




2017

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Recommended Citation

Hicks, Wayne (2017) "Comment: Maryland State Drone Law Puts Residents at Risk of Privacy Intrusions from Drone Surveillance by Law Enforcement Agencies," *University of Baltimore Law Forum*: Vol. 47 : No. 2 , Article 5.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol47/iss2/5>

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MARYLAND STATE DRONE LAW PUTS RESIDENTS AT RISK OF PRIVACY INTRUSIONS FROM DRONE SURVEILLANCE BY LAW ENFORCEMENT AGENCIES

By: Wayne Hicks¹

As technology rapidly advances, society is becoming more efficient and interconnected than ever before.² Unmanned Aircraft Systems (“UAS”), more frequently referred to as “drones,”³ have taken on an increasingly involved role in the progression towards a more interconnected society.⁴ For example, drones are presently capable of improving our ability to monitor potentially devastating storms,⁵ improving wildlife conservation efforts,⁶ increasing efficiency in agriculture,⁷ transporting goods to underdeveloped

¹ J.D. Candidate, 2017, University of Baltimore School of Law. I would like to thank the staff of the *University of Baltimore Law Forum* for all of their hard work throughout the drafting process. I would also like to thank my faculty advisor, Steven P. Grossman, for his guidance and expertise. Finally, a special thanks to my grandmother, Patricia Watkins, and the rest of my family for their support and confidence in me throughout law school.

² *Our Connected World*, NAT’L GEOGRAPHIC, <http://www.nationalgeographic.com/earthpulse/technology.html> (last visited Nov. 6, 2015).

³ Congress has defined drones as “an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.” FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331, 126 Stat 11, 72 (2012).

⁴ NAT’L GEOGRAPHIC, *supra* note 2.

⁵ Katy Galimberti, *Can Drones Offer New Ways to Predict Storms, Save Lives?*, ACCUWEATHER (June 1, 2014, 2:26 AM), <http://www.accuweather.com/en/weather-news/drone-weather-safety-prediction/27739091> (declaring that drones offer the potential to provide critical information on storms and weather patterns that is typically lost in the gap between the surface and our storm tracking satellites).

⁶ Joshua Barajas, *Drones take flight in Alaska to Survey Wildlife*, PBS (May 5, 2014, 5:58 PM), <http://www.pbs.org/newshour/rundown/drones-take-flight-alaska-survey-wildlife/> (explaining that drones are currently being used to better track tagged wildlife in order to improve wildlife conservation efforts in Alaska).

⁷ Christopher Doering, *Growing use of drones poised to transform agriculture*, USATODAY, (Mar. 23, 2014, 7:18 AM), <http://www.usatoday.com/story/money/business/2014/03/23/drones-agriculture-growth/6665561/> (explaining how drones provide technology that could improve efforts to identify issues with crops, such as problems with insects and water deficiency).

countries, and providing several forms of vital assistance to law enforcement.⁸

Although the potential for drones appears promising, the advancements of drone capabilities have been met with increasing concerns regarding the government's ability to keep pace and provide regulations on drone usage.⁹ Regulations are necessary to promote a balance between citizens' privacy rights and legitimate uses of drones that allow society to exploit this technological advancement.¹⁰ The concerns surrounding invasions of privacy by drones involve intrusions by commercial and recreational operators,¹¹ but are mainly a result of the various drone uses by law enforcement agencies, primarily their use of drone surveillance to obtain evidence.¹²

The use of drones is relatively new to our government and there are still many unanswered questions regarding how to promote the safe and effective use of these aircrafts.¹³ Consequently, the lack of sufficient regulations by the federal government has left state governments scrambling to put together

⁸ Daisy Carrington & Jenny Soffel, *15 Ways Drones Will Change Your Life*, CNN, <http://www.cnn.com/2013/11/03/business/meet-your-friendly-neighborhood-drones/> (last updated Nov. 18, 2013, 5:23 AM); Brian Handwerk, *5 Surprising Drone Uses (Besides Amazon Delivery)*, NAT'L GEOGRAPHIC (Dec. 2, 2013), <http://news.nationalgeographic.com/news/2013/12/131202-drone-uav-uas-amazon-octocopter-bezos-science-aircraft-unmanned-robot/>.

