



August 5, 2013

Bob Davis
Cadwalader
700 6th Street, NW, Suite 300
Washington, DC 20001

Dear Mr. Davis:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, thank you for your work on the Aerospace States Association, the Council of State Governments, and the National Conference of State Legislatures' "UAS State Privacy Considerations" and for the opportunity to provide feedback.

We were pleased to see the drafters recommend requiring a warrant for "government surveillance of an individual or their property where the individual is specifically targeted for surveillance in advance without their permission." We were also pleased to see you adopt recommendations that "information collected for commercial use should not be used for law enforcement purposes, without a warrant" and that "[c]ommercial UAS and model aircraft flights should not track specific individuals without their consent." We also appreciate your recommendation that UAS be unarmed.

It is imperative, though, that if the government is to use unmanned aerial systems (UAS) for warrantless observation when a particular individual or property has not been specifically identified that states prohibit the repurposing of data collected and adopt strict limits on data retention.

Similarly, we have some concerns about the recommendation that "[a]ny images recorded during a civil or commercial UAS flight . . . be time- and date-stamped and show relevant GPS designations. If retained, these records must be corroborated with flight records for the UAS, show the purpose of the information collection, and be available for public viewing on request." While we believe that oversight of UAS use is paramount, there are ways to ensure accountability without sacrificing privacy.

Necessity of Prohibiting Repurposing of Collected Data

In our society, it is a core principle that the government does not collect information about individuals' innocent activities just in case they do something wrong. But UAS threaten to turn that principle on its head, to the detriment of our society. Psychologists have repeatedly found that people who are being observed tend to behave differently than they do when they are not being watched. This effect is so great that a recent study found that "merely hanging up posters of staring human eyes is enough to significantly change

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people’s behavior.”¹ There is a real danger that, if faced with the prospect of the keen eye of the government on their backs through the use of unregulated UAS, people will change how they behave in public – whether at a political rally or in their own backyards.

UAS surveillance is fundamentally different from a policeman on the beat or manned aerial surveillance. An officer on the ground simply cannot be equipped with the technology – for example cameras with powerful lenses that can take in blocks or even full cities at a time – a UAS can be. And, UAS are not subject to the same natural limits as piloted aircraft – the expensive of acquisition, maintenance, and use and the pilots and ground crews who require that the aircraft land at the end of a shift so the pilot can rest. As the technology progresses, UAS will make possible a “surveillance society,” in which everyone’s movements are monitored, tracked, recorded, and scrutinized by authorities. The only way to avoid this dystopian future and prevent mass, suspicionless searches of the general population is to ensure that information collected by drones for one purpose cannot be used for another purpose, such as general law enforcement or enforcing administrative laws.

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In particular, we fear that UAS technology will be disproportionately used to patrol low income communities and communities of color, perhaps eventually at all times, effectively denying the people who live in those communities any privacy in the public way. This fear is not without precedent. For example, in New York City, police officers have reportedly driven unmarked vehicles equipped with license plate readers around local mosques in order to record each attendee.² Without the proper safeguards, UAS could allow this sort of suspicionless surveillance program to expand exponentially. For this reason, it must be crystal clear that UAS are not to be used pretextually, and the only way to do that is to prohibit repurposing of UAS-collected data. While there may be appropriate exceptions to this rule, those exceptions should be limited to emergencies connected to life and safety.

Need for Data Retention Limits

Images of identifiable individuals captured by law enforcement UAS should not be retained or shared unless they are of the target of the investigation that justified drone deployment, and there is reasonable suspicion that the images contain evidence of criminal activity or are relevant to an ongoing investigation or pending criminal trial. UAS do not only collect information on suspects, but they also collect information on the

¹ Sander van der Linden, “How the Illusion of Being Observed Can Make You a Better Person,” *Scientific American*, May 3, 2011, online at <http://www.scientificamerican.com/article.cfm?id=how-the-illusion-of-being-observed-can-make-you-better-person>; M. Ryan Calo, “People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship,” 114 *Penn St. L. Rev.* 809, online at <http://www.pennstatelawreview.org/articles/114/114%20Penn%20St.%20L.%20Rev.%20809.pdf>.

