Authority (IRA) by state officials triggers federal resources. States are not currently required to report such expenditures to NGB when IRA authority is used. NGB acknowledged this disconnect. (Ex 89:1)

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(5) NG personnel in State active duty or [Section 502 of ] title 32, U.S.C...status. (Ex 21:1-2)

DODI 3025.22, *The Use of the National Guard for Defense Support of Civil Authorities*, July 26, 2013 Incorporating Change 1, May 15, 2017, states as follows:

2. APPLICABILITY. This instruction:

b. Does not apply to:

(1) National Guard activities conducted while on active duty or in federal service ... or State immediate response activities using National Guard personnel that are conducted in accordance with paragraph 4.h. of [DoD Directive 3025.18].

(2) National Guard activities conducted in State active duty status, including State immediate response activities using National Guard personnel, activities that are determined to be the responsibilities of the individual States, or activities conducted through the execution of mutual aid and assistance agreements between the States or local civil authorities.

(4) National Guard training activities that are conducted in a duty status pursuant to section 502(a) or 502(f) of Reference (a).

(7) The use of the District of Columbia National Guard for DSCA, which will be handled in accordance with Executive Order 11485 (Reference (j)) and the Secretary of Defense Memorandum (Reference (k)) (Ex 22:1-2)

### **Status of Personnel**

National Guardsmen may be in one of four “statuses”<sup>6</sup>:

|   | <b>Command</b> | <b>Missions</b>                                    | <b>Funding</b>                      |
|---|----------------|--|-------------------------------------|
| <b>State Active Duty</b>  | Governor       | State-directed                                     | State (Federal funds for equipment) |
| <b>Title 32, Sec. 502(a), Inactive Duty Training/Active Training (i.e., traditional Guard service - one weekend a month plus two weeks)</b> | Governor       | Primarily training for federal active duty mission | Federal                             |

<sup>6</sup> This does not include NG technicians or Title 5 National Guard civilian employees. See generally, NGB/JA, 2019 Domestic Operations Law and Policy, p. 25-27. (Ex 23) However, people in those categories were not used here.

|   |                    |  |         |
|---|--------------------|--|---------|
| <b>Title 32, Sec. 502(f),</b><br>“training or other duty” | Governor           | As directed by President or SecDef; as directed by SecArmy or SecAF under certain conditions | Federal |
| <b>Title 10 Federal Active Duty</b>                       | Military commander | Military operations  | Federal |

See generally, 2019 Domestic Operations Law and Policy, Sec. 5. (Ex 23)

32 USC §502, *Required Drills and Field Exercises*, states as follows

(f)(1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may-...be ordered to perform training or other duty in addition to that prescribed under subsection (a).

(2) The training or duty ordered to be performed under paragraph (1) may include the following:

(A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.

(B) Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations-

(i) are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and

(ii) are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty troops), Department of Defense contractor personnel, or Department of Defense civilian employees. (Ex 24:1-2)

CNGBI 1302.01, *Guidance for Members Performing Duty Under the Authority of 32 USC § 502(f)*, 23 Apr 2012, Certified as current 12 July 2017, states as follows:

4(a) - Members performing duty under the authority of 32 U.S.C. §502(f) will not perform duties that are not specific requirements of the mission for which the members were ordered to duty. If circumstances require a change of duty, Commanders must amend/curtail the current order.

4(e) - Commanders may order members performing duty under 32 U.S.C. §502(f) to respond to an emergency in accordance with the Immediate Response Authority and State law. (Ex 25:1-2)

CNGBI 2000.01C, *National Guard Intelligence Activities*, 14 August 2018, states as follows:

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4. It is NGB policy that NG intelligence personnel operating in a Title 32 (T32) status operate as members of the Department of Defense (DoD) intelligence component and must comply with all DoD guidance and Federal laws applicable to the component, including all intelligence oversight (IO) rules IAW references b and c. (See also, CNGBM 2000.01A, Encl A, para 12.a.(3) and 12.d.; Encl. E, para 3.b. (Ex 26:1)

#### **IV. DISCUSSION AND ANALYSIS**

The investigating team interviewed 31 witnesses from the NGB and field personnel who conducted or supported the operations in Minnesota, Arizona, California, and Washington, DC. Mission data and electronic products were preserved and analyzed for the presence of personal information on individuals.

##### **Overarching Review of Collection and Authorities**

###### *Collection*

The evidence showed RC-26B aircraft flew in support of National Guard elements and/or law enforcement officials by providing situational awareness from the air. Such visuals of major crowd movements or fires near government buildings, property, or roads helped officials on the ground maintain near real time awareness, all in public places, without collecting personal information on or identifying individual citizens. There is no evidence individuals or specific organizations were targeted, followed, or identified.

The RC-26B sensors, both infrared and electro-optical, have enough resolution to show distinct architectural features of buildings and allow identification of a place, at least to a trained analyst or person familiar with the area under observation. They also have enough resolution to show basic features of vehicles that may allow a trained observer to identify such things as make and model, in some cases, but not to read license plates. The sensors can also identify objects as people, and detect some activities such as walking or riding a bicycle. By associations, they can lead a trained observer to differentiate between military members and civilians by their patterns of movement – more ordered as compared to more random – and by association with military vehicles. (Ex 30:19) However, the sensors do not have sufficient resolution to identify facial features or even the gender or race of a person. (Ex 30:18; Ex 31) In addition, none of the aircraft for the flights in question carried signals intelligence equipment, and thus, did not have any capability for collecting information from cell phones or radios. (Ex 13b)

Here is a representative infrared image from one of the flights:

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(Ex 87)

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. (Ex 54:2) 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. In that way, earlier activity of the person observed from the flight could be connected with the person. That connection could be especially strong if there was a video recording. If the suspicious activity was connected to a crime, then either the observers or the recording could be used as witnesses or evidence. It is this concern that supports the DoD policy on SecDef or designee approval being required to use intelligence assets for non-intelligence purposes due to the concern that military capabilities could become law enforcement capabilities, absent proper oversight. It is important to emphasize here, though, that there is no evidence that such a risk manifested in any of these RC-26B flights.

A particularly concerning situation, however, appeared in the Arizona operation. The Concept of Operations briefing said, “AZ ANG RC-26 capability will provided (sic) [Phoenix

Police Dept] capability to rapidly maneuver joint law enforcement/national guard ground forces to identified focus areas IOT deter planned/unplanned demonstrations, protests or looting.” (Ex 32:1) Properly approved missions can support civilian law enforcement, but there is no scenario in which it is acceptable or permissible to use DoD assets to deter demonstrations and protests, assuming they remain lawful. The failure to make the distinction between peaceful and violent protest may be due to a lack of training or proper procedure, or may have simply been loose wording written in great haste. However, the protection of constitutional rights is fundamental to all DoD missions that touch on the U.S. population and it is surprising it was not more clearly recognized. In fact, during Minnesota Mission #2, 2-3 Jun 20, Mission # DCN92TZ01246, discussed below, the RC-26B was used to scan building rooftops to look for any security concerns that would affect the safety of protesters and to watch for groups that might interfere with peaceful protesters. (Ex 33:1)

Every witness involved with the imagery from the RC-26B missions confirmed their focus was on large groups of people, and those groups were observed for situational awareness on possible threats to public safety, peaceful protestors, National Guard members, and critical infrastructure. For those flights that directly supported law enforcement, a law enforcement officer aboard the aircraft or in an Operations Center could observe potential threats to public safety in order to direct a law enforcement response on the ground. In these cases, all RC-26B aircrew followed their normal practices of offering the video recordings to law enforcement at the end of missions. If law enforcement did not accept the video recordings, the recordings were destroyed.<sup>7</sup> Witnesses testified this is the first time the National Guard has employed the RC-26B for Civil Disturbance Operations. Given the lack of doctrine, NGB, the RC-26B Community, and the states reverted to past doctrines for either support DSCA missions for natural disasters or law enforcement support in the National Guard Counterdrug Program.

### *Compliance with Rules for the Conduct of Intelligence Activities*

The primary rules for DoD governing the conduct of intelligence activities are in DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*, 8 Aug 16. Para 3.1.a.(1) says:

a. Scope. (1) The Defense Intelligence Components provide necessary information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents. The procedures in this issuance govern the conduct of Defense Intelligence Components ... when conducting intelligence activities under DoD’s authorities.

<sup>7</sup> [REDACTED]

Para. 3.1.a.(3) then provides a vital carve-out:

Activities not governed by this issuance will be carried out in accordance with other applicable policies and procedures, .... *When specifically authorized by the Secretary of Defense or delegee to perform missions or functions other than foreign intelligence or CI, Defense Intelligence Components will comply with DoD policy applicable to DoD non-intelligence organizations and any specific operational parameters specified by the Secretary of Defense for that mission or function. Examples of such activities are:*

- (a) Law enforcement or civil disturbance activities conducted under DoD authorities ...
- (b) Defense support of civil authorities, when directed by the Secretary of Defense. (Emphasis added) (Ex 16)

In other words, intelligence resources (i.e., people, equipment, and processes) can be treated as non-intelligence resources if SecDef or a delegee approve that use.<sup>8</sup> Once approved, intelligence resources follow any applicable non-intelligence rules.

In this case, there is no dispute that no one asked for specific SecDef permission under that section of DoDM 5240.01.<sup>9</sup> The only issue is whether or not this rule requiring SecDef permission applies to RC-26B operations. After carefully examining the laws, instructions, rules and authorities, the preponderance of the evidence logically supports that the rule does apply.

DoDM 5240.01, Glossary, says:

Defense Intelligence Components. All DoD organizations that perform foreign intelligence or CI missions or functions, including: ... The foreign intelligence ... elements of the Active and Reserve Components of the Military Departments ...

The National Guard recognizes that rule in its own policy. It is NGB policy that National Guard intelligence personnel operating in a Title 32 status operate as members of the Department of Defense (DoD) intelligence component and must comply with all DoD guidance and Federal laws applicable to the component, including all intelligence oversight (IO) rules. (Ex 19:1; Ex 20:28,42)

The NGB policy then creates a carve-out:

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<sup>8</sup> There is a parallel provision in DoD 5240.1-R, Procedure 12. However, challenges with applying that rule in this context are discussed in later analysis, below.

<sup>9</sup> The CNGB asked SecDef for permission to use 32 U.S.C. 502(f) status. (Ex 8) Within that request was a note that the NG intended to use IAA (Incident Assessment and Awareness) and UPAD (Unclassified Processing and Dissemination). Nothing in the request would indicate that the NG treated these as intelligence resources, nor did the email flag the request as seeking SecDef approval under DoDM 5240.01, para. 3.1.a.(3)(a) or (b).

Federal intelligence and intelligence, surveillance, and reconnaissance (ISR) equipment *as defined in the glossary* is not used for activities other than authorized foreign intelligence or counterintelligence (CI) activities and associated training unless approved by the Secretary of Defense (SecDef) or his or her designee IAW [Executive Order 12333, DoDD 5148.13, DoDM 5240.01, and DoD 5240.1-R.]. (Emphasis added) (Ex 19:1)

The Glossary says:

Federal Intelligence and Intelligence, Surveillance, and Reconnaissance (ISR) Equipment is equipment purchased with Military Intelligence Program or National Intelligence Program monies. (Ex 19:20)

The NGB then applies this policy to the RC-26B as follows:

[Proper Use Memorandums are not required for Counterdrug missions if] “The equipment being used for CD missions is CD-funded equipment (in other words, the UH-72 or RC-26B) by aircrews on CD-funded orders and is not ISR equipment ... (such as the MC-12, JSTARS ... ). (Ex 20:49)

This is the point at which the NG policy appears unsupported.<sup>10</sup>

First, there is no higher level DoD or other federal policy that would restrict ISR equipment only to that which is “purchased with Military Intelligence Program or National Intelligence Program monies.”<sup>11</sup> This definition is not simply an NGB implementation of a higher-level policy, but appears to be a policy decision in itself. It creates the scope of a rule, but the scope of an intelligence oversight rule rests with USD (I&S) and DoD SIOO rather than with NGB. The references in the CNGBI do not cite, for instance, to any policy memorandum from them that concurs with the NGB interpretation.

Second, applying fiscal law ought to be a factor, and the use of intelligence funding ought to create a clear presumption that particular equipment is intelligence equipment, but it may be one of many factors. For instance, the DoD doctrinal definitions of ISR, intelligence, and

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<sup>10</sup> The NGB/JA 2019 Domestic Operations Law and Policy deskbook does not address this issue directly, but in fairness, it is intended to provide only a “framework” It refers to CNGBI 2000.01C and CNGBM 2000.01A, but simply says:

(2) NG intelligence personnel and equipment may not be used for intelligence activities other than FI or CI unless that use is approved by the SecDef or his designee.

(3) NG intelligence personnel in SAD are not members of the DoD intelligence component, and are prohibited from engaging in DoD intelligence and CI activities, and from using DoD intelligence (IAA) and CI equipment and facilities unless authorized by SecDef (or designee). (Ex 23:10, 155)

It does not address the definition of federal ISR equipment nor mention the RC-26B. NGB/JA may want to include some discussion on federal ISR equipment in a future edition.

<sup>11</sup> The NGB/JA legal reviews of CNGBI 2000.01C and CNGBM 2000.01A do not address this issue.

reconnaissance all point to a conclusion that equipment used for a reconnaissance purpose ought to be considered an intelligence asset.<sup>12</sup> And when the RC-26B was used for an active-duty wartime purpose, it was for ISR. If an overseas situation required, the Air Force could always exercise the option to utilize the RC-26B. There is also little doubt it would be used in its role as a reconnaissance aircraft and it would thus be subject to intelligence oversight.

