



U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

November 5, 2002

## MEMORANDUM FOR THE ATTORNEY GENERAL

*Re: Department of Defense Assistance in an Federal Bureau  
of Investigation Domestic Terrorism Investigation*

You have asked whether the Department of Defense has the authority to assist the Federal Bureau of Investigation ("FBI") in a domestic counter-terrorism investigation by operating a military aircraft and certain airborne surveillance equipment. We have orally advised your office previously that such assistance is authorized by statute and is not prohibited under the Posse Comitatus Act, and that use of the surveillance equipment at issue would not violate the Fourth Amendment. This memorandum memorializes that advice.

### I. Background

The Director of the FBI has requested the Secretary of Defense to provide technical assistance in the investigation of the shooting deaths of eight individuals in the greater Washington, D.C. metropolitan area.<sup>1</sup> The series of shootings began on October 3, 2002. All took place in Washington, D.C. and Maryland and Virginia suburbs and were characterized by a single shot from a high-powered rifle. Ten days into the investigation, law enforcement agencies were frustrated by a failure to identify the shooter or shooters. Fear caused by the string of attacks, which law enforcement officials had not yet been able to stop, had a significant impact on daily life throughout the Washington metropolitan area, leading to school lock-downs, the cancellation of many outdoor activities, and frequent shutdowns of major highways as police conducted a dragnet after each new shooting.<sup>2</sup> A joint task force of federal, state, and local law enforcement agencies, including the FBI, was formed to conduct the investigation. The FBI determined that investigative efforts would be significantly enhanced if Department of Defense ("DOD") resources were used to provide aerial surveillance and an immediate response capability.

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<sup>1</sup> Letter to the Honorable Donald H. Rumsfeld, Secretary of Defense, from Robert S. Mueller, III, Director, Federal Bureau of Investigation (Oct. 14, 2002).

<sup>2</sup> See Carol Morello and Jamie Stockwell, *No Attack, No Arrests, No Shortage of Anxiety: Area Faces New Week Under the Sniper's Gun*, WASH. POST, Oct. 14, 2002, at A1; Amanda Ripley, *Inside the Sniper Manhunt*, TIME, Oct. 21, 2002, at 30.

In response to the FBI's request, DOD agreed to provide Army personnel and equipment to conduct aerial reconnaissance in support of federal law enforcement agencies in Northern Virginia, Maryland, and the District of Columbia. Based upon several conversations with DOD and FBI personnel, we determined that the DOD aircraft would provide the following types of surveillance capability for the FBI:

(1) The aircraft in question are equipped with daytime video equipment capable of providing a high-resolution image that would allow viewers to see particular vehicles in traffic. As we understand it, the plans for operations called for FBI agents to be aboard each aircraft. FBI agents would direct the Army personnel to focus on and track a particular vehicle. That vehicle could then be monitored and its location communicated by the FBI agents on the aircraft to participating law enforcement personnel on the ground, who could then undertake appropriate law enforcement activities based on that information.

(2) The aircraft are also equipped with nighttime video equipment. This equipment employs Forward Looking Infrared ("FLIR") technology that detects infrared radiation generated by heat-emitting objects, including automobiles, and projects the location of the heat source on a screen. Like the daytime surveillance equipment, this technology would enable the FBI to follow a targeted vehicle until law enforcement personnel on the ground could locate and stop the vehicle. We were advised by DOD personnel that the FLIR system cannot provide information concerning the interior of an object or structure, only that the object or structure is emitting heat. Moreover, we were advised that the FLIR system at issue here is not sufficiently sensitive to pick up every heat source. The walls of a house, for example, would ordinarily prevent the system from detecting any heat source within the structure. The only heat source from a house likely to register on the system would be heat escaping directly from a fire through a chimney. Even in this situation, the screen would indicate only the existence of a heat source, and not the precise nature of the heat source. Thus, a chimney emitting heat from a fireplace likely would not be identifiable without analysis by a skilled technician with an in-depth knowledge of a particular area being examined and the types of heat sources that might be expected to register. Moving vehicles would be readily identifiable on the screen due to the pattern of movement, and a skilled technician might be able to discern whether a vehicle was a car or a truck if an outline could be ascertained, but the FLIR would not produce more detailed identifying information such as a color.