⁹ Larry Downes, *America Can't Lead the World in Innovation if the FAA Keeps Dragging its Feet on Drone Rules*, WASHINGTON POST (Oct. 8, 2014), <https://www.washingtonpost.com/news/innovations/wp/2014/10/08/america-cant-lead-the-world-in-innovation-if-the-faa-keeps-dragging-its-feet-on-drone-rules/> ("The fate of a multi-billion-dollar industry is hanging in the balance. And as history has amply demonstrated, regulators who move too slowly often wind up sidelined or obsolete.").

¹⁰ *Protecting Privacy from Aerial Surveillance: Recommendations for Government use of Drone Aircraft*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/report/protecting-privacy-aerial-surveillance-recommendations-government-use-drone-aircraft> (last visited Nov. 6, 2015).

¹¹ *Domestic Drones*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/domestic-drones>.

¹² Veronica E. McKnight, *Drone Technology and the Fourth Amendment: Aerial Surveillance Precedent and Kyllo Do Not Account for Current Technology and Privacy Concerns*, 51 CAL. W. L. REV. 263 (2015).

¹³ Keith Wagstaff, *FAA Misses Deadline for Creating Drone Regulations*, NBC NEWS (Oct. 1, 2015, 3:29 PM), <http://www.nbcnews.com/tech/innovation/faa-misses-deadline-creating-drone-regulations-n437016> ("Right now, commercial drone operators work in a regulatory gray zone...with the proper guidelines, the drone industry could create 100,000 jobs and \$82 billion in economic activity within a decade.").

guidelines on drone usage.¹⁴ As expected, the lack of comprehensive drone regulation has only increased the concern of citizens who fear that the unregulated use of drones puts their privacy rights at risk.¹⁵

This comment will explore newly enacted Maryland legislation, which preempts local governments by permitting only state or federal drone regulations to govern drone use,¹⁶ and the resulting privacy concerns among local governments.¹⁷ Part I describes the current landscape of federal drone use and regulation, including Fourth Amendment implications, and further explains section 14-301 of the Maryland Code of Economic Development,¹⁸ which is the governing statute that regulates drone usage in Maryland. Part II will explain how the preemption clause¹⁹ in section 14-301 has caused increasing concern that the statute will undermine local governments' ability

¹⁴ Sarah Breitenbach, *States Rush to Regulate Drones Ahead of Federal Guidelines*, THE PEW CHARITABLE TRUSTS (Sept. 10, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/10/states-rush-to-regulate-drones-ahead-of-federal-guidelines>.

¹⁵ Michael Berry & Nabihah Syed, *The FAA's slow move to regulate domestic drones*, WASH. POST (Sept. 14, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/24/the-faas-slow-move-to-regulate-domestic-drones/>.

¹⁶ See, e.g., ME. REV. STAT. tit. 25, § 4501; IDAHO CODE ANN. § 21-213; TEX. GOV'T CODE ANN. § 423.003; VA. CODE ANN. § §19.2-60.1.

¹⁷ Robin Clark, *Unmanned Aircraft Systems Research, Development, Regulation, and Privacy Act of 2015*, MD. ASS'N OF COUNTIES (Apr. 2, 2015), <http://www.ciclt.net/ul/mdcounties/SB0370ET.pdf>.

¹⁸ "Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "Unmanned aircraft" means the flying portion of an unmanned aircraft system, flown by a pilot via a ground control system, or autonomously through use of an onboard computer, a communication link, and any additional equipment that is necessary for the unmanned aircraft to operate safely.

(3) "Unmanned aircraft system" means an unmanned aircraft and all the associated support equipment, control stations, data links, telemetry, communications and navigation equipment, and other equipment necessary to operate the unmanned aircraft.

In general

(b) Only the State may enact a law or take any other action to prohibit, restrict, or regulate the testing or operation of unmanned aircraft systems in the State.

Application

(c) Subsection (b) of this section:

(1) preempts the authority of a county or municipality to prohibit, restrict, or regulate the testing or operation of unmanned aircraft systems; and

(2) supersedes any existing law or ordinance of a county or municipality that prohibits, restricts, or regulates the testing or operation of unmanned aircraft systems."

¹⁹ MD. CODE ANN., ECON. DEV. § 14-301(b) ("... Only the State may enact a law or take any other action to prohibit, restrict, or regulate the testing or operation of unmanned aircraft systems in the State.").

to control drone usage within its jurisdictions, resulting in invasions of residents' privacy rights.²⁰ Part III will propose amending section 14-301 to allow local governments the ability to regulate drone usage by law enforcement within its jurisdictions and provide guidelines for local regulations that would assist in protecting individuals' privacy rights while still permitting the use of drones in a safe and effective manner.