Third, it appears that even using the NGB rubric does not lead to the conclusion that the RC-26B should be outside the intelligence resource umbrella. The NGB definition in the CNGBI refers to “Equipment *purchased with ...*” certain funds. However, the RC-26B appears to have been originally *purchased* by Air Mobility Command as Operational Support Aircraft. It was then *modified* to become a reconnaissance aircraft using National Guard Reserve Equipment Account funds. It has since been *used* to support Operation IRAQI FREEDOM (OIF) and Operation ENDURING Freedom (OEF) for ISR purposes, likely using Overseas Contingency Funds, and for Counterdrug missions using Counterdrug funds. (Ex 1:4)

By comparison, the NGB treats the MQ-9 as an ISR asset (CNGBM 2000.01A, Encl F, para. 4.a.) and rightly so, given its capabilities and mission. However, its funding for purchase comes from Aircraft Procurement--Air Force funds and not from intelligence funds. (See Consolidated Appropriations Act, 2020, Committee Print of the Committee on Appropriations, U.S. House of Representatives, on H.R. 1158 / Public Law 116–93, [Legislative Text and Explanatory Statement], January 2020, p. 381.<sup>13</sup>

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<sup>12</sup> There is a distinct exclusion for capabilities tied to weapons employment. See the definition of “intelligence-related”: “Specifically excluded are programs so closely integrated with a weapon system that their primary function is to provide immediate-use targeting data.” (Ex 19:21)

<sup>13</sup> ██████████, makes a distinction. He said, “MQ-9, the airframe, itself, is bought as an operational platform, right? Which is why it is, it is built as a, uh, as a targeting platform, right, in an operational mission set. But when they purchase the sensor on the underneath of the MQ-9, that was funded with NIP and MIP money, right? So that made it in an Intelligence sensor.” (Ex 30:7) This investigation did not seek independent evidence of the funding for the MQ-9 sensors and does not contest ██████████ assertion. However, our conclusion is that funding, by itself, is not the right test. For instance, the official Air Force Fact Sheet on the MQ-9 says: “... The MQ-9 Reaper is an armed ... remotely piloted aircraft that is employed primarily against dynamic execution targets and secondarily as an intelligence collection asset. ... The MQ-9 baseline system carries the Multi-Spectral Targeting System, which has a robust suite of visual sensors for targeting [infrared, TV cameras, laser range finder /designator]. In its secondary role as an ISR asset, the MQ-9 is part of a system that support strike aircraft and ground commanders by acquiring and tracking dynamic targets or other useful intelligence.” (See MQ-9 Reaper Fact Sheet, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/>, September 23, 2015 (visited 29 July 2020)). The Fact Sheet acknowledges that the MQ-9 has intelligence as one of its missions, but makes no reference to funding. Instead, it focuses on a capability (sensors) and how it is actually used (targeting or ISR). In addition, it is the combination of the sensor and the platform that makes the sensor usable. There is no contention, for instance, that someone would, could, or did remove the sensor and the processing and display equipment from the RC-26B. That level of distinction is not in any policy. Even the NGB in the CNGBI does not attempt that fine a distinction when using funding as the sole test. Most importantly, the use of funding as the sole test is a creation of NGB policy, it is a policy that goes beyond NGB’s authority, and there is no evidence it is supported by higher-level policy.

One witness pointed to the concept that the RC-26B was not an active-duty “program of record” as part of their analysis as to why the RC-26B is not an intelligence asset. (Ex 34) That concept is misplaced. First, the phrase appears nowhere in any intelligence oversight rule – Executive Order 12333, DoDD 5148.13, DoDM 5240.01, or DoD 5240.1-R – so the people writing the intelligence oversight rules did not consider it a key factor in their application. Second, the phrase “program of record” is an acquisition term which can be applied to all acquisitions, from weapons to weapons systems to logistics systems to ISR platforms.<sup>14</sup>

So just as NIP or MIP funding creates a strong presumption that an asset acquired with those funds is an intelligence asset, so acquisition as an intelligence program of record likewise creates the same strong presumption. In fact, the two are likely synonymous – that is, an acquisition activity that is labeled as an intelligence program of record is almost certainly funded with NIP or MIP funds, and is almost certainly an ISR asset subject to intelligence oversight. However, that does not mean the opposite corollary is always true.

That is, an asset that performs intelligence activities may have been acquired with non-intelligence funds. It is the fact of the intelligence activities that drives the asset to being subject to intelligence oversight. An asset may have been purchased with funds with broad purposes, or the acquisition was done with the wrong funds, or the acquisition may have been done with a mixture of funds. But if it is used for intelligence activities, then it is subject to intelligence oversight rules.<sup>15</sup>

The analysis is fairly straightforward: the aircraft, with all its systems, is federal equipment; if used for a federal mission by active duty forces, the RC-26B would be and was used as an ISR asset; as an ISR asset, it would be subject to intelligence oversight rules; federal equipment does not change its character simply by being in the hands of the National Guard, even if funded by the National Guard, absent some special permission to the contrary. It cannot be that intelligence equipment moves in and out of oversight, especially for something so significant as a requirement for SecDef approval for law enforcement support, simply by changing its funding line or its position in its lifecycle from acquisition through use through

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<sup>14</sup> See, for instance, Defense Acquisition University Glossary Definition. “Program of Record: 1.) Program as recorded in the current Future Years Defense Program (FYDP) or as updated from the last FYDP by approved program documentation ... 2.) May also refer to a program having successfully achieved formal program initiation, normally Milestone B. ... the term ‘program of record’ is a budgeting term as much or more than a program management term, indicating this phase of lifecycle – when a program has a dedicated funding line in the budget.” <https://www.dau.edu/acquikipedia/pages/articledetails.aspx#!522> (visited 4 August 2020). Note, however, this term is not used in the most significant DoD acquisition issuances, DoDD 5000.01, The Defense Acquisition System, May 12, 2003, Incorporating Change 2, August 31, 2018, and DoDI 5000.02, Operation of the Adaptive Acquisition Framework, January 23, 2020.

<sup>15</sup> This does not mean that all sensors are subject to intelligence oversight rules. There is an exception for programs that are so closely integrated with a weapon system that their primary function is to provide immediate-use targeting data. See, for instance, DoDD 5148.13 and AFI 14-404. However, that exception does not fit the RC-26B.

modification. Finally, even the NGB applies some intelligence oversight rules to the use of the RC-26B, including requiring a Proper Use Memorandum in most cases.<sup>16</sup>

All of these factors lead to a conclusion that the full gamut of intelligence oversight rules ought to apply to the RC-26B. This is why Congress and the press got engaged on this issue. They believed individuals were being subjected to military-grade surveillance. This is why SecDef approval under DoDM 5240.01, para 3.1.c. should have been specifically requested.

### ***Title 32, U.S. Code, Sec. 502(f) Status***

As noted in the Authorities section, Guardsmen may be in four “statuses”:

- State Active Duty
- Title 32, Sec. 502(a), Inactive Duty Training/Active Training (i.e., traditional Guard service - one weekend a month plus two weeks)
- Title 32, Sec. 502(f), “training or other duty”
- Title 10 active service

Under Sec. 502(f)(2)(A), the training or duty may include “Support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.”

NGB/JA has interpreted the provision this way:

The purpose of FTNGD-OS [Full Time National Guard Duty for Operational Support] is to provide the necessary skilled manpower to support existing or emerging requirements under 32 U.S.C. §502(f). Training may occur incidental to performing FTNGD-OS. ... Per

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<sup>16</sup> There is a collateral process issue here regarding Proper Use Memorandums (PUM). On the active duty side, PUMs are used to support training of intelligence units that may gather domestic imagery to ensure they do not collect US person information improperly. For operational DSCA missions using active duty forces presented to USNORTHCOM via the DSCA EXORD, the proper process is to use a Domestic Imagery Legal Review (DILR) in support of Incident Awareness and Assessment. So the active duty side uses PUMs for training and DILRs for DSCA operations. For the Guard, CNGB policy describes how to process a PUM and the states involved here processed PUMs and sought legal reviews. The PUMs were founded on the notion that these were training missions. This report concludes later that 502(f) status was not authorized; that the missions were not done for federal training; that PUMs were not a proper coordination device; and that each of the PUMs filed was founded on an improper premise – that 502(f) status had been approved for training. Therefore, the PUMs do not have any real effect for showing compliance with appropriate rules. They evaluate compliance with intelligence oversight rules governing collection of foreign intelligence and counterintelligence, and training in support of that. For instance, they address intentional and incidental collection, which are terms used in DoDM 5240.01, Proc 3, to describe the circumstances for the lawful intentional or incidental collection of U.S. Person information in support of a foreign intelligence or counterintelligence mission. However, those rules are never reached if the mission is conducted for non-intelligence purposes, and the National Guard in either State Active Duty status or Title 32 status has no authority to conduct foreign intelligence missions. The PUMs examined the wrong rule sets. This created misplaced confidence that rules were being followed.

CNGBI 1302.01, members performing duty under the authority of 32 U.S.C. §502(f) will not perform duties that are not specific requirements of the mission for which the members were ordered to duty. If circumstances require a change of duty, Commanders must amend/curtail the current order. Commanders may order members performing duty under 32 U.S.C. §502(f) to respond to an emergency in accordance with the Immediate Response Authority and State law. (Ex 23:78)

...

NG personnel in 32 U.S.C. §502(f) Operational Support [OS] status may be used for DSCA if the Governor makes a formal request for DSCA authority IAW DoDI 3025.22. If approved by SecDef, support could occur under 32 U.S.C. §502(f)(2). The utilization of FTNGD-OS personnel is largely limited to the underlying purpose and funding for which they were brought onto duty. In many cases, each individual OS Soldier or Airman must be reviewed based on their own orders, mission and funding source. Commanders must be careful in using federally funded OS for solely State purposes. (Ex 23:79)

It is important to note that 502(f) describes a status and not a mission.

On 3 Jun 20, CNGB asked SecDef to approve Sec. 502(f) status. (Ex 8:1) [REDACTED] confirmed SecDef never approved the request because SecDef's staff could not find a lawful way to approve it. (Ex 35:14)

SecDef did not approve a federal mission, with the exception of the District of Columbia. To the extent training was cited as the purpose of the missions with operational support as an incidental benefit, those flights were reversing the guidance of NGB legal advisors. (Ex 34:70) In addition, any training justification is not well-supported in the evidence. For instance, none of the witnesses cited to any training deficiencies that would be filled by participating in these flights, nor any training objectives they would fulfill above minimum requirements.

Finally, interpreting these missions as training with incidental operational benefit flips the justification DoD gave to Congress when requesting the change to Sec. 502(f).<sup>17</sup> DoD asked Congress to amend Sec. 502 in the 2007 National Defense Authorization Act to allow for "Total Force Integration," which was an effort to leverage the skills and experience of the Guard. (Ex 91:3; Ex 92:2-3) The point was to more closely align the Guard to active duty requirements and provide more training and integration than could be achieved during weekends and two weeks in

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<sup>17</sup> However, see, *Bostock v. Clayton County, Georgia*, Slip Opinion No. 17-1618, U.S. Supreme Court, June 15, 2020 at 24-25 (Gorsuch, J: "unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage— not to leave room for courts to recognize ad hoc exceptions"). [For certain purposes,] this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. ... When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime. That is exactly the sort of reasoning this Court has long rejected."

the summer. DoD did not express an intent to have elements of the NG direct independent missions not directly related to active duty missions.<sup>18</sup>

A comprehensive review of the mission authorities involved showed numerous directives in the area of support to civil authorities, with some nuanced distinctions. While authorities for support of border missions, counterdrug operations, and natural disasters such as wildfires, floods, hurricanes, and the like were fairly well known and regularly exercised, each has its own specific authorities and limitations. Employment of National Guard assets in response to civil unrest scenarios are highly unusual, distinctly different, and require special measures. Unless tasked by SecDef in support of a federal mission, NGB serves in a coordination and oversight role only. With respect to the RC-26B, a low density asset (only 11 aircraft exist across the country), NGB requires notification of state-initiated missions, uses the Air National Guard Readiness Center to aid in coordination for those states without RC-26B aircraft assigned, and ensures compliance by submission of PUMs under NGB instructions. Each of the RC-26B missions flown completed a PUM detailing the use and limits on imagery used in support of civil authorities, including a reminder that no U.S. persons will be targeted. Each PUM also received two legal reviews -- one at the state level and another at the National Guard Bureau. What is noticeably absent in the mission generation process are formal centralized validation or approval phases. The PUM requests are forwarded by the states to NGB J2, who staffs them through JA, ANG 2/3/6/10, Intelligence Oversight, J33, J35, and J5. However this NGB oversight and PUM approval does not equate to mission approval. (Ex 37:1) This, coupled with the MN TAG stating they could use help with visualization from above, in response to CJCS and Pentagon senior leaders asking what Minnesota needed in terms of support, may have contributed to the common perception that these missions were directed and approved from above. (Ex 38:1) Of note, a subsequent request from CNGB to SecDef to federally fund these missions was never granted. (Ex 35:14) What was missing was a clear authorization from a Governor (except for California) or SecArmy, or a clear delegee, to authorize aerial observation, with instructions on how to conduct the mission in accordance with state law, and approval from SecDef (or delegee). A standardized and regularly exercised process for approving the use of this rare asset in a civil disturbance setting that could also assess not just whether such missions are legally permissible, but consider whether they are advisable under the circumstances, could improve the current process and avert concerns of misuse.

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<sup>18</sup> There is support for the concept that a Service Secretary, even after the fact, can direct that disaster relief by Guardsmen may be credited for federal training and federal pay under Sec 502(a). This would allow the disaster relief activity to be done with DoD funds without reimbursement from the State (52 Comptroller General 35, Jul 17, 1972.) However, see SecDef Memorandum, Reimbursable Activities in Support of Other Entities, 19 June 2020, substantially limiting discretion in not requiring reimbursement for certain activities. The memorandum does not cite 32 U.S.C. 502, but does cite “DoDD 3015.18 [probably 3025.18], *Defense Support of Civil Authorities*,” which applies to the NG. In any case, the NGB requested Sec 502(f) status and it was not granted. (Ex 35:14)

### *Complexity and Vagueness in DoD-level Policy*

The interface between Defense Support to Civil Authorities or state law with Intelligence Oversight is fairly simple: DoD intelligence resources, including those in the National Guard, can only be used for Defense Support to Civil Authorities, including support to civilian law enforcement, if SecDef approves and the intelligence resources are used under Defense Support to Civil Authorities rules or state law, as SecDef directs. (See DoDM 5240.01, para 3.1.c. and DoD 5240.1-R, Procedure 12) However, reaching that conclusion and discerning what resources are in or out of the scope of the policy can be difficult. Complexity and vagueness in DoD policy contribute to this difficulty. This section lays out several examples.

As for the use of Intelligence assets in DSCA, DoDD 3025.18, para 4.u. says: “Use of intelligence assets for DSCA purposes must be in accordance with Reference (o) [DoD Directive 5240.01, “*DoD Intelligence Activities*,” August 27, 2007, as amended].” However, DoDD 5240.01 does not use the phrase “intelligence assets” in a way that would be useful for analysis for DSCA purposes. DoDD 5240.01, para 5.4., says, “The Secretaries of the Military Departments with IC elements shall: 5.4.1. Organize, staff, train, and equip the intelligence assets of the Military Departments, including CI, signals intelligence, geospatial intelligence, measurement and signatures intelligence, and human intelligence assets, to support operational forces, national level policy-makers, and the acquisition community.” However, it is clear that DoDD 3025.18 is referring to all intelligence assets of DoD, including those outside the Military Departments, so the meaning of “intelligence assets” is not discernible just by referring to DoDD 5240.01. By comparison, DoDM 5240.01 refers to Defense Intelligence Components without any distinction among people, equipment, or processes, each of which or all together could be considered “assets” in the meaning intended by DoDD 3025.18. So neither DoDD 3025.18 nor DoDD 5240.01 gives clear, distinct language about what is in or out of coverage of intelligence oversight, especially for the National Guard, although it can be discerned by looking to DoDM 5240.01. This means that reaching a proper conclusion depends on whether a reader starts with DoDD 5240.1, DoDD 3025.18, or DoDM 5240.01, and that does not seem like a useful structure for policy.<sup>19</sup>

Also, DoD 5240.1-R, Procedure 12, para C12.2.2.3. says: “Specialized equipment and facilities may be provided to Federal law enforcement authorities, and, when lives are endangered, to State and local law enforcement authorities, provided such assistance is consistent with, and has been approved by an official authorized pursuant to, Enclosure 3 of DoD Directive 5525.5 ...” However, DoDD 5525.5 has been replaced by DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies*. In its applicability section, DoDI 3025.21 says it, “Does not apply to: “The Defense Intelligence and Counterintelligence Components, when providing intelligence assistance to civilian law enforcement activities in accordance with ... Procedure 12 of DoD 5240.1-R ... [or to] NG personnel in State active duty or [Section 502 of ] title 32,

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<sup>19</sup> Even with the vagueness, NGB seems to have at least partially solved the problem. See CNGBI 2000.01C, para 4.d.

