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Drones: The American Controversy

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Abstract

One of the most enduring problems confronted by a free society is the method through which law and order are maintained. There is an inherent tradeoff between freedom and the preservation of order through the construct and enforcement of laws. These attributes alone could be the subject of great debate. However, the United States and many other modern nations are experiencing a proliferation of technology that greatly enhances the sensory and capabilities of the user. If that user is the government, the debate over apparent intrusions into the lives of private citizens is amplified. The questions examined by this article are; should advanced technologies be used by law enforcement agencies? Is the government overstepping their Constitutional constraints by employing advanced technologies? Do the advantages outweigh the disadvantages of the uses of such technologies?

Introduction

Advanced technological systems and machines are burgeoning in the United States. Technology is an integral part of the everyday lives of many Americans and the technologies used by law enforcement agencies are no different. There are many advantages to law enforcement incorporating advanced technology. Some of the advantages of using unmanned aircraft are force multiplication realized through requiring fewer personnel to operate the aircraft and systems. For example, a police helicopter typically requires at least two personnel; one to fly the aircraft and one to manage the systems. A platform that requires less intervention to accomplish both enhances the capabilities of a single officer, freeing resources for other tasks. Another advantage is an increased ability to loiter. If air support is requested for long duration events, such as armed and barricaded persons, hostage situations, and special events, the human element places restrictions upon the ability for air support to remain on station for long periods of time. However, as the technology increases, so does the debate surrounding law enforcement's use of said technologies; many of these debates center on constitutional protections such as privacy, and warrantless search and seizure. This debate has been particularly true of the use of unmanned aerial vehicles (UAV's), sometimes referred to as drones. The magnitude of this debate is evidenced by debates in state legislatures. For example, as of 2014, legislation had been introduced in thirty-six states relating to drones, with four states having already passed some form of drone related legislation.¹ While much of the legislation introduced seeks to solve perceived privacy issues, some of the legislation seeks to require a warrant before drones are used, even in public places where privacy expectations are diminished.²

This article will argue that the use of drones is not significantly different from current technologies, with the primary difference being the absence of an onboard operator. Although there are concerns over privacy implications and the targeting of persons by armed domestic drones, this article argues that these concerns are largely unfounded, as there are already protections in place with respect to these issues contained within the United States Constitution. Does this guarantee that law enforcement will never violate these provisions? Of course not. Today and throughout the history of law enforcement in the United States,

¹ "Status of 2014 Domestic Drone Legislation in the States," *American Civil Liberties Union*, April 22, 2014, available at: <https://www.aclu.org/blog/technology-and-liberty/status-2014-domestic-drone-legislation-states>.

² "The Year of the Drone: An Analysis of State Legislation Passed This Year," *American Civil Liberties Union*, November 7, 2013, available at: <https://www.aclu.org/blog/technology-and-liberty/year-drone-roundup-legislation-passed-year>.

there are valid claims litigated through the courts that have both accused and substantiated abuses of these rights by law enforcement officials. A quick search of the Supreme Court docket shows that there are almost always cases involving search and seizure being argued before the Court. However, should these abuses occur, there are already procedures for remedy in place.

Literature Review

In reviewing available literature, it appears as though many of the articles investigate the use of drones as a jurisprudence issue, analyzing both present and speculative laws that would enable or constrain such operations. The legal considerations are important because these questions will have to be answered before drones become routine components of law enforcement operations. Although drones will likely be used in other functions, such as conducting scientific missions, humanitarian missions, and commercial functions, arguably the most controversial arguments will surround law enforcement and military uses.

