

LAW ENFORCEMENT'S USE OF WEAPONIZED DRONES: TODAY AND TOMORROW

INTRODUCTION

What do children, adults, photographers, farmers, utilities, agriculture, oil and manufacturing companies, and law enforcement have in common? They all asked for a drone for Christmas. In fact, the Federal Aviation Administration (“FAA”) became concerned in October of 2015 with reports of at least one million Americans likely to find a drone under the tree on Christmas morning.¹ However, one of these things is not like the other. While children, adults, farmers, and companies are using drones to monitor their own activities, law enforcement agencies are using drones to monitor the activities of others.² While a step in the right direction for those concerned with the safety of our police officers, some see this as a platform for constitutional issues.³ Amongst these varying points of view are residents of North Dakota, where a bill was passed with the intention to enumerate and limit law enforcement’s use of drones.⁴ However, after a close reading of the finalized bill, the text itself may actually expand law enforcement’s use of drones, rather than limit it.⁵

North Dakota passed House Bill 1328 into law on April 16, 2015, which “provide[s] for limitations on the use of unmanned aircraft for surveillance.”⁶ The purpose of the act was to restrict law enforcement’s use of drones for surveillance efforts in the collection of criminal evidence.⁷ Along with these

1. Dan Reed, *A Million Drones for Christmas? FAA Frets the Threat for Planes*, FORBES (Oct. 1, 2015, 7:05 AM), <http://www.forbes.com/sites/danielreed/2015/10/01/drones-faa-christmas/#11290e663f27> [https://perma.cc/F4SV-Y8LY].

2. *Domestic Drones*, AM. C. L. UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/domestic-drones> [https://perma.cc/DT3Y-QLPB].

3. Eyragon Eidam, *Reports on North Dakota Weaponized Drone Law Miss Larger Picture*, GOV’T. TECH. (Sept. 18, 2015), <http://www.govtech.com/public-safety/Reports-on-North-Dakota-Weaponized-Drone-Law-Miss-Larger-Picture.html> [https://perma.cc/X6XS-7BXQ].

4. Marco della Cava, *Police Taser Drones Authorized in N.D.*, USA TODAY (Aug. 29, 2015, 6:25 PM), <http://www.usatoday.com/story/tech/2015/08/28/police-taser-drones-authorized-north-dakota/71319668/> [https://perma.cc/558X-NVBC].

5. *Id.*

6. H. 1328, 2015 Leg., 64th Sess. (N.D. 2015).

7. Justin Glawe, *First State Legalizes Taser Drones for Cops, Thanks to a Lobbyist*, THE DAILY B

efforts, the original proposed bill included the language, “A state agency may not authorize the use of, including granting a permit to use, an unmanned aircraft armed with any lethal or nonlethal weapons, including firearms, pepper spray, bean bag guns, mace, and sound-based weapons.”⁸ However, after transformations by fellow lawmakers, the bill now reads, “[a] law enforcement agency may not authorize the use of, including granting a permit to use, an unmanned aerial vehicle armed with any *lethal* weapons.”⁹ Although the North Dakota bill’s purpose was to decrease law enforcement’s use of drones in criminal situations, after revisions, it now inadvertently allows the use of “non-lethal” weapons, such as pepper spray, tear gas, Tasers, beanbag guns, or sound cannons to be mounted on drones.¹⁰ This is a win for some, but is concerning for others as implications of the legislation would give law enforcement the ability to incapacitate suspects from miles away.¹¹

As a St. Louis native, student at Saint Louis University School of Law, and prior law clerk at Emerson Electric, Co., located in Ferguson, Missouri, this kind of police power is particularly interesting to me. It gives rise to the question of how the dynamic of the riots, which occurred in Ferguson in August and November of 2014, would have been changed had Missouri police officers been allowed to use drones armed with “non-lethal” weapons.