U.S.C. ... status.” So DoD 5240.1-R, Proc 12, points to DoDI 3025.21, which points back to DoD 5240.1-R, Proc. 12. Again, not a useful structure for policy.

### *The National Guard and DSCA Generally as Compared to DSCA for Law Enforcement Support*

DoDD 3025.18, para 1.b. says it “Applies to ... National Guard ... personnel when under Federal command and control. Also applies to National Guard personnel when the Secretary of Defense determines that it is appropriate to employ National Guard personnel in title 32 ... status to fulfill a request for DSCA, the Secretary of Defense requests the concurrence of the Governors of the affected States, and those Governors concur in the employment of National Guard personnel in such a status.”

DoDD 3025.18 also points to DoD Instruction 3025.21, “*Defense Support of Civilian Law Enforcement Agencies*,” February 27, 2013. That gives a clear indication that defense support to civilian law enforcement agencies is a distinct subset of Defense Support to Civil Authorities, and reading DoDD 3025.18 and DoDI 3025.21 together indicates that the National Guard is subject to the special rules for support to civilian law enforcement in certain cases. However, DoDI 3025.22, *The Use of the National Guard for Defense Support of Civil Authorities*, para 2.b., says it applies to “The use of the National Guard for DSCA ... in accordance with [DoD Directive 3025.18, “*Defense Support of Civil Authorities*,” December 29, 2010], when conducted in a duty status pursuant to section 502(f) ...” However, the exclusions in DoDI 3025.22 do not include support to civilian law enforcement or address the use of intelligence assets, so only the closest, most arduous reading of the policies would lead to a clear conclusion that National Guard personnel must seek SecDef approval: 1) to support civilian law enforcement as a special form of defense support to civil authorities when in Title 32 status, or 2) use intelligence resources for any form of defense support to civil authorities, including for Immediate Response Authorities. The logic trail is in the rules, but it is a more difficult trail than it needs to be, especially when these rules are only used when time is of the essence, and American’s lives and property are at so much risk that uniformed military forces must step in.

### *Treatment of Immediate Response Authority*

DoDD 3025.18, para. 4.i., authorizes Immediate Response Authority in response to a request for assistance from a civilian authority. Federal Immediate Response Authority is a form of DSCA that allows DoD officials (Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials) to:

- provide an immediate response to a request for assistance from a civil authority under imminently serious conditions
- if time does not permit approval from higher authority, to temporarily employ the resources under their control, subject to any direction provided by higher

headquarters, to save lives, prevent human suffering, or mitigate great property damage within the U.S.

DoDD 3025.18 also refers a couple of times to “installations,” which indicates some connection to an installation is important.

By comparison, DoDD 3025.18, para 4.j. recognizes the authority of State officials to direct a State immediate response using National Guard personnel under State command and control (including personnel in Title 32 status in accordance with State law), but National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.

The challenge is that the policy for federal Immediate Response Authority and state Immediate Response Authority are not very parallel, but it appears there is some intent in the policy that they should be, at least with respect to the use of federal equipment. The next few paragraphs discuss this.

DoDD 3025.18 points to the DoD Dictionary for the definition of civil authorities. It says, “Those elected and appointed officers and employees who constitute the government of the United States, the governments of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, insular areas, and political subdivisions thereof.” (Ex 39:39) With respect to the National Guard, many personnel are officers or employees of their respective states, at least when in a duty status. It seems unlikely that DoD policy would anticipate having a Guardsman in Title 32 status serve as a civil authority for the purpose of requesting official help under state Immediate Response Authority, and then have that person, or another National Guard person in Title 32 status, approve the state Immediate Response and use federal equipment, without some policy indicators of limitations for support of law enforcement or the use of intelligence resources. The problem is that the language allows this, and some form of this happened, in essence, in some of these flights.

Also, DoDD 3025.18, para 4.i.(1), points to Reference (e) for guidance to commanders in applying Immediate Response Authority. However, Reference (e) was cancelled by that same DoDD (see para 1.g.). This may be an administrative matter, but is an example of the confusion that can be generated by DoD-level policy.

## **Examination of Each Mission**

We now turn to an examination of how the RC-26B was requested, authorized, and performed. Following the Minnesota analysis, we will examine Arizona, California, and the District of Columbia, individually. In each section we will explore who tasked and approved the missions and for what purpose. We will then review the authorized parameters of each mission and compare those to what actually occurred. Lastly, for each set of missions, we will consider what, if anything, was executed improperly or could be improved.

## *Flights Over Minnesota*

We begin the analysis of what occurred in each of the states and the District of Columbia with the RC-26B flights over Minnesota (hereafter referred to as "The Minnesota flights.") These flights are a good starting point as Minneapolis was the center of civil unrest, which in turn led to similar demonstrations in other major U.S. cities. The Minnesota flights are unique in that they provide a good example of one state (Wisconsin) assisting another state (Minnesota) with coordination from NGB. As Minnesota did not have the air assets needed, the Wisconsin National Guard responded, flying 3 missions over 4 days from 1-4 Jun 20.

### **Minnesota Chronology**

| <b>DATE</b> | <b>EVENT</b>  |
|-------------|---|
| 28 May 20   | Minnesota Governor Tim Walz mobilizes the Minnesota National Guard to assist law enforcement in restoring civil order after protests turn destructive in Minneapolis. (Ex 40:1)   |
| 31 May 20   | Minnesota NG J3 requests capabilities to conduct IAA in support of situational awareness and damage assessment w/r/t civil disturbance. (Ex 41)   |
| 1 Jun 20    | [REDACTED] in [REDACTED], recognized the request in the JIEE secure webpage and matched Wisconsin ANG as the nearest unit with capabilities (RC-26B) to fulfill the request for assistance. (7:3)   |
| 1 Jun 20    | PUM approved at NGB, per CNGBM 2000.01. <sup>20</sup> (Ex 43)   |
| 1-2 Jun 20  | #1 of 3 missions flown. Tail number 91-0504, call sign "DAGGR 04," carrying a crew from the 115 WG of the WI ANG, departed 1 Jun 20 at 1815L (CST) and flew to Minneapolis, MN. The overall mission, which included travel from Wisconsin to Minnesota and a fuel stop, lasted 7 hours, 15 min. DAGGR 04 returned to base in Wisconsin, landing at 0130L on 2 Jun 20. (Ex 44; Ex 100) |
| 1-2 Jun 20  | During mission #1, the aircraft transmitted video/images to the Joint Operations Center (JOC) in Minneapolis. (Ex 45)   |
| 2-3 Jun 20  | #2 of 3 missions flown. Tail number 91-0504, Call Sign "ANIML 11," carrying crew from the 115 WG of the WI ANG, departed 2 Jun 20 at 1925L and flew to Minneapolis, MN. The overall mission, which included travel from Wisconsin to Minnesota and a fuel stop, lasted 6 hours. ANIML 11 returned to base in Wisconsin, landing at 0125L on 3 Jun 20. (Ex 46; Ex 100)                 |

<sup>20</sup> Domestic IAA PUMs originate in the state which owns the requested asset, in this case Wisconsin, by the J2 or J3 (O-4 or above), and the state JA must certify the request is compliant with state law and policy. The PUM request is then forwarded to NGB J2, who staffs it through JA, ANG 2/3/6/10, Intelligence Oversight, J33, J35, and J5. The coordinating offices look at the purpose of the collection, who the user will be, the process of dissemination, and compliance with applicable governing instructions. (Ex 37:1)

|                        |  |
|------------------------|--|
| 4 Jun 20 2-3<br>Jun 20 | #3 of 3 missions flown. Tail number 91-0504, Call Sign "ANIML 11," carrying crew from the 115 WG of the WI ANG, departed 4 Jun 20 at 1110L and flew to Minneapolis, MN. The overall mission, which included travel from Wisconsin to Minnesota and a fuel stop, lasted 6 hours 20 minutes. ANIML 11 returned to base in Wisconsin, landing at 0125L. (Ex 47; Ex 100) |
|------------------------|--|

Governor Walz's Emergency Executive Order 20-64, activating the Minnesota National Guard (MNNG) and declaring a peacetime emergency, stated:

Unfortunately, some individuals have engaged in unlawful and dangerous activity, including arson, rioting, looting, and damaging public and private property. These activities threaten the safety of lawful demonstrators and other Minnesotans, and both first responders and demonstrators have already been injured. Many businesses, including businesses owned by people of color, have suffered damage as a result of this unlawful activity. The City of Minneapolis has exhausted its resources and called for assistance from mutual aid partners to ensure immediate response to protect life, safety, and property. These mutual aid partners have fully committed their available resources. The Cities of Minneapolis and St. Paul have activated their emergency operations plan, and the Mayors of both cities have requested the assistance of the Minnesota National Guard to help provide security and restore safety. (Ex 48:1)

After being mobilized, the [REDACTED], was part of a telephone conference with CNGB and CJCS. During that telephone conference, after providing a status update, [REDACTED] was asked what support he needed. In response, he mentioned that overhead imagery would be helpful. (Ex 49:1)

[REDACTED] stated he received a series of phone calls from the CJCS beginning at 0001 hours on 29 May 20 through 31 May 20. On 30 May 20, [REDACTED] suggested to him that "aerial observation is very important." (Ex 38:1) [REDACTED] explained he took this as a suggestion, not an order. He added no particular aircraft was discussed, only the capability. After that, [REDACTED] recalled speaking with the MN Joint Staff about the idea of aerial observation capability. From there, he believed the MN ANG A2 or A3 contacted the Air National Guard Readiness Center and shortly thereafter, on 31 May 20, MNNG J3 submitted a request for support capabilities through NGB's web-based coordination module, Joint Information Exchange Environment (JIEE).<sup>21</sup> The JIEE request incorrectly stated the request was for "over flight of 10-15 target areas to assist MN HSEM with flood situational awareness...and disaster target areas." (Ex 41:1) The PUM correctly stated the RC-26B missions were to be in Support of Civil Disturbance in Minnesota. (Ex 50:1)

[REDACTED], corroborated [REDACTED] testimony that the idea for overhead images originated during conversations between [REDACTED] and [REDACTED]. He

<sup>21</sup> JIEE is a Web-based collaborative software capability that allows the Guard to coordinate and provide situational awareness in all 50 states and territorial joint operations centers.

stated his understanding of [REDACTED] commander's intent was to use the images to locate fires in the metro areas, and identify locations of large crowd gatherings to anticipate where Guard missions may be tasked. (Ex 49:1) [REDACTED] added some context to the urgency of the situation and the need to take swift action. He related the Minnesota National Guard civil disturbance response happened much quicker than floods and other natural disasters experienced in the past and noted natural disaster responses generally had longer lead times for planning. He further stated that in this case, the peaceful protests in Minneapolis quickly turned violent with little to no notice and this compressed planning and execution timeline caused decision points to be much quicker than in other responses. (Ex 49:1)

According to the [REDACTED], Minnesota was the first state to request IAA support for what was described as "Civil Disturbance Operations" resulting from the protests. He stated he developed Courses of Action (COA) on his own initiative prior to the request for aircraft based on his sense requests would likely come. He based this on three years of Manned Airborne ISR FAM experience during other DSCA events. [REDACTED] worked with the 11 state RC-26B Program Managers in a collaborative fashion to plan and source this requirement, while simultaneously filling the other NG Counterdrug (CD), Southwest Border (SWB), and other DSCA missions. He briefed [REDACTED] [REDACTED], on the plan to request RC-26B aircrew from Wisconsin to support Minnesota's IAA request. [REDACTED] approved his plan and called the affected RC-26B State TAGs for their concurrence. (Ex 7) After NGB reviewed and approved the PUM, the three missions to be flown over Minnesota were approved by [REDACTED], WI ANG. (Ex 7:4)

[REDACTED] [REDACTED] stated that on 30 or 31 May, he spoke directly to [REDACTED] about IAA support. This phone call was initiated by NGB J2. According to [REDACTED] [REDACTED] offered two options for IAA for MN: unmanned aircraft from North Dakota ANG or RC-26B aircraft from Wisconsin ANG. [REDACTED] indicated that Minnesota would like the offered IAA support. Two methods for Minnesota to request the support were offered: via the Emergency Management Assistance Compact (EMAC, the mutual support agreement between the states) or via a Request for Assistance (RFA) message through the JIEE secure website. [REDACTED] prepared EMAC requests for IAA support for both North Dakota and Wisconsin. North Dakota denied the EMAC support request due to lack of available aircraft. The EMAC request for Wisconsin was canceled as NGB J2 (either [REDACTED] or [REDACTED], LNOs to the MN JOC) advised [REDACTED] to submit a RFA through JIEE instead. This decision to deviate from EMAC will be addressed later, but marks a point at which thoughts may have deviated from one of the viable status and funding options. [REDACTED] stated [REDACTED] [REDACTED], advised him how to submit a PUM for the IAA support.<sup>22</sup> He also noted the IAA support requests moved very fast. The ground support crew came from Mississippi, the aircraft was from Alabama, and the aircrew was from Wisconsin. He also coordinated for the RC-26B images to be transmitted into the 34<sup>th</sup>

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<sup>22</sup> The PUM eventually came from the Wisconsin ANG, the state which owned the requested aircraft.