Scholars, such as Burrow, are concerned not only of the legal ramifications of domestic drone use by government organizations, but the broad-spectrum variations Americans could experience.³ Burrow foresees a proliferation of unmanned surveillance systems in American skies in the future unless mitigating strategies are developed today. The primary dangers associated with these systems, as Burrow argues, are the threats to anonymity, privacy, and freedom from an omnipresent government.⁴ Although there are certainly legal analyses in his article, the primary focus is on American idealism. Burrow states, “a mere suspicion of a UAS [Unmanned Aerial Systems] flying high in the sky can have a chilling effect on democracy that most Americans would consider intolerable.”⁵

Other Scholars, such as William Marra, are looking beyond the first generation of drone technology toward the future, the threat of which they consider to be far more severe. Marra argues that today’s technology is simply an extension of current technologies because there are still human operators, though they are absent from the platform. Marra argues that the platforms of the future are currently incomprehensible, and should be treated with great care and skepticism by Americans and lawmakers alike. Marra states, “truly autonomous drones will

³ Matthew Burrow, “The Sentinel Clouds Above the Nameless Crowd: Protecting Anonymity from Domestic Drones,” *New England Journal On Criminal & Civil Confinement* 39:2 (July 2013): 427-458.

⁴ “Status of 2014 Domestic Drone Legislation in the States.”

⁵ Ibid.

have capabilities not before seen. If we struggle with the implications of today's technology, the conversations about tomorrow will be still more fraught."⁶

There have also been some fascinating dissections of the human toll associated with the body's absence from armed conflict. Pugliese examines the relationship developed between warriors over millennia of engaging in armed combat on behalf of a state. Although this type of warfare is similarly endangered, the modern instruments of war are cause for concern. Pugliese illustrates a paradigmatic shift in conflict. Pugliese states,

“the cubicle warrior is a cyborg warrior prosthetically grafted, through satellite feeds, to his or her drone and yet effectively quarantined, through the parenthetical bracketing that is enabled by his or her cubicle location and screen technologies, from risks of violence of the battlefield.”⁷

The paradigm shift is found in the warrior's absence from the battlefield, resulting in new psychological stimuli for both the warrior and the policy maker. For example, the President could be encouraged to engage in conflict foreseeing the diminishing human penalties of engaging in battle if a nation no longer has to commit personnel.

Law Enforcement Aircraft Regulations

There are several sources from which regulations regarding the use of drones by law enforcement are issued. Some of these are the Federal Aviation Administration (FAA), federal and state legislatures, federal and state courts, and the parent government of the law enforcement agency, such as the municipality. Each of these sources has an influence on the abilities of law enforcement to obtain and operate UAV's. The courts and legislatures will be discussed in further detail below. First, it is important to examine the FAA's role as the gatekeeper for UAV approval.

The FAA regulates the use of aircraft by law enforcement. For a law enforcement agency to operate a UAV, current regulations require that the agency apply to the FAA for a Certificate of Waiver or Authorization (COA).⁸ Once the agency applies,

⁶ William Marra and Sonia McNeil, “Understanding “the loop”: Regulating the next generation of war machines,” *Harvard Journal Of Law & Public Policy* 36:3 (July 2013): 1139-1185.

⁷ Joseph Pugliese, "Prosthetics of Law and the Anomic Violence of Drones," *Griffith Law Review* 20:4 (December 2011): 931-961.

⁸ “Fact Sheet – Unmanned Aircraft Systems (UAS),” *Federal Aviation Administration*, January 6, 2014, available at: http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153.

the FAA conducts an evaluation to determine if the proposed use of the UAV can be accomplished safely. If the FAA determines that the proposed use can be accomplished safely, the COA may be issued. Contained with the COA are mandates specific to the operating agency, such as a specific block of airspace, and other special provisions such as operating under Visual Flight Rules (VFR) only.⁹

Current regulations for obtaining a COA are quite cumbersome, and it is no different for law enforcement agencies. As of the latest data available, there were only 545 active COA's issued by the FAA.¹⁰ This number is all-inclusive and not the number of authorizations issued to law enforcement. So, although the technology is highly desired, it has not yet become a routine law enforcement tool. It is unclear if it will become easier for law enforcement to obtain authorization to use UAV's in the future, but the FAA has received a mandate to integrate UAS into the nation's airspace by 2015.¹¹

