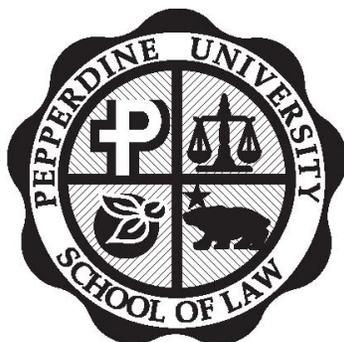


“Eyes in the Sky: The Domestic Use of Unmanned Aerial Systems”

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SHORT BIOGRAPHY

Gregory McNeal is a professor at Pepperdine University where his research and teaching focus on national security law and policy, criminal law and procedure and international law.

He previously served as Assistant Director of the Institute for Global Security, co-directed a transnational counterterrorism grant program for the U.S. Department of Justice, and served as a legal consultant to the Chief Prosecutor of the Department of Defense Office of Military Commissions on matters related to the prosecution of suspected terrorists held in the detention facility in Guantanamo Bay, Cuba. He is a Forbes contributor where he writes a column about law, policy and security.

The looming prospect of expanded use of unmanned aerial vehicles, colloquially known as drones, has raised understandable concerns regarding privacy. Those concerns have led some to call for legislation mandating that nearly all uses of drones be prohibited unless the government has first obtained a warrant. Such an approach would exceed the requirements of the Fourth Amendment and lead to perverse results that in some instances would prohibit the use of information when gathered by a drone, but would allow the same information to be admitted if gathered by nearly any other means. Such a technology centric approach to privacy misses the mark --- if privacy is the public policy concern, then legislation should address the gathering and use of information in a technology neutral fashion. This testimony outlines six key issues that Congress should remain cognizant of when drafting legislation.

1) CONGRESS SHOULD REJECT CALLS FOR A BLANKET REQUIREMENT THAT ALL DRONE USE BE ACCOMPANIED BY A WARRANT: Proposals that prohibit the use of drones for the collection of evidence or information unless authorized by a warrant are overbroad and ill-advised.¹ Such legislation treats the information from a drone differently than information gathered from a manned aircraft, differently than that gathered by a police officer in a patrol car, or even from an officer on foot patrol. Under current Fourth Amendment jurisprudence, police are not required to shield their eyes from wrongdoing until they have a warrant, why impose such a requirement on the collection of information by drones?

For example, imagine a police officer was on patrol in her patrol car. While driving she witnesses the car in front of her strike a pedestrian and speed off. Until witnessing the crime she did not have probable cause, or even reasonable suspicion to believe the vehicle in front of her would be involved in a crime. Let’s further assume that her dash camera recorded the entire incident. That video may be used as evidence against the driver in a subsequent criminal proceeding, but under broadly worded proposals mandating a warrant for drone usage, the same piece of evidence if gathered by a drone would be inadmissible in court. Why?

Consider another example. Police receive an anonymous tip that someone is growing marijuana in their backyard. A police officer attempts to view the backyard from the ground but his view is blocked by a 10 foot tall fence. The officer next decides to fly a commercially available remote controlled helicopter² over the backyard and from a vantage point that does not violate FAA regulations observes marijuana plants growing in the yard. This observation would be unlawful under proposals that require a warrant for observations from a drone. However, these facts are nearly identical to the facts in the Supreme Court’s 1986 *California v. Ciraolo*³ decision which upheld aerial surveillance. The only difference is that in *Ciraolo*, the officer flew over the backyard in an airplane, rather than using a drone.

Notably, the fact that Ciraolo had erected a 10 foot fence to manifest his “intent and desire” to maintain privacy did not necessarily demonstrate a reasonable expectation of privacy as the court noted that the fence “might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck...” Thus, according to the Supreme Court, not only would observation of the marijuana plants from the air (as described above) be lawful, observation from the top of a police truck over the fence would be lawful, and by extension, observation of the marijuana plants by

¹ For example, the “Preserving Freedom from Unwarranted Surveillance Act of 2012.”