Infantry Division Headquarters (34<sup>th</sup> ID) as well as the Minnesota Joint Operations Center (JOC). (Ex 51)

### ***Stated Objectives***

The objective of these three flights, as stated in the PUM, were:

[T]o conduct realistic training and evaluation in core Federal military mission areas, with the incidental benefit of providing situational awareness, assessing the existence and extent of damage, and evaluating the effectiveness of damage mitigation efforts. Airborne platforms and sensors to be used are the RC-26B with electro-optical/infrared (EO/IR) full motion video (FMV) sensors operated by the 115th Fighter Wing. All platforms, sensor data and imagery products will be used in support of the IC [Incident Commander] during this timeframe. Signals Intelligence (SIGINT), Human Intelligence (HUMINT), and Measurement and Signatures Intelligence (MASINT) will NOT be collected or disseminated. (Ex 50:2)

Additionally, the PUM stated:

No U.S. persons will be targeted during these missions. Any personally identifying information unintentionally and incidentally collected about specific U.S. persons will be purged and destroyed unless it may be lawfully retained and disseminated to other governmental agencies that have a need for it IAW applicable laws, regulations, and policies. (Ex 50:2)

There were no law enforcement members, military or civilian, on board the aircraft for any of the three sorties flown by Wisconsin ANG RC-26B aircrew over Minnesota. (Ex 49:2) The Wisconsin [REDACTED] reviewed the request and certified the intended use was legally sufficient, stating:

I certify that the intended collection and use of the requested information, materials, and imagery are in support of Congressionally approved programs and are not in violation of applicable laws. The request for imagery is not for the purpose of targeting any specific U.S. person (USPER), nor is it inconsistent with the Constitutional and other legal rights of U.S. persons. Applicable security regulations and guidelines, and other restrictions will be followed. (Ex 50:3)

Additionally, the Wisconsin [REDACTED], similarly certified the proper purpose of the missions and use of any images gathered, writing:

I am authorized as a trusted agent and certifying official on behalf of the requesting unit, and I understand I am responsible for the accuracy of the information contained herein and for the proper safeguarding of products received in response. (Ex 50:3)

## *Mission Results*

Minnesota Mission #1, 1-2 Jun 20, Mission #DCN92TZ01245, Call Sign DAGGR 04. The Mission Pilot was [REDACTED].<sup>23</sup> The Co-Pilot was [REDACTED] and the Mission Systems Officer (MSO) was [REDACTED]. DAGGR 04 took off at 1815 CST on 1 Jun 20. According to the Mission Report (MISREP), the initial tasking was to gain situational awareness on a large crowd gathering at Chicago Ave and 38th St in Minneapolis.<sup>24</sup> A group of people were noted adding materials to a barrier, like defensive positions. The crew noted while the overall atmosphere seemed peaceful, at these defensive positions there were clear Entry Control Points (ECP) with smaller groups ushering large groups through. The aircraft was then vectored to observe the Minnesota Governor's mansion. No crowds were observed there. Follow-on taskings included historic locations around the city. The aircraft then returned to Chicago Ave and 38th Street, with nothing significant noted. The aircraft was vectored to an area where there were possible shots fired at Guard members. The crew conducted a defensive scan looking for groups massing greater than 10 for the safety of forward deployed Guardsmen or destruction of property. (Ex 45) No massing or destruction was observed. The aircraft was again re-vectored to an area where there was a possible shooting at a Guard vehicle. No massing or destructive behavior could be detected from the air. Finally, the aircraft reassumed situation awareness scans at Chicago Ave and 38<sup>th</sup> St. Human figures were seen climbing on top of a building using a car pulled up to the side of a lower ledge; however, no destructive activity was observed. The aircraft returned to base and landed at 0130 CST on 2 Jun 20. (Ex 44; Ex 100)

A representative image during the 01 Jun 20 flight is depicted here:

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<sup>23</sup> [REDACTED] is a [REDACTED].

<sup>24</sup> The intersection of Chicago Ave and 38th St is the location of the memorial honoring Mr. George Floyd and was a gathering place for protests.



(Ex 31)

Minnesota Mission #2, 2-3 Jun 20, Mission # DCN92TZ01246, Call Sign AMINL 11. The Mission Pilot was [REDACTED]. Co-Pilots were [REDACTED] and [REDACTED]. The MSO was [REDACTED]. ANIML 11's takeoff time was 1925 CST on 2 Jun 20. According to the MISREP, upon arrival on station the aircraft was directed by the JTAC to observe the intersection of Chicago Ave and 38<sup>th</sup> St. The aircraft scanned the general area to include the four primary roads leading in to the intersection as well as barricades and makeshift Entry Control Points (ECPs) which were erected by protesters leading into the area. The aircraft also scanned building rooftops and looked for any security concerns that would affect the safety of protesters. The MSO watched for any large crowds, destruction of property, and fires in the area that may be of concern to local fire departments. The air controller on the ground reported observing a large crowd gathering at Chicago and 38th at the memorial site and confirmed the crowd was peaceful. Adjacent rooftops were scanned with nothing significant noted. Road obstructions were noted and observed in all directions leading into the intersection. One obstruction included a school bus next to an improvised barricade, a 2 level (~4 feet and ~6 feet) refined barricade structure, a pile of debris, large dumpsters, a box truck, and several other vehicles. These obstructions were spaced uniformly, appearing like defensive positions or vehicle impediments. While scanning road obstructions, the MSO noted on the sides of these obstructions there appeared to be ECPs with large groups of individuals clearing others through. The larger group dispersed into smaller groups, with some remaining behind. The group appeared peacefully gathered, so a scan of the State Capitol area was conducted. No groups

were observed gathering there. Scans were completed at sites where fires were set a few days prior. Nothing was observed so the initial location was then given another situational awareness scan. No groups were noted to be interfering with peaceful protests. The aircraft returned to base at 0125 CST on 3 Jun 20. (Ex 46)

Minnesota Mission #3, 4 Jun 20, Mission # DCN92TZ01248, Call Sign ANIML 11. The Mission Pilot was [REDACTED]. The Co-Pilot was [REDACTED] and the MSO was [REDACTED]. ANIML 11 took off at 1110 CST on 4 Jun 20. According to the MISREP, the aircraft checked in with the controller over the radio around 1310L. An initial point was given and situational awareness scans were conducted. The aircraft observed a large crowd estimated at 1,000 in the road and on sidewalks. Rooftops were scanned for any potential threats to civilians or military members with nothing significant noted. Roadways were scanned for any obstructions or possible threats. The aircraft was later moved to a second location where a crowd of approximately 800-1,200 had converged. Threat scans were conducted with nothing significant noted. Additional situational awareness scans were done for the remainder of the mission until the aircraft returned to base and landed at 1730L. (Ex 47)

[REDACTED] is the [REDACTED]. He works at [REDACTED] in Arlington, VA, but during support operations in Minnesota he was detailed as part of an NGB Joint Leadership Team (JLT) sent to Minnesota to assist with IAA during the Civil Disturbance Operations. [REDACTED], while positioned in the Minnesota JOC, could see the RC-26B video feed on the screen at the front of the JOC. He stated the JOC was occupied by National Guard members only and was not a joint operation with the State Emergency Management or law enforcement agencies. He also confirmed the purpose of the RC-26B in Minnesota was to provide situational awareness for Force Protection for the MN National Guard, consistent with the stated objectives and aircrew understanding of the mission intent noted earlier. (Ex 53:1)

[REDACTED], was present in the JOC for the Civil Disturbance Operations on the afternoon of 29 May 20. He noted this was the first time the Minnesota National Guard has used IAA for domestic operations. [REDACTED] stated the images received from the RC-26B were not very useful as the feed was very "grainy and in black and white." (Ex 54:1) He related that comparatively, the Minnesota State Police transmitted their overhead helicopter images into the JOC as well and noted the police imagery was much better quality. (Ex 54:1) On 2 Jun 20, the RC-26B ground crew moved their ground station to Fridley, MN (northwest of Minneapolis). [REDACTED] observed the images from the second night's flight on the ground crew's monitors and felt the quality of the images was better than the day before. [REDACTED] members were with him at Fridley -- [REDACTED] and [REDACTED]. The areas of interest observed were in the vicinity of the State Capitol, and South Minneapolis near Chicago Ave and 38<sup>th</sup> St. He confirmed no specific individuals were identifiable from the RC-26B images. (Ex 54:2)

## Analysis

The threshold question has to be whether or not the missions flown were authorized at the right level. As addressed earlier, rules for the conduct of intelligence activities should apply to the RC-26B as an ISR asset. As such, employment of the RC-26B should have been approved by SecDef or his designee. Understanding the issue of lack of proper approval to conduct the mission, the analysis will continue and consider whether the Minnesota collection itself violated any standard. However, the standard to apply is driven by the level of approval obtained. As such, in order to better understand what should have occurred, we will examine in hindsight what should have happened and compare that with what actually happened in an effort to identify points along the process where enhanced focus in the future can help avoid some of the identified missteps.

Interviews and documents examined indicated the mission focus of the Minnesota flights was to provide support to National Guard members on the ground in Minnesota. (Ex 50:1) This varies slightly with the stated intent and execution in other states that had a more direct connection to law enforcement, which will be discussed later. (Ex 45:2) Witnesses interviewed, including aircrew and program managers, appeared to have a good understanding of the left and right limits on collection, focusing efforts on federal property sites, and looking for hazards to that property and the National Guard troops present on the ground. It should be noted that this is similar, yet far different from the routine domestic missions the planners and crew were more familiar with (natural disasters, floods, wildfires, hurricanes, etc.) and far removed from the overseas mission set. The inherent complexity in employing this aircraft domestically for Civil Disturbance Operations is that while rightfully overseeing federal property, buildings, monuments, and intersections during mass protest demonstrations, human beings are also present. As such, it is difficult, if not impossible, to filter out people which are not by themselves the intent of collection from places of interest that are. It is also problematic from a practical application standpoint to have members look for large crowds and potential threats to safety while at the same time require them to not look at individuals. Herein lies the inevitable dichotomy between valid overwatch and force protection on the one hand, and potential unwanted collection of personal information on the other.

In evaluating the proper employment of RC-26B air assets over Minnesota, as will likewise be examined for flights over Arizona, California, and Washington DC, the facts will be analyzed through three *unequal* lenses. The first and most important being Intelligence Oversight and whether the RC-26B aircraft flying these missions violated any standard with respect to collection of personal information. This is understandably the first and foremost concern of Congress, the media, and citizens and is the primary focus of this investigation. Secondly, though likely more of interest to internal audiences, is a discussion of the underlying mission approval process, recognizing the unique circumstances of the protests, how rapidly events unfolded, and the relative inexperience, collectively, in responding to such a crisis. Finally, although not the topic of headlines or letters of concern, is a discussion of ensuring members responding to the call for such taskings were in the proper duty/pay status.

## *Intelligence Oversight*

No information on individual U.S. persons was collected during RC-26B flights over Minnesota. Eleven witnesses from the NGB, Wisconsin, and Minnesota were interviewed. Mission data and electronic products were analyzed for the presence of information on individual citizens. Overall, the evidence collected and analyzed showed RC-26B aircraft flew in support of National Guard elements by providing situational awareness scans from the air. Such visuals of federal property included major crowd movements or fires near government buildings, property, or roads, giving officials on the ground near real time awareness, without collecting information on or identifying individuals. There is no evidence individuals or specific organizations were targeted, followed, or identified. That said, RC-26B sensors, both electro-optical and infrared, have enough resolution to show distinct architectural features of buildings and allow identification of a geographic place. They also have enough resolution to show basic features of vehicles that may allow a trained observer to identify such things as make and model, in some cases, but not to read license plates.

Another sample IR image from the Minnesota flights appears here:



(Ex 42:2)

A sample Electro-Optical (EO) daytime image from the Minnesota flights appears here:



(Ex 42:3)

Given the information gained from aircrew interviews, the post-mission Mission Reports, and the images provided, it is clear that no personal information was collected.

The PUM was not the right tool to use, but it properly set the parameters and intent beforehand for "situational awareness" and damage assessment in support of the Incident Commander and plainly states "No U.S. persons will be targeted during these missions." (Ex 50) While the MISREP for the first mission indicates they were to gain situational awareness on a large crowd gathering, no identifying details beyond that were noted before moving on to similar scans of the Governor's quarters and historic locations around the city. The crew reported conducting "a defensive scan" looking for groups massing greater than 10 "for the safety of forward deployed Guardsmen or destruction of property." (Ex 44) At one point on the 1 - 2 Jun flight, DAGGR 04 observed "human figures" climbing on top of a building using a car pulled up to the side of a lower ledge, however no destructive activity was observed and there was no further reporting on the identity or individual characteristics of the human figures.

Other Minnesota flights reported scanning building rooftops looking for any security concerns that would affect the safety of protesters, law enforcement personnel, or military

personnel. (Ex 46:1) The MSO testified he watched for any large crowds, destruction of property, and fires in the area that may be of concern to local fire departments on the ground. (Ex 45:2) While the investigators noted the witnesses had a fine line to walk when answering questions from IG investigators in the aftermath of public concern about the appropriateness of such missions, the video footage supports the statements made by the witnesses.

### *Mission Approval Process*

Having examined the aspects of the Minnesota flights, we now turn to the structure of the mission approval process itself. A standardized process that provides direction on who authorizes, validates, approves, directs, or orders such flights is perhaps the most significant shortfall. It is a recommended improvement area, along with associated education and training, which was an observation validated by ██████████ in his testimony. (Ex 35:14)

The genesis of the Minnesota missions appears to have been a combination of pull (from the States) and push (from NGB). The ██████████, received phone calls from CJCS and SecDef and recalled that on 30 May 20, ██████████ suggested to him that "aerial observation is very important." After that, ██████████ spoke to his staff about the idea of aerial observation capability. (Ex 38:1) Then, the Minnesota A2 or A3 contacted the Air National Guard Readiness Center and shortly thereafter, on 31 May 20, the Minnesota National Guard's J3 submitted the request for these observation capabilities through the NGB's web-based coordination module, JIEE.

At the same time, the ██████████ dutifully developed COAs and briefed ██████████ the ██████████, on the gameplan to request RC-26B aircrew from Wisconsin to support Minnesota's request. ██████████ approved the COAs on where to source the RC-26B aircraft and crews and he called the affected RC-26B State TAGs for concurrence. (Ex 7:3) This high level coordination may have added to the ambiguity about where the request was coming from and who was driving the approval chain. Witnesses consistently stated there was a sense the PUM, an Intelligence Oversight coordination tool, but not a mechanism for *mission* approval, was inappropriately viewed as NGB approval or disapproval for the mission itself. Chief among them, the ██████████, who testified:

Some people say, well, if I stop the PUM, then, therefore, I stopped them from operationally flying. And my argument is that's not the intent of the PUM. The PUM is to ensure that if they fly, they do it by the proper procedures, and legally in accordance with U.S. law and policy regulation. But if you want to actually stop it, then there's an operational chain that should be involved at then actually curtails that flight or puts another restriction on it. But that's not the PUM that should be doing that. (Ex 30:40)

In the case of the Minnesota flights, NGB reviewed and approved the PUM covering the three missions flown. ██████████ stated ██████████ processed PUMs for the Civil Disturbance Operations in the same manner as other domestic missions such as forest fires, floods, and

hurricanes. One of the takeaways from this investigation has to be a recognition in the future that civil unrest response is unlike forest fires, floods, hurricanes, or any other natural disaster. With the exception of lost persons (wanting to be identified and rescued) this issue of intelligence oversight is not a concern as it is with respect to civil unrest. It is this enhanced sensitivity that led to all RC-26B missions being halted by [REDACTED]. (Ex 35:6)

[REDACTED] stated the J3/Operations function has been hesitant to validate or approve IAA missions. He has offered a suggestion on a revised process within NGB to validate IAA missions that would include creating an IAA multi-functional fusion cell to review and formally validate IAA missions. (Ex 30:48)

For Civil Disturbance Operations, the mission approval process should involve Governors, or another civilian official directing the TAGs to conduct civil disturbance operations, then TAGs approving the need for IAA, and then State J3s validating requests placed in JIEE to NGB. NGB J3 could serve as the channel of communications for the states and forward requests to the appropriate DoD official for execution. If ISR resources (people, equipment, or processes) are used, the State J2s should engage NGB J2 for help in making requests for DoDM 5240.01 approvals. State legal officials, possibly including state NG judge advocates, should review the proposed action for compliance with state law. Civil disturbance needs a more deliberate, coordinated validation approach, perhaps via the previously mentioned fusion cell.

