Directive 5240.01: A Threat to American Liberty

By: Jeffrey Clark

Summary: The Pentagon adopted, just a month and a half ago, a new directive in the run-up to the 2024 presidential election that authorizes military-intelligence agents to use lethal force against the American people in connection with political unrest that, in many instances, would be protected First Amendment activity.

Mainstream media and progressive media defending the Biden-Harris Administration have tried to waive away concerns about this new directive, which puts American civil liberties at grave risk (especially of the conservative/populist variety). The new directive does revise an older directive but, as explained below, the changes ***reduce*** protections for liberty and for activity designed to lead to political or policy change.

Additionally, drones can be used to exercise such force, as can secret contractors and security personnel, who may not even be aware they are acting under the direction of military authorities. Cover plans and obscured contracts can be used to augment military-intelligence assets.

Congressional oversight, stricter media scrutiny to bring these important matters to the attention of the American people, and Executive Branch reform depending on the outcome of the 2024 election are all justified here. Eternal vigilance is the price of liberty.[1]

Introduction

One reason why the treaty power was granted to the President (subject to the check of the Senate to concur by a two-thirds majority of the Senators present) is intelligence-based. In other words, the Framers thought it essential that the President could make use of intelligence—*i.e.*, of spying and related analysis—to negotiate and make such treaties. John Jay, perhaps the least known of the authors of the *Federalist Papers*, well knew this truth and he made it central to his defense of the Treaty Clause, U.S. Const., art. II, § 2, cl. 2, in *Federalist* 64.

In making it part of the defense of the Treaty Clause, Jay set forth a broader rationale for the use of intelligence gathering and spycraft tools. Jay's theory was that spying should be ***externally focused***, so that it could help arrange foreign affairs to the exclusive benefit of the United States of America.

> *It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite. …*
>
> *The [constitutional] convention have done well, therefore, in so disposing of the power of making treaties, that although* ***the President*** *must, in forming them, act by the advice and consent of the Senate,* ***yet he will be able to manage the business of intelligence in such a manner as prudence may suggest****. …*
>
> ***In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more an object of attention, and the government must be a weak one indeed, if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole.*** *It will not be in the power of the President and Senate to make any treaties by which they and their families and estates will not be equally bound and affected with the rest of the community; and, having no private interests distinct from that of the nation, they will be under no temptations to neglect the latter.*[2]

Tempering Jay's focus of using intelligence to foster international deals for the benefit of the United States is a separate idea—***that internal partiality is to be guarded against and avoided***. The purpose of a treaty is to attend to and advance the interests of all Americans in external affairs.

But as to internal affairs, Jay does not emphasize that spying is required. In internal affairs, the focus of the American President must be on delivering benefits to America that are not partial to some States or regions—on what Jay calls "the good of the whole." Obviously, the power to gather intelligence whether openly or clandestinely is but a part of the full range of powers of the national government and its President. But the external-versus-internal distinction that Jay fashioned can be broadened out to analyzing when it is proper or improper to use intelligence powers.

With that background in Constitutional theory and its objectives concerning intelligence, it becomes clear the structural incentives implied by Pentagon Directive 5240.01, released just a few months ago, represent risks too great to be tolerated in a free society. To demonstrate that Pentagon Directive 5240.01 reflects dangerous innovations in the use of intelligence, turning the eyes and power of the state against American citizens at home, this paper is divided into the following sections:

Part I explains what Pentagon Directive 5240.01 (hereafter "The 2024 Directive") provides and how it changed as against a prior version of the directive as issued in 2016. *See* *DOD DIRECTIVE 5240.01: DOD Intelligence and Intelligence-Related Activities and Defense Intelligence Component Assistance to Law Enforcement Agencies and Other Civil Authorities* (Sept. 27, 2024).

Part II responds to the attempts by the Pentagon and others to defend The 2024 Directive as "no big deal," as par for the course.

Part III explains how various parts of The 2024 Directive could be abused and how it might essentially constitute "retconning" of activities that the intelligence community may have already made use of.