² Perhaps a Parrot A.R. drone from the local mall’s Brookstone store.

³ 476 U.S. 207 (1986).

police from the third floor of a neighboring home would also be lawful. But under proposals requiring a warrant for observations by a drone, this evidence would be inadmissible.

What public policy goal is advanced by the suppression of evidence of a crime when documented by a drone when the same evidence if recorded by a dashcam, observed from an airplane, or viewed from a neighboring home would be admissible in court?

2) CONGRESS SHOULD REJECT BROADLY WORDED USE RESTRICTIONS:

Congress should reject broadly worded use restrictions that prohibit the use of any evidence gathered by drones in nearly any proceeding. Such restrictions exceed the parameters of the Fourth Amendment and in some circumstances may only serve to protect criminals while not deterring governmental wrongdoing.

For example, the Alameda County, California Sheriff’s Department recently proposed the use of small UASs for: crime scene documentation, EOD missions, HAZMAT response, search and rescue, public safety and life preservation missions, disaster response, fire prevention, and documentation of a felony when such documentation is premised upon probable cause.⁴ Linda Lyle, a privacy advocate with the ACLU criticized the proposal, stating: “If the sheriff wants a drone for search and rescue then the policy should say he can only use it for search and rescue...Unfortunately under his policy he can deploy a drone for search and rescue, but then use the data for untold other purposes. That is a huge loophole, it’s an exception that swallows the rule.”⁵ Her points mirror the ACLU’s position in their December 2011 white paper where they state that drone use is acceptable so long as “the surveillance will not be used for secondary law enforcement purposes.”⁶ It is also similar to the language used in other proposals prohibiting the use of information gathered by a drone “as evidence against an individual in any trial, hearing or other proceeding...”

A simple hypothetical can help to illustrate the problem with this approach. Imagine that law enforcement uses a drone to search for a lost hiker in a national park. This is a search and rescue mission that fits within the public safety, emergency, or exigency exceptions in most proposals. However, imagine that during the course of the search the drone observed a man stabbing a woman to death in the park. That collection was entirely inadvertent, and as such suppressing the videotape of the stabbing would not serve to deter the police from using drones in the future as they were not searching for an unrelated stabbing crime, they were searching for a lost hiker. Yet, that evidence under the blanket use restrictions found in various proposals circulating in state legislatures, Congress, and under the ACLU’s “secondary law enforcement purposes” standard would need to be suppressed.⁷ Such suppression doesn’t protect privacy (as inadvertent discovery can’t be deterred); it merely protects a criminal who if observed from a helicopter, an airplane, or

⁴ Alameda County Sheriff’s Office, General Order 615 available at: <http://nomby.files.wordpress.com/2013/02/small-unmanned-aircraft-system-general-order-6-15-draft.pdf>

⁵ Paul Detrick, “Cops with Drones: Alameda Co. CA Weighs Technology vs. Privacy” available at: <http://reason.com/reasontv/2013/04/04/cops-with-drones-technology-vs-privacy>

⁶ “Protecting Privacy from Aerial Surveillance: Recommendations for Government Use of Drone Aircraft,” American Civil Liberties Union, December 2011, p. 16.

⁷ For example, the “Preserving American Privacy Act of 2013” in Section 3119c creates a general prohibition on the use of covered information as “evidence against an individual in any trial, hearing, or other proceeding...” While the Act provides a set of exceptions, including one for emergencies, the language of the emergency exception as currently drafted does not clearly specify that inadvertent discovery of information unrelated to the emergency justifying the drone usage would be admissible, and it’s likely that defense counsel in such a case would seek to prohibit the admission of evidence in such a case by relying on the lack of a clearly specified exception.

from the ground would face evidence of his crime, but under some broadly worded drone focused privacy bills may be more difficult to prosecute.

What public policy goal is furthered by suppressing evidence of a crime merely because the evidence was gathered from a drone? If the discovery were genuinely inadvertent, there is little to no deterrent value that justifies suppressing the evidence.

