

Good afternoon Chairman Rockefeller, Ranking Member Thune and Members of the Committee. Thank you for the opportunity to testify on behalf of the American Civil Liberties Union (ACLU), its more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, about the privacy and free speech implications of the domestic use of drones by the government and the private sector.

I. Introduction

Unmanned aircraft carrying cameras raise the prospect of a significant new avenue for the surveillance of American life. Many Americans are familiar with these aircraft, commonly called drones, because of their use overseas in places like Afghanistan, Pakistan and Yemen. But drones are coming to America. Under 2012 legislation, the Federal Aviation Administration is required

¹ This legislation has dramatically accelerated the deployment of drones and pushed this issue to the forefront.

At the same time, drone technology is quickly becoming cheaper and more powerful while our privacy laws have not kept up with the technology. Aerial surveillance from manned aircraft has been with us for decades. One of the first aircraft the Wright brothers built was a surveillance aircraft, and it was sold to the U.S. Army. But manned aircraft are expensive to purchase, operate and maintain, and this expense has always imposed a natural limit on the surveillance capability. Now that surveillance can be carried out by

and include human remotely guided aircraft as well as autonomous, self-guided vehicles. They include:

Large fixed-wing aircraft. The largest drones currently in use, such as the Israeli-made *Heron*, has a wingspan is 86 feet, and it can stay aloft for 20 hours and reach an altitude of 40,000 feet.² In Pakistan and Afghanistan, the U.S. military and CIA deploy Predators and Reapers armed with surveillance capability as well as missiles capable of destroying a moving vehicle from thousands of feet in the air.³

Small fixed-wing aircraft. Smaller fixed-wing aircraft are the current favorite for

At the same time, there are potential positive uses of drones, such as drone-based photography for applications like newsgathering, art and government accountability. Much as the inclusion of digital cameras into smartphones has revolutionized things like citizen journalism and the ability of Americans to document police abuse, the availability of cheap, unobtrusive drones may allow improvements to civil liberties and other areas of American life. Given this reality, what are the dangers and what are the benefits of drone use?

a. Harms

The reasons for concern reach across a number of different dimensions:

Chilling effects. What would be the effect on our public spaces, and our society as a whole, if everyone felt the keen eye of the government or corporate surveillance whenever they ventured outdoors? Psychologists have repeatedly found that people who are being observed tend to behave differently, and make different decisions, than when

hanging up posters of staring human eyes

¹⁷ Will the noise associated with drone operation become an unconscious signal to Americans that they are being watched?

Voyeurism. The widespread use of video surveillance has revealed how susceptible this technology can be to individual abuse, including voyeurism. In 2004, a couple making love on a dark nighttime rooftop balcony, where they had every reason to expect they enjoyed privacy, were filmed for nearly four minutes by a New York police helicopter using night vision. This is the kind of abuse that could become commonplace if drone technology enters widespread use. (Rather than apologize, NYPD officials flatly denied that this filming constituted an abuse, telling a television report
helicopt

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Mission creep. Even where drones are being envisioned for positive uses, such as search and rescue, fighting wildfires, and

b. Benefits

V. *Existing Legal Protections*

In order to consider how to best strike this balance, we must first review the applicable law. The following two sections address the current legal regimes impacting drone use and provide our recommendations for improving privacy and safeguarding free speech when regulating drone technology.

a. Fourth Amendment

As described above, many of the most significant potential harms from unchecked use of drones come from the government. Unfortunately, constitutional protections enshrined in the Fourth Amendment will be able to provide meaningful protections against abuse. There are no Supreme Court cases ruling on drones although the court has allowed some warrantless aerial surveillance from *manned* aircraft. In the 1986 decision *California v. Ciraolo*, the Supreme Court focused on whether an individual has a privacy interest in being free from aerial surveillance of his backyard. In spite of the defendant's high fence the court stated there was not a privacy intrusion

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Similarly in *Dow Chemical Co. v. United States*, the Supreme Court held that a precision aerial mapping camera taking photographs of a chemical plant was simply conventional photography and not so revealing of intimate details as to ³² In *Florida v. Riley*, the court authorized a search where a police officer flew over a greenhouse and spotted marijuana through a broken pane in a greenhouse roof.³³ Unsurprisingly, many law enforcement agencies, including the FBI, read this case law as granting them almost unfettered authority to collect information using drones.³⁴

On the other hand, in a recent decision in *U.S. v. Jones*, a concurrence joined by five justices held that ubiquitous, long term tracking of an individual raised constitutional concerns. The use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. While this case involved tracking through a GPS device, the underlying reasoning could well apply to drone technology. As drone technology becomes more prevalent, it is easy to imagine a f

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³¹ *California v. Ciraolo*, 476 U.S. 207 (1986).

³² *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

³³ *Florida v. Riley*, 488 U.S. 445 (1989).

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online at:

http://www.slate.com/blogs/future_tense/2013/12/17/fbi_slideshow_explains_why_it_thinks_warrantless_drone_surv

robust interpretation of *Jones*

sites may be applied more generally to protect privacy in UAS operations throughout the NAS. [National Airspace] ⁴³

d. Tort and Peeping Tom Laws

In addition to the protections of the Fourth Amendment and rules promulgated by the FAA, state and federal statutory laws and common law also protect individual privacy rights and apply to the use of drones.