PART I. WHAT THE 2024 DIRECTIVE DOES

Before looking at what The 2024 Directive does, it is important to establish the baseline of what DOD Manual 5240.01 did (hereafter "The 2016 Manual Procedures").[3] Chronologically, it should be noted that both versions (the 2016 and the 2024 versions) of the relevant policies were established during Democrat Administrations.

The 2016 Manual Procedures

The first thing to note about this document is that its title does not reference domestic law enforcement. Consistent with this, the very first page of The 2016 Manual Procedures explains that the purpose of these procedures is to guide "foreign intelligence and counterintelligence (CI) activities," with deviations from that being the exception rather than the rule.[4] In other words, The 2016 Manual Procedures are roughly consistent with Jay's externally focused theory of intelligence gathering.

Next, The 2016 Manual Procedures establish as a principal purpose "[e]stablish[ing] procedures to enable DoD to conduct authorized intelligence activities in a manner that protects the constitutional and legal rights and the privacy and civil liberties of U.S. persons. DoD authorized intelligence activities are ***foreign intelligence and counterintelligence (CI) activities*** unless otherwise specified in this instance" (emphasis added).[5] Relatedly, The 2016 Manual Procedures "[a]uthorize[] the Defense Intelligence Components to collect, retain, and disseminate information concerning U.S. persons in compliance with applicable laws, Executive orders, policies, and regulations."[6]

These two key points are gone in The 2024 Directive. What replaced them is this set of three bulleted objectives. The new directive:

- Implements Executive Orders (E.O.s) 12333 and 13388, and Title 50, United States Code (U.S.C.).
- Establishes policy and provides direction for DoD intelligence and intelligence-related activities.
- ***Assigns responsibilities and provides guidelines for Defense Intelligence Component intelligence assistance to law enforcement agencies and other civil authorities.***[7]

At this point alone, American citizens should be concerned that: (1) protections of U.S. law for its citizens under the Constitution, statutes, regulations, and the like are now being deemphasized; and (2) the focus on intelligence gathering is shifting from foreign actors to domestic actors. This puts liberty in the crosshairs.

The 2016 Manual Procedures spanned 56 pages, whereas The 2024 Directive spans only 22 pages. What was removed? Section 3 of The 2016 Manual Procedures (entitled "Procedures") was deleted. That important original Section 3 was designed to protect "U.S. Person Information" ("USPI"). For instance, here are just four subsections of Section 3 in The 2016 Manual Procedures: (1) "Electronic Surveillance … Compliance with the Fourth Amendment;" (2) Electronic Surveillance Targeting a Person in the United States; (3) Collection of USPI; and (4) Retention of USPI. These are no more in The 2024 Directive (although there is a brief cursory mention buried in the document of civil liberties protections on page 4).

One can only conclude that the guts of the liberty and privacy protections in The 2016 Manual Procedures have been torn out. And what is the new Section 3 in The 2024 Directive? Answer: "Defense Intelligence Component Assistance to Law Enforcement Activities and Other Civil Authorities."[8] In other words, liberty protections have been removed ***and*** new powers impinging on American citizens have been granted.

Next, and perhaps most importantly, it should be recognized that The 2016 Manual Procedures do not use the word "lethal" or authorize any level of force against the American people. As demonstrated below, The 2024 Directive is very different. It does specifically authorize the use of lethal force, subject only to very anemic safeguards.

A. The New Authorization to Use Lethal Force

The first provision in The 2024 Directive in this vein is Section 3.3(a). It provides as follows:

> Secretary of Defense Approval.
>
> (1) The Secretary of Defense may approve any type of requested permissible assistance described in Paragraph 3.2.
>
> (2) The decision to approve requests for these types of permissible assistance described in Paragraph 3.2. to law enforcement agencies and other civil authorities are reserved to the Secretary of Defense:
>
> ***(a) Provision of personnel to support response efforts for civil disturbances, which may also require Presidential authorization.***
>
> (b) DoD response to chemical, biological, radiological, nuclear, and high-yield explosive incidents.
>
> ***(c) Assistance in responding with assets with potential for lethality, or any situation in which it is reasonably foreseeable that providing the requested assistance may involve the use of force that is likely to result in lethal force, including death or serious bodily injury. It also includes all support to civilian law enforcement officials in situations where a confrontation between civilian law enforcement and civilian individuals or groups is reasonably anticipated. Such use of force must be in accordance with DoDD 5210.56, potentially as further restricted based on the specifics of the requested support.***
>
> (d) Provision or use of ***DoD unmanned systems*** in the United States except as delegated by the Secretary of Defense pursuant to the October 31, 2023 Secretary of Defense Memorandum.[9] (emphasis added)