I. FEDERAL DRONE REGULATION AND MARYLAND'S RESPONSE

As drone capabilities continuously advance,²¹ they are proving to be a valuable asset to law enforcement agencies throughout the United States.²² Drones provide law enforcement with the capability of improving efforts to safely conduct search-and-rescue missions, respond to active shooter situations,²³ and engage in aerial surveillance to discover and obtain evidence of criminal activity.²⁴ However, the use of aerial "surveillance drones" by law enforcement has raised increasing concerns over the potential for invasions of individuals' privacy rights.²⁵ For instance, surveillance drones have the capacity to be equipped with highly sophisticated technology, including facial recognition software, infrared or thermal imaging, and microphones capable of recording private conversations from above.²⁶ Moreover, because drones can be operated without the need for direct human intervention from within the aircraft, their relatively small size allows law enforcement to conduct virtually unnoticeable surveillance.²⁷

²⁰ See Wiley Hayes, *New State Law on Drones Sparks Privacy Debate in Carroll*, CARROLL COUNTY TIMES (July 1, 2015), <http://www.carrollcountytimes.com/news/local/ph-cc-drone-law-july1-20150701-story.html>.

²¹ Daisy Carrington & Jenny Soffel, *15 Ways Drones Will Change Your Life*, CNN (last updated Nov. 18, 2013, 5:23 AM), <http://www.cnn.com/2013/11/03/business/meet-your-friendly-neighborhood-drones/>.

²² Sean Varah, *5 Ways Drones Can Help Cops Fight Crime*, POLICEONE.COM (Sept. 17, 2015), <https://www.policeone.com/police-products/Police-Drones/articles/9502450-5-ways-drones-can-help-cops-fight-crime/>; *Domestic Drones*, *supra* note 11.

²³ Varah, *supra* note 22.

²⁴ *Domestic Drones*, *supra* note 11.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

A. CURRENT LANDSCAPE OF DOMESTIC DRONE REGULATION

The Federal Aviation Administration (“FAA”) maintains complete authority over the nation’s airspace in order to promote the safe and efficient use of aerial vehicles.²⁸ However, the rapid pace in advancement of drone capabilities and affordability over the past decade²⁹ has led to an increased interest among public and private entities, causing lawmakers to play catch-up.³⁰ This increased popularity of drones ultimately led Congress to pass the FAA Modernization and Reform Act of 2012,³¹ which charged the FAA with developing federal guidelines that will safely and effectively integrate drones into national airspace.³² However, the task of developing effective drone regulations has proven to be more difficult than Congress initially anticipated, which is made evident by the FAA’s recent failure to meet their mandated deadline for the proposed guidelines prescribed by the Act.³³

Although there are currently no federal regulations on the use of drones by law enforcement agencies, the FAA has established an application process including various guidelines that public agencies must satisfy before they are permitted to operate drones.³⁴ Law enforcement agencies seeking to operate drones are required to apply for a certificate of authorization (“COA”).³⁵ A

²⁸ 49 U.S.C. § 40103.

²⁹ Brian Barrett, *So, Dutch cops Are Teaching Majestic Eagles to Hunt Drones*, WIRED (Feb. 1, 2016, 4:24 PM) <http://www.wired.com/2016/02/so-dutch-cops-are-teaching-majestic-eagles-to-hunt-drones/> (“As consumer-focused quadcopter drones become increasing capable, available, and affordable, the potential that they may be used by bad actors grows in kind.”).

³⁰ *Domestic Drones*, *supra* note 11.

³¹ *See supra* note 28.

³² *Id.* (“The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.”).

³³ *See supra* note 28; Keith Wagstaff, *FAA Misses Deadline for Creating Drone Regulations*, NBC NEWS (Oct. 1, 2015, 3:29 PM), <http://www.nbcnews.com/tech/innovation/faa-misses-deadline-creating-drone-regulations-n437016> (quoting an FAA spokesperson: “We have been consistent in saying that we’re going to move as quickly as possible . . . but the integration of unmanned aircraft into the nation’s airspace is going to have to proceed on an incremental basis.”).

³⁴ *Certificates of Waiver or Authorization (COA)*, FED. AVIATION ADMIN., (Aug. 19, 2016), https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/system_ops/aaim/organizations/uas/coa.