Reflecting now on the appropriateness of RC-26B flights, and whether he saw any difference in a Civil Disturbance Operation versus a hurricane, versus a flood, [REDACTED] responded:

If you asked me back in the first part of June, the end of May, I'd say there is no difference. And the reason I say that is because we follow the same processes and procedures, and we ensure that the, that we're legally doing what we're supposed to be doing. You ask me that now, and I think, yes, there's an enhanced sensitivity to doing Civil Disturbance Operations inside the United States. (Ex 30:40-41)

Interestingly, [REDACTED] pointed out, and the investigating team concurs, the language NGB J2 is required to use in the PUMs should be flipped. Instead of first stating the IAA mission is a training mission with the incidental benefit of providing an operational need, in truth, these support missions are not pre-planned and are used primarily for the operational need with a secondary training benefit. (Ex 30:52-53)

There were no SIGINT capabilities on the RC-26B aircraft. There was no personal information collected on these missions. Normally, the full motion video is not retained by the NG, but in this case, since NGB J2 anticipated follow-on questions, imagery was saved by NGB J2 for the DC and MN missions and it was provided to the investigating team.

### *Status of Personnel*

[REDACTED] for the WI ANG stated he and other full-time aircrew members rotate from Counterdrug (CD) orders and Title 32 Active Duty Operational Support (ADOS). When on CD orders, they can only fly National Guard Counterdrug Missions.<sup>25</sup> RC-26B Aircrew flying Southwest Border missions can fly no other missions on these orders. When on ADOS orders, aircrew typically fly search and rescue, hurricane, and other domestic missions. When they are not flying domestic missions on ADOS, they fly training missions, e.g., proficiency training missions. On 30 or 31 May, [REDACTED] received a text from [REDACTED] the [REDACTED] at NGB asking if he had crews available for "over watch" missions in Minneapolis and what type of orders were his full-time crew on. [REDACTED] responded WI could support the request and the full-time aircrew were on Title 32 ADOS orders. (Ex 45:1)

On the topic of members being in the right status at the time of performing these duties, [REDACTED] noted the RC-26B is a sore topic. He stated he believes there are violations in its use in domestic responses, particularly when supporting State Active Duty missions. The RC-26B crews tend to use Immediate Response Authority (IRA) as their guide to not break the RC-26B Aircrew's ADOS orders, which would, in turn, impact their pay and benefits. Not surprisingly, funding lies at the heart of the matter. He explained if the states had to pay for RC-26B missions, it would prove to be expensive for the state. (Ex 30:51)

With respect to whether personnel were in the proper funding status at the time, the 4 Jun 20 internal Info Memo to SecDef from Assistant Secretary of Defense for Homeland Defense and Global Security, (hereafter "memo"), is especially instructive in pointing out the left and right limits on authorities under these circumstances. Aside from the fact the [REDACTED] submitted the request for federal funding (under 32 USC § 502(f) status) on 3 Jun 20, two full days after the first of three flights over Minnesota, the DoD recognizes there was "no statutory authority to grant the request to fund a state's use of State National Guard to execute State missions." (Ex 10:1) The memo is also instructive here inasmuch as it identifies the other options available to achieve the desired objectives, namely State Active Duty status. In relevant part the memo states:

Planning and responding to public safety and health emergencies, including protests and civil unrest, are primarily local and State responsibilities. Governors may use their very well-trained, equipped, and -led State National Guard in a State active-duty status, as many have, to perform any State missions authorized by the Governor and they routinely do so during major events, and in response to emergencies and disasters. (Ex 10:2)

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<sup>25</sup> See 32 USC 112

Also, 31 USC § 1301 (the Purpose Statute) reminds us funds appropriated by Congress to DoD may only be expended for the purpose for which they were appropriated. In order for personnel to be properly in 32 USC § 502(f) status, they must be placed on orders to support DoD operations or missions undertaken at the request of the President or SecDef. (Ex 10:1) While 502(f) status is discussed later with respect to support for Washington DC, this status would not have been appropriate in Minnesota, Arizona, or California and was not approved.

██████████ stated he was told by SecDef to tell his (SecDef's) staff what was needed in an action memo authorizing 502 (f) funding, which ██████████ did in his 3 Jun 20 e-mail. After OSD was unable to find a lawful way to approve it, the request was never approved. (Ex 35:12; Ex 90:1)

Ideally, the Minnesota Governor or a delegee would have approved an EMAC request to Wisconsin for RC-26B flights, and the Wisconsin Governor or a delegee would have approved it. The NGB and Air National Guard Readiness Center (ANGRC) staffs would have supported coordination and rapid staffing. After getting SecDef approval to use the RC-26B in a non-intelligence role, the RC-26B crews would have been advised that they were no longer operating under intelligence oversight rules but were operating under state law where the flight occurred, in this case, Minnesota.

### *Flight Over Arizona*

We now turn to the one RC-26B flight over Arizona. The Arizona flight, like the California flight, is an example of a state utilizing RC-26B aircraft within its own state, with coordination with NGB. The Arizona National Guard flew one mission on 2 Jun 20. (Ex 55)

### **Arizona Chronology**

| DATE      | EVENT  |
|-----------|--|
| 31 May 20 | AZ Governor Doug Ducey issued statewide Declaration of Emergency. Declaration also authorized an expanded National Guard mobilization "to protect life and property throughout the state." (Ex 56) |
| 1 Jun 20  | AZ National Guard submitted a PUM request to NGB J2 on 1 Jun 20. The PUM was approved by NGB J2 on 1 Jun 20. (Ex 7:6; Ex 57)   |
| 2 Jun 20  | Phoenix, Scottsdale, and Tucson experienced protests that led to property damage. (Ex 93) Authorization to fly the mission came from the AZNG JOC, J33. (Ex 58:1)                                  |

|          |  |
|----------|--|
| 2 Jun 20 | An AZ ANG RC-26B crew conducted one observation flight. Call Sign Stash 22, from 214 ATKG, Tucson, took off at 1510 MST on 2 Jun 20. The aircraft stopped to onboard two Phoenix Police Dept officers at Sky Harbor Airport in Phoenix, AZ at 1550L, who directed the aircraft throughout the flight from 1715-2045L. The aircraft observed multiple groups ranging in size from 150-500, all of which appeared peaceful. (Ex 55; Ex 58) |
|----------|--|

Governor Ducey's public statements on the matter included:

At the request of local leaders and in coordination with state and local law enforcement, I'm issuing a statewide Declaration of Emergency and curfew starting at 8:00 p.m. tonight and effective for one week. This gives law enforcement an additional tool to prevent the lawlessness we've seen here and in cities nationwide. Police will be equipped to make arrests of individuals who are planning to riot, loot or cause damage and unrest. Today's declaration also authorizes an expanded National Guard mobilization to protect life and property throughout the state. Our office will continue to communicate with local law enforcement to provide whatever resources we can. (Ex 56:1)

Additionally, the Governor authorized the [REDACTED] to "mobilize and call to activate [sic] all or such part of the Arizona National Guard as is determined necessary to assist in the protection of life and property throughout the State." (Ex 56:5)

### ***Stated Objectives***

According to the Arizona PUM request dated 31 May 20, protests were spreading throughout the U.S. and were assessed to have the potential to turn violent, resulting in significant property damage and possible injury or death to citizens. The PUM covered Title 32 training missions flown by the AZNG over areas of the State of Arizona affected by civil disturbances from 31 May 2020 through 30 June 2020. The stated purpose of the missions was "to conduct realistic training and evaluation in core Federal military mission areas with the incidental benefit of providing situational awareness, assessing the existence and extent of damage and evaluating the effectiveness of damage mitigation efforts." (Ex 59:2) Named areas of interest were to be selected by the supported Incident Commander. The RC-26B from the 162<sup>nd</sup> Fighter Wing in Tucson was specifically named as the platform, along with its capability to provide forward looking infrared (FLIR) and optical/infrared (EO/IR) full motion video. The platform, sensor data, and imagery products were to be used in a support role of local, state, and federal officials. It was expressly written that Signals Intelligence (SIGINT), Human Intelligence (HUMINT), and Measurement and Signatures Intelligence (MASINT) would not be collected or disseminated. (Ex 59:2)

The PUM also established no U.S. persons would be targeted during these missions and stated any personally identifying information unintentionally and incidentally collected about specific U.S. persons would be purged and destroyed unless lawfully retained and disseminated. Sensor data and images resulting from these missions were to be processed by AZNG analysts and UPAD<sup>26</sup> units designated by NGB J2 on unclassified systems. Raw images, analytical data, working copies, and finished products would be available for use by the AZNG, US Northern Command (NORTHCOM) (if necessary<sup>27</sup>), the National Guard Bureau, local and state first responders, Arizona Emergency Management Agency, and Incident Command Centers for the purpose of damage assessments, Defense Support to Civil Authorities (DSCA) operations, and future support planning. All imagery/products were to be reviewed at the end of response efforts and then quarterly thereafter if retained, and shredded or deleted when no longer required. All AZNG personnel involved in the handling of such images and products were subject to intelligence oversight (IO) and received IO training. (Ex 59:3)

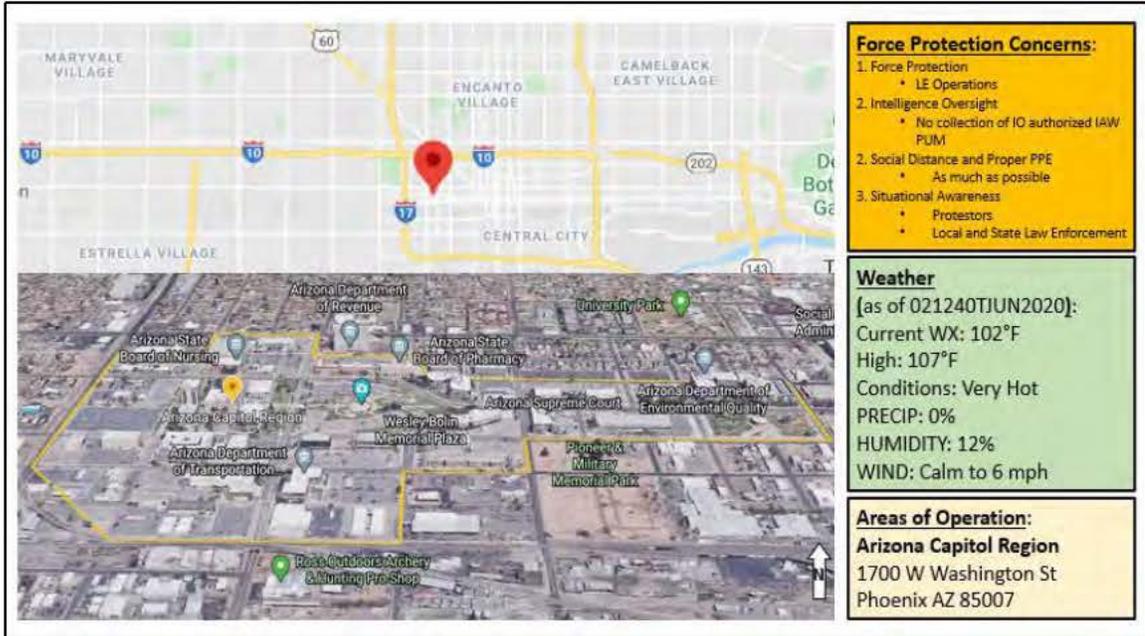
██████████ is the ██████████, which is a standing task force responsible for the Arizona NG Civil Support Team, Cyber Operations, Counterdrug, and the State Partnership Program with Kazakhstan. He stated a PUM for the RC-26B mission was approved by NGB for the mission and he believed the mission was executed properly. However, he did not know who authorized the mission -- only that the PUM was approved. ██████████ related the mission was in support of the Multi-Agency Coordination Center (MACC) located in Phoenix. The MACC is a fusion center with various first responder agencies participating. (Ex 60)

A legal sufficiency review was contained within the PUM and expressed no legal concerns. (Ex 59:3) Among the Concept of Operations (CONOPS) mission briefing materials was the following slide depicting areas of interest:

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<sup>26</sup> Unclassified Processing, Analysis, and Dissemination.

<sup>27</sup> Use of the RC-26B to support NORTHCOM would typically come about after a Presidential disaster declaration, with FEMA as a lead federal agency, with the flight operating under DSCA rules. This would not be the case with these RC-26B sorties having a role in supporting law enforcement.



(Ex 63:1)

However, also part of that CONOPS mission brief was a slide with some more troubling language. Specifically, slide one, appeared as follows:

**Aviation Support to Phoenix Police Department – AVIATION OVER WATCH LOITER SUPPORT (2JUN2020)**

**MISSION:** AZ ANG provides Defense Support of Civil Authorities (DSCA) operations by providing aviation over watch loiter support and video download link to the Phoenix Police Department (PPD) within the Phoenix metropolitan area airspace, departure location at Phoenix Sky Harbor Airport, from 1700 to approximately 2200 IOT support local law enforcement during planned demonstrations and protests.

**CONOP:** Deploy RC-26 Aircraft from Phoenix Sky Harbor Airport to provide aviation over watch loiter, and video download link capability to the Phoenix Multi-Agency Coordination Center (MACC). AZ ANG RC-26 capability will provide PPD capability to rapidly maneuver joint law enforcement/national guard ground forces to identified focus areas IOT deter planned/unplanned demonstrations, protests or looting.

