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# Domestic Drones

CAUSE FOR CONCERN?

AN ACLU OF MISSISSIPPI WHITE PAPER

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## **I. Introduction**

Few privacy issues have generated a more visceral reaction than those raised by domestic drones, and the ACLU of MS' mission compels us to actively participate in the debate. This paper is in response to six questions our office received from officers of the Phi Theta Kappa chapter at Holmes Community College to inform their Honors in Action project on drones. The paper is structured so that each question is distinctly identified and individually addressed in subsections 1 - 6. Because the questions presented were comprehensive, the use of domestic drones is a relatively recent topic of debate, and the civil liberty concerns are complex, we have elected to format our response into a publicly available white paper.

## **II. Civil Liberty Concerns Regarding Domestic Drones**

The first four questions directly address policy considerations and the need for domestic drone regulations to protect fundamental civil liberties.

1. *“What, exactly, is the cause for concern over our right to privacy regarding drones?”*

In order to appreciate the potential harm for civil liberties, it is first necessary to differentiate between government use and nongovernment use of drone technology. Government agencies at the federal, state and local level are greatly expanding their use of surveillance drones, and nongovernmental actors are also beginning to use the technology for personal and commercial use. While there is potential for personal and commercial drones to become tools for harmful privacy invasion, the ACLU and the ACLU of MS are more concerned with governmental use – more specifically, the danger that drones will be used for continuous, widespread surveillance. That threat is especially troubling because the government has the ability to restrict our liberty. Simply put, drone usage has the potential to substantially alter the American principle that we don't monitor innocent people just in case they do something wrong.

Moreover, there is a real danger that, if faced with the prospect of “big brother” through the use of unregulated drones, people will change how they behave in public – whether at a political rally or in their own backyards.

It's also worth noting that surveillance tends to disproportionately affect the most disadvantaged among us. It's very likely that drone technology will be disproportionately used to patrol low income communities, perhaps eventually at all times, effectively denying the people who live in those communities any reasonable expectation of privacy. Relatedly, this technology could amplify the disastrous consequences of racial profiling. Without the proper safeguards, drones could allow for an exponential expansion of suspicionless surveillance.

There is no denying that there are several current and innumerable potential uses of drone technology that are beneficial, including search and rescue missions, disaster response, scientific research, and tracking wild fires. But deployed without proper

regulation, drones capable of facial recognition, infrared imaging, and recording personal conversations would cause unprecedented invasion of privacy. A network of drones could enable mass tracking of vehicles and people in wide areas. Smaller drones could go completely unnoticed and record individual activity in our most protected and intimate settings – through our living room windows or over our backyard fences.

Although the Supreme Court has not yet had occasion to consider whether the Fourth Amendment places limits on government use of drones, it has allowed some warrantless aerial surveillance from *manned* aircraft. In 1986, the Court ruled that there was no privacy intrusion when police borrowed an airplane, flew it over a suspect’s backyard and spotted marijuana plants growing there, because “[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed.”<sup>1</sup> Nonetheless, there are strong arguments that drone surveillance using sophisticated technology would violate the Fourth Amendment.<sup>2</sup>

Finally, consistent with our position regarding police body-worn cameras, the photographs, video, audio, and/or data collected should neither be released en masse nor made completely unavailable to the public. The need for government transparency and accountability must be balanced with individual privacy concerns.

2. *"How are drones more likely to be an invasion of privacy than other aircraft?"*

The question is correct in acknowledging that other aircraft do raise privacy concerns. It would not be surprising to learn that a police helicopter – rather than monitoring or patrolling an area – has targeted certain individuals to surveil without good reason. As mentioned above, law enforcement officers in California borrowed a plane to fly over someone’s home when probable cause was lacking for a warrant.<sup>3</sup> Nonetheless, such surveillance is much more likely with drones. Essentially, drones are more concerning for the same reasons that drone technology can benefit society in so many ways.

This is especially true in Mississippi, where local government simply does not have the resources to maintain million-dollar helicopters, much less the professional pilots and staff necessary to operate them.<sup>4</sup> High quality police drones would certainly cost less to attain and operate. Thus, more agencies would utilize them, and agencies would utilize more of them. Because drones would be more widely used, the industry will be more innovative. The current technological capabilities are astonishing, and there’s no telling what would follow. Another consequence of more surveillance units in the sky is the opportunity for coordinated surveillance.

Not only are manned aircraft more expensive because of their size, but they are spatially limited. It’s very possible that a micro-drone – because of its size and virtual silence – could hover close by without a citizen ever realizing he or she is being monitored. A

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<sup>1</sup> *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>2</sup> See, *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>3</sup> *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>4</sup> “Tupelo Police Helicopter Headed to State Surplus,” *djournal.com* (October 10, 2014). available at: <http://djournal.com/news/tupelo-police-helicopter-headed-state-surplus/>

helicopter could hardly follow an individual within close enough proximity to obtain audio of conversations. Relatedly, manned aircraft is temporally limited. Obviously, pilots have to sleep, but there is technology available to easily charge drones without even landing them.

