

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

Privacy and Civil Liberties Oversight Board

on

Notice of Public Forum on Domestic Terrorism

87 Fed. Reg. 19536

June 30, 2022

The Electronic Privacy Information Center (EPIC) submits these comments in response to the Privacy and Civil Liberties Oversight Board's (PCLOB) Notice of Public Forum on Domestic Terrorism.¹ EPIC staff attended the June meeting and submitted comments on the meeting agenda.² EPIC applauds the PCLOB's decision to investigate the risk that domestic terrorism investigations pose to privacy, civil liberties, and safety. In addition to EPIC's earlier comments, EPIC provides here specific recommendations to investigate surveillance abuses at fusion centers and in the deployment of drones and airplanes for aerial surveillance.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.³ EPIC has particular interest in issues related to national security and surveillance. EPIC has engaged with the PCLOB since it was first formed in 2004. In

¹ 87 Fed. Reg. 19536, [https://documents.pclob.gov/prod/Documents/EventsAndPress/b2b6a3c4-0988-4ad4-ba62-4ccd68b6ef3e/Public%20Forum%20Notice%203.25.2022%20\(Final\).pdf](https://documents.pclob.gov/prod/Documents/EventsAndPress/b2b6a3c4-0988-4ad4-ba62-4ccd68b6ef3e/Public%20Forum%20Notice%203.25.2022%20(Final).pdf).

² Comments of EPIC on the PCLOB's Agenda, May 25, 2022, <https://epic.org/documents/epic-comments-agenda-for-pclob-may-2022-meeting-on-domestic-terrorism/>.

³ See About EPIC, EPIC.org, <https://epic.org/epic/about.html>.

that time, EPIC has provided extensive comments to the Board on EO 12333, FOIA procedures, and “defining privacy,” among other topics.⁴

I. The PCLOB should investigate instances of protest monitoring, dissemination of bad intelligence, and privacy and civil liberties compliance at fusion centers.

Fusion centers are a particularly dangerous branch of the federal government’s counter-terrorism infrastructure due in part to the fact that they operate in a jurisdictional void between federal and state law enforcement authority.⁵ In light of the danger that fusion centers pose, EPIC urges the PCLOB to investigate several incidents and issues at fusion centers. EPIC also recommends that the PCLOB audit fusion centers at random for compliance with privacy and civil liberties policies and publicize more information about what technologies fusion centers regularly deploy to monitor individuals. In particular, the PCLOB should review the following:

1. The role of fusion centers in preventing mass shootings that often constitute domestic terrorism is an issue of imminent public concern. In particular, the PCLOB should investigate whether Suspicious Activity Reporting is an effective program and should audit Texas fusion centers responses to Suspicious Activity Reports. Despite public scrutiny in the wake of the Uvalde shooting, fusion centers have not released detailed statistics on how they processed SARs and how often SARs result in investigations, arrests, or convictions.⁶
2. Fusion centers were involved in policing protests and surveilling protesters in 2020. The PCLOB should investigate publicized instances of fusion centers engaging in political policing including but not limited to:

⁴ Comments of the Electronic Privacy Information Center to the Privacy and Civil Liberties Oversight Board, Request for Public Comment on Activities Under Executive Order 12333 (June 16, 2015), <https://epic.org/privacy/surveillance/12333/EPIC-12333-PCLOB-Comments-FINAL.pdf>; Jeramie D. Scott, Nat’l Sec. Counsel, EPIC, Prepared Statement for the Record Before the Privacy and Civil Liberties Oversight Board (Jul. 23, 2014), https://epic.org/news/privacy/surveillance_1/EPIC-Statement-PCLOB-Review-12333.pdf; Comments of the Electronic Privacy Information Center to the Privacy and Civil Liberties Oversight Board, Freedom of Information, Privacy Act, and Government in the Sunshine Act Procedures (July 15, 2013), https://epic.org/open_gov/EPIC-PCLOB-FOIA.pdf; Letter from Marc Rotenberg, EPIC President, Khaliah Barnes, EPIC Administrative Counsel, EPIC to PCLOB on “Defining Privacy,” at 4 (Nov. 11, 2014), available at https://epic.org/open_gov/EPIC-Ltr-PCLOB-Defining-Privacy-Nov-11.pdf.

⁵ For more on the imperative to investigate fusion centers, see EPIC’s May 25, 2022 comments on the PCLOB’s agenda: <https://epic.org/documents/epic-comments-agenda-for-pclob-may-2022-meeting-on-domestic-terrorism/>.

⁶ David Barer and Matt Grant, Texas touts suspicious activity reports but critics warn of consequences, KXAN News (Jun. 29, 2022), <https://www.kxan.com/stop-mass-shootings/texas-touts-suspicious-activity-reports-but-critics-warn-of-consequences/>.

- a. Repeated surveillance of protests and even Juneteenth celebrations events by the Austin Regional Intelligence Center.⁷
- b. Long-running evidence of political policing and threats to undocumented migrants by the Boston Regional Intelligence Center.⁸
- c. The extensively documented role of the Milwaukee fusion center in surveilling racial justice protests in 2020.⁹

II. The PCLOB should conduct a review of federal agency deployments of aerial surveillance.

Aerial surveillance by drones and airplanes equipped with advanced technologies poses serious risks to privacy in public. Aerial monitoring using drones involves unmanned drones equipped with imaging technology that can be remotely controlled or fully automated. Drone video monitoring is a relatively easy and inexpensive aerial surveillance method, presenting a new way to surveil large areas. Planes can be equipped with surveillance camera technology and used to carry out mass surveillance as well. For example, the city of Baltimore used cameras attached to aircraft to surveil its residents in a surveillance pilot program that was invalidated as unconstitutional by the Fourth Circuit.¹⁰ Drones and planes can be equipped with other surveillance technologies as well, including heat sensors, GPS sensors, automated license plate readers, and cell phone surveillance technology like IMSI catchers.

