If You Fly a Drone, so Can Police

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By Stephen E. Henderson

What the Fourth Amendment says about law enforcement use of unmanned aerial vehicles.

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According to the U.S. Constitution, the more you fly your drone, the more police can fly theirs. “Come on,” you might reply, “that hoary document”—and, yes, sorry to make you the sort who drops words like *hoary*—“that hoary document surely says nothing about drones.” But in fact it does. At least it does as interpreted by the courts. In particular, it is how they interpret the Fourth Amendment. So, to understand this aspect of drones, we first must understand this provision of the Bill of Rights.

The Fourth Amendment articulates a critical right “of the people”—namely our right to be secure in our “persons, houses, papers, and effects” “against unreasonable searches and seizures.” In one sense, this bedrock right is a no-brainer. After all, can you imagine the founders enshrining a constitutional right to be free from reasonable searches and seizures? Or a constitutional requirement that we suck up unreasonable ones? “I’m sorry to confess, Thomas,” James Madison might have written in one of his letters to Jefferson, “that I’m still stuck on the drafting here—shall government conduct be reasonable or unreasonable? Any advice will be greatly appreciated.” Would that all our constitutional questions could be answered so easily.

It’s true, the Fourth Amendment text does not stop at “against unreasonable searches and seizures.” But it goes on only to articulate the requirements for obtaining a judicial warrant, namely probable cause, oath or affirmation, and particular description of where is to be searched and what is to be seized. These are all important, but they say nothing about for what sorts of searches
and seizures a warrant is required. (Some argue the founders meant the amendment to do otherwise, but our focus will be on the Fourth Amendment we have today, not as it might have been.) Thus, it has been left entirely up to the courts, including most prominently the U.S. Supreme Court, to answer the question of which government intrusions are unreasonable without warrants—for example, can police fly a drone over your backyard?—and further just what requirements govern when a warrant is not necessary.

None of this is to denigrate this most important constitutional right. It is not easy to draft a constitution, let alone one that can withstand hundreds of years of the most compressed and dramatic change in recorded history. But given its “no-brainer” ambiguity, it is hardly surprising that scholars and jurists have healthy disagreements over the Fourth Amendment’s meaning. Yet cutting through those disagreements are areas of convergence, one of which is that law enforcement can do to us just what you and I do to each other. Think of it as privacy law’s mutated version of the golden rule: Only do unto others what you want the police doing to you.

Now, lest you get carried away, remember that you and I don’t know each other well. (After all, you’re the type of person that says documents are hoary, and I don’t go for that sort of thing.) So when I say “what you and I do to each other,” I’m not talking about the intimate sorts of interactions of lovers or close friends, where I rifle through your purse and you make yourself at home in my living room. Instead, we are talking about the dozens of other people interactions we have every day: The local political candidate and the Mormon missionary stop by the house to hand you a pamphlet,
the local press capture your jog in a quick news bite about the cost of watering the city green, and kids try to sell you cookies and jamboree tickets while an older fellow tries to interest you in the merits of a miracle cleaner. We have limited control over these types of interactions, in part because they fall within customary social norms, and in part because other constitutional rights are at play. You or I might not be interested in what the Jehovah’s Witnesses are selling, but they have a First Amendment right to share their message.

And the same goes for the 21st century marvel that is the drone, or—if you want to be pedantic about it—the unmanned aerial vehicle. As I describe with my colleagues Marc Blitz, James Grimsley, and Joseph Thai in this law review article, there is a First Amendment right to record. It is not a neat, easy sort of right to explain the boundaries of, and indeed those boundaries are still being worked out, but there is little doubt the right exists. And there is little doubt this First Amendment right extends to at least some aerial recording. Only it is really, really hard to delimit that right. So hard, in fact, that we proposed four limitations but ultimately are not sure any of them can do the work. But the upshot is this: You have a constitutional right to engage in certain drone flight for purposes of image capture, meaning the government could not stop the flight even if it wanted to.

It could put some boundaries on that flight, though. In the article, we explain some of the limitations Congress or a state legislature might be able to constitutionally require, such as prohibiting the targeting of a single residence, perhaps by limiting the amount of time a drone could hover over a particular home each day, and
perhaps by also regulating the altitude of that flight. But assuming that you fly your drone within any such limitations, what does it mean for the police?

As a direct First Amendment matter, it means nothing—police as police don't have these sort of First Amendment rights. But as a Fourth Amendment matter, it means they can fly, too, without having to obtain any warrant or other pre-clearance. After all, the Supreme Court would reason, if I have ample privacy with you and everyone else flying over my home uninvited for these limited periods—if, in Supreme Court speak, that is the backdrop for my “reasonable expectation of privacy”—how would that meaningfully change when the sheriff adds her quadcopter to the mix?

So, what is good for the goose—those of us wishing to fly drones—is also good for the gander: those in law enforcement wishing to fly drones. Although underappreciated, this principle undergirds significant Supreme Court case law and—as we defend in the article—makes pretty good sense. It really is hard to argue that our personal security is much affected by police doing the things in which unrelated and uncontracted—for private persons are routinely engaged.

This does not mean legislatures are unable to alter these default rules. Remember, police do not have the First Amendment rights that would, for us, trump overly restrictive legislation. Thus, we could see more situations like that a few years back in Seattle, in which the mayor and police department pledged to return purchased drones to the manufacturer in order to satiate community concern. (Those drones ultimately made their way to
And with 41 states considering drone legislation in 2016, it will be some time before state rules sort themselves out. But, again, for the most part it makes good sense that the police can do as the rest of us would, so I’m not at all sure legislatures should restrict solely law enforcement, especially as more of us begin to fly. More likely, then, are programs like that of the Michigan State Police providing statewide authorization to pilot drones for certain law enforcement purposes.

So fly that drone as much as you like, and think about gifting a professor one to do the same. But be careful in pushing the boundaries of acceptable drone flight, because as far as the Fourth Amendment is concerned, police officers are taking off just behind you.

This article is part of the drones installment of Futurography, a series in which Future Tense introduces readers to the technologies that will define tomorrow. Each month from January through June 2016, we’ll choose a new technology and break it down. Read more from Futurography on drones:

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