3) IF CONGRESS CHOOSES TO IMPOSE A WARRANT REQUIREMENT, IT SHOULD CAREFULLY CONSIDER CODIFYING EXCEPTIONS: If Congress seeks to impose a statutory warrant requirement on the use of drones, it should codify exceptions to the warrant requirement and exclusionary rule that the courts have developed through decades of jurisprudence.

As the Supreme Court has noted, suppressing evidence has serious consequences for the “truth-seeking and law enforcement objectives” of our criminal justice system, and as such should present “a high obstacle for those urging [for its] application”⁸ it should be “our last resort, not our first impulse.”⁹ As such, the measure for when we should apply the exclusionary rule should not be whether a drone was used, but rather should be when “the benefits of deterrence...outweigh the costs.”¹⁰ Some exceptions and other procedural devices that Congress should consider codifying are:

- Rather than codify a blanket restriction on the use of any information gathered from a drone, Congress should codify a **standing requirement** that premises one’s ability to raise a suppression challenge on whether the person raising the suppression claim was the purported target of drone surveillance. Thus, if law enforcement uses a drone to document illegal dumping of toxic waste by Co-conspirator #1, Co-conspirator #2’s privacy rights were not violated and #2 should not have the ability to vicariously assert #1’s privacy rights to protect himself from prosecution.
- Evidence gathered by drones should be admissible in proceedings short of trial such as grand jury proceedings,¹¹ preliminary hearings,¹² bail hearings,¹³ and other **non-trial proceedings**.
- Evidence gathered by drones should be admissible for **impeachment purposes** as there is little deterrent value in keeping such impeachment evidence out of a trial (as law enforcement is unlikely to gather it solely for that purpose) and the use of evidence gathered by drones for such a limited purpose furthers the truth-seeking process and deters perjury.¹⁴

⁸ *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 364-365 (1998).

⁹ *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

¹⁰ *Herring v. United States*, 129 S. Ct. 695, 700 (2009).

¹¹ This is consistent with the Supreme Court’s approach to Fourth Amendment violations per *United States v. Calandra*, 414 U.S. 338 (1974). (noting that allowing “a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury’s duties, and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury’s role.”).

¹² This is consistent with Congress’ guidance in Federal Rule of Criminal Procedure 5.1(e) which states in relevant part “At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired.”

¹³ See 18 U.S.C. 3142(f) noting the “rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.”

¹⁴ *Contra James v. Illinois*, 493 U.S. 307 (1990).

- If Congress imposes a statutory warrant requirement on the use of drones, it should also codify directly, or by reference the body of jurisprudence associated with the so-called **good faith exception** as articulated in *United States v. Leon*¹⁵ and *Massachusetts v. Sheppard*.¹⁶ The good faith exception allows for the admission of evidence gathered pursuant to a defective warrant, unless, based on objective facts, “a reasonably well trained officer would have known the search was illegal despite the magistrate’s authorization.”
- Congress should make clear that the **independent source doctrine** as articulated in *Murray v. United States* applies equally to drone related surveillance.¹⁷ The independent source doctrine allows for the admission of evidence, despite police illegality, if the evidence seized was not causally linked to the illegal police conduct.
- Congress should codify the **inevitable discovery rule** articulated in *Nix v. Williams*.¹⁸ In the context of drone surveillance, the rule would operate to allow the admission of drone gathered evidence in a criminal trial if the prosecutor can prove (by a preponderance of the evidence) that the evidence would have ultimately or inevitably been discovered by lawful means.¹⁹
- Rather than suppress all fruit of drone surveillance, Congress should codify the **attenuation principles** articulated in *Nardone* and *Wong Sun*.²⁰ The Court in *Wong Sun* stated that when considering whether fruit of an unlawful search should be suppressed, a court must ask “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Stated differently, at some point the fruit of the poisonous tree loses its potency. Factors Congress should consider codifying are passage of time between the illegal search and the acquisition of evidence, intervening events and a lack of foreseeability that the illegal drone surveillance would result in the gathering of evidence, and whether the initial illegal surveillance was a flagrant or deliberate violation rather than an accidental one.²¹