Benefits of Drone Use

The benefits of using drones are largely dependent upon operational objectives, but there are some general features that benefit all users. The most promising benefits are associated with the decreased manpower, and the needs associated with personnel, that are integrally present in manned flight operations. There are manmade limits imposed on operations that are relieved by drones. Manned aircraft cannot stay aloft as long because of limitations of both the aircraft and the operator.¹² Personnel must eat, drink, rest, and expel waste. All of these functions place needless limitations on operations. The Predator B, for example, can stay aloft for approximately twenty hours.¹³ Drones have the inherent benefit of being unmanned. This allows for greater operational capabilities in that it eliminates limitations associated with personnel, such as fatigue, eating, drinking, relieving themselves, and the monotony of completing long duration missions. Personnel can be switched out and breaks can be taken without interrupting ongoing operations.

⁹ Ibid.

¹⁰ Ibid.

¹¹ "FAA Makes Progress with UAS Integration," *Federal Aviation Administration*, available at: <https://www.faa.gov/news/updates/?newsId=68004>.

¹² J. Tyler Black, "Over Your Head, Under the Radar: An Examination of Changing Legislation, Aging Case Law, and Possible Solutions to the Domestic Police Drone Puzzle," *Washington and Lee Review* 740:3 (June 2013): 1829-1885.

¹³ Jim Waymer, *Drones seek storm's secrets: New unmanned drones promise better weather insights* (Washington, D.C.: NOAA, June 2009), available at: <http://uas.noaa.gov/news/drone-seeks-storm-secrets.html>.

There are also cost considerations that make the use of UAV's desirable to law enforcement officials. According to a study conducted by the Government Accounting Office of the cost comparison of operating both manned and unmanned aircraft in support of Customs and Border Protection operations, there was a significant cost savings.¹⁴ The study shows that the average cost per flight hour for the Blackhawk helicopter, a manned aircraft, was approximately \$5,233.¹⁵ This includes fuel, maintenance, and other costs associated with both flying and maintaining the aircraft. According to the same study, the cost per flight hour for the Predator B, an unmanned aircraft, was \$3,234. This also included fuel, maintenance, and other costs associated with both flying and maintaining the aircraft. This is a nearly \$2,000 savings per flight hour. The Border Patrol uses both platforms for similar missions, including aerial surveillance and coordinating with ground units to apprehend suspected aliens and smugglers.¹⁶ One considerable difference is that the Blackhawk is capable of delivering personnel while the Predator is not.

Legal Considerations

There is presently a legal framework protecting the rights of Americans to be secure from government intrusion and search. The Fourth Amendment to the Constitution guarantees the right to be free from unreasonable searches and seizures of their person and property.¹⁷ The modern interpretation is that a person and their effects are safe from search and seizure, absent a warrant based upon probable cause, notwithstanding exigent circumstances. However, the privacy of citizens is limited outside of their homes. When in public view, their protections from warrantless search are limited because they and their actions are generally viewable by others. It is unnecessary for law enforcement to obtain a warrant for contraband they observe in plain view or in the course of lawful action. An example is speed enforcement from an aerial vehicle. The Oklahoma Highway Patrol uses both helicopters and fixed wing aircraft in enforcement of speed laws on public roads.¹⁸ The troopers observe traffic and calculate speed using time/distance formulas. When a violator is located, the information is

¹⁴ Davi D'Agostino, *Observations on the Costs and Benefits of an Increased Department of Defense Role in Helping to Secure the Southwest Land Border* (Washington, D.C.: GAO, September 2011), available at: <http://www.gao.gov/assets/100/97733.pdf>.

¹⁵ This cost excludes the salary of pilots.

¹⁶ Hook, John, "Drones Used by CBP Agents to Patrol the Deserts North of Mexico," *Fox 10 News*, available at: <http://www.wmyt12.com/story/25558981/2014/05/19/drones-used-by-cbp-agents-to-patrol-the-deserts-north-of-mexico>.

¹⁷ Legal Information Institute, "Fourth Amendment," *Cornell Law School* (January 2014), available at http://www.law.cornell.edu/constitution/fourth_amendment.