(3) One Army aircraft would be equipped with a multi-element camera system that includes a Battlefield Ordinance Awareness ("BOA") capability designed to detect muzzle flash. It can detect flash of large caliber artillery, but the BOA system is currently being tested by DOD to determine whether it can reliably detect the firing of small arms (such as rifles). To detect small arms fire, the camera must be airborne and the gunshot must occur within the sensor field of view.

Both DOD and FBI personnel advised us that although Army personnel would be operating the aircraft and surveillance equipment, they would focus on targeted areas only at the direction of the FBI agents aboard each aircraft, and would generate raw data from the

surveillance equipment. The FBI further advised that Army personnel would not interpret the data obtained or instruct the FBI on how to interpret the data. In addition, the plan did not call for the aircraft to be patrolling the area on a continuous basis. Rather, the aircraft was to circle in one limited area in a holding pattern and then would respond to a suspected sniper incident at the direction of the FBI. Surveillance equipment would be turned on at the beginning of a flight, but would not be monitored throughout the flight except as needed to focus on suspected activity identified by the FBI. A law enforcement agency command center would receive live motion video via on-board communications systems aboard the aircraft. This center would provide, via satellite communication, immediate instructions on where to focus resources, based upon law enforcement information, in response to another shooting incident.

## II. Statutory Authority

Congress has authorized DOD to provide specific types of assistance to civilian law enforcement personnel. Under 10 U.S.C. § 372 (2000), the Secretary of Defense ("the Secretary") may make available to any federal, state, or local law enforcement official "any equipment" for law enforcement purposes. Section 373 permits the Secretary to make DOD personnel available to provide federal, state, and local law enforcement officials with expert advice. 10 U.S.C. § 373 (2000). Pursuant to 10 U.S.C. § 374(b)(1) (2000), the Secretary may, upon request from the head of a federal law enforcement agency, make DOD personnel available to operate equipment with respect to certain situations, including a foreign or domestic counter-terrorism operation, for purposes specified in 10 U.S.C. § 374(b)(2).<sup>3</sup> Those purposes include "[a]erial reconnaissance." 10 U.S.C. § 374(b)(2)(C). Authorized activity under those sections is subject to the limitation in section 375 of the same title that the Secretary "prescribe such regulations as may be necessary to ensure that any activity . . . under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." 10 U.S.C. § 375 (2000):

We conclude that the assistance sought from DOD is authorized under section 374, and does not run afoul of the limitations of section 375. A plane and its technological tracking equipment no doubt constitute "equipment" for purposes of section 372. Army personnel may operate such equipment for the purpose of "[a]erial reconnaissance," 10 U.S.C. § 374(b)(2)(C), with respect to a "foreign or domestic counter-terrorism operation,"<sup>4</sup> 10 U.S.C. § 374(b)(1)(C).

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<sup>3</sup>The term "Federal law enforcement agency" is defined in 10 U.S.C. § 374(b)(4)(A) as "a Federal agency with jurisdiction to enforce" certain statutes, including "any law, foreign or domestic, prohibiting terrorist activities." Because the FBI, a Justice Department agency, has authority to enforce criminal laws pertaining to terrorism, and because the Attorney General is vested with all functions within the Department of Justice, both the Attorney General and the Director of the FBI may properly make a request for DOD assistance under section 374.

<sup>4</sup>We have been advised by the FBI's General Counsel's office that among the possibilities that the FBI considered as the sniper investigation progressed were that the attacks might be acts of domestic terrorism. The term "domestic counter-terrorism operation" is not defined for purposes of section 374. The characterization of the

Cf. *Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies*, 15 Op. O.L.C. 36, 38-39 (1991) (airborne use of a technology that detects infrared radiation generated by heat-emitting objects was aerial reconnaissance permitted under section 374) (“1991 OLC memo”). The instant case falls squarely within section 374 as it involves aerial surveillance in the context of a multi-state series of sniper shootings involving possible crimes the FBI is investigating as a domestic counter-terrorism operation.