Modern tort law recognizes four torts – the legal term for injury to a plaintiff for which they are entitled relief – relating to privacy.⁴⁴ The most relevant for a discussion of drones is for harms relating to “intrusion upon seclusion” which has been adopted by all but two states.⁴⁵ It is described by the Second Restatement of Torts as “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns.” This invasion must be “highly offensive to a reasonable person.” The Restatement states that this tort applies to “use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires”⁴⁶ Any invasion under this standard must be “outrageous to a person of ordinary sensibilities” and objectively offensive.⁴⁷ As a general matter, claims are more likely to be successful if the intrusion is into the home and less so when it takes place in public places.

Drones can be an extremely powerful surveillance tool, and their use by law enforcement must be subject to strict limitations, as should all government power. In addition to the courts, Congress also has a duty to uphold the constitution and should enact statutory protections that bolster those found in the Fourth Amendment.

At a minimum, Congress should enact the following core measures to ensure that this happens:

Usage restrictions. Drones should be subject to strict regulation to ensure that their use does not eviscerate the privacy that Americans have traditionally enjoyed and rightly expect. Innocent Americans should not have to worry that police will scrutinize their activities with drones. To this end, the use of drones should be prohibited for indiscriminate mass surveillance, for example, or for spying based on First Amendment-protected activities. In general, drones should not be deployed by the government except:

where there are specific and articulable grounds to believe that the drone will collect evidence relating to a specific instance of criminal wrongdoing or, if the drone will intrude upon non-public spaces, then the government must first obtain a warrant based on probable cause; or

where required for a geographically confined, time-limited emergency situation in person lost in the wilderness; or

for reasonable non-law enforcement purposes by non-law enforcement agencies, where privacy will not be substantially affected, such as geological inspections or environmental surveys, and where the surveillance will not be used for secondary law enforcement purposes or for any purpose other than the stated purpose.

Image retention restrictions. Images of identifiable individuals captured by aerial surveillance technologies should not be retained or shared unless there is reasonable suspicion that the images contain evidence of criminal activity or are relevant to an ongoing investigation or pending criminal trial.

Public notice. The policies and procedures for the use of aerial surveillance technologies should be explicit and written, and should be subject to public review and comment.

drones for special restrictions over and above those applicable to non-newsgathering applications.

The constitutional right to photograph anything visible from a public vantage point including, and in particular, government activity must be protected. Policy makers should not distinguish between amateur or professional photographers in doing so.

Other restrictions on photographs and other information taken or collected using drones should be proportionate to the privacy threat represented. Existing and constitutional laws punishing the inappropriate use of photographs should be explored and evaluated before Congress or federal regulators issue new laws or regulations that single out drone photography for special treatment.

Congress and federal regulators should resist efforts to expand already overbroad anti-paparazzi or anti-whistleblower laws to drone photography, including so-called

photography of businesses involving agricultural or animal products subject to special restrictions.

Even within these necessary restrictions, there are still some areas where it is already clear that legislation will be necessary. One immediate area of concern that will require Congressional action is the sharing of information between the private sector and police for the purposes of criminal law enforcement.

History has demonstrated that information held by the private sector frequently ends up in the hands of government, often

some of the issues policy makers will likely need to address as they consider application of the FIPPS in this new area:⁵⁶

Transparency: In many cases drone operators will have to create and make publicly available a data collection policy that explains the data that is being collected and includes a catalog of any violations of the policy. In addition, the FAA should explore whether technological solutions exist that would allow the public to track the location of drone during flights.

Individual Participation: Community involvement is critical in any drone regulation. Residents might be given an opportunity to opt their property out of surveillance. If personally identifiable information (PII) collected, the public should have a method to redress privacy violations.

Purpose Specification and Use Limitations: Drones should be flown only pursuant to specific, articulated purposes which are made public. Use of captured data should be limited by these purpose specifications and unnecessarily collected PII should be deleted or obscured except for auditing purposes.⁵⁷

Data Quality and Integrity: Affected residents should have the ability to correct inaccuracies in the PII aggregated by the use of drones and that the information collected has not been altered or destroyed in an unauthorized manner.

Security: Data collection statements and test plans should detail the security used for communication between ground stations and drones. All communications should be encrypted when audiovisual content is being transmitted.

Accountability and Auditing: In large scale or commercial drone operations, employees should be familiar with their privacy policy and trained in compliance. The FAA should also play an ongoing role in this auditing and compliance.

The specter of routine aerial surveillance in American life is on the near horizon a development that would profoundly change the character of public life in the United States. We need a system of rules that complies with the First and Fourth Amendment and ensures that Americans can enjoy the benefits of drone technology without bringing our country a large step closer to a scrutinized by the authorities.

⁵⁶ Note that, as described in section V. (c), some of these measures have already been adopted by the FAA for the operators of drone test sites.

⁵⁷ For example the popular Google Streetview has the capacity to blur the faces of individuals and license plates

http://www.google.com/intl/en_us/maps/about/behind-the-scenes/streetview/privacy/#streetview