**SR/AZMAC/REQ-A #:** TBD

**WHO IS INVOLVED:**  
**REQUEST POC:**  
 Name / Phone #: TBD (PPD), phone TBD, Email: TBD

**AZ-JOC POC:**  
 Name / Phone #: [REDACTED] Email: [REDACTED]

**TASKED UNIT POCs:**  
 Name / Phone #: [REDACTED]  
 Email: [REDACTED]

**Timeline / Coord Inst / Planning Details:**

1. RC-26 arrives at Phoenix Sky Harbor Airport at 1600
2. RC-26 Aircraft departure/wheels up at 1700
3. End of mission anticipated at approximately 2200
4. Two PPD Law Enforcement Officers on-board with RC-26 Crew
5. Provide aerial over watch loiter support IVO Phoenix Metropolitan Area Airspace with focus areas on identified large malls, AZ Capitol Complex and other locations on-call during operations
6. Provide video download link to MACC and SEOC
7. Potential other locations of interest/observation may include sports stadiums, fire stations, police departments if possible based upon flight operations
8. Loiter time to range from five to six hours based upon flight requirements
9. RC-26 Aircraft Tail # 940262
10. [REDACTED] Pilot Call Sign "Stash 22"
11. Provide RC-26 flight hours report to [REDACTED]
12. No follow-on mission currently projected, but potential missions possible to follow

**Personnel and Equipment Requested**

1. One RC-26 with Crew
2. Video Download Link Equipment for deployment to MACC and SEOC
3. No transportation requirements
4. Others ??

(red box added for emphasis) (Ex 61:1)

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In relevant part (see red box), the CONOPS slide states:

CONOP: Deploy RC-26 Aircraft from Phoenix Sky Harbor Airport to provide aviation over watch loiter, and video downlink capability to the Phoenix Multi-Agency Coordination Center (MACC). AZ ANG RC-26 capability will provided [sic] PPD capability to rapidly maneuver joint law enforcement/national guard ground forces to identified focus areas IOT [in order to] *deter planned/unplanned demonstrations, protests or looting.* (emphasis added) (Ex 61:1)

Deterring protests and demonstrations, assuming they are lawful, is not consistent with constitutional rights. While this may be an in-artfully worded sentence, this glaring misstep highlights what appears to be an unclear picture more generally on unique limitations inherent in civil disturbance operations. Whether such an oversight points to a lack of training, understanding, or experience with this kind of support, it is noteworthy as a recommended improvement area that should be addressed by the National Guard.

### ***Mission Results***

Arizona Mission, 2 Jun 20, Mission #DCN92TZ01154, Tail #94-0262, Call Sign STASH 22. The Mission Pilot was [REDACTED]. The Co-Pilot was [REDACTED] and the MSO was [REDACTED]. The aircraft took off at 1510 MST on 2 Jun 20. According to the MISREP, the aircraft arrived at Sky Harbor Airport in Phoenix, AZ at 1550L and onboarded two Phoenix Police Department (PPD) officers. The PPD officers directed airborne operations throughout the single mission from 1715-2045L. The aircraft observed multiple groups ranging in size from 150-500 personnel. The majority of the groups observed were located throughout the downtown Phoenix area, and all appeared to be peaceful. Additional flight time was dedicated to looking for problems in areas of interest provided by PPD around the metro Phoenix area. The PPD officers onboard directed mission complete and the aircraft returned to Sky Harbor Airport, before returning to home station in Tucson at 2205L. (Ex 62)

[REDACTED] is the [REDACTED] for the Arizona National Guard, stationed at Tucson Air National Guard Base, Tucson AZ. He coordinated but did not fly on the single RC-26B mission, and he confirmed two PPD officers were aboard during the flight. [REDACTED] stated the authorization to fly the mission came from the [REDACTED], namely [REDACTED]. The PUM was coordinated and approved between the AZ JOC and NGB J2. He stated the imagery downlink was planned to be transmitted and received by the PPD for situational awareness for the PPD and partner agencies to more effectively deter violence and assist in the safety of peaceful protests. However, the downlink was not successful on this mission due to software incompatibility. Since the imagery could not be received on the ground, the PPD officers onboard the aircraft viewed the images in the aircraft and communicated with PPD on the ground via radio. [REDACTED] confirmed there was no recorded video on this mission. (Ex 58:2)



identifying information was unintentionally or incidentally collected, it would have been purged and destroyed unless lawfully retained and disseminated. There was no evidence any personal information was collected during the Arizona flight. While there are no images to examine, like were available for the Minnesota and Washington DC flights, witness testimony nevertheless helped describe in detail how the mission was conducted, and allayed concerns about collection of personal information.

██████████ the ██████████ for the AZNG, explained the imagery downlink was planned to be transmitted to the PPD to support their situational awareness, to effectively deter violence, and to assist in the safety of peaceful protests. However, the downlink was not successful due to software incompatibility. ██████████ noted the RC-26B civil disturbance mission differed from the South West Border (SWB) and Counterdrug (CD) missions in that the SWB and CD missions focus on individuals whereas the civil disturbance mission focused upon groups of people.

The Arizona MISREP consistently noted the aircraft observed multiple groups ranging in size from 150-500 personnel and that the majority of the groups observed, which were located throughout the downtown Phoenix area, all appeared to be peaceful. Despite the previously noted problematic wording in the CONOPS briefing, there is no evidence the aircraft ever attempted to deter any planned or unplanned demonstrations or otherwise lawful protests.

### *Mission Approval Process*

It is understandable and there is support in the record that this was a mission set the AZNG was not familiar with. ██████████ noted this was the first time in his memory dating back 29 years that the Arizona National Guard has been involved in any Civil Disturbance Operations. Having acknowledged the rarity of the situation, it is somewhat surprising that ██████████ the ██████████, knew a PUM was approved by NGB for the mission and believed "it was executed properly," but did not know who authorized the mission--only that the PUM was approved. This is another example that underscores the prevalence of misunderstandings with respect to civil disturbance. Like Minnesota, members of the AZNG appear to have held the belief that PUM approval in some way amounted to mission approval. Similarly, ██████████ knew the ██████████ authorized the flight, but he did not know the process for mission approval for civil disturbance or other domestic operations support missions. Again, this unfamiliarity is not unique to Arizona but appears to be a common theme among the states with respect to underlying procedural errors stemming from a failure to fully appreciate the unique nature of civil disturbance support.

### *Status of Personnel*

██████████ stated the aircrew supporting the 2 Jun 20 mission were on Operation Guardian Shield (SWB) orders. He related that he had asked ██████████ if it was acceptable to fly this mission on SWB orders or whether the orders should be amended, and he was told the

aircrew were cleared to fly on SWB orders. Finally, the PUM noted the mission to be flown would be "Title 32 training missions flown by the AZNG over areas of the State of Arizona affected by civil disturbances from 31 May 2020 through 30 June 2020." (Ex 59) The stated purpose of the missions was "to conduct realistic training and evaluation in core Federal military mission areas with the incidental benefit of providing situational awareness, assessing the existence and extent of damage and evaluating the effectiveness of damage mitigation efforts." This justification is problematic. First, in order to be training, they must have been training for a particular METL (Mission Essential Task List) or federal mission. Civil Disturbance is rightfully a state mission, not a federal one, absent a declaration to the contrary. Second, if the crew was training for a federal military mission, the last known active duty mission the RC-26B had was overseas as an ISR asset. This simply cannot be the case in a domestic response setting. Third, there is little to support an assertion that this was a pre-planned training mission. The facts, chief among them a Gubernatorial Declaration of Emergency, point to the primary purpose for the flight being response to civil unrest within the state and supporting local law enforcement onboard the aircraft. By all accounts, these state law enforcement officers dictated the parameters of the observation. All things considered, State Active Duty should have been the proper status. As will be discussed later, it is a familiar practice to categorize, to the maximum extent, missions flown under the training umbrella, which carries with it the sought after federal funding.

Ideally, the Arizona Governor or Arizona TAG would have specifically requested SecDef approval to use the RC-26B for defense support to Civilian law enforcement, citing DoDM 5240.01, para 3.1.a.(3) and DoD 5240.1-R, Procedure 12 as the basis. Since Arizona had RC-26B aircraft resident in the state, after getting approval from SecDef to use the RC-26B in a non-intelligence role the Governor could have ordered the Arizona National Guard to conduct the flight and the mission would have been flown in State Active Duty status. In a coordination and oversight role, the NGB and ANGRC staffs would have supported coordination and rapid staffing. Beforehand, the RC-26B crews would have been advised that they were no longer operating under intelligence oversight guidelines, but rather, under Arizona law.

***Flight Over California***

We now turn to the one RC-26B flight over California. The California flight, like the Arizona flight, is an example of a state utilizing RC-26B aircraft within its own state, with coordination from NGB. The California National Guard flew one mission, on 3 Jun 20. (Ex 64)

**California Chronology**

| DATE      | EVENT   |
|-----------|---|
| 29 May 20 | California National Guard submitted Proper Use Memo to NGB for support flights within the State of California for 30 May 20 to 30 Sep 20. (Ex 65) |
| 30 May 20 | NGB approved California PUM. (Ex 66)  |

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|           |  |
|-----------|--|
| 30 May 20 | California Governor Gavin Newsom declared a State of Emergency and determined local authority was inadequate to address the threat posed by the civil unrest. (Ex 67)  |
| 1 Jun 20  | California Governor's Office of Emergency Services, Assistant Chief, Ron Quigley, submits high priority request for California National Guard aerial IAA platform for El Dorado County. (Ex 68)  |
| 3 Jun 20  | JFHQ-CA JOC called the CA ANG [REDACTED], giving verbal order to support the civil unrest mission. Follow on listed [REDACTED], as the approving authority. (Ex 69)  |
| 3 Jun 20  | CA ANG flew one RC-26B civil disturbance response support flight. An RC-26B from the 144 FW, Fresno, Call Sign Bear 26, took off from Fresno ANGB at 2007 PST on 3 Jun 20 and stopped to onboard law enforcement officers at Sacramento/Mather Airport. During the short flight, no significant activity was noted and the mission was terminated. After returning to the Sacramento/Mather airport, the aircraft completed its final leg and returned to Fresno, landing at 2300 PST on 3 Jun 20. (Ex 64:1) |

The California Governor's Proclamation of a State of Emergency stated in relevant part:

**WHEREAS** Los Angeles County and the City of Los Angeles have requested State assistance including the activation of the California National Guard based on the civil unrest the City and County of Los Angeles report and based on limited local resources; and

**WHEREAS** I find that conditions of Government Code section 8558(b), relating to the proclamation of a State of Emergency, have been met; and

**WHEREAS** under the provisions of Government Code section 8625(c), I find that local authority is inadequate to address the threat posed by the civil unrest within Los Angeles County and the City of Los Angeles.

**NOW, THEREFORE, I, GAVIN NEWSOM**, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes, including the California Emergency Services Act, and in particular, Government Code section 8625, **HEREBY PROCLAIM A STATE OF EMERGENCY** to exist in Los Angeles County and the City of Los Angeles. (Ex 67:1)

The California State of Emergency is dated 30 May 20. (Ex 67:1) This declaration appears to be limited to Los Angeles County and the City of Los Angeles. On 1 Jun 20, a subsequent request from the California Governor's Office of Emergency Services (OES), was submitted for California National Guard aircraft support for El Dorado County. (Ex 68) The California National Guard Proper Use Memorandum (PUM) was dated 29 May 20 and covered the time period from 30 May 20 to 30 Dec 20. (Ex 65:1)



followed by a written Fragmentary Order (FRAGO) after the crew was airborne. (Ex 69:1) He stated the FRAGO was not signed, but listed [REDACTED], as the approving authority. (Ex 69:1; Ex 70:2, 7) He also confirmed all of the aircrew members were on ADOS orders provided by the [REDACTED] ([REDACTED] except for him. [REDACTED] was on CD orders, on Annual Training (AT) status.<sup>28</sup> Whenever he flies DSCA missions, [REDACTED] stated he typically does so in AT status. (Ex 69:1)

In terms of the process by which missions are generated, [REDACTED] explained that as [REDACTED], he looks for two documents which provide authority to fly DSCA Missions: a FRAGO from the JOC, and a PUM. According to [REDACTED], the law enforcement officers onboard the RC-26B for this mission observed the situation on the ground and assessed the mission was not worth continuing as there did not appear to be any crowd activity of interest. Before the mission was flown, the officers received reports there would be rioters and looters planning to march to the suburbs of El Dorado County for violent purposes. [REDACTED] stated the primary RC-26B mission was to provide cover for law enforcement in case violence erupted. (Ex 69:1)

[REDACTED] was the [REDACTED] on the flight and he stated his belief that the El Dorado County Sheriff's Office support mission was a Counterdrug mission. He stated a law enforcement officer from the El Dorado County Sheriff's Office was aboard the aircraft and provided the instructions to the aircrew for the named areas of interest. [REDACTED] stated officer safety was the primary focus of the mission. He recalled the law enforcement officer aboard mentioning the Hell's Angels may incite some violence around El Dorado Hills, CA. As the RC-26B loitered over El Dorado Hills, [REDACTED] could see several police vehicles and police foot patrols at various intersections in the city. As a result, there were not many people on foot in the city. [REDACTED] did not recall seeing any disturbances, nor did the law enforcement officer aboard direct back up to any police officer in distress. [REDACTED] stated he downloaded the images from the El Dorado County mission onto a thumb drive and gave it to the law enforcement officer aboard. He further stated he did not maintain any images taken on this mission, which is common practice for all RC-26B missions. (Ex 96)

## Analysis

Once again, the top question is whether or not the mission was authorized at the right level. As addressed earlier, Intelligence Oversight rules should apply to the RC-26B as an ISR asset. As such, the employment of the RC-26B should have been approved by SecDef or his designee. Having noted this threshold issue, the analysis will continue and consider whether the California flight itself violated any standard. We will examine the facts surrounding the flight

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<sup>28</sup> 32 USC § 112, the National Guard CD Program, requires Soldiers and Airmen serving on the program to perform regularly scheduled Inactive Duty Training and Annual Training with their home units. When Annual Training is performed, the CD member makes notification to their respective Comptroller who reimburses the CD MILPERS Account for the days served on Annual Training (AT).

and compare them with the standards in an effort to identify areas where potential changes can help avoid missteps in the future.

### ***Intelligence Oversight***

Interviews and documents examined indicated the mission focus of the California flight was providing situational awareness, assessing the existence and extent of damage, and to evaluate the effectiveness of damage mitigation efforts. Despite the fact training was listed as the primary purpose, the evidence indicates that while there may have been some secondary training benefit, the primary purpose still appears predominantly to be support to law enforcement in response to the state's emergency response activities. While this creates a disconnect in terms of personnel being in the right status, which will be subsequently addressed, this fact by itself does not appear to raise concerns with respect to intelligence oversight. The California PUM stated:

No U.S. persons will be targeted during these missions. Any personally identifying information unintentionally and incidentally collected about specific U.S. persons will be purged and destroyed unless it may be lawfully retained and disseminated to other governmental agencies that have a need for it IAW applicable laws, regulations, and policies. (Ex 65:2)

Somewhat concerning is the provision in the PUM that:

Sensor data and imagery resulting from these collection efforts will be processed and *exploited* by the CANG on unclassified systems and networks, including but not limited to the JFHQ-CA-J2, Joint Operations Center, 234th Intelligence Squadron, 163rd Attack Wing, and U-PAD units designated by the NGB J2. (emphasis added) (Ex 65:2-3)

While the term "exploitation" has a negative connotation in everyday use, it is an intelligence career field term of art.<sup>29</sup> As such, this is another example of holdover or crossover from the ISR/intelligence world to civil disturbance response.

