

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
COMMENTS ON PROPOSED DRONE LEGISLATION
MAY 31, 2013

Use of Domestic Drones

The increasing number of bills introduced in states across the country addressing the use of unmanned aerial vehicles, also known as drones, signal that not only are states concerned with intrusive government surveillance of their citizens without a warrant, but that domestic drone use is becoming more prevalent as the technology advances, signaling a sudden need for legislation. There are major Fourth Amendment and privacy implications that come with the use of drones in the United States, and the threats to privacy and civil liberties need to be properly addressed in any new drone legislation. Many outdated statutes are applied today in the digital age that undercut Fourth Amendment rights, and new regulations need to address the concerns of these rapidly advancing surveillance tools. That is why the National Association of Criminal Defense Lawyers (NACDL) created its own model legislation, promoting protection of fundamental Fourth Amendment rights. The model legislation is available [here](#).¹

Prohibited Use Without a Warrant and Suppression of Evidence

If drones are used by a person or entity of the government or funded in any way by the government, a warrant should be required for any surveillance of a person within a state, county, or municipality. A warrant should also be required for the surveillance of personal or business property located within the state to gather evidence or other information pertaining to criminal conduct or conduct in violation of a statute or regulation, except in certain special circumstances. This prevents unwanted government intrusion into privacy, and protects Fourth Amendment and state privacy rights. Traditionally, an exception to the warrant requirement exists for evidence that is found in “plain view.” The plain view doctrine becomes muddled, however, when drones are used because the drones have high-tech capabilities, that are not in the “general public use,”² to conduct surveillance on areas in plain view and not in plain view, such as the inside of a home.³ The technology is evolving so rapidly that it is currently difficult to discern exactly what kind of private data may be collected by the government and private entities. Unmanned aircrafts may be outfitted with surveillance equipment to include high resolution cameras, thermal heat imaging devices, and geolocation tracking devices.

Additionally, any evidence obtained in violation of the legislation should be inadmissible in a criminal trial. It is important that this suppression remedy be included in state drone legislation, otherwise the only recourse an individual could have is civil, which does not benefit a defendant facing criminal charges. A warrant requirement may be toothless without such a suppression remedy.

Limit Exigent Circumstances

Reasonable exceptions to a warrant requirement for the use of a surveillance drone include exigent circumstances or the assessment of an environmental or weather related catastrophe. Exigent

¹ <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=26568&libID=26537>.

² *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (reasoning that the police used a device, a thermal heat imaging device, not in the “general public use” to gather information about the inside of a private home.).

³ *Id.* (holding that using thermal imaging to obtain information from inside a home constituted a search under the Fourth Amendment.).

circumstances exist when law enforcement possesses reasonable suspicion that absent swift preventative action, there is an imminent danger to life or imminent risk of threat or bodily harm. This should further be limited for use only until the danger and risk that prompted the use of the drone are no longer imminent.

Access to Third Party Records

Drone legislation should address the “third party doctrine.” Third party records are records created and stored by private companies in their ordinary course of business. Today, these records go beyond bank records or dialed phone numbers, and can include all emails, geo-location information, a record of visited websites, and even internet search terms. The Supreme Court has held that individuals have no reasonable expectation of privacy in records shared or generated by a third party. By giving up information to a third party, a person “assumes the risk” that the company would reveal that information to the government. In other words, law enforcement may be able to access drone surveillance data, without a warrant, obtained by a private company for use as evidence in a criminal trial.

In a recent Supreme Court decision, *United States v. Jones*, which involved the placement of a GPS locator on a suspect’s car by police officers without a valid warrant, the Court held that the use of a GPS device constituted a search under the Fourth Amendment.⁴ Justice Sotomayor’s concurrence in particular questioned the use of the third party doctrine in the digital age. She said “[t]his approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”⁵ This has great implications for the use of drones to monitor, collect, and store information that can then be shared with the Government under an outdated third party doctrine.

As all states can do, some states have provided greater protection than what the federal Constitution affords to third party records. Such protections may be found in legislation, court cases, or even state constitutions. Each individual state should be familiar with its own laws on third party records in determining whether or not such a provision needs to be included in that state’s drone legislation.

Conclusion

NACDL encourages the implementation of the above suggestions into model legislation regulating the use of domestic drones. We look forward to working with you. Please contact NACDL’s National Security and Privacy Counsel, Mason Clutter, with any questions. She may be reached at mclutter@nacdl.org or 202-465-7658.

⁴ *United States v. Jones*, 132 S.Ct. 945 (2012) (“We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’ . . . The Government physically occupied private property for the purpose of obtaining information.”).

⁵ *Id.* at 10.