³⁵ *Id.* (“COA is an authorization issued by the Air Traffic Organization to a public operator for a specific UA activity. After a complete application is submitted, FAA conducts a comprehensive operational and technical review. If necessary, provisions or limitations may be imposed as part of the approval to ensure the UA can operate

COA requires the department requesting authorization to agree to operate its drones within federal guidelines and describe the purpose for its request as well as the areas it intends to fly the drones.³⁶ The FAA typically grants drone usage for a specified time period necessary to satisfy the agency's proposed purpose, and COA approvals are made viewable to the public on the FAA's website.³⁷

In the absence of comprehensive federal drone regulation, the FAA currently permits state and local governments to regulate law enforcement agencies' drone operations, such as the ability to determine the locations on the ground from which drones may be operated.³⁸ Many state and local government officials throughout the nation have responded to this grant of authority by passing a variety of drone regulations to meet their jurisdictional needs.³⁹

Several of the current state regulations are aimed specifically at protecting residents' privacy when law enforcement agencies are conducting aerial surveillance during criminal investigations.⁴⁰ Although the FAA permits the states to do so, the lack of uniformity in current state drone guidelines is causing concern within the FAA for the safety of the airspace.⁴¹ As a result, the FAA has made it clear that if these current state laws are challenged in court, they will be considered preempted by the FAA's authority over the nation's airspace and the validity of the laws will be determined pursuant to current federal guidelines.⁴²

safely with other airspace users. In most cases, FAA will provide a formal response within 60 days from the time a completed application is submitted.”)

³⁶ See *Sample COA Application*, FED. AVIATION ADMIN. (Sept. 8, 2008), https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/system_ops/aaim/organizations/uas/media/COA%20Sample%20Application%20v%201-1.pdf.

³⁷ *Freedom of Information Act Responses*, FED. AVIATION ADMIN. (Nov. 3, 2015), https://www.faa.gov/uas/resources/foia_responses/; see generally 5 U.S.C. § 552.

³⁸ See generally *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, FED AVIATION ADMIN. (Dec. 17, 2015), https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf.

³⁹ See, e.g., IDAHO CODE ANN. § 21-213; TEX. GOV'T CODE ANN. § 423.003; VA. CODE ANN. § 19.2-60.1.

⁴⁰ *Id.*

⁴¹ See *supra* note 38.

⁴² See *id.* at 2 (“A navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system.” See *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), and *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); see also *Arizona v. U.S.*, 567 U.S. ___, 132 S.Ct. 2492, 2502 (2012) (“Where Congress occupies an entire field . . . even complimentary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is

B. MARYLAND'S RESPONSE TO THE LACK OF FEDERAL GUIDELINES

The Maryland Legislature has responded to the void in federal drone regulations by passing section 14-301.⁴³ This new law gives the state government exclusive authority over the regulation of drone usage, thereby preempting the ability of a county or municipality to impose their own usage restrictions.⁴⁴ The law also obligates Maryland's aviation administration to research the benefits and concerns of drone use in order to improve the understanding of drones and assist in developing more thorough guidelines.⁴⁵

Although it appears that state officials are adamant in their pursuit of effective drone regulations, many local government officials in Maryland are concerned with the lack of regulations focused on privacy interests; specifically, the lack of regulations protecting residents' Fourth Amendment privacy rights from intrusions by law enforcement through drone surveillance.⁴⁶ These concerns are largely a result of the preemption clause of section 14-301, which local officials feel undermines their ability to properly protect their citizens.⁴⁷

This has been expressed through proposals presented to the Maryland General Assembly by county officials seeking to have more restrictive drone legislation passed.⁴⁸ For instance, former Carroll County Commissioner, Robin Bartlett Frazier, proposed legislation that would discourage police use of drones without a warrant as well as preclude the county government from collecting evidence for the purpose of code enforcement or administrative proceedings.⁴⁹ Although this proposal failed to achieve a majority vote, it did receive support from other county officials who are concerned about violations of their citizens' privacy rights.⁵⁰ Despite this growing support for more comprehensive drone legislation by county officials, it still remains

parallel to federal standards.”)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (1992).

⁴³ MD. CODE ANN., ECON. DEV. § 14-301.

⁴⁴ *Id.*

⁴⁵ *See id.* (the aviation administration is required to develop and report their findings to Maryland officials by 2018); Hayes, *supra* note 20.

⁴⁶ Hayes, *supra* note 20.

⁴⁷ *See* MD. CODE ANN., ECON. DEV. § 14-301(c)(1) (“preempts the authority of a county or municipality to prohibit, restrict, or regulate the testing or operation of unmanned aircraft systems[.]”); Clark, *supra* note 17.