4) CONGRESS SHOULD SPEND A SUBSTANTIAL AMOUNT OF TIME CAREFULLY DEFINING TERMINOLOGY AND SPECIFYING WHAT PLACES ARE ENTITLED TO PRIVACY PROTECTION: What a layperson sees when they read the word search, what a legislator means, and what a court may think the legislature meant are all different things. As such, when using terms like search, surveillance, reasonable expectations, curtilage, private property, public place and other terms of art, Congress should specify what the terms mean. This definitional task will be the most important part of the legislative drafting process as the terminology will drive what actions are allowable and what places are entitled to privacy protection. Congress should consider adopting an entirely new set of definitions, and be prepared to reject existing terminology which may be confusing. A good example of a well thought out definitional

¹⁵ 468 U.S. 897 (1984).

¹⁶ 468 U.S. 981 (1984).

¹⁷ 487 U.S. 533 (1988).

¹⁸ 467 U.S. 431 (1984).

¹⁹ Note, *Nix* was a Sixth Amendment case but courts have applied the fruits analysis to searches.

²⁰ *Nardone v. United States*, 308 U.S. 338 (1939) and *Wong Sun v. United States* 371 U.S. 471 (1963) respectively.

²¹ See, *Brown v. Illinois*, 422 U.S. 590, 604 (1975).

approach is the proposed legislation offered by Professor Christopher Slobogin.²² He uses the following terms:

- “Search: An effort by government to find or discern evidence of unlawful conduct. A targeted search seeks to obtain information about a specific person or circumscribed place. A general search seeks to obtain information about people or places that are not targets at the time of the search.”
- “Public search: A search of a place, in the absence of explicit consent, focused on activities or persons, limited to what the natural senses of a person on a lawful public vantage point could discern at the time of the search.
- “Probable cause: An articulable belief that a search will more likely than not produce contraband, fruit of crime, or other significant evidence of wrongdoing...”
- “Reasonable suspicion: An articulable belief that a search will more likely than not lead to evidence of wrongdoing....”

5) CONGRESS MAY WANT TO CONSIDER CRAFTING SIMPLE SURVEILLANCE LEGISLATION, RATHER THAN VERY DETAILED DRONE LEGISLATION: In light of the various issues I’ve raised in my prior points, Congress may find it preferable to legislate with an eye towards controlling surveillance writ large, not just drone surveillance. To do this Congress should focus on controlling the duration of surveillance.

The duration of surveillance can be controlled by crafting legislation that places aggregate limits on how long law enforcement may surveil specific persons or places. Slobogin suggests a sliding scale, allowing for 20 minute searches at an officer’s discretion, 20 minute to 48 hour searches with a court order and reasonable suspicion, and searches of longer than 48 hours when accompanied by a warrant and probable cause.²³ The specific amount of time Congress may settle on will depend on whether Congress wants to value privacy or law enforcement efficiency, but the point is that carefully crafting duration based rules for surveillance (whether by drone or otherwise) may be a wiser choice than the current drone focused approach that is riddled with blanket bans and exceptions. (To see the perils of a process riddled with exceptions, look at the recent bill passed by the Texas legislature which has no fewer than 22 exceptions for drone use with carve outs for agriculture interests, electrical companies, oil companies, real estate brokers and others).²⁴ Rather than crafting special exceptions, legislating with an eye towards creating rules based on clearly defined (albeit arbitrary) durational limits on surveillance creates legislation that is clearer and easier to follow.