¹⁸ Oklahoma Highway Patrol, "Troops," Oklahoma Highway Patrol (January 2014), available at: <http://www.ohptroopers.com/troops.html>.

relayed via radio to troopers waiting on the ground to stop the vehicle. Another example would be a police helicopter observing a suspect on the ground fleeing from ground units, a very common practice. In fact, the City of Tulsa Police Department requires that if an air unit is available, they must respond to any pursuit involving Tulsa Police units.¹⁹ Once the air unit has the suspect vehicle in sight, the ground units are removed to reduce the danger posed to the public inherent in high-speed pursuits. Because the suspects are operating their vehicle on public roadways, the constitutional and privacy considerations are limited based on diminished expectation of privacy.

The Supreme Court, in *Katz v. United States*, opined that in determining the protection against government surveillance, it is the location of the search, and not the methods of the search, that determines what amount of protection is received.²⁰ Therefore, aerial observations of actions in public are usually not protected actions. The most important aspect of considering the legal basis for observation by law enforcement is where the person was when observed, and their reasonable expectation of privacy while there, as well as precautions taken to maximize privacy. Many examples of this analysis apply to private property and its surrounding curtilage. It has limited application while in public places where expectation of privacy is decreased.

The reason for such legal debates is fundamental in a nation of free citizens who desire order that comes with the construct and enforcement of laws. Black states,

“the goal of any privacy rules should be to effectively and clearly balance the legitimate interests of law enforcement with the need to protect privacy and civil liberties against excessive government intrusion.”²¹

For it is law enforcement’s mandate to detect crime, gather evidence, and prosecute those responsible. However, for those not engaged in criminal activity, the right to be free from government intrusion is a primary concern. There are examples suggesting that the government agencies will use technological advances to increase surveillance activities, such as the National Security Administration’s collection of phone and other records of private citizens not suspected of crimes.

There are as many opinions as there are possibilities in the future of legislation and litigation involving the use of drones to support law enforcement operations.

¹⁹ Tulsa Police Department Policy and Procedure 21-102B (internal policy, not available online).

²⁰ “Status of 2014 Domestic Drone Legislation in the States.”

²¹ *Ibid.*

For brevity, a few were selected for analysis in this article based on the polarity of their arguments. The first opinion is that of Paul Ohm, an Associate Law Professor at the University of Colorado. Ohm posits that in order to ensure that the rights of the individual are afforded the same level of protection from government intrusion as they currently receive, that, "it should take, on average, as long to solve a crime today as it has in the past."²² This is an absurd burden to place on law enforcement. There have been many technologies that have impacted law enforcement operations. One example is in car computers. Although these are certainly not new, the capabilities of the computers have steadily advanced. This has allowed in car computers to transform from a simple mobile terminal to an indispensable tool that officers rely heavily upon in performing their jobs. Something as simple as conducting a records check in the vehicle without having to relay information to a dispatcher, then waiting for a return, has contributed to efficiency in the field.

John Villasenor, Professor of Electrical Engineering and Public Policy at UCLA, supports limiting legislation requiring law enforcement agencies to disregard evidence of crimes detected while operating a drone, but not within the scope of its current operation.²³ For example, if a drone is conducting surveillance during an operation and happens upon evidence of crime in progress, the information obtained by the drone could be the only obtainable evidence of that crime. The reason Villasenor gives is that, "investigators often use images collected from privately owned surveillance cameras to help solve crimes, including, in many cases, cameras that were not owned or operated by the victim of the crime." However, Americans would not welcome the threat of omnipresent surveillance, so middle ground must be found.

Black supports legislation that would limit the drone's use to bona fide operations as opposed to using drones and their sensors as a crime detection platform.²⁴ This functionally limits the operational capabilities of the platform by underutilizing capabilities such as time aloft. Many of the larger platforms, such as the Predator systems, can remain aloft for long periods of time, and using them only for bona fide operations does not fully take advantage of these capabilities. As discussed previously, drones are the next logical evolution of current police air units. There is no legal precedence for limiting the scope of current law enforcement manned aerial operations to bona fide missions, without the ability to detect criminal behavior. In fact, while not involved in operations

²² Robert Molko, "The drones are coming! Will the fourth amendment stop their threat to our privacy?" *Brooklyn Law Review* 78:4 (June 2013): 1279-1333.