There are three observations to make about all this:

First, note that the focus of issuing The 2024 Directive, with its new Section 3, is on responding to "civil disturbances." It is not possible to read this Biden-Harris Administration order, issued in late 2024, with a presidential election on the immediate horizon, where Republican candidate Donald Trump is literally being called "Hitler," as

anything other than a reference to disturbances at conservative and populist rallies and protests.[10]

Second, the only real constraint on use of sending military intelligence assets on the face of The 2024 Directive to help domestic law enforcement authorities quell civil disturbances using "force that is likely to result in lethal force, including death or serious bodily injury," and deploying "assets with potential for [such] lethality" is that the situation involve "reasonable foreseeab[ility]" where confrontations between federal personnel and protesters are "reasonably anticipated." That is a set of two, nearly identical tests wholly in the eye of the beholder, especially as this is not the tort-concept of reasonable foreseeability that is probed in the crucible of adversary litigation and judged against legal precedents. Instead, this is a matter of military authorities—and military intelligence authorities, no less—exercising discretion they have conferred on themselves in an area where the courts are going to be loath to intervene to second guess the Pentagon—and especially not to second-guess ***combined*** military and intelligence operations.

The 2024 Directive does incorporate by reference DoD Directive 5210.56, *Arming and the Use of Force* ("Arming Directive"). The Arming Directive's basic limitations boil down to this test: "When force is necessary to perform official duties, DoD personnel will use a reasonable amount of force and will not use excessive force. The reasonableness of any use of force is determined by assessing the totality of the circumstances that led to the need to use force."[11] This is a vague test, and especially where intelligence operations are involved, as they are inherently with The 2024 Directive; civilians injured as a result of The 2024 Directive may never learn the identity or the precise circumstances of whom to sue for use of "excessive force" and where "assessing the totality of the circumstances" may remain classified.[12]

Third, The 2024 Directive authorizes the use of drones. Indeed, the Pentagon's website on unmanned aircraft systems is ***now specifically directed inwards*** at the American people, in violation of Jay's logic:

> ***The primary purpose of the Department of Defense (DoD) domestic aviation operations are to support Homeland Defense (HD)*** and Defense Support of Civilian Authorities (DSCA) ***operations***, and military training and exercises. While manned aircraft primarily support these missions, the operational use of DoD unmanned aircraft systems (UAS), in lieu of manned aircraft may be appropriate for ***some domestic mission sets***, when sustained endurance efforts are required; unmanned aircraft provide superior capabilities; or physical infrastructure limitations prohibit the use of manned rotary or fixed-winged aircraft.[13]

The 2024 Directive references "Guidance for the Use of Unmanned Aircraft Systems in the U.S. National Airspace" (dated Oct. 31, 2023), but this document is unavailable and so it cannot be assessed whether it contains additional constraints to reasonable foreseeability and reasonable anticipation (which are no real constraint at all).[14] The approach that has been set up is essentially one of: "just trust us" with this alarming new authority.

In addition to Section 3.3(a), The 2024 Directive references lethality in Section 3.4 as well: "Approval of requests for permissible assistance described in Paragraph 3.2. may be provided on a case-by-case basis … consider[ing] these factors:" ***(1) lethality***, (2) risk, (3) cost, (4) appropriateness, (5) readiness, and (6) scope.[15] Again, the fact that authorization for military intelligence to greenlight lethal operations against U.S. citizens on domestic soil on a case-by-case basis will use ***a six-factor balancing test*** is not very reassuring.[16] Balancing tests are often where law goes to die because it is rarely clear how to weigh one factor vis-à-vis the others. "A 'balancing test' is defined ***as a subjective test*** with which a court weighs competing interests."[17]