Section 375 provides that military personnel operating equipment pursuant to section 374 may not directly participate in a search, seizure, arrest, or other similar activity unless otherwise authorized by law. This Office has concluded that Congress intended section 375 to prohibit “at most military participation in searches involving physical contact with civilians or their property, and perhaps only such searches that are likely to result in direct, physical confrontation between military personnel and civilians.” 1991 OLC memo at 46. This conclusion was based on an examination of the legislative history, which demonstrates that Congress passed those statutes in an attempt to clarify confusion that has arisen due to inconsistent approaches in the courts as to the boundaries of permissible DOD law enforcement activities in light of the Posse Comitatus Act. See 1991 OLC memo at 42-46. It is evident from the committee reports that Congress intended to codify the distinction, set forth in *United States v. Red Feather*, 392 F. Supp. 916, 924-25 (D.S.D. 1975), between “indirect passive” law enforcement activity, which the *Red Feather* Court deemed permissible under the Posse Comitatus Act, and “direct active” involvement in law enforcement activity, which was prohibited. *Id.*

The FBI’s plan in the instant case does not run afoul of this Office’s 1991 interpretation of section 375. The FBI has advised that the DOD role will be limited to piloting the plane, operating the airborne surveillance equipment over areas as directed by the FBI, and transferring to the FBI any imagery and other data collected. The FBI will handle dissemination of data to other participating law enforcement agencies. This limited DOD role under FBI direction does not involve any contact with civilians or their property, and therefore appears to be well within the limits set by section 375. Cf. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (role played by Navy personnel in operating ship to transport terrorist suspect from abroad in an FBI operation did not violate DOD regulations issued under 10 U.S.C. § 375).

Because the aerial reconnaissance at issue here is authorized by section 374, and is not

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sniper task force investigation as such an operation, however, is fully consistent with the definition of “domestic terrorism” found elsewhere in the United States Code. In 18 U.S.C. § 2331, the term “domestic terrorism” is defined to include activities that occur in the United States that “involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State,” that “appear to be intended to intimidate or coerce a civilian population.” 18 U.S.C. § 2331(5) (West Supp. 2002). At the time the Director requested assistance from DOD, the sniper’s attacks certainly “appear[ed] to be intended to intimidate . . . a civilian population.” They appeared to be intended to spread fear throughout the region. And they certainly had the effect of terrorizing the area, requiring the cancellation of almost all outdoor events and even causing many to fear standing at a gas station to fill their cars with gasoline. See, e.g., Carol Morello and Jamie Stockwell, *No Attacks, No Arrests, No Shortage of Anxiety: Area Faces New Week Under the Sniper’s Gun*, WASH. POST, Oct. 14, 2002, at A1.

prohibited under section 375, it does not violate the Posse Comitatus Act, which generally prohibits the military forces of the United States from engaging in civilian law enforcement activities. *See* 18 U.S.C. § 1385 (2000). That Act, by its terms, does not apply to activities that are “expressly authorized by the Constitution or Act of Congress.” *Id.*<sup>5</sup>

### III. Fourth Amendment Considerations

As explained below, based on our understanding of the surveillance capabilities of the aircraft and the use the FBI intends to make of those capabilities, we believe that the law enforcement activity contemplated by the FBI does not constitute a search under the Fourth Amendment.

It is established that in the context of a visual observation, surveillance does not constitute a search within the terms of the Fourth Amendment unless the individual being observed has “a subjective expectation of privacy in the object of the challenged search” and “society [is] willing to recognize that expectation as reasonable.” *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)). Based on the Supreme Court’s precedents, whether a particular observation in this context intrudes upon a reasonable expectation of privacy, and thus amounts to a search for Fourth Amendment purposes, will depend on the technology used and the area under observation.