6) CONGRESS SHOULD CONSIDER ADOPTING TRANSPARENCY AND ACCOUNTABILITY MEASURES, PERHAPS IN LIEU OF A WARRANT REQUIREMENT OR SUPPRESSION RULES: Transparency and accountability measures may be more effective than suppression rules or warrants for controlling and deterring wrongful government surveillance. To hold law enforcement accountable, Congress should mandate that the use of all drones be published on a regular basis (perhaps quarterly) on the website of the agency operating the system. These usage logs should detail who operated the system, when it was

²² Christopher Slobogin, “Making the Most of *United States v. Jones* in a Surveillance Society: A Statutory Implementation of Mosaic Theory,” *Duke Journal of Constitutional Law & Public Policy* (forthcoming) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2098002.

²³ Slobogin at 24.

²⁴ See HB 912, available at: <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB912>

operated, where it was operated (including GPS coordinates), and what the law enforcement purpose for the operation was. Congress may even mandate that manufacturers of unmanned systems come equipped with software that allows for the easy export of flight logs that contain this information. Such logs will allow privacy advocates and concerned citizens to closely monitor how drones are being used and enables the political process as a mechanism to hold operators accountable.

In circumstances where publishing usage logs may reveal information that is law enforcement sensitive (such as an ongoing investigation) the agency operating the drone may keep their usage logs confidential until the investigation is closed. The agency should be required to make the logs public within 30 days of the close of an investigation. To facilitate public accountability Congress should mandate that all logs be published in an open and machine readable format consistent with the President's Executive Order of May 9, 2013.

For evidence that this flight log approach works, one need only look across the Atlantic to the UK where many police departments publish their helicopter flight logs on their webpage --- in fact some even live Tweet their helicopter's activities. While there is no law within the United Kingdom that specifically requires police departments or law enforcement agencies to publish the flight logs of their helicopters, their version of the Freedom of Information Act appears to be the legislative authority prompting publication of police helicopter logs.

Like the United States, there are a number of public watchdog groups in the United Kingdom that monitor police activity, including groups whose sole purpose is to monitor the activity (and related noise complaints) of police helicopters.²⁵ These groups, and their respective websites, act as a forum for noise and privacy complaints from various individuals across the Kingdom, and several of these groups organize and lobby Members of Parliament (MPs) to pass legislation restricting helicopter flyovers.²⁶ These groups, and the advocacy which they generate, appear to be largely responsible for the recent trend of many UK police departments publishing their helicopters' flight logs, or even creating Twitter accounts for their helicopters that publish real-time or delayed-time updates of the aircraft's activity.²⁷

These helicopter Twitter accounts, which have become a growing trend amongst British police departments, have had an immediate and powerful effect on public relations in their respective jurisdictions. In Islington, the police department went from struggling to handle the overload of noise complaints relating to the department's use of its helicopter to receiving no complaints after the creation of its Helicopter Twitter feed.²⁸ The Twitter account gained over 7,000 followers after its first few weeks, and the public criticism of police helicopter activity ceased entirely. The officer

²⁵ See <http://www.helicopter-noise.org.uk/>;

http://www.whatdotheyknow.com/request/issue_of_police_helicopter_fligh

²⁶ See <http://www.parliament.uk/edm/2012-13/394> (proposed legislation to regulate/reduce the amount of noise pollution caused by nighttime police helicopter flyovers in London).

²⁷ Not all activity is published. The Cleveland (UK) Police Department's website indicates that: "This page is intended to provide basic information to the general public regarding the work of the police helicopter and will be updated on a daily basis. Weekend and public holiday updates will appear on the next working day. Please note that not all items are always listed due to operational sensitivity or ongoing investigation." <http://www.cleveland.police.uk/news/helicopter-watch.aspx>

²⁸ http://www.islingtongazette.co.uk/news/police_helicopter_twitter_account_stops_islington_complaints_1_1206725

second in command of the department reflected on the effectiveness—as well as future potential—of the Twitter feed by issuing this statement:

Maybe that is all people wanted – just to know and understand what we were doing. We don’t update people in real time, but my vision is that soon we will be able to let people know about an operation as soon as it is over. In some cases we could get them to help – imagine if an elderly person with Alzheimer’s was missing in Islington, we could Tweet our followers to keep an eye out.