In this paper, I aim to explore the positive or negative implications of a

legislature regarding law enforcement's use of weaponized drones. Finally, Part IV will specifically address the State of Missouri. It will examine current laws and pending legislation in the State of Missouri regarding law enforcement's use of drones. This paper will conclude by considering the idea and the implications of allowing Missouri law enforcement to use weaponized drones, and how it would affect riot-like situations, such as those seen in Ferguson.

I. THE MERGING OF CRIMINAL PROCEDURE AND PRIVACY

A. *Fourth Amendment Searches*

The Fourth Amendment guarantees:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹²

Over the years, the United States Supreme Court has had to redefine what constitutes an "unreasonable search" as technology develops. Starting in 1967, in its decision in *Katz v. United States*, the Supreme Court considered how electronic listening devices affected the Fourth Amendment analysis of unreasonable searches.¹³ In this case, the Court found that the government's use of an electronic recording device to eavesdrop on a conversation within a phone booth was indeed an unreasonable search.¹⁴ The Court returned to this same question in *Kyllo v. United States*, where it had to consider the government's use of a thermal image scanner to search inside one's home, finding once again that it was an unreasonable search under the Fourth Amendment.¹⁵ A critical point of the holding in *Kyllo* focused on the fact that the technology used, a thermal imager, was not in general public use, creating a new test to be applied to the government's use of technology in considering whether a search is unconstitutional.¹⁶

However, the Supreme Court was confronted with a separate inquiry when looking at how the third-party doctrine applies to hidden wires¹⁷ and

12. U.S. CONST. amend. IV.

13. 389 U.S. 347, 348–49 (1967).

14. *Id.* at 353.

15. 533 U.S. 27, 29, 40 (2001).

16. *Id.* at 34.

17. *United States v. White*, 401 U.S. 745, 752 (1971) (finding that the use of a wire is not an unreasonable search under the Fourth Amendment, as there is no reasonable expectation of privacy in what is conveyed to a third party).

telephones.¹⁸ In the cases dealing with these issues, the Court held consistently with the third-party doctrine, finding that there is no reasonable expectation of privacy in what one conveys to a third party, even if through electronic measures not in general public use. Significantly, in 2012, the Supreme Court revived the importance of constitutionally protected areas in regards to new technology in their decision in *United States v. Jones*.¹⁹ In *Jones*, the Court held that the government's use of a GPS device on petitioner's vehicle to monitor the whereabouts of the vehicle is an unreasonable search, as it is a

ability to use reasonable force.³⁸ However, issues arise when police officers use “excessive force” in their attempts to detain, arrest, or apprehend a suspect, as this form of physical force may be considered an “unreasonable seizure”

can an officer truly evaluate the scene by use of a drone? As accurately quoted by Judge Martin in his dissent in *Davis*, “[i]f times have changed, reducing everyman’s scope to do as he pleases in an urban and industrial world . . . the values served by the Fourth Amendment [are] more, not less, important.”⁴⁷

C. Law Enforcement’s Use of Force Within the Fourth Amendment

In certain situations, the police may need to exert certain forms of force.⁴⁸ Specifically, force may be necessary in situations of protecting others or self-defense.⁴⁹ There is no universal definition or set of rules for the use of force.⁵⁰ Typically, each individual agency will set guidelines for their officers regarding when officers can use force and how much, but this is not required or standardized.⁵¹ These guidelines are commonly developed from use of force continuums, or a model of what scenarios require different forms of force.⁵²

However, the use of force is determined by the police officer on a case-by-case basis.⁵³ The International Association of Chiefs of Police has descr.

threat to the safety of the officers or others,” and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.”⁶³ Essentially, this reasonableness test uses a totality of the circumstances determination.