3. *“As more and more people acquire drones, what other civilian rights, besides our right to privacy, could be affected/threatened?”*

Once again, it is important to recognize the different consequences of government use and nongovernment use of drones. Drones could be utilized for virtually limitless purposes, from aesthetic videography to groundbreaking scientific research. There’s also great potential for personal drone usage that places government officials in front of, rather than behind, the lens.

Whether resulting from mechanical error or criminal intent, a few states have considered legislation that favors security over freedom, specifically First Amendment Rights. For example, legislation was introduced in New Jersey this summer that criminalized photographing “critical infrastructure.”<sup>5</sup> The ACLU adamantly defends the First Amendment right to filmography and photography of government buildings and public locations that certainly fall within the broad scope of “critical infrastructure.” Under the proposed law, using a drone to make sure traffic wasn’t backed up on your usual route to work could result in incarceration for over a year.

Furthermore, drones could be used as an effective tool to monitor the government. It’s perfectly legal for a citizen to record an on-duty law enforcement officer, but we continue to see this First Amendment right violated. We know of instances in which officers didn’t appreciate people videoing their actions with an iPhone, and that sentiment carried over to personal drones monitoring the police reaction to protests in Ferguson.

It’s become clear that the Fourth Amendment is not the only right at risk in the policy debate concerning domestic drone legislation and regulations.

4. *“Some experts argue that FAA regulations are impeding drone use, even in situations when using them could potentially save lives and money. Is the reason for the FAA regulations related to civilian rights? If so, how?”*

The ACLU of MS is without a basis of knowledge to provide the reasoning beyond what has been presented publicly, which primarily focuses on public safety. The FAA, concerned with airspace safety, has kept domestic drone use at bay through very strict regulations, but in the 2012 FAA Modernization and Reform Act, Congress required the FAA to open up domestic airspace much more widely to drones by 2015.

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<sup>5</sup> Assembly, No. 4344. Available at: [http://www.njleg.state.nj.us/2014/Bills/A4500/4344\\_R1.PDF](http://www.njleg.state.nj.us/2014/Bills/A4500/4344_R1.PDF)

The ACLU focus is on regulating government use of drones. Private industry and research institutions should be free to continue their research and development, consistent with current state laws on the books. Moreover, putting privacy protections in place regarding government use is actually good for business. Establishing clear and uniform rules concerning domestic drones would do more than protect civil liberties. It would make investing time, money and resources into the industry less risky. Ambiguity and different rules in different jurisdictions would hinder innovation and development. Right now, many in the public fear drones – for example, there was so much community backlash when Seattle police acquired drones that they returned the drones to the manufacturer. With privacy protections in place, many people will become more comfortable with the idea of domestic drone use, which will create a more favorable climate for business to both sell and test their products.

The key is to put in place a system of rules to ensure that we can enjoy the benefits of this technology without bringing us closer to a “surveillance society,” in which everyone’s movements are at constant risk of being monitored, tracked, recorded, and scrutinized by authorities.

### **III. The Solution**

The final two questions concern what residents of Mississippi can do to protect their privacy and the strategy implemented by the ACLU to address our concerns with domestic drone policy.

5. *“What precautions should the public take to keep from having our privacy invaded by the use of drones?”*

Remain vigilant in awareness regarding any legislative or administrative proposals that impact privacy rights or public access to information, and make your concerns known to your elected representatives. Last year, the state legislature introduced a Drone Prohibition Act (HB 347) which was deficient in civil liberty protections, and the ACLU of MS actively lobbied against this proposal. Of most concern, the bill allowed for law enforcement to conduct drone surveillance without a warrant. HB 347 also failed to establish clear standards for the retention and disclosure of the images and other data acquired through governmental drone use.

6. *“When does the ACLU start making rules and regulations regarding privacy as it relates to drones: before or after people start complaining?”*

The ACLU of MS is not a rules and regulation making authority. The ACLU of MS is a non-profit organization which ensures the protection of constitutional rights and civil liberties through litigation, legislation and advocacy. The ACLU of MS constantly monitors governmental promulgation of laws, regulations and policies that impact citizen's rights. In addition to our efforts, information we receive when people request our assistance helps to ensure we are able to protect freedom.

Whenever possible, we proactively defend civil liberties. The ACLU issued *Protecting Privacy from Aerial Surveillance* in 2011, before domestic drones was such a hot topic. A common creed at our office is “because freedom can’t protect itself,” and the word choice is deliberately defensive. We would much rather protect civil liberties than fight to regain them, and recent history has demonstrated that government use of surveillance technology cannot be blindly trusted. The potential harm is too great, and the near certainty of overreach in the absence of timely rules is too costly.

## **VII. Conclusion**

There’s no denying that domestic drone policy will be legislated and regulated in coming years, and too much is at stake. After all, *Freedom can’t protect itself*. We will continue to track legislative, policy, and industry developments concerning drones within Mississippi – supporting developments respecting privacy rights and zealously opposing those which do not. We are thrilled to learn that college students in Mississippi are interested in policies related to domestic drone use, and we look forward to reading Phi Theta Kappa’s final report on such an important and timely issue.