Also of potential concern was language used in the California Governor's Office of Emergency Management request to the California National Guard for aerial assistance. The request stated in relevant part:

Request for CNG aerial IAA platform to assist with information of groups forming in the west end of El Dorado County. (Ex 68:1)

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<sup>29</sup> The DoD Dictionary of Military and Associated Terms, June 2020 defines exploitation as: 1. Taking full advantage of success in military operations, following up initial gains, and making permanent the temporary effects already created. 2. Taking full advantage of any information that has come to hand for tactical, operational, or strategic purposes. 3. An offensive operation that usually follows a successful attack and is designed to disorganize the enemy in depth. (JP 2-01.3)

While we recognize the notion of assisting with "information of [sic] groups" may be concerning from a strict intelligence oversight standpoint, we also recognize this request was written, or at least submitted by, a state employee, California's Assistant Emergency Services Chief, who would not reasonably be expected to be familiar with intelligence oversight rules pertaining to ISR assets.

In considering the intelligence oversight concerns generally, there was no evidence any personal information of U.S. persons was collected during the California flight. While there are no images to examine, like were available for the Minnesota and Washington, DC flights, witness testimony, including that of ██████████ the MSO, helped describe in sufficient detail how the mission was conducted, and allayed concerns about actual collection of personal information. Lines should be drawn making clear the distinction between terms used in executing federal intelligence essential tasks versus civil disturbance response support. State employees in positions to make requests for such assistance might benefit from education and training efforts in this area as well.

### *Mission Approval Process*

In terms of the process by which the mission was generated, California acted upon a request from the Office of Emergency Services and relied on both a FRAGO and an NGB-approved PUM in affect at the time. ██████████ explained that as the ██████████ ██████████, he looks for two documents to provide "authority to fly DSCA missions, a FRAGO from the JOC, and a PUM." (Ex 69) While he may have used the term *DSCA* missions in a general sense, we note here that DSCA is a category of missions requiring SecDef approval.<sup>30</sup> Absent that approval, the mission must be conducted in State Active Duty status with mission assignments through state channels.

### *Status of Personnel*

██████████ confirmed all the aircrew members for this RC-26B flight were on ADOS orders provided by ██████████ except for him. ██████████ was on Counterdrug (CD) orders, on AT status. Whenever he flies DSCA missions, ██████████ stated he typically does so in AT status. The stated purpose of the missions was to conduct "realistic training and evaluation in core Federal military mission areas with an incidental benefit of providing situational awareness,

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<sup>30</sup>The National Guard provides requested military response to domestic emergencies. The early employment of the National Guard is often in State Active Duty status at the direction of the governor and the command of The Adjutant General (TAG). The National Guard could also be employed in Title 32 status or Title 10 status, both of which require SecDef approval. (Joint Pub 3-28 Defense Support to Civil Authorities, 2018, p.I-11)

...  
While the use of intelligence assets by the National Guard requires SecDef approval, the use of non-intelligence assets in a Title 32 or State Active Duty status for IAA requires approval of the governor. (Joint Pub 3-28 Defense Support to Civil Authorities, 2018, p.IV-3)

assessing the existence and extent of damage, and to evaluate the effectiveness of damage mitigation efforts." (Ex CA PUM) While this language triggers federal funding under a Title 32 training status, the priority appears to be in reverse order. The primary purpose here was more accurately providing situational awareness, assessing the existence and extent of damage, and to evaluate the effectiveness of damage mitigation efforts, with an incidental training benefit. As such, personnel likely should have been in State Active Duty status.

Likewise, the RC-26B mission was flown by the California National Guard in response to the request for support from the California Office of Emergency Services. This further supports the notion that members would ideally have been in State Active Duty status and in turn, should have been paid by state funds.

While there do not appear to have been any intelligence oversight concerns or incidents where personal information was collected on any individual, it is not entirely clear what UPAD intelligence personnel were poised to do if images had been received. While intelligence personnel receive annual intelligence oversight training, the concept of civil disturbance is a unique support mission that could use specialized training to ensure the lines between federal mission intelligence practices are not blurred when it comes to domestic support roles. In terms of process and status, ideally, the California Governor would have specifically requested SecDef approval to use the RC-26B for defense support to civilian law enforcement, citing DoDM 5240.01, para 3.1.a.(3) and DoD 5240.1-R, Procedure 12 as the basis. Since California had RC-26B aircraft resident in the state, the Governor could have ordered the California National Guard to conduct the flight and the mission would have been flown in State Active Duty status. In a coordination and oversight role, the NGB and ANGR staffs would have supported coordination and rapid staffing. Beforehand, the California RC-26B crews would have been advised that they were no longer operating under intel oversight guidelines, but rather, under California law.

### *Flights Over Washington, DC*

We now turn to the two RC-26B flights over Washington, DC. The flights in this location were particularly unique due to the governmental structure of the city (i.e., no Governor).



|           |  |
|-----------|--|
| 2 Jun 20  | #1 of 2 flights. RC-26B Tail # 92-0373, Call Sign ANVIL 01, operated by aircrew from the 130 <sup>th</sup> AW, WV ANG departed Clarksburg, WV at 2002 EDT, flying to Washington DC, then returning to Clarksburg at 0100L on 3 Jun 20. Flight over DC was from 2038 to 0011L. Their pre-planned named areas of interest (NAI) included the Washington, Lincoln, WWII, Vietnam, Jefferson, and Korean Memorials, Lafayette Square, St John's Cathedral, and possible large groups of people. The aircrew reported no activity around the memorials, with larger numbers of people around Lafayette Square. The 193 <sup>rd</sup> Air Support Operations Squadron (ASOS) of the Pennsylvania ANG provided ground communications. (Ex 76; Ex 7:1) |
| 3 Jun 20  | #2 of 2 Flights. RC-26B Tail # 92-0373, Call Sign ANVIL 01, operated by aircrew from the 130 <sup>th</sup> AW, WV ANG, departed Clarksburg, WV on 3 Jun 20 at 2008 EDT, flying to Washington DC and returning to Clarksburg, WV at 0048L on 4 Jun 20. Flight over DC was from 2045 to 2355L. The NAIs were the same as the previous flight with the addition of Capitol Hill and the DCNG Mobile Command Post. The crew reported no significant activity at the memorials. The largest group of people were in the Lafayette Park area. (Ex 77)  |
| 3 Jun 20  | MS ANG RC-26B returned to its home station in Meridian, MS from their tasked Southwest Border Mission. They terminated their Southwest Border Mission one day earlier than planned to support a potential DC IAA flight on 4 Jun 20. (Ex 7:5)  |
| 5 Jun 20  | SecArmy ordered the DCNG to cease RC-26B flights over DC. (Ex 80:1)  |
| 5 Jun 20  | [REDACTED] ordered the RC-26B flights to cease their support of Civil Disturbance Operations. (Ex 7:5)   |
| 8 June 20 | [REDACTED] signed a legal review stating no legal objections to both the expedited and written PUM Requests from West Virginia supporting the District of Columbia Civil Disturbance Response. (Ex 78)   |

The National Guard response in the District of Columbia (DC) was very different from that provided in the other three states, with the primary reason being the governmental structure of Washington DC. Pursuant to Sec. 49-409 of the DC Code, the President is the Commander in Chief of the DCNG when in its militia status. Under DC Code Sec. 49-103, the President may activate the DCNG to assist with domestic emergencies when additional resources are needed. As a result, there is no State Active Duty status available for members of the DCNG when activated for domestic missions. Therefore, DCNG members are always in Title 32 federal pay status during scheduled training and when activated for domestic responses in Washington, DC. (Ex 35:2; Ex 79)

Over the years, the President (POTUS) has largely delegated his Commander-in Chief duties of the DCNG to the SecDef. In turn, the SecDef has delegated much of the day to day peacetime responsibilities of the DC Army National Guard to the Secretary of the Army

(SecArmy), and for the DC Air National Guard to the Secretary of the Air Force (SecAF). SecDef has also delegated the activation of the DCNG for domestic emergencies to SecArmy. (Ex 79)

The weekend of 30-31 May 20 was when protests over the death of George Floyd turned violent and destructive in DC. (Ex 80:1; Ex 81:1) According to [REDACTED] on 1 Jun 20 he was called to a meeting with SecDef, who relayed the concerns of POTUS on the civil unrest in DC. SecDef then instructed CNGB to provide a National Guard force of 5,000 personnel to DC. CNGB reminded SecDef this would be a Title 32 federal expenditure for the 5,000 personnel, and SecDef acknowledged. There was no discussion of an aerial observation capability during this meeting. (Ex 35:3)

Shortly after this meeting, NGB J2 and NGB A2 began to plan for the use of the RC-26B to support the DCNG. That same day, [REDACTED] was contacted by [REDACTED], to ask if DC would like the RC-26B for IAA purposes in DC. [REDACTED] responded to [REDACTED] that DC would accept the RC-26B if it was available. [REDACTED], and [REDACTED] both stated they did not request the RC-26B or IAA capability but did not turn down the offer from NGB. [REDACTED], the [REDACTED] stated neither he nor SecArmy requested the RC-26B. (Ex 80:1)

A group teleconference between CNGB and all TAGs took place on 1 Jun 20. During this call, the RC-26B was mentioned and the [REDACTED] stated the RC-26B in WV would have limited availability. [REDACTED] the [REDACTED] at NGB, stated [REDACTED] participated in this All TAG call and asked [REDACTED] to check into the availability of the RC-26B to support the DCNG. [REDACTED] contacted [REDACTED] for the WVNG who confirmed their limited availability to fly missions through 3 Jun 20. (Ex 7:4)

There were two PUMs approved by [REDACTED] at NGB J2 for the DC Civil Disturbance Operation. The first PUM was requested by [REDACTED] on Saturday, 30 May 20 for Airborne Imagery for the period of 30 May – 30 Jun 20. [REDACTED] stated her practice has been to request PUMs for every operation the DCNG performs. She went on to state the DCNG has never conducted any IAA flights. However, out of caution she has PUMs approved in advance in case IAA was requested. In compliance with CNGBM 2001.01, the aircraft requested for this PUM were for the aircraft assigned to the DCNG: the F-16 fixed wing aircraft, and UH-60 and UH-72 helicopters. The PUM also described the sensors available for use on these aircraft. The PUM was approved by [REDACTED] one hour after the request was made. (Ex 82; Ex 83).

The second PUM Request letter was signed by [REDACTED] on 1 Jun 20. The verbiage in the PUM Request was very similar to the [REDACTED]

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DC PUM Request referenced above. The noticeable difference between the PUMs were the aircraft to be flown. WVNG listed the UH-72 helicopter and the RC-26B to be flown in DC. This PUM was approved by [REDACTED] at NGB J2 at 1337L on 2 Jun 20. (Ex 82)

[REDACTED] served as a [REDACTED] to the DCNG for the RC-26B missions. He has extensive experience in this role as both a contractor and in military status. He has worked with several National Guard states for other domestic responses, such as hurricanes, flooding, and search and rescue missions. Since the DCNG had never conducted IAA or aerial observation missions in the past, [REDACTED] took an active role in coordinating the mission. First, on 1 Jun 20 at 2320L, [REDACTED] transmitted a JIEE message on behalf of the DCNG to the National Guard Bureau requesting IAA support from 2-8 Jun 20. [REDACTED] stated he made this request on behalf of the DCNG J2 and J3, and his stated reason was the DCNG J2 did not have access to the JIEE program. [REDACTED] also advised the DCNG J2 and J3 that if the RC-26B should be diverted from its normal pattern of loitering above the NAIs, it should be the J2 to communicate the redirection to the RC-26B aircrew. He further explained it would reduce confusion if only one voice was speaking to the aircrews. When asked about J3's input in the redirections, he assumed the J3 was collaborating with the J2. (Ex 85:2)

### *Stated Objectives*

The objective of these two flights, as stated in the District of Columbia and West Virginia PUMs were:

[T]o conduct realistic training and evaluation in core Federal military mission areas, with the incidental benefit of providing situational awareness, assessing the existence and extent of damage, and evaluating the effectiveness of damage mitigation efforts. (Ex 94:2; Ex 82:2)

Additionally, both PUMs stated:

All platforms, sensor data and imagery products will be used in a support role of local, state, District and federal officials. Signals Intelligence (SIGINT), Human Intelligence (HUMINT), or Measurement and Signatures Intelligence (MASINT) will NOT be collected or disseminated.

No U.S. persons will be targeted during these missions. Any personally identifying information unintentionally and incidentally collected about specific U.S. persons will be purged and destroyed unless it may be lawfully retained and disseminated to other governmental agencies that have a need for it IAW applicable laws, regulations, and policies. (Ex 94:2; Ex 82:2-3)

There were no law enforcement members, military or civilian, on board the aircraft for either of the two sorties flown. (Ex 86:1) The [REDACTED],

[REDACTED] reviewed the request twice. The first was an expedited email request from [REDACTED] and the second one was a written legal review dated 8 Jun 20. The legal reviews stated:

[REDACTED]  
(Ex 78:1)

Additionally, this same legal review by [REDACTED] cited law and policy regarding non-consensual surveillance on U.S. persons:

[REDACTED]  
(Ex 78:1)

### ***Mission Results***

District of Columbia Mission #1, 2-3 Jun 20, Mission DCN92TZ01154, Call Sign ANVIL 01. The Mission Pilot was [REDACTED] and the Co-Pilot was [REDACTED]. [REDACTED] was the MSO. Two other members were aboard this flight for RC-26B MSO training – [REDACTED] and [REDACTED]. All aircrew were members of the 130<sup>th</sup> Airlift Wing, WV ANG. The aircraft departed Clarksburg, WV at 2002 EDT, flying to Washington DC, then returning to Clarksburg at 0100L hours on 3 Jun 20. Flight time over DC was from 2038 to 0011L. Their pre-planned NAIs included the Washington, Lincoln, WWII, Vietnam, Jefferson, and Korean Memorials, Lafayette Square, St John’s Cathedral, and possible large groups of people. The aircrew reported no activity around the memorials, with larger numbers of people around Lafayette Square. The 148<sup>th</sup> Air Support Operations Squadron (ASOS) from Pennsylvania Air National Guard provided ground communications. (Ex 76)

During the first part of Mission #1, the images from the RC-26B could not be received by the 148<sup>th</sup> ASOS due to equipment incompatibility. The sensors on the RC-26B aircraft were dated and not immediately compatible with the newer equipment operated by the 148<sup>th</sup> ASOS. During the last part of the mission, the 148<sup>th</sup> ASOS was able to provide a work around that

allowed them to receive the RC-26B transmitted images. However, the images could only be viewed on the 148<sup>th</sup> ASOS hand held devices and were not relayed into the DC JOC as intended. (Ex 85) As a result, no images could be saved or distributed during this mission. (Ex 52; Ex 37)

District of Columbia Mission #2, 3-4 Jun 20, Mission DCN92TZ01155, Call Sign ANVIL 01. The Mission Pilot was [REDACTED] and the Instructor Pilot was [REDACTED]. [REDACTED] was the MSO, with two MSOs in training -- [REDACTED] and [REDACTED]. The aircrew from the 130<sup>th</sup> Airlift Wing, WVANG. The flight departed Clarksburg, WV on 3 Jun at 2008L, flying to Washington DC and returning to Clarksburg, WV at 0048L on 4 Jun 20. Flight time over DC was from 2045 to 2355L. The NAIs were the same as the previous flight with the addition of Capitol Hill and the DCNG Mobile Command Post. The crew reported no significant activity at the memorials. The largest group of people were in the Lafayette Park area. (Ex 77) Both missions were conducted in the same manner, with the RC-26B loitering around the predesignated monuments for 10-15 minutes and then moving to another NAI. The RC-26B aircrew was requested only once to divert from their NAIs to a suspected trouble spot -- there was a reported fire at an intersection, and the RC-26B aircrew flew to that location but found no such fire. (Ex 86:1)

The 148<sup>th</sup> ASOS again provided the ground linkage to the imagery transmitted from the RC-26B. The incompatibility issues experienced on the first mission were resolved for Mission #2. The images were downloaded onto the DAART<sup>31</sup> system for use in the DCNG JOC and the UPAD unit at Arkansas Air National Guard. (Ex 88:1) Since the full-motion video produced by the RC-26B was not visible by the UPAD, they were only able to provide an assessment on still images. These still images and the full-motion video captured on this second flight were saved by NGB J2 in the event of follow-on questions after this mission. (Ex 52:1)

NGB J2 shared this imagery with Air Force Investigators:

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<sup>31</sup> The Domestic Operations Awareness and Assessment Response Tool (DAART) is an unclassified web-based system with access controlled by NGB J2.