Worse yet, Section 3.3(a)'s case-by-case approach requiring advance authorization includes an exception for "Exigent Circumstances" in Section 3.5. The only meaningful restriction in Section 3.5 in deeming particular circumstances to be "exigent" is that further greenlighting is required for exigent uses of force going beyond 72 hours (three days).[18]

Additionally, though catalogued at the back of a long list, The 2024 Directive allows military intelligence authorities armed with lethal force to disseminate information they gather to domestic law enforcement, whether federal, state, or local. Indeed, even violations of foreign law can be considered:

> [W]hen lives are in danger, [the following] are authorized:
>
> …
>
> (5) Dissemination of intelligence information where such information may be relevant to a violation of any Federal or State law within the recipient's jurisdiction, in accordance with Section 271 of Title 10, U.S.C.
>
> (6) Disseminating lawfully collected information reasonably believed to indicate a violation of Federal, State, local, or foreign laws, in accordance with the August 22, 1995 Memorandum of Understanding between the DoD and the Department of Justice, or other applicable memorandums of understanding.[19]

The 2024 Directive authorizes military intelligence to be present at potential civil disturbances, use lethal force, and then give any information it has collected to domestic law enforcement at all levels for future prosecutions.

C . The 2024 Directive's Secret Contractor Provision

Section 1.2(g) of The 2024 Directive is also worth highlighting. It allows the use of secret military contractors who can even be kept in the dark that they have been contracted to perform military intelligence functions:

> Defense Intelligence Components may enter into contracts or arrangements for the provision of goods ***and services*** with commercial organizations, non-academic institutions, private institutions, or private individuals within the United States ***without revealing the sponsorship of the Defense Intelligence Component if***:
>
> > (1) The contract or arrangement is for routine goods or services necessary for the support of approved activities (e.g., ***credit cards, car rentals, travel, lodging, meals, rental of office space or commercial communications or information technology***, and other items incident to approved activities); ***or***
> >
> > (2) ***There is a written determination or approval of a cover plan***, annex, or amendment by the Defense Intelligence Component head, or delegee, the Secretary or Under Secretary of a Military Department, or the USD(I&S) that the sponsorship of a Defense Intelligence Component must be concealed to protect the activities of the Defense Intelligence Component concerned.[20]

A William Arkin article in *Newsweek* bringing to light information from inside the intelligence community proves critical in understanding this.[21] William Arkin is a reporter (and not a conservative) with a long track record of working with intelligence sources to break new stories about developments in that community. His article revealed to America that the Pentagon appears to be operating a secret spying program known as "Signature Reduction":

> ***The largest undercover force the world has ever known is the one created by the Pentagon over the past decade. Some 60,000 people now belong to this secret army, many working under masked identities and in low profile, all part of a broad program called "signature reduction."*** The force, ***more than ten times the size of the clandestine elements of the CIA,***

> carries out ***domestic*** and foreign assignments, both in military uniforms and under civilian cover, in real life and online, sometimes hiding in private businesses and consultancies, some of them household name companies.[22]

It would be one thing if this 60,000-man spy army were being overseen rigorously by Congress, but that is not the case:

> What emerges is a window into not just a little-known sector of the American military, ***but also a completely unregulated practice***. ***No one knows the program's total size***, and the explosion of signature reduction has never been examined for its impact on military policies and culture. ***Congress has never held a hearing on the subject.***[23]

What Arkin describes appears parallel to what Section 1.2(g)(1) of The 2024 Directive authorizes (such as making credit-card payments under cover, or the use of whole "cover plans"). Precise figures of how many of the 60,000-man Signature Reduction force is operating domestically are unknown, but Arkin estimates that half of them are "special operations forces" operating abroad.[24] But this leaves up to as many as the other half (30,000) operating domestically. It is hard to conceive of a greater violation of the intelligence theories of John Jay than this.