The Suffolk Police Department launched its Twitter feed with the hope of shedding some light on police practices. Roger Lewis, an observer with the Suffolk Police, described the department’s intentions in the following way:

We hope to use the Twitter feed to highlight the positive work being done by the Air Operations Unit and to keep members of the public informed as to why the helicopter has been deployed. We hope people will enjoy finding out more about the Unit and hopefully our tweets will give some explanation as to why we have been deployed and give some interesting insights into a very important policing tool.²⁹

It is not difficult to see how the practice of disclosing non-sensitive flight logs through a public channel—such as a department web page or through Twitter—can be a useful tool in reassuring the public that law enforcement’s helicopter does not represent Big Brother’s eye in the sky, but rather embodies a part of the department’s lawful policing practices. Just as a police helicopter high overhead can be ominous to those on the ground who are unaware of its purposes, the very idea of drones—of any kind—flying above American cities and towns might be foreboding to many lay persons. By requiring law enforcement to publish data or logs Congress can add a citizen centric political check that will help quell the fears of a society that is not yet certain how it should react to the increasing presence of drones over the skies of America.

CONCLUSION

The emergence of unmanned aerial vehicles in domestic skies raises understandable privacy concerns that require careful and sometimes creative solutions. However, we should reject alarmist calls that suggest we are on the verge of an Orwellian police state as we’ve heard these calls before and they did not come true.³⁰ In 1985, the ACLU argued in an amicus brief filed in *California v. Ciraolo* that police observation from an airplane was “invasive modern technology” and upholding the search of Ciraolo’s yard would “alter society’s very concept of privacy.” Later, in 1988, the ACLU argued in *Florida v. Riley* that allowing police surveillance by helicopter was “Orwellian” and “would expose all Americans, their homes and effects, to highly intrusive snooping by government agents...” In a different context in 2004 (before the advent of the iPhone) police in Boston were going to use Blackberry phones to access public databases --- the equivalent of Googling. Privacy advocates decried the use of these handheld phones as “mass scrutiny of the lives and activities of innocent people,” and “a violation of the core democratic principle that the government should not be permitted to violate a person’s privacy, unless it has a reason to believe that he or she is involved in wrongdoing.”³¹ Reactionary claims such as these get the public’s attention and are easy to make,

²⁹ <http://helihub.com/2012/09/03/uks-suffolk-police-helicopter-unit-now-on-twitter/>

³⁰ Interestingly, Orwell seems to be a favorite citation for the ACLU who has cited him nearly 70 times in briefs.

³¹ See Gregory S. McNeal, “Can The 'Drone' Industry Compete With The Privacy Lobby?” available at: <http://www.forbes.com/sites/gregorymcneal/2012/08/13/can-the-drone-industry-compete-with-the-privacy-lobby/>

but have the predicted harms come true? Is the sky truly falling? We should be careful to not craft hasty legislation based on emotionally charged rhetoric. Outright bans on the use of drones and broadly worded warrant requirements that function as the equivalent of an outright ban do little to protect privacy or public safety and in some instances will only serve to protect criminal wrongdoing. Rather than pursuing a drone specific approach or a warrant based approach, Congress should consider surveillance legislation aimed at making the use of these systems more transparent and empowering the people to hold operators accountable.

ATTACHMENT



North Carolina's Poorly Worded Drone Killing Privacy Bill

GREGORY S. MCNEAL

This article is available online at:

<http://www.forbes.com/sites/gregorymcneal/2013/03/31/north-carolinas-poorly-worded-drone-killing-privacy-bill/>

A [bill](#) introduced in the North Carolina General Assembly will practically ground all future drone use in the state if it is not rewritten. The bill proposes to “regulate the use of drones to conduct searches” and is already being praised by the ACLU of North Carolina as an “opportunity to place strong safeguards and regulations on the use of drones” The bill, however, doesn’t regulate the use of drones so much as it buries their operation in ambiguities and contradictory constraints.