The Supreme Court has held that no search occurs when officers make observations of objects visible to the naked eye from an aircraft, even when they are observing a private home and the curtilage around the home, because there can be no reasonable expectation that activities and objects in uncovered outdoor areas will be free from observation from the air. *See, e.g., Florida v. Riley*, 488 U.S. 445, 451-52 (1989) (greenhouse containing marijuana plants visible to the naked eye from a helicopter flying at 400 feet in navigable airspace); *Ciraolo*, 476 U.S. at 215 (fenced-in backyard within the curtilage of a home observed from a plane at an altitude of 1,000 feet within navigable air space). If such observations of the curtilage of home do not constitute a search, it follows *a fortiori* that similar observations of more public areas (roadways, parks, open fields, etc.) do not constitute a search. Indeed, it is well settled that persons have no reasonable expectation to be free from visual observation in such areas. *See, e.g., United States v. Dunn*, 480 U.S. 294, 303-04 (1987); *Oliver v. United States*, 466 U.S. 170, 182 (1984). The Supreme Court has suggested in dicta, however, that observation of a home or curtilage made with a powerful technological enhancement may amount to a search. The Court has not fully discussed how much technological enhancement of ordinary perception would transform surveillance into a search. As far as we are aware, lower federal court decisions are uniform in

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<sup>5</sup> Even if DOD’s involvement in this case were not authorized by section 374, it would not violate the Posse Comitatus Act because it does not constitute direct military involvement in law enforcement. *See generally* Letter for Deanne Siemer, General Counsel, Department of Defense, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel at 13 (Mar. 24, 1978) (no violation of Posse Comitatus Act where “there is no [military] contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over the actions of civilian officials”).

holding that observations of the exterior of a home and the curtilage around a home made with devices such as telescopes and binoculars (including observations made from aircraft) do not constitute a search.<sup>6</sup> On the other hand, the Supreme Court has found that the use of a thermal imaging device not available to the general public to explore details of the *interior* of a home constitutes a search and is therefore presumptively unreasonable without a warrant. *Kyllo*, 533 U.S. at 40. *See also United States v. Tabor*, 635 F.2d 131 (2nd Cir. 1980) (observation with telescope of objects *inside* a home not observable with naked eye constituted search). The Court also has suggested in dicta that use of a satellite capable of scanning from many miles away, if directed at ascertaining information about the interior of a house, might also constitute a search. *Kyllo*, 533 U.S. at 35. *Cf. Dow*, 476 U.S. at 238.

Similarly, in the case of private property that is not a private home or its curtilage, the Court has held that an observation from an airplane using a commercially available precision aerial mapping camera is not a search under the Fourth Amendment. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986). Here, too, the Court suggested that the use of technology that provided too much enhancement of observation might amount to a search. *Id.* ("It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.").

Applying these principles to this case, we conclude that the aerial surveillance contemplated by the FBI in the sniper investigation does not constitute a search under the Fourth Amendment. The aircraft and its surveillance equipment are to be used in a response mode. That is, they are not conducting a constant sweep of the area in search of the sniper, but rather will respond to a particular area when an incident occurs to assist in tracking the sniper. As a result, most of what they will be trying to observe (vehicles on roadways) will be in open, public space. Such observation does not constitute a search under the Fourth Amendment. It is true that, as a matter of routine operating procedure, the surveillance equipment on the aircraft will be turned on as the aircraft circles in a holding pattern and personnel on board would be able to see images of whatever happens to be below if they were to watch the screen.<sup>7</sup> Even though no DOD or FBI personnel will be monitoring the equipment at such times, the aircraft may well circle over homes and other private property and "observe" them by taking in data. In addition, in tracking the fleeing sniper, the aircraft may end up focusing observation upon a particular house or other building. Such observations are entirely permissible because they are not searches under

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<sup>6</sup> *See, e.g., United States v. Cervantes-Garcia*, 940 F.2d 1536 (9th Cir. 1991) (table) (1991 WL 144508) (aerial surveillance with gyroscopic binoculars no more intrusive than precision aerial mapping cameras sanctioned in *Dow Chemical*, 476 U.S. 227 (1986)); *United States v. Allen*, 675 F.2d 1373, 1379-80 (9th Cir. 1980) (use of widely available binoculars from helicopters permissible); *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973) (use of binoculars to view defendant's storage building at a 80-90 feet distance not a search given time of day and surroundings).