⁴⁸ Hayes, *supra* note 20.

⁴⁹ *Id.*

⁵⁰ *Id.* (County Commissioner Richard Rothschild, R-District 4, supported Robin Bartlett Frazier's proposed guidelines, and agreed that her worries about drone use were legitimate).

unclear what protection courts will provide to citizens in the absence of drone guidelines.⁵¹

C. THE FOURTH AMENDMENT APPLIED TO DRONE SURVEILLANCE

The Fourth Amendment provides citizens the right to be secure from unreasonable searches and seizures of their person, houses, papers, and effects.⁵² In order to determine whether a search has taken place for Fourth Amendment purposes, it must be determined that the individual had a subjective expectation of privacy to the area and items searched and that society would be prepared to recognize that expectation of privacy as reasonable.⁵³ An individual's right to privacy within the home has long been held as receiving the highest protection under the Fourth Amendment.⁵⁴

In the context of technological surveillance of the home, the Supreme Court has held that a search is presumptively unreasonable where technology that is not generally available to the public is used to see within a home⁵⁵ without a search warrant, thereby exposing details that would otherwise have been unknown.⁵⁶ However, the protections provided by the Fourth Amendment are not without limits and there are circumstances where government intrusions of privacy do not amount to a search.⁵⁷ For instance, the Supreme Court has held that society does not recognize that which is exposed in "open fields"⁵⁸ as private, and thus government surveillance of property within an open field does not amount to a search under the Fourth

⁵¹ Hayes, *supra* note 20; John Villasenor, *Privacy, Security, and Human Dignity in the Digital Age: Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 HARV. J. L. & PUB. POL'Y 460 (Spring 2013) ("Although the Supreme Court has never specifically ruled on the question of UAS privacy, it has examined the Fourth Amendment implications of aerial surveillance on several occasions.").

⁵² U.S. CONST. amend. IV.

⁵³ *Katz v. United States*, 389 U.S. 347, 361 (1967); *see Olmstead v. United States*, 277 U.S. 438, 466 (1928) (interpreting the Fourth Amendment as protecting property, but the court abandoned this property centered interpretation for the reasonable expectation of privacy test developed in *Katz*).

⁵⁴ *Silverman v. United States*, 365 U.S. 505, 511(1961).

⁵⁵ *Katz*, 389 U.S. at 361 (holding that where a search using sophisticated technology reveals something already exposed in "plain view," that search is considered unprotected by the Fourth Amendment).

⁵⁶ *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

⁵⁷ *See Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986); *California v. Ciraolo*, 476 U.S. 207, 215 (1986); *United States v. Knotts*, 460 U.S. 276, 285 (1983).

⁵⁸ *Oliver v. United States*, 466 U.S. 170, 178 (1984) (defining "open fields" as activities conducted out doors in fields, except for areas immediately surrounding the home).

Amendment.⁵⁹ Further, government searches of areas an individual may consider within the curtilage of the home may not amount to a search if the items sought to be protected are seen as knowingly exposed to the public by the owner.⁶⁰ Therefore, it follows that government surveillance of activity that takes place on public streets or areas otherwise openly exposed to public view is not considered a search for Fourth Amendment purposes.⁶¹ In the context of aerial surveillance by law enforcement, the Supreme Court, in *California v. Ciraolo*, determined that an individual does not have a reasonable expectation of privacy from warrantless aerial surveillance conducted by plane 1,000 feet over one's home and curtilage.⁶²

The Supreme Court expanded on this ruling in *Dow Chemical Co. v. United States* when it held that individuals do not have a reasonable expectation of privacy from aerial surveillance of their place of business.⁶³ The Court reasoned that where aerial surveillance does not reveal intimate or otherwise shielded details of the area searched, but instead reveals information that is exposed to the public overhead, the surveillance does not implicate the Fourth Amendment.⁶⁴ This holding was later applied to aerial surveillance of a home in *Florida v. Riley*, in which the Court explained that individuals do not maintain a reasonable expectation of privacy that their actions will not be observed from the air.⁶⁵

II. § 14-301'S PREEMPTION CLAUSE LEAVES MARYLAND RESIDENTS EXPOSED TO AERIAL SURVEILLANCE BY LAW ENFORCEMENT DRONES

As drone technology advances, drones are proving to be useful surveillance tools for law enforcement, yet Maryland's newly enacted section 14-301 preemption clause inhibits local counties or municipalities from responding to protect their citizens' privacy rights.⁶⁶ The preemption of local authority to regulate drones has been disputed among local officials in Maryland since the inception of the law, as evidenced by the Maryland

⁵⁹ *Dow Chem. Co.*, 476 U.S. at 233 (contrasting that which is knowingly exposed in an open field to that which is within the owner's home or curtilage, which generally receives Fourth Amendment protection).