Federal agencies including DHS and the National Guard have developed aerial surveillance systems. These systems may be billed as providing anti-domestic terrorism support at large public

⁷ Mara Hvistendahl, Austin Fusion Center Spied on Nonpolitical Cultural Events, *The Intercept* (Nov. 30, 2020), <https://theintercept.com/2020/11/30/austin-fusion-center-surveillance-black-lives-matter-cultural-events/>.

⁸ Sidney Fussell, Boston Police Used Twitter and Facebook to Surveil Protestors Using the #MuslimLivesMatter Hashtag, *Gizmodo* (Feb. 7, 2018), <https://gizmodo.com/boston-police-used-twitter-and-facebook-surveil-protest-18228148771>; Shannon Dooling, Citing New Documents, Advocates Call On Boston Public Schools To Stop Sharing Info With ICE, *WBUR News* (Jan. 7, 2020), <https://www.wbur.org/news/2020/01/06/bps-ice-information-sharing-new-documents>.

⁹ Isiah Holmes: <https://wisconsinexaminer.com/2021/12/22/how-should-fusion-centers-be-used-during-protests/>.

¹⁰ *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330 (4th Cir. 2021), <https://www.ca4.uscourts.gov/opinions/201495A.P.pdf>.

events but are often deployed improperly to monitor and intimidate protesters and chill protected speech. A New York Times review of Customs and Border Protection’s role in policing the George Floyd protests found that the agency deployed helicopters, airplanes, and drones over at least 15 different cities in 2020.¹¹ Those flights resulted in at least 270 hours of surveillance video, among other monitoring. And CBP was not alone in sending aircraft over protesters in 2020, the National Guard also deployed aircraft over protests. In a widely reported incident, the National Guard flew helicopters just a few dozen feet over protesters in Washington, DC.¹² The National Guard also deployed surveillance aircraft over protests in at least four cities in 2020.¹³ A Pentagon reviewed concluded that the flights were legal, though it also found that the Guard wrongly classified the planes as non-surveillance aircraft and had few rules in place surrounding deployment of the planes.¹⁴

Aerial surveillance is also commonly used along the U.S. – Mexico border, and border surveillance aircraft have been appropriated for other purposes. In 2018 the DHS OIG published a report faulting CBP for not ensuring “effective safeguards for information, such as images and video, collected on and transmitted from its UAS.”¹⁵ An EPIC FOIA request revealed that in 2020 the Texas Department of Public Safety reassigned to Pilatus border surveillance planes to overfly protests on a daily basis, and collected video from those flights.¹⁶

¹¹ Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. Times (Jun. 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html>.

¹² Luis Martinez, *Soldiers disciplined for helicopters hovering over BLM protesters in DC*, ABC News (Apr. 14, 2021), <https://abcnews.go.com/Politics/soldiers-disciplined-helicopters-hovering-blm-protesters-dc/story?id=77066526>.

¹³ Lolita C. Baldor, *Pentagon: Use of surveillance planes in protests was legal*, Wash. Post (Aug. 21, 2020), https://www.washingtonpost.com/world/national-security/pentagon-use-of-surveillance-planes-in-protests-was-legal/2020/08/21/e7b6d53c-e40b-11ea-82d8-5e55d47e90ca_story.html.

¹⁴ *Id.*

¹⁵ DHS OIG, *CBP Has Not Ensured Safeguards for Data Collected Using Unmanned Aircraft Systems*, OIG-18-79 (Sept. 21, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-79-Sep18.pdf>.

¹⁶ *See*, <https://epic.org/epic-obtains-records-about-texas-use-of-aerial-surveillance/>.

In light of serious privacy and civil liberties risks posed by aerial surveillance, the PCLOB should investigate the following questions:

1. What policies are in place to limit DHS's deployment of aerial surveillance and does DHS comply with those policies?¹⁷
 - a) When has DHS overstepped its limits and authorized flights over protests and how did those instances occur?
 - b) To what extent is countering domestic terrorism a justification DHS uses to deploy surveillance aircraft?

2. How does the National Guard deploy aerial surveillance craft?
 - a) What the National Guard's policies around aerial surveillance and what are the agency's thresholds for deploying surveillance aircraft?
 - b) How have those policies been updated since the Pentagon review?
 - c) How does the National Guard ensure compliance with its policies?
 - d) What are the surveillance capabilities of National Guard aircraft?

Conclusion

EPIC applauds the Oversight Board for its new focus on domestic terrorism investigations. These investigations have the potential to cause privacy, civil liberties, and safety harms that are likely to fall heaviest on poor and minority communities, activists and political dissidents. EPIC looks forward to engaging further with the Oversight Board to support the Board's work in this area.

Respectfully Submitted,

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¹⁷ CBP's Air and Marine Operations division appears to be responsible for aerial protest surveillance in 2020.