D. The 2024 Directive and the Administrative Procedure Act's Military Affairs Exception

The Pentagon does not seem to be issuing policies that comply with the ***spirit*** of the statutory requirements of the Administrative Procedure Act ("APA"). Agencies must generally comply with the APA's notice-and-comment requirements before they can issue "legislative rules" or "substantive rules."[25] Mere guidance documents are exempt from such treatment. But there are constraints on guidance-document usage so that agencies do not abuse their use when a regulation should be the procedural vehicle for their action.[26]

Permits and directives that regulate (voluntarily or involuntarily) conduct external to any agency (such as the Pentagon here) are generally covered by the APA's rulemaking demands to use notice and comment processes before a rule can go into effect.[27] While The 2024 Directive is not a permit (although it is intended to operate as a kind of "license to kill" granted to military-intelligence personnel in some circumstances), nevertheless the description of a *de facto* rulemaking in *Appalachian Power* (see *supra* n. 24) readily applies to The 2024 Directive.

The loophole that the Biden-Harris Administration exploits here is that military-affairs rules are exempt from the procedural rulemaking requirements of the APA.[28] The 2024 Directive clearly regulates civilians, even allowing them to be killed. But, as it is stated, it involves a military function. Hence, by using military-intelligence to perform functions that federal law enforcement or Homeland Security agencies could perform, the Defense Department can pull itself out of the APA and avoid having to run the gauntlet of notice-and-comment rulemaking, which could force the Pentagon to defend The 2024 Directive in litigation and expose it to invalidation and being set aside or enjoined as unlawful.

The purpose of the APA exemption is to protect the military so that it can operate in foreign theaters. This is why Section 553(a)(1) exempts not just military affairs but foreign-affairs policymaking from the notice-and-comment requirements. In other words, the gist of the law is consistent with the Jay distinction of what is external requiring "perfect secrecy and immediate despatch" versus that which is internal, which should be subject to notice-and-comment rulemaking. Obviously, the United States has many domestic military bases. But among other proper functions, this is because our military is trained and based here so that it can be deployed abroad.

To create an entire program to use the military on domestic citizens without going through notice-and-comment rulemaking, however, seems to circumvent the spirit of the APA. Nothing would stop a new Administration from revising The 2024 Directive to either repeal it outright, to scale it back to The 2016 Manual Procedures, which were more protective of liberty and USPI, or to voluntarily make use of notice-and-comment procedures so that the voice of the regulated public can be heard on the provisions and procedures of The 2024 Directive. This would allow the courts to test whether The 2024 Directive comports with the First Amendment, with the Fourth Amendment, and with due process as guaranteed in the Fifth Amendment, since The 2024 Directive allows the use of summary procedures that could result in death, dismemberment, or personal injury inflicted on the citizenry.

PART II. RESPONDING TO DEFENSES OF THE 2024 DIRECTIVE

The Pentagon responded to online furor created by The 2024 Directive by issuing a statement from spokeswoman Sue Gough on October 24, 2024.[29] Gough's statement cannot be found in the Pentagon's press releases, and thus was presumably released separately to news outlets, such as Fox. Said Gough: "***The policies concerning the use of force by DOD addressed in DoD 5240.01 are not new***, and do not authorize the DOD to use lethal force against U.S. citizens or people located inside the United States, contrary to rumors and rhetoric circulating on social media."[30]

First, note that the Gough statement indicates that the Pentagon does not regard The 2024 Directive as being new. It is undeniable, however, that The 2024 Directive differs from the 2024 Manual Procedures, which do not mention the use of lethal force. One concludes that there may be some classified instruction that was issued before 2024, supporting the "retconning" theory that is suggested in Part III.

Second, the thrust of the statement appears to rest (especially considering Fox's headline for the story referencing "***Troops***") on a distinction between troops on the one hand and military-intelligence assets on the other. It may be reassuring that non-intelligence troops are not authorized by The 2024 Directive to use lethal force on American citizens. But the fact remains that the plain text of the directive authorizes the use of military intelligence to employ lethal force and the number of individuals working in the "secret army" under the Signature Reduction Program is far in excess of the *de minimis*.

The final paragraph in the Fox story states as follows: "Defense intelligence personnel are permitted to supply intelligence, analysis, training, equipment and weapons to civilian authorities. ***However, they cannot use force themselves.***"[31] That statement appears to have been given to Fox on background, to provide context supporting the overall thrust of the story, which is that American civilians have nothing to worry about from the directive. The problem for the Pentagon is that The 2024 Directive specifically contradicts this sentence. The 2024 Directive does not allow military intelligence merely to assist domestic law enforcement authorities who can use lethal force. No, The 2024 Directive says that military intelligence ***itself*** can respond with assets that can use lethality and notes that the requested assistance (i.e., of the Pentagon by domestic law enforcement authorities) can result in the use of lethal force and dire injury as caused by those military-intelligence assets.

