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Thank you Chairman Sensenbrenner, ranking Member Scott, and members of the Committee for inviting me to testify about the Fourth Amendment issues surrounding the domestic use of drones by law enforcement officials.

My name is Tracey Maclin. I am a law professor at Boston University School of Law. I have taught Constitutional Law and Criminal Procedure since 1985. My opening comments will be brief.

The constitutionality of drones for domestic law enforcement purposes raises several questions that are not easily answered by the Supreme Court's current jurisprudence.

Drones can be equipped with sophisticated cameras, thermal imaging devices, license plate readers and laser radar systems. According to a recent paper by the Congressional Research Service, soon drones will be able to operate with facial recognition or soft biometric recognition

equipment that can "recognize and track individuals based on attributes such as height, age, gender, and skin color."

Because of the advanced technology now available, comparing a drone to a traditional airplane for Fourth Amendment purposes is similar to comparing a frisk conducted by a security guard to a modern x-ray machine that can see beneath one's clothing utilized at some airports.

The 1980s Supreme Court rulings that airplane and helicopter surveillance did not implicate the Fourth Amendment were premised on naked-eye searches and surveillance equipment that was readily available to the public. For example, in *California v. Ciraolo*, Chief Justice Burger's majority opinion distinguished concerns about future electronic developments from "***simple visual observations from a public place***" that were challenged in *Ciraolo*.

Moreover, in each of those cases, the Court signaled that more intrusive and sophisticated police surveillance would raise different and more difficult Fourth Amendment issues. Thus, I agree with the view of John Villasenor that the Court's 1980's rulings do not control the use of drones that are capable of capturing much more detail unavailable to the human eye.

Furthermore, it is important to recognize, even among the Justices of the Roberts' Court, the definition of what constitutes a "search" under the Fourth Amendment is subject to change.

In the recent GPS case, *United States v. Jones*, five Justices indicated a willingness to reassess traditional notions of privacy regarding long-term electronic monitoring of a person's movements in public. Justice

Sotomayor, for example, encouraged her colleagues to reconsider the Court's traditional analysis for even short-term monitoring of a person's public activities. And Justice Alito, although not going as far as Justice Sotomayor in his willingness to reconsider the Court's privacy jurisprudence, did state: "The use of longer term GPS monitoring investigations of most offenses impinges on expectations of privacy."

A final point: When considering whether drone surveillance constitutes a search under the Fourth Amendment, I encourage the Committee to avoid resolving this question with a simplistic litmus test or legal term of art.

When deciding search and seizure cases, often judges will rule that the central point of the Fourth Amendment is "reasonableness." In the typical case, this "reasonableness" model is the equivalent of a rational basis test for judging a statute, or governmental conduct that implicates non-fundamental rights. In these ordinary cases, judges uphold police intrusions because the intrusion rationally serves legitimate state interests.

This degree of deference to police intrusions is at odds with the central purpose of the Fourth Amendment, which is distrust of discretionary police power. The Fourth Amendment was not inserted in the Bill of Rights so that judges could defer to government intrusions of privacy; rather the amendment was designed to control such intrusions. The colonists who battled the British did not trust or defer to the judgments of British customs officials. They wanted the discretionary power of customs officers restrained.

Objections to warrantless drone surveillance do not stem from a view that law enforcement officers are bad people. Instead, objections are raised against this form of police authority because “power is a heady thing, and history shows that the police acting on their own cannot be trusted.” This distrust of discretionary police power is the central meaning of the Fourth Amendment.

Thank you for the opportunity to speak today. I look forward to your questions.