III. WEAPONIZED DRONES—THE FUTURE OR THE NOW?

A. *International Use of Weaponized Drones*

In 2011, headlines broke in *The Washington Post* and *The New York Times* that the United States had built a secret drone base in Saudi Arabia.¹⁰⁴ Even more alarming were reports of the first lethal mission by the drone base in September of 2011.¹⁰⁵ Anwar al-Awlaki, an American citizen and alleged al-Qaida terrorist, was killed by a drone strike in Yemen on September 30, 2011.¹⁰⁶ In 2010, the Obama Administration authorized the targeted killing of al-Awlaki due to his ties to terrorism.¹⁰⁷ Generally, international law allows a country to use lethal force against an individual or group if it poses an imminent threat to that country, which is how al-Awlaki became a “kill or capture” target of the United States.¹⁰⁸ Al-Awlaki was the first American to be placed on the CIA’s “kill or capture” list.¹⁰⁹ He was also the first American citizen to be hunted and killed by the United States government without a trial since the Civil War.¹¹⁰

this theory be extended within our everyday society? How close to home are these weaponized drones? To answer these questions, we must take a historic look at the rise of weaponized drones internationally.

Although there are numerous companies that are manufactures and providers of UAVs, there are some companies that specialize in modifying drones in order to equip them with various weapons.¹¹³ For example, Desert

Further, in the United Kingdom, the Police Minister has endorsed the use of drones “to patrol the UK’s skies, to monitor criminal activity and provide air support, saying they should be treated like ‘any other piece of police kit.’”¹²⁴ However, the Police Minister notes that due to the already crowded airspace by civil and military aircrafts, the use of police drones would likely take a while to get approved.¹²⁵ But, once restrictions are lifted, he envisions them having every right that is afforded to a police helicopter.¹²⁶ Yet, the use of drones by law enforcement is not only an international operation.

Police use of drones is much closer to home than one may think. In 2015, forty-five of the fifty states considered legislation regarding drones.¹²⁷ The majority of the bills were aimed at protecting privacy by restricting the use of drones for unwarranted surveillance.¹²⁸ Although many state legislatures are trying to keep up with technology, it seems as if the government agencies may be a few steps ahead. According to the Electronic Frontier Foundation, as of 2013, at least fifteen states have law enforcement agencies that have either applied for drone authorization from the Federal Aviation Administration or have borrowed drones from the Customs and Border Protections for special operations.¹²⁹ Additionally, we have seen the rise in legislation regarding the use of weaponized drones within the United States.¹³⁰ In both South Carolina and Tennessee, bills have been proposed which prohibit the equipping of privately owned UAVs with any form of weapon.¹³¹ However, this does not apply to government agencies, thus providing a loophole for drones utilized by police to be equipped with lethal and non-lethal weapons.¹³² Although many

124. *Id.*

125. *Id.*

126. *Id.*

127. Eric Adler, *That Buzz in the Air? Drones of Christmas, Coming to Skies Near You*, KANSAS CITY STAR (Dec. 5, 2015, 3:21 PM), <http://www.kansascity.com/news/business/technology/article48196290.html> [<https://perma.cc/7DFR-4639>].

128. *Id.*

129. *Law Enforcement Agencies Using Drones List, Map*, GOVERNING (2013), <http://www.governing.com/gov-data/safety-justice/drones-state-local-law-enforcement-agencies-license-list.html> [<https://perma.cc/Y5Q4-6MGW>]. The fifteen states include Washington, Oregon, Idaho, Utah, California, Arizona, Colorado, Texas, North Dakota, Minnesota, Ohio, Arkansas, Alabama, Georgia, and Florida. *Id.*

130. Joe Wolverton, *Tennessee, South Carolina Could “Green Light” Weaponized Police Drones*, THE NEW AMERICAN (Dec. 31, 2015), <http://www.thenewamerican.com/usnews/constitution/item/22238-tennessee-south-carolina-could-green-light-weaponized-police-drones> [<https://perma.cc/8WH8-6NKF>].

131. *Id.*

132. *Id.* In Tennessee, the proposed legislation, HB 1456, had the purpose of “creat[ing] [a] Class E felony of attaching a weapon to an unmanned aircraft.” This bill has since been withdrawn. H. 1456, 109th Gen. Assemb., 2nd Reg. Sess. (Tenn. 2016). The South Carolina bill, HB 4425, was introduced for the purpose of “provid[ing] that it is unlawful to operate an

believe the likelihood of these types of bills being passed is low, a bill of this nature has already been enacted—in North Dakota.¹³³ So, what does this mean for Missouri?