²³ John Villasenor, "Observation from above: Unmanned aircraft systems and privacy," *Harvard Journal Of Law & Public Policy* 36:2 (Spring 2013): 457-517.

²⁴ "Status of 2014 Domestic Drone Legislation in the States."

such as monitoring a police pursuit, many aviation units conduct routine patrols just as ground units do. One example is the use of drones by the Border Patrol to patrol the U.S. border in search of illegal activity.²⁵ Although discussion of future legislation is speculative, it is important to consider so that knee-jerk reactions and emotional elements are refuted in advance. Villasenor best epitomizes the purpose of future legislation by stating that, "the best solutions are those that increase privacy protections without impeding reasonable, non-privacy-violating uses."²⁶

Domestic Law Enforcement Drone Operations

Relevant, timely, and actionable intelligence is as vital in law enforcement operations as it is in military operations around the world. The stakes are similarly high. The wrong information can lead to the wrong actions, which can and does cost lives. The use of drones affords commanders on the ground the ability to gain situational awareness through exploration of the operational environment and gather real time intelligence, much like military commanders. This information aids commanders in making more informed decisions by allowing officers to deploy resources more efficiently and approach situations more safely. A recent example of this was the use of a Customs and Border Protection Predator B by law enforcement in North Dakota. The intelligence gathered by the drone assisted law enforcement officers in identifying their suspects, the suspects locations, and most importantly, learning when they were unarmed. This allowed law enforcement to move in on the suspects at a substantially decreased risk of harm to the suspects and officers.²⁷

The variety of drones also presents exciting advances in law enforcement tactics. One example is the Hummingbird.²⁸ This drone, as its name suggests, is much smaller than traditional aircraft. This drone would employ stealth techniques, by virtue of its size, to infiltrate environments that are deemed too hazardous for law enforcement personnel. Although many instances would require a warrant to employ, drones such as this could be sent inside a building to detect criminal activity and listen in on a criminal conspiracy. The recording of this information would greatly enhance the prosecution of criminal cases. One hypothetical

²⁵ Phil Mattingly, "FBI uses drones in domestic surveillance, Mueller says," *Washington Post* (June 2013), available at: http://www.washingtonpost.com/world/national-security/fbi-uses-drones-in-domestic-surveillance-mueller-says/2013/06/19/d51d4oda-d925-11e2-a9f2-42ee3912ae0e_story.html.

²⁶ Agostino, "Observations on the Costs and Benefits of an Increased Department of Defense Role..."

²⁷ Waymer, "Drones seek storm's secrets: New unmanned drones promise better weather insights."

²⁸ Tulsa Police Department Policy and Procedure 21-102B (internal policy, not available online).

situation would be a narcotics manufacturing investigation. Law enforcement officials receive information that subjects in a private residence are manufacturing methamphetamine. Currently, in order to develop sufficient probable cause, a confidential informant or undercover officer would have to either purchase narcotics from an individual or somehow infiltrate the residence. Both circumstances are highly hazardous situations. With the advent of drones such as the Hummingbird, law enforcement officers could obtain a warrant, then use the drone to infiltrate the residence to watch and record the activities within. This would provide invaluable evidence for criminal prosecution. It would also aid law enforcement officers in more safely executing the apprehension of the suspects inside, similar to the North Dakota use to decrease the likelihood of violent and armed resistance.

Another example, from a homeland security perspective, would be the inability for informants or undercover officers to quickly, and safely infiltrate suspected terrorist cells. A drone such as the Hummingbird could be used to infiltrate and observe meetings of suspected terrorist organizations, gaining real time, actionable intelligence. This information would be invaluable to counter-terrorist operations in stopping terrorist plots. Although the extent of small drone use in the war on terror is not as widely publicized as the use of larger drones, these platforms have proven to be very useful in the international war on terror, and it is logical to suspect that the same successes will be realized domestically.