<sup>7</sup> No recordings will be made as the aircraft circles in a holding pattern waiting to respond to a call unless so ordered by the FBI.

the Supreme Court's decisions in *Riley*, 488 U.S. at 453-55, and *Ciraolo*, 476 U.S. at 213-15. As the Court explained in *Ciraolo*, "[i]n an age where private and commercial flight in the public airways is routine" there is no reasonable expectation that observations of outside areas may not be made from the air. 476 U.S. at 215. See also *Kyllo*, 533 U.S. at 34 ("[T]he technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private."). In addition, because the aircraft operates at an altitude of 7,000 to 11,000 feet and the video equipment will not be providing substantial magnification of images, it is likely that the FBI personnel aboard the aircraft during the day will not be able to see any particular vehicle or building with as much detail as a person observing the vehicle or building from public vantage points on the ground.<sup>8</sup> The aircraft certainly is not providing the sort of advanced satellite technology that the Supreme Court has cautioned against.

Furthermore, no question is presented here concerning observations of the *interior* of a home because DOD officials have advised us that none of the surveillance equipment that will be used has the capability of seeing within a house or other building. The FLIR equipment that will be used at night will not allow the FBI to discover any information about the interior of the home. Thus the *Kyllo* Court's concern that the sanctity of the home be kept safe from "prying government eyes" is not implicated here. See *Kyllo*, 533 U.S. at 37.

Finally, we note that there would be an additional basis for concluding that use of the surveillance equipment is permissible under the Fourth Amendment if the aircraft focused upon a particular house or other structure in tracking the fleeing sniper. Even if the aerial observations of such a building were deemed to be a search (which, as explained above, they are not), a search made in hot pursuit of a fleeing suspect is permissible even without a warrant. See *Warden v. Hayden*, 387 U.S. 294, 299-300 (1967).

#### IV. Conclusion

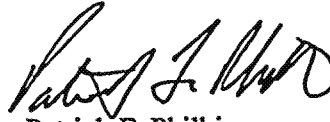
We conclude that, based on the operational plan that has been described to us, the Department of Defense has the authority to assist the Federal Bureau of Investigation in the sniper task force investigation by operating a military aircraft and certain airborne surveillance equipment, under the direction of the FBI. The DOD personnel involved in piloting the aircraft

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<sup>8</sup> We note that in *Riley*, *Ciraolo*, and *Dow*, the Court took care to note that the aircraft involved was lawfully within navigable airspace at the time of the observation. See, *Riley*, 488 U.S. at 451-52 ("Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse."); *Ciraolo*, 476 U.S. at 213-14 ("[t]he observations . . . took place within public navigable airspace. . . . Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed."); *Dow*, 476 U.S. at 229 ("At all times the aircraft was lawfully within navigable airspace."). Thus, if the DOD plane were not flying in lawful navigable airspace, it is possible that observations from those areas might be deemed to be searches. See *Riley*, 488 U.S. at 451 ("We would have a different case if flying at that altitude had been contrary to law or regulation."). Especially in light of changes in flight restrictions after the September 11, 2001, terrorist attacks, the FBI should be aware of this possible constraint.

and operating the surveillance equipment will not participate directly in law enforcement activity and their role is therefore authorized under 10 U.S.C. § 374. In addition, based on our understanding of the technology, on board the plane, we conclude that the aerial surveillance the FBI plans to undertake will not constitute a search under the Fourth Amendment.

Please let us know if we can provide any further assistance.



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