² Adam Goldman & Matt Apuzzo, With Cameras, Informants, NYPD Eyed Mosques, *Associated Press* (Feb. 23, 2012), <http://www.ap.org/Content/AP-In-The-News/2012/Newark-mayor-seeks-probe-of-NYPD-Muslim-spying>.

whereabouts and behaviors of *everybody* who enters their fields of view. Without limits on data retention, it will only be a matter of time before the government and other UAS users can compile dossiers of personal information about innocent people, including their travel and behavioral patterns, where they work, what they do for fun, and what friends, doctors, protests, political events, or churches they may visit. Collecting this sort of personal information constitutes a significant invasion of privacy. Therefore, it is imperative that the government delete captured information within days or weeks at most, unless there are legitimate reasons to retain records.

Similarly, while we recognize the oversight and accountability purposes for time-, date-, and GPS- stamping each image captured by a UAS, retaining it, and making it available to the public, an image in and of itself can reveal a vast amount of personal information; requiring that it be time-, date-, and GPS-stamped can expose an even more detailed picture of an individual's life. There may be more narrowly-tailored ways to ensure that UAS adhere to their designated flight plans and schedules. Indeed, while we believe that people should have the right to find out if their likeness, location information, or property has been captured by a UAS, given the likelihood that information collected by a drone could be highly sensitive, particularly if retained for long enough periods of time to establish patterns, it may be worth exempting the actual photographs from general public viewing. While we generally worry about information individuals do not wish for others to know being exposed without their knowledge or consent, we also worry more specifically that UAS images may become tools of stalkers or simply ne'er-do-wells seeking to identify patterns of behavior – such as when an individual tends to leave his or her home to identify a good time for a robbery.

Necessary Oversight

Oversight is crucial, and there are ways to conduct oversight of UAS use without sacrificing privacy. Communities must play a central role in deciding whether to purchase drones, and the policies and procedures for UAS use should be explicit and written, and should be subject to public review and comment. Similarly, like any new technology, UAS must be monitored to make sure they are a wise investment that works.

It would be perfectly appropriate and advisable, for example, to require entities that use UAS to annually report number of times a UAS was used, organized by the types of incidents and the types of justification for deployment; the number of crime investigations aided by the use of a UAS, including description of how the UAS was helpful in each instance; the number of uses of UAS for reasons other than criminal investigations, including a description of how the UAS was helpful in each instance; the frequency and type of data collected on individuals or areas other than targets; and the total cost of the given UAS program. It may also be useful to report, in the case of law enforcement, the number of arrests resulting from information gathered by a UAS and the offenses for which arrests were made; the number of trials resulting from such information; the number of motions to suppress made with respect to such information

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(and the number granted or denied); and the number of convictions resulting from such information, the offenses for which the convictions were obtained, and a general assessment of the importance of the UAS-collected information to the conviction. Each of these reporting requirements would elucidate how UAS are being used, where they are helpful, and where they are not without violating individuals' privacy by releasing time-, date-, and GPS-stamped images to the public.

Conclusions

With appropriate protections against the repurposing of collected data, reasonable data retention limits, and meaningful oversight mechanisms in place, we can take advantage of the many beneficial UAS uses where privacy will not be substantially affected, like firefighting, chemical and HAZMAT detection, monitoring of pollution, pipelines, wildlife, traffic, and floods, search and rescue, delivering medical supplies to remote areas, etc., without sacrificing our values and fundamentally altering our society.

If you have any questions, would like to discuss the issue further, or would like to see ACLU's model state legislation, please don't hesitate to reach out to me at abohm@aclu.org or (212) 284-7335.

Sincerely,



Allison S. Bohm
Advocacy & Policy Strategist

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