Jeremiah Gertler, a military aviation specialist for the Congressional Research Service, stated that the U.S. Department of Homeland Security has been using drones to support domestic law enforcement and humanitarian operations, such as relief operations in Haiti.²⁹ This includes Customs and Border Protection border operations to deter illegal border crossings by illegal aliens, criminals, and terrorists. These operations have resulted in the detection and interdiction of the smuggling of drugs, weapons, and other contraband. Customs and Border Protection drone assets have also assisted other federal, state, and local agencies, such as the Federal Bureau of Investigation, Department of Defense, Immigration and Customs Enforcement, Secret Service, and the Texas Rangers, as well as others.³⁰

The same report states that the Federal Aviation Administration expects to issue approximately 30,000 unmanned aircraft permits in the next twenty years.³¹ This

²⁹ Gertler, Jeremiah, U.S. Unmanned Aerial Systems CRS Report RL42136 (Washington, D.C.: Library of Congress, Congressional Research Service, 2012), available at: <http://fas.org/sgp/crs/natsec/R42136.pdf>.

³⁰ "Status of 2014 Domestic Drone Legislation in the States."

³¹ Ibid.

is further evidence of the proliferation of drones domestically, though not all of these will be used for military or law enforcement purposes. Other federal agencies also benefit from the cost effectiveness and decreased risk to personnel that drones offer. The National Oceanic and Atmospheric Administration has used drones to replace many previously manned aircraft missions to study the most dangerous storms threatening the United States. Waymer states, “in the middle of the Atlantic, they will hunt hurricanes-maybe leading to the end of manned reconnaissance flights, or at least the most dangerous ones.”³² Similarly, the National Aeronautic and Space Administration (NASA) uses a variant of the Predator B for long duration Earth science flight missions.³³

Another example of the utility of drones is the ability to lessen the burden on operators responsible for tedious or monotonous tasks during long duration flights. The Civil UAV Assessment Team at NASA provides an excellent example. They state, “The ability of a payload to either autonomously calibrate itself or to be calibrated more efficiently than current technology allows will enhance the utility of the UAV science platform and reduce mission costs.”³⁴ This advantage translates to law enforcement activities that could become long duration, such as traffic management, surveillance, monitoring fleeing suspects, aiding in rescue activities, locating missing persons, and conducting over watch during tactical operations. The ability for the operator to place some equipment on an autonomous setting would allow more systems that are pertinent greater attention. For example, an operator tasked with over watch of a tactical situation could program the UAV to fly circular patterns, relieving the operator of this task so that they can operate other systems, such as Forward Looking Infrared (FLIR).

The Deployment of Armed Domestic Drones

While discussing the future of domestic drone use, another fear is the use of armed drones against American citizens on American soil. Though this scenario is arguably unlikely, there is some legal basis for this debate. One of the more famous examples is the killing of U.S. citizen, and combatant against the United States, Anwar al-Aulaqi in 2011 in Yemen. Though he was suspected in plotting terrorist attacks against U.S. citizens both foreign and domestic, his death has

³² Marra and McNeil, “Understanding 'the loop': Regulating the next generation of war machines.”

³³ National Aeronautic and Space Administration, “An Earth science aircraft for the twenty-first century,” (July 2014), available at:

<http://www.nasa.gov/centers/dryden/news/FactSheets/FS-073-DFRC.html#.UuGv2xDnaM8>.

³⁴ Civil UAV Assessment Team, “Earth Observations and the Role of UAVs: A Capabilities Assessment,” NASA, August 2006, available at:

http://www.nasa.gov/centers/dryden/pdf/175939main_Earth_Obs_UAV_Vol_1_v1.1_Final.pdf.

been controversial. The basis for this attack, as Dreyfuss explains, “no laws, international or domestic, prohibit the practice if it is carried out by a state against an enemy of that state actively engaged in armed conflict against that state.”³⁵ American citizens selected for targeting are afforded further procedures as demanded by the U.S. Constitution, particularly the Fourth and Fifth Amendments. The Fourth Amendment is relevant because Supreme Court decided in *Tennessee v. Garner* that the death of a suspect is the ultimate seizure. The Fifth Amendment is relevant due to the Due Process Clause. However, if these burdens are sufficiently met, there is no legal preclusion to the use of deadly force.

