CONGRESS FINALLY GETS AROUND TO LEARNING ABOUT DOMESTIC DRONES AND PRIVACY

After Congress has spent the last several years telling DOD and FAA to speed up the roll out of drones in domestic airspace, and partly in response to efforts (by Rand Paul, among others) to protect all of our privacy and other efforts (by Shelley Moore Capito) to protect farmers from observation by the EPA, someone finally thought to ask the Congressional Research Service about the Fourth Amendment implications of drones.

The analysis largely tracks what I wrote in this post: drones would be permitted to do simple observation, and would be permitted to do even more when operating close to a border. The big question about drones, though, is whether all the fancy technology they've got distinguishes them from the kind of naked eye surveillance a cop would be able to conduct.

> Currently, UAVs carry high-megapixel cameras and thermal imaging, and will soon have the capacity to see through walls and ceilings. 98 These technologies are not generally available to the public, and under current jurisprudence, their use by law enforcement would probably constitute a search covered by the Fourth Amendment. However, the use of low-powered cameras or other unsophisticated technology to view people and objects in plain view while in their home might not trigger Fourth Amendment protections.
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> The crucial question, then, is whether

> drones have the potential to be significantly more invasive than traditional surveillance technologies such as manned aircraft or low-powered cameras– technologies that have been upheld in previous cases. In this vein, some have asked whether using sophisticated digital platforms on a drone is any different from attaching the same instrument to a lamppost or traditional aircraft. 108 Take, for example, the tracking of license plates. Currently, many states and municipalities employ automatic license plate readers (ALPRs), which are usually mounted on police vehicles or stationary objects along the streets, take a snapshot of a license plate as a car drives by, and store this information in a large database for possible later use by law enforcement. 109 It is alleged that these devices can be used to track a person's movements when police aggregate the data from a multitude of ALPR stations. 110 A majority of the reviewing federal circuit courts have held that a person has no reasonable expectation of privacy in his license plate number. 111 However, it appears that no federal court has addressed the constitutionality of the use ALPRs (whether attached to a drone, manned vehicle, or a stationary device), as opposed to plate numbers collected by a human observer.
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> Unlike a stationary license plate tracker or video camera, drones can lock on a target's every move for days, and possibly weeks and months. This ability to closely monitor an individual's movements with pinpoint accuracy.

What's interesting about this discussion, however, is that the example the report

uses—license plate trackers—is one of the more primitive kinds of technologies that drones carry.

Yet even the technologies that the report lists as currently or imminently used with drones are far more interesting from a Fourth Amendment perspective.

> Currently, drones can be outfitted with high-powered cameras, 21 thermal imaging devices, 22 license plate readers, 23 and laser radar (LADAR). 24 In the near future, law enforcement organizations might seek to outfit drones with facial recognition or soft biometric recognition, which can recognize and track individuals based on attributes such as height, age, gender, and skin color. 25 As explained below, the relative sophistication of drones contrasted with traditional surveillance technology may influence a court's decision whether domestic drone use is lawful under the Fourth Amendment.

And that's just the stuff the CRS knows about (they work from public reports, not classified data).

Finally, the report doesn't consider (beyond the mention of aggregating data from ALPR stations) how these technologies couple with data storage—with the government's admission that it keeps "incidentally" collected data on Americans.

There's just this one hint that drones can also move from surveillance to targeting fairly quickly.

> Drones are perhaps most commonly recognized from their missions abroad, including to target and kill suspects members of Al Qaeda and related groups, but they might be used for a variety of other purposes, including for both commercial and law enforcement

> activities within the United States. In fact, the FAA predicted that 30,000 unmanned aircraft could be flying in U.S. skies in less than 20 years.

And even then, that invocation of “related groups” like AQAP never gets around to admitting that drones have already been used to kill American citizens.