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(Ex 87)

## Analysis

Once again, the top question is whether or not the mission was authorized at the right level. Intelligence Oversight rules should apply to the RC-26B as an ISR asset. As such, the employment of the RC-26B should have been approved by SecDef or his designee. Having noted this threshold issue, the analysis will continue and consider whether the Washington, DC flights themselves violated any standard. We will examine the facts surrounding the flight and compare them with the standards in an effort to identify areas where potential changes can help avoid missteps in the future.

### *Intelligence Oversight*

As addressed earlier, rules for the conduct of intelligence activities should apply to the RC-26B as an ISR asset. As such, the employment of the RC-26B should have been approved by SecDef or his designee. Understanding the issue of lack of proper approval to conduct the mission, the analysis will continue and consider whether the collection itself violated any standard. However, the standard to apply is driven by the level of approval obtained. As such, in order to better understand what should have occurred, we will examine in hindsight what should have happened and compare that with what actually happened in an effort to identify

points along the process where enhanced focus in the future can help avoid some of the identified missteps.

Interviews and documents indicate the mission focus of the WV ANG RC-26B flights over Washington, DC was to provide situational awareness, assess the existence and extent of damage, and to assist in public safety. Despite the fact training was listed as the primary purpose, the evidence indicates that while there may have been some secondary training benefit, the primary purpose still appears predominantly to be support to the DCNG in their support to law enforcement agencies. While this creates a disconnect in terms of personnel being in the right status, which will be subsequently addressed, this fact by itself does not appear to raise concerns with respect to intelligence oversight. The West Virginia PUM stated:

No U.S. persons will be targeted during these missions. Any personally identifying information unintentionally and incidentally collected about specific U.S. persons will be purged and destroyed unless it may be lawfully retained and disseminated to other governmental agencies that have a need for it IAW applicable laws, regulations, and policies. (Ex 82:2-3)

Somewhat concerning is the provision in the PUM that:

Sensor data and imagery resulting from these collection efforts will be processed and exploited by JFHQ WVNG and DCNG personnel and U-PAD units designated by NGB J2 using unclassified systems. Raw imagery, analytic data, working copies and finished products may be disseminated to and used by the DCNG, WVNG, local and state first responders, the DC Homeland Security and Emergency Management Agency (DC HSEMA), law enforcement, National Guard Bureau (NGB), and U.S. Northern Command (USNORTHCOM) for the purpose of damage assessment, for the purpose of damage assessment, domestic operations, and future support planning. Products will be disseminated in hard copy and electronic format via approved and secure dissemination channels, specifically the Domestic Operations (DOMOPs) Awareness Assessment and Response Tool (DAART) server. All imagery will be reviewed at the end of any response efforts. Some imagery and sensor data will be retained for training, planning, or historical purposes; all other imagery and sensor data will be purged, deleted or destroyed at the end of any response effort. Any products retained will be reviewed quarterly and purged, deleted, or destroyed when no longer required. All WVNG personnel involved in collecting, processing and exploiting, analyzing or disseminating imagery and products are subject to intelligence oversight (IO) and have received IO training. (Ex 82:2-3)

The concern over the term *exploitation* was discussed in the California Intelligence Oversight section above. The primary concern with this term is it has application to foreign intelligence rather than being sensitive to domestic operations. Another potential area of concern is the mention of UPAD. UPADs are designed to view images provided by aerial platforms and provide a second set of eyes to assist in identifying hazards, predict progression of wildfires, and assist with search and rescue missions. National Guard Geospatial Analysts volunteer to support

domestic operations when requested. The analysts are able to accomplish career and readiness training requirements when operating the UPAD. (Ex 97)

Interviews revealed that if an analyst were to see a hazard or issue of safety on the aerial images provided to them, they have the capability to either call or text an end user to mitigate the hazard or needed rescue. (Ex 85:2-3; Ex 88:1) The past uses of UPADs for floods, wildfires, and search and rescue missions have proven an effective means for Geospatial Analysts to achieve training and provide needed awareness to first responders and senior leaders, and approval to use UPAD should be sought to use it for National Guard Civil Disturbance Operations.

That said, it is clear the AR UPAD<sup>32</sup> is an intelligence resource and subject to DoDM 5240.01 and the need for SecDef approval to conduct non-intelligence missions. They operate for the purpose of training for their Title 10 mission and they are assigned to an ISR Group. (Ex 88:1).<sup>33</sup>

Finally, the latter part of the WVNG PUM Request demonstrates prudent protection against improper use of the images gained from the RC-26B flights. In short, the National Guard provides the images to their supported customers and does not maintain copies of the images, except for “training, planning, or historical purposes.” Of the limited number of images retained by the National Guard, they are required to be reviewed quarterly and then purged when no longer needed. (Ex 85:2-3) Every aircrew and intelligence professional spoken to for this investigation was cognizant of this requirement and stated they were diligent about purging the unneeded images promptly.

### ***Mission Approval Process***

The mission approval process was even more complex and convoluted than for the three states in this report. Authorizations for activating the DCNG for domestic support missions are to be approved at high levels of the federal government. SecDef was within his authority to verbally authorize the DCNG and 11 other National Guard States to operate as he directed. When he communicated this order to the CNGB, he provided some general parameters of the support he expected the National Guard to perform in this effort. Neither aerial observation nor IAA were mentioned or suggested during this communication. (Ex 35:6) Further complicating this matter is that SecArmy did not request this capability, nor did anyone in the senior ranks of the DCNG request this capability. (Ex 80:1; Ex 71:1; Ex 81:1) The closest communication

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<sup>32</sup> SAF/IG chartered this investigation to look into use of the RC-26B during recent protest activities. Because the use of the AR UPAD is so closely connected to the use of the RC-26B over Washington, DC, the investigating team concluded it was in the scope of the investigation.

<sup>33</sup> The UPADs are not “programs of record.” They operate with commercial off the shelf computers with commercially procured internet to allow connectivity with supported local, state, and federal agencies, and their computer equipment was purchased with NGREA funding. (Ex 88:1) The ROI has previously determined that these factors do not exclude the UPAD from DoDM 5240.01 and the need for SecDef approval to conduct non-intelligence missions.

resembling mission requests was initiated by the National Guard Bureau. [REDACTED] asked [REDACTED] if the DCNG would like IAA. [REDACTED] stated yes if it is available, then communicated her conversation up her chain of command, although the communication never reached [REDACTED]. (Ex 71:1; Ex 80:1) Even this could be construed more as a PUM request rather than a mission approval since the DCNG had a habit of requesting PUMs for previous support missions, but has never conducted an IAA mission. (Ex 71:1) Further, when the written request for the IAA support was made to NGB, it was written by a [REDACTED] on behalf of the DCNG. Then the West Virginia RC-26B was identified and sourced through NGB.

However, the threshold issue remains the same as for the three states, whether or not the missions flown were authorized at the right level. By law, executive order, and delegations, the DCNG activations must be authorized by the President, SecDef, or SecArmy. Further, all duty for DCNG and supporting National Guard States must be performed in Title 32 or federal militia status. Therefore, any ISR asset used for non-intelligence use must be approved by SecDef. In this case, there was no evidence that POTUS, SecDef, or SecArmy knew of the RC-26B flights until it came to light in the media.

### *Status of Personnel*

[REDACTED], the [REDACTED] on both missions, stated all the aircrew members were on 32 USC § 112 National Guard Counterdrug orders with the exception of himself. [REDACTED]

[REDACTED] stated it was appropriate for these Airmen on Counterdrug orders to fly the mission in DC via Immediate Response Authority (IRA). He explained the IRA was allowed for up to 72 hours and the West Virginia aircrew served approximately 48 hours. [REDACTED] further explained he would submit those Airmen on Counterdrug orders for Annual Training status through the NGB Counterdrug Directorate (NGB J32), then the Counterdrug fund would be reimbursed for the days the aircrew were on the missions in DC.

[REDACTED] provides oversight for the RC-26B and Army Aviation Counterdrug Missions. [REDACTED]

[REDACTED] testified the normal process is for the resource managers at NGB-J32 to track the reimbursement process for these IRA missions. Further, the Deputy Assistant Secretary of Defense for Counter Narcotics and Global Threats (DASDCN) would approve the RC-26B aircrews supporting IRA missions. In an email after the interview, [REDACTED] stated the NGB J32 requested verbal approval to the DASDCN for the IRA response by the WV ANG RC-26B aircrew on 9 Jun 20. (Ex 98; Ex 99)

[REDACTED]

The RC-26B community makes efforts to assure those who want to serve as full-time aircrew can do so on the active duty orders described above without experiencing a time gap between orders. These gaps would affect the benefits for the Airmen and their families, such as healthcare and housing allowances. (Ex 7)

All but one of the WV ANG RC-26B aircrew served in 32 USC § 112 National Guard Counterdrug Status during their flights over DC. The West Virginia RC-26B Program Manager and NGB J32 complied with CNGBI 3100.01B to place the aircrew into Annual Training status in order for the Counterdrug funding to be reimbursed to avoid a purpose violation. However, the investigation determined the IRA has been improperly applied as no one from senior levels provided proper approval for IRA. In this case, it should have been SecDef or SecArmy to authorize IRA along with the IAA mission.

Due to the unique governmental structure of the District, all National Guard support must be in federal status. Officers in the DCNG consistently confirmed they did not request the RC-26B, nor did SecDef or SecArmy. NGB leaned forward to offer this assistance and may have done so for past domestic missions. It is clear that this and other civil disturbance support capabilities should be considered at more senior levels of government than experienced in this case.

## V. SUMMARY

In response to peaceful and violent protests occurring in many US cities following the death of Mr. George Floyd in Minneapolis, Governors (for California, Arizona, and Minnesota) and SecDef or the Secretary of the Army (for Washington, DC) responded and authorized National Guard assistance. Decisions were made at various places and levels for aircraft overflights to provide awareness about emerging events. The seven (7) RC-26B flights in question, all flown by National Guard units, took infrared and electro-optical images which had enough resolution to show distinct architectural features of infrastructure such as buildings and roads, as well as basic features of vehicles. The RC-26B missions did not collect personal information. The sensors on the aircraft were not capable of identifying any distinguishing features of people, or other potentially identifying characteristics such as race or gender. The missions were not used to track individuals, but there was a risk that they could have been. None of the aircraft for the flights in question carried signals intelligence equipment, and thus, did not have any capability for collecting information from cell phones or radios.

Aircrew from the Arizona National Guard and California National Guard flew in their own states. Aircrew from the Wisconsin National Guard flew over Minneapolis, and aircrew from West Virginia flew over Washington, DC. The Arizona and California flights each carried

two local law enforcement officers. Efforts to send images from the aircraft to the ground met with varying success in different locations. Recording of the images also varied by location.

Policy interpretations by the National Guard Bureau led to a mistaken belief that approval from the Secretary of Defense for use of the RC-26B was not required for purposes of the rules applicable to the conduct of intelligence activities. Other interpretations led to a mistaken belief that 32 USC § 502(f) status was appropriate for RC-26B aircrew and support personnel. Personnel involved in planning and executing these missions frequently told the investigating team they recognized missions of this sort fall under special authorities, but there is a lack of understanding and knowledge of the applicability of the various governing instructions.

Lastly, the investigation determined vagueness in DoD policy substantially contributed to the National Guard Bureau's conclusions that the RC-26B is not an intelligence resource. Complexity and vagueness in DoD policy on Immediate Response Authorities also led to the likely misuse of those authorities.

## VI. RECOMMENDATIONS

1. NGB should review CNGBI 2000.01C and CNGMB 2000.01A in light of this report. They should propose appropriate adjustments to rules on the use of intelligence assets in DSCA generally and defense support to civilian law enforcement specifically, and they should clarify how to transition from intelligence authorities to authorities applicable to other missions. NGB should seek the views of appropriate offices in USD(P) and DoD SIOO in creating these adjustments.

2. NGB should review its procedures for missions under 32 U.S.C. 502(f) to ensure it has processes to confirm that use of 502(f) status is proper for the mission at hand, that the proper person has approved the use of 502(f) for that mission and for the Guard personnel on it, and that information on those procedures is provided to the field.

3. NGB should create training to provide to the states to address confusion regarding the applicability of various authorities and their application to domestic operation missions.

4. NGB and USD(P) should collaborate to clarify policies applicable to NG support to civilian law enforcement, particularly who can approve support under Immediate Response Authority.

5. USD(I&S), USD(P), and DoD SIOO, in consultation with NGB as appropriate, should clarify the DoD issuances on the interface between the rules applicable to the conduct of intelligence activities and Defense Support to Civil Authorities, especially in

the context of support to civilian law enforcement, Immediate Response Authority, and state Immediate Response Authority.

6. United States Property and Fiscal Officers (USPFOs) in Minnesota, Wisconsin, Arizona, California, West Virginia, Arkansas, and Mississippi should review the use of federal funds for the RC-26B flights and supporting downlink and analysis. USPFOs should consider reimbursement, as appropriate.

I have reviewed this Report of Investigation conducted by the SAF/IGS investigating team and I concur with its findings.



SAMI D. SAID  
Lieutenant General, USAF  
The Inspector General

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