The so called “Preserving Privacy Act of 2013” would, barring a few narrow exceptions, make it unlawful for an individual or State agency “to use a drone for the purpose of gathering evidence . . . pertaining to criminal conduct.” It takes an aerial axe to the long-established plain view doctrine, which allows law enforcement officers to seize evidence and contraband found when an officer observes that evidence and contraband from a lawful vantage point. The bill accomplishes this by making any information or data acquired from the warrantless use of a drone inadmissible in civil, criminal, or administrative proceedings unless the drone’s use fell under a handful of narrow exceptions. Inadvertent discovery of a crime isn’t listed as one of those exceptions. If this bill passes, evidence of a person stabbing someone to death, if inadvertently collected by a drone, would be inadmissible in any criminal or civil proceeding. The bill imposes restrictions that don’t exist for ordinary law enforcement officers on the ground or flying overhead in manned aircraft. Society has never before asked the police to look the other way when they inadvertently observe criminal conduct from a lawful vantage point, but North Carolina’s proposed law would force them to do just that.

While the bill (in Part C) allows for several exceptions to the limitation on drone usage, those exceptions are largely meaningless. For example, the second exception listed in the bill states that drones may be used to conduct a search within the “Search and Seizure by Consent” provision of the state’s general statute. While, the state’s general statute gives a law enforcement officer the authority to conduct a warrantless search and make seizures when individuals and property owners give their consent to search their persons, possessions, or property –it is difficult

to see how this would be implemented in an aerial context. Will police need to go door to door asking residents if they wouldn't mind a drone flying overhead? Why the special restrictions for drones but not for manned helicopters?

The Supreme Court has held time and time again that non-intrusive aerial surveillance over areas open to public view does not constitute a search prohibited by the Fourth Amendment (see *California v. Ciraolo*, *Florida v. Riley*, *Dow Chemical v. United States*), so perhaps the drafters of the bill are more concerned about any aerial observation, not just those observations that would trigger Fourth Amendment scrutiny (i.e. would be a search). What, then, constitutes an unlawful observation for the purposes of this new law? Let's consider a scenario where a drone is launched in response to a 911 call, and is deployed to 1313 Mockingbird Lane, the site where the call originated. If a subject runs from 1313 Mockingbird Lane to 1315 Mockingbird Lane, does the drone need to go blind? Will police need to contact each person in the neighborhood to get their consent prior to observing their property? After all, the bill limits the scope of an undefined “search” to collection of “information or data only on the person or location subject to the search,” and also requires that operators “avoid information or data collection on individuals, homes, or areas other than the subject of the search.” The 911 scenario seems to fit within the bill's prohibitions. Perhaps the bill's drafters were hoping that drones would have automated technology that blurs or redacts all other persons or properties other than the subject of the “search?” (That might be a good idea, but the bill doesn't take this path, rather it seems headed toward prohibition).

Another way in which the bill is a drone killer is in Part G, where the bill requires the destruction of any information collected in violation of the law within 24 hours of the information's collection. Juxtapose that provision against Part E which allows those who have been aggrieved under this new law to sue the violating agency or individual, and even provides for criminal punishment for improper collection activities. Careful readers will immediately note the dilemma: A drone operator could be prosecuted or sued for (1) collecting information in the first place, (2) destroying that information (because she is covering up evidence of a crime as well as discoverable evidence in a lawsuit), and (3) prosecuted for not destroying the information (as required by the law). If I'm a trial lawyer, I love the Catch 22 this provision creates. Actually, privacy advocates will find a lot to love in this bill in general. The document reeks of ambiguities and vagueness, and leaves a lot of room to argue that just about any use of a drone in any situation violates some portion or provision of the proposed law.

If preventing drones from ever being operated is the goal of the bill's sponsors, then this bill will do the trick. But if the drafters are serious about wanting to allow drone usage while still protecting privacy, this bill will require substantial rewriting.

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