⁶⁰ *Ciraolo*, 476 U.S. at 213 (holding that curtilage is determined by factors such as proximity to the home and steps the owner takes to conceal the area from public view).

⁶¹ *Knotts*, 460 U.S. at 281 (reasoning that this level altitude is considered a public vantage point of the home and therefore the defendant's expectation of privacy from this surveillance was unreasonable).

⁶² *Ciraolo*, 476 U.S. at 215.

⁶³ *Dow Chem. Co.*, 476 U.S. at 239.

⁶⁴ *Id.* at 238.

⁶⁵ *Florida v. Riley*, 488 U.S. 445, 451-52 (1989).

⁶⁶ See *supra* note 19.

Association of Counties (“MACo”) expressed opposition to the passing of the current law.⁶⁷ In its address, MACo conveyed its concern that the statute’s complete preemption of local authority undercuts the role a county government should play in affording protections to its citizens.⁶⁸ Specifically, MACo emphasizes the necessity of allowing local municipalities to create their own jurisdictional-sensitive regulations in light of the fact that this is a new and fast-changing technology implicating their local citizens’ privacy rights.⁶⁹

The fear among local officials in Maryland regarding their inability to impose their own drone use regulations stems from the absence of federal or Maryland laws requiring warrants for the operation of drones by law enforcement.⁷⁰ Prior to the passing of section 14-301, Maryland lawmakers made unsuccessful attempts to remedy this issue by introducing a bill that would prohibit law enforcement from engaging in drone surveillance without a warrant.⁷¹ However, due to the lack of any warrant requirement by the State for the use of drones in conjunction with federal case law allowing the warrantless observation of property from publically navigable airspace, agencies are currently authorized to conduct highly intrusive criminal surveillance without implicating local residents’ Fourth Amendment privacy rights.⁷²

A. PRIVACY FROM DRONE SURVEILLANCE IS A VALID CONCERN IN MARYLAND

Although there is currently no publically released COA by the FAA for law enforcement agencies in Maryland, in recent years, the Queen Anne’s County Department of Justice was authorized to use drones by the FAA.⁷³ Similarly, the FBI reported to have used drones to conduct surveillance in Baltimore City with the assistance of the Baltimore City Police Department

⁶⁷ Clark, *supra* note 17 (“The bill’s complete local preemption undermines a county government’s role in developing reasonable manner and use regulations as necessary to protect privacy rights.”).

⁶⁸ Clark, *supra* note 17.

⁶⁹ *Id.*

⁷⁰ See FAA, Fact Sheet-Unmanned Aircraft Systems (UAS) (Jan. 6, 2014), https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153; see MD. CODE ANN., ECON. DEV. § 14-301.

⁷¹ See H.B. 1233, 2013 Leg., 433rd Sess. (Md. 2013).

⁷² See *supra* note 70; *Riley*, 488 U.S. at 451-52.

⁷³ See *Fact Sheet-Unmanned Aircraft Systems* (UAS), FED. AVIATION ADMIN. (Feb. 15, 2015), https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297.

during the 2015 Baltimore riots.⁷⁴ FBI surveillance logs limited the description of their drone activity in Baltimore during the riots to “electronic surveillance,” providing a vague depiction to the public of the actual technology used during their surveillance.⁷⁵ However, FBI internal documents obtained through Freedom of Information Act requests revealed that the drones operated by the FBI were equipped with night-vision and infrared cameras, the latter of which provides law enforcement the ability to observe information within the walls of a home.⁷⁶ More Maryland law enforcement agency applications for drone use are likely soon to follow in light of Maryland police agencies testing drones in an effort to better understand the capabilities of drone surveillance.⁷⁷

B. THE “REASONABLE EXPECTATION OF PRIVACY” AND DRONE SURVEILLANCE

Although our understanding of drone technology has vastly increased in recent years, drone surveillance that constitutes an infringement of an individual’s Fourth Amendment privacy rights is currently unclear.⁷⁸ It has been held that the reasonable expectation of privacy test used by courts to determine whether a search has occurred for Fourth Amendment purposes does not include