Other defenses of The 2024 Directive have relied on irrelevant discussion of the Posse Comitatus Act and the Insurrection Act. After repeating the points addressed above, one typical example quotes the Pentagon's Gough (apparently in a talking point not given to or used by Fox) as saying the "updated issuance remains consistent with DoD's adherence to the Posse Comitatus Act, commitment to civil rights, and support of other safeguards in place for the protection of the American people."[32] It is thus true that The 2024 Directive does reference the Posse Comitatus Act, but it is hard to see how that Act would serve as a check on The 2024 Directive because what the directive does is make use of military-intelligence apparatus and assets. As CRA Senior Fellow Ken Cuccinelli and Adam Turner have explained, the military cannot be used ***as a posse comitatus***, which has a very clear and delimited historical meaning that would not

extend to the intelligence functions of the military.[33] In other words, the military can be used as a non-posse comitatus. And use of the military to do intelligence is not what Blackstone or the generation of the Framers thought of as a posse comitatus purpose.

The remainder of a piece in *The War Horse* that includes the Pentagon's points as made to Fox (along with other arguments) pivots to the Insurrection Act, arguing that it is the real source of concern, as it places, in the view of legal progressives consulted by *The War Horse*, insufficient constraints on the President's power to use that statute. CRA's Cuccinelli and Turner addressed the Insurrection Act (which operates as an exception to the Posse Comitatus Act) in the same paper cited above.[34] A critical difference between using the Insurrection Act and the Pentagon authority is that a public presidential proclamation to disperse is necessary to make use of the Insurrection Act.[35] By contrast, Directive 5240.01 can be invoked secretly.

For these reasons, defenders of The 2024 Directive have matters exactly backwards: That new directive is far more to be feared than the Insurrection Act, which has existed literally for centuries, long before the modern classification system and the rise of the Trumanite national-security state.[36] That era begins circa the end of World War II and, perhaps not coincidentally, that is also when the 1946 Administrative Procedure Act was adopted, exempting military affairs from notice-and-comment rulemaking. Better to trust in the President's publicly released notice as provided by a public proclamation to violent gatherings or combinations to disperse than in non-existent APA procedures the military is not covered by—and thus only on internal Executive Branch self-controls that are only as good as the personnel of the administrative state.

PART III. HOW THE 2024 DIRECTIVE COULD BE MISUSED

To summarize what The 2024 Directive does and how it could be abused:

First, the 2024 Directive allows the military-intelligence apparatus of this country to spy on Americans within the United States, subject only to receiving the specified bureaucratic approvals to do so. The phrase "Fourth Amendment" does not appear in the directive.

Second, the 2024 Directive appears to allow, for the first time, military-intelligence agents and contractors to use lethal force on Americans within the United States whenever their superiors deem it appropriate for them to be given that authorization.

Third, the 2024 Directive allows the use of lethal force as long as an advance analysis is done using a so-called six-factor balancing test, which (a) amplifies subjectivity in application of the 22 pages of The 2024 Directive; and also (b) allows subjectivity to hide in the weeds of the weighing process amongst the six factors.

Fourth, the 2024 Directive allows the widespread use of drones to spy on Americans in the United States—and, potentially, to dispense lethal force against them when they engage in protest activities. This places any civilian protest launched to question federal or other government actors at grave risk of disruption from the air.

Fifth, the 2024 Directive further allows the federal government to augment its own military-intelligence operatives with private contactors. This may be the Signature Reduction Program, which could be as large as 30,000 individuals. These contractors do not have to tell the American public that they are working for the government. And indeed, they may not even know that they are doing so. More realistically, however, private contractors are likely to have military or other government affiliations and what The 2024 Directive really gives is plausible deniability to such contractors.

Sixth, any intelligence gathered against Americans from military-intelligence operatives, from their contractors (kept in the dark or not), or from drones and other surveillance can be shared with federal, state, and local law enforcement authorities. This opens up the door to massive entrapment operations. This will foster immense distrust in the United States akin to that which existed in East Germany, in the Soviet Union, and in Communist China.