Former Attorney General Eric Holder contends that there are three elements for targeting U.S. Citizens in foreign countries. The first is a review that determines they pose an immediate threat. The second is that capture is not feasible. The third is that the operation conforms to applicable law of war procedures.³⁶ As the law of armed conflict does not limit the scope of such operations geographically, it is feasible that these strikes could occur on U.S. soil, however unlikely. The President, with congressional approval, has the option of using military force in this manner, so long as the persons targeted are actively engaged in armed conflict with the United States. This is despite such laws as the Posse Comitatus Act, as the United States is engaged in armed conflict, via the Global War on Terror, and not using military forces to enforce civilian laws. The President was given congressional authorization through the passage of legislation such as the National Defense Authorization Act in 2012.

Now, as there are no known cases involving the targeting of U.S. citizens on U.S. soil, the application of such procedures is somewhat speculative, but the implications are clear. In order to stop a terrorist attack, the military and law enforcement are prepared to use force, including deadly force, to intervene. An example is Vice President Dick Cheney’s decision to have hijacked flights shot down while the 9/11 terrorist attacks were unfolding.³⁷

While it is almost unimaginable that the U.S. Military and law enforcement would be permitted to use a drone strike, or any other lethal means, to carry out an execution of an American citizen on American soil, it is not so improbable that

³⁵Mike Dreyfuss, "My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad," *Vanderbilt Law Review* 65 (January 1, 2012): 249.

³⁶ Marshall Thompson, "The Legality of Armed Drone Strikes against U.S. Citizens within the United States," *Brigham Young University Law Review* 1 (February 2013): 153-182.

³⁷ "Cheney’s order to shoot down hijacked 9/11 planes necessary," *Fox News* (September 2011), available at: <http://www.foxnews.com/politics/2011/09/04/cheney-order-to-shoot-down-hijacked-11-planes-necessary/>.

the use of armed drones, or other lethal means, to stop an unfolding terrorist attack or operation would be considered. This is based upon the previous paragraphs description of the authorization to shoot down commercial aircraft, containing innocent U.S. citizens, to intervene in a terrorist attack. For example, if a suicide bomber were headed toward a populated area, presumably containing their intended target, and armed air assets were available, whether manned or unmanned, it is reasonable to assume that they would be authorized to terminate that target. Thompson states,

“If the use of armed drone strikes is acceptable under the laws of armed conflict, and the laws of armed conflict apply to the use of military force within the United States, then the U.S. military could conceivably target a U.S. citizen in the United States using an armed drone.”³⁸

Therefore, although highly unlikely, it is legally permissible, under certain circumstances, for military action without geographical and technological limitations.

Conclusion

There has been a great deal of debate concerning the current use of drones by the military and law enforcement agencies. Most of the scholarly debate consists of the legality, past, present, and future, of the use of drones. There is a lot of speculation as to how law enforcement agencies will use drones in the future. Also questioned is the legislative and judicial actions necessary to balance the ubiquitous conflict between the private lives of citizens, and legitimate law enforcement activities required to maintain order as the technological capabilities of government and law enforcement increase.

It is important to consider that there are very limited differences between manned and unmanned aircraft. The most obvious of which is the absence of a human operator on board. These drones are not autonomous decision makers, simply tools used in the furtherance of agency operational objectives. The many sensors that these platforms carry are not unique to unmanned platforms, but can just as easily be outfitted on manned aircraft. The many legislatures and courts throughout the United States have failed to move with the pace of technological innovation. It is important that these organizations do more to prepare themselves for the proliferation of technologies that impact the lives of citizens. However, it is equally important that the citizens understand that the same technologies they enjoy can and will be used by law enforcement to better perform their duties. And although there will undoubtedly be abuses, there are

³⁸ Gertler, U.S. Unmanned Aerial Systems.

procedures and remedies in place to protect the anonymity and privacy of law abiding citizens.