IV. MISSOURI LEGISLATION AND DRONES

A. *Legislation in the State of Missouri Regarding Law Enforcement's Use of Drones*

Since 2013, three bills have been proposed in Missouri attempting to restrict the use of drones.¹³⁴ Missouri House Bill 46, which is now dead, was proposed with the purpose to “prohibit[] the use of a drone or other aircraft to gather evidence or other information with specified exceptions.”¹³⁵ This bill proposed three restrictions to the use of drones.¹³⁶ First, it restricts anyone, including government agencies and law enforcement from using a drone to conduct any type of surveillance regarding potential criminal activity without a warrant.¹³⁷ Second, it restricts all users of unmanned aerial devices from flying and using the device for conducting surveillance under the “doctrine of open

B. Implications of Allowing Missouri Law Enforcement to Use Weaponized Drones

One of St. Louis's largest proponents of law enforcement's use of drones is Chief of Police, Sam Dotson, who is working to make it happen.¹⁴¹ Dotson has already requested allowance from the Federal Aviation Administration for St.

streets of Ferguson, Missouri.¹⁵¹ During the protests surrounding the death of Michael Brown, Ferguson Police lined the streets in riot gear and militarized equipment.¹⁵² Amongst other tactics, the police deployed copious amounts of tear gas on protestors without warning.¹⁵³ These militarized police tactics have led to public outcry, as well as lawsuits filed.¹⁵⁴ These suits, filed against three Missouri police agencies, have settled, requiring that police warn protestors before deploying tear gas and allowing them to disperse, unless the harm is truly imminent.¹⁵⁵ However, many questions and concerns plague this nation in regards to the law enforcement's use of drones in similar riot-like situations.

How would these regulations apply to drones? Could a drone administer tear gas or other invasive forms of crowd control? Is it likely that we could see drones used in a manner similar to that of Lucknow, India? Is it reasonable to believe that police could properly provide warning for protestors to disperse when they are operating from a distance with drones? Could a police officer reasonably assess whether or not harm is truly imminent from a drone? In an area, such as St. Louis, which has seen a fair share of dangerous unrest and a police force that responds in a militarized fashion, law enforcement's use of drones, weaponized or not, is a realm of hot debate.

CONCLUSION

There are two sides to every debate, and the debate regarding law enforcement's use of weaponized drones is not unlike any other. Proponents to the police's use of drones see this as a way to protect our men and women in blue. Critics of law enforcement's use of weaponized drones see it as an unsettling step in the direction of overly-militarized police forces and possible violations of our constitutional rights. As simply stated, "[t]he balance is between a technology that potentially can have a lot of private and public benefit along with some very real privacy and safety concerns."¹⁵⁶

However, this paper can boil down to a single question—if law enforcement can use non-lethal weapons to seize a suspect, why can't they use a drone armed with a non-lethal weapon to do the same? I argue that under *Graham*, when assessing the reasonableness of a particular use of force, such as tear gas dispersed from a drone, it will likely cause an issue as to whether

151. Terry Goldsworthy, *Urban Combat: Ferguson and the Militarisation of Police*, THE CONSERVATION (Aug. 18, 2014, 4:22 PM), <https://theconversation.com/urban-combat-ferguson-and-the-militarisation-of-police-30568> [<https://perma.cc/KQ53-GS2L>].

152. *Id.*

153. Sarah Begley, *Missouri Police Will Restrict Tear Gas After Ferguson Lawsuit*, *comat*

the officer could truly assess the situation and administer the proper amount of force. As we see more and more legislation passed allowing law enforcement agencies to use weaponized drones, we will likely be faced with an increase in excessive force lawsuits. As the ACLU wrote in an article criticizing the North Dakota bill allowing law enforcement to arm drones with non-