Finally, all of the six foregoing abuses can be used to chill political speech criticizing a current Administration's policies, which is entirely contrary to the First Amendment and to broader First Amendment values that are designed to keep politics open, free, and competitive.

In considering the practical potential for the use of such a program, attention should perhaps be given to another William Arkin article published in *Newsweek* that has not gotten enough notice, put out as part of a series on the first anniversary of the January 6 riot.[37] Former Acting Attorney General Jeff Rosen reportedly authorized secret FBI commandos (comprising "a half-dozen elite government special operations teams") to be stationed in the Capitol on January 6.[38] Rosen acted entirely on his own: "Rosen made a unilateral decision to take the preparatory steps to deploy Justice Department ***and so-called 'national' forces***."[39]

Note the fact that Arkin refers to the use not just of DOJ "assets" but also to the use of "national forces." This is one consideration that suggests that The 2024 Directive

may be a species of retconning—***retroactively*** authorizing the ***continuation*** of something that had already been done in the past—in the guise of authorizing new prospective uses of force and of intelligence assets.[40] Moreover, much like the use of "lethality" in The 2024 Directive, Rosen's authorization "entailed an automatic green light allowing federal responders to take the initiative and spare no resources, ***including shoot-to-kill authority***, to deal with this most extraordinary condition."[41] The article does flag potential military involvement in this way:

> The dedicated rapid response force, ready to deploy anywhere in the United States within two hours of notification, reached operational readiness during the Obama administration, ***with dedicated national response elements from*** the Department of Energy ***and augmentation from the military's Joint Special Operations Command***.[42]

Finally, the last paragraph contains perhaps the true bombshell, suggesting not just a DOJ operation but a joint DOJ-DOD military and law enforcement operation:

> ***The role that the military played in this highly classified operation [on J6] is still unknown, though FBI sources tell Newsweek that military operators seconded to the FBI, and those on alert as part of the National Mission Force, were present in the metropolitan area.***[43]

What Arkin describes bears strong resemblance to what The 2024 Directive appears designed to authorize, ostensibly for the first time.

CONCLUSION

The 2024 Directive (DOD Directive 5240.01) is a very troubling document. It authorizes secret use of military intelligence assets, coupled with secret contractors, to spy on the American people when they engage in political or other forms of protest. Most alarmingly, it clearly allows the use of lethal force by military-intelligence agents, and thus the directive likely rests outside the ability of a reviewing court, using the powers of judicial review, to rein in the excesses of the directive and its discarding of procedural protections for American liberty. The political Left is both engaging in the misdirection play of arguing that the Insurrection Act is of greater concern, as well as outright lying about the directive. This should give all Americans serious pause.

Powers reposed in secret bureaucracies, spies, and quasi-governmental action at one or more degrees of remove, using private contractors, is a relatively modern innovation of the Trumanite state. John Jay would not approve of intelligence powers designed for use only in external, foreign affairs being imported into the mainland of

the country. Closer in time to his generation, legislators who had been present at the Founding saw no problem in reposing in the President of the United States the power to put down insurrections. They knew the President would do this ***openly*** when circumstances warranted. And statutes like the APA and its military exception were not even a glimmer in the eye in the late Eighteenth Century, when the Constitution was written and ratified.

Congressional oversight concerning The 2024 Directive, further scrutiny by paid media and citizen journalists, and internal reforms if the Executive Branch changes hands on January 20, 2025 are all warranted.

Endnotes

1. This quotation is generally attributed to Thomas Jefferson, but Monticello notes that it "currently ha[s] no evidence that Thomas Jefferson ever said or wrote" these words. The Jefferson Monticello, *Eternal Vigilance Is the Price of Liberty (Spurious Quotation)*, https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/eternal-vigilance-price-liberty-spurious-quotation/ (last visited Oct. 31, 2024).

2. *Federalist* Number 64 (Mar. 7, 1788) (John Jay) (first paragraph break and emphasis added).

3. *See* *DOD Manual 5240.01: Procedures Governing the Conduct of DOD Intelligence Activities* (Aug. 8, 2016).

4. *See id.* at 1.

5. *Id.*

6. *Id.*

7. The 2024 Directive at 1 (emphasis added).

8. *See* The 2024 Directive at 2.

9. The 2024 Directive at 13.

10. *See* Jeffrey Goldberg, *Trump: 'I Need the Kind of Generals That Hitler Had': The Republican nominee's preoccupation with dictators, and his disdain for the American military, is deepening*, THE ATLANTIC (Oct. 22, 2024).

11. *Id.* at 15.

12. The 2024 Directive does forbid the use of assassination but that presumably means only that prominent political leaders (and probably formal leaders, such as federal, state, or local government officers or candidates) cannot be killed. Ordinary American protesters would not be protected under this exception. *See* 2024 Directive at 5.

13. U.S. Department of Defense, *Unmanned Aircraft Systems (UAS): DoD Purpose and Operational Use* (undated).

14. *See* 2024 Directive at 22. A former Pentagon intelligence operative referenced in Part IV below also cannot locate this document.

15. *See id.* at 14-15.

16. *Id.*

17. Cornell Law School, definition of "balancing test" (emphasis added).

18. *See* The 2024 Directive at 16.

19. The 2024 Directive at 12.

20. The 2024 Directive at 4.

21. *See* William, M. Arkin, *Exclusive: Inside the Military's Secret Undercover Army*, NEWSWEEK (May 17, 2021, updated July 5, 2021).

22. *Id.*

23. *Id.*

24. *See id.*

25. *See generally* Jared P. Cole & Todd Garvey, Congressional Research Service, *General Policy Statements: Legal Overview* (Apr. 14, 2016).

26. For instance, the D.C. Circuit will strike down guidance documents when they reach beyond internal organizational matters or the mere establishment of internal rules governing purely discretionary decisionmaking (think of an enforcement policy used as part of prosecutorial discretion). *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (striking down an EPA guidance document as a disguised rule).

27. *See* 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy …."); 5 U.S.C. § 551(6) ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing"); 5 U.S.C. § 551(7) ("'adjudication' means agency process for the formulation of an order"); 5 U.S.C. § 551(8) ("'license' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").

28. *See* 5 U.S.C. § 553(a)(1) ("This section applies, according to the provisions thereof, except to the extent that there is involved—(1) a military or foreign affairs function of the United States …."). *See also* *United States v. Ventura-Melendez*, 321 F.3d 230 (1st Cir. 2003).

29. *See* Chris Pandolfo, *Pentagon Denies False Claim That Biden-Harris Admin Authorized Troops to Use Force Against Americans: Pentagon says DOD Directive 5240.01 does 'not authorize' it to use 'lethal force' on US Citizens*, Fox News (Oct. 25, 2024).

30. *See* Fox Article (emphasis added).

31. *See id.* (emphasis added).

32. *See* Sonner Kehrt, *Far-Right Suggests Military Just Authorized Lethal Force Against Americans Ahead of the Election. It Didn't: As Trump warns about an "enemy from within," a Defense Department directive set off a firestorm on alt-tech social media. But the Insurrection Act is the real threat, experts say*, THE WAR HORSE (Oct. 23, 2024).

33. *See* Ken Cuccinelli & Adam Turner, *Policy Brief: The U.S. Military May Be Used to Secure the Border* (Mar. 24, 2024) at 3-23.

34. *See id.* at 23-26.

35. *See* 10 U.S.C. § 254.

36. *See* Michael J. Glennon, NATIONAL SECURITY AND DOUBLE GOVERNMENT (2014) (explaining the difference between our Madisonian constitutional structure and the Trumanite national security state that governs from the shadows).

37. *See* William Arkin, *Exclusive: Secret Commandos with Shoot-to-Kill Authority Were at the Capitol*, NEWSWEEK (Jan. 3, 2022).

38. *Id.*

39. *Id.* (emphasis added).

40. *See* MERRIAM WEBSTER DICTIONARY, *A Short History of 'Retcon'* (reflecting the addition of this term to the dictionary in October 2021).

41. *Id.* (emphasis added).

42. *Id.* (emphasis added).

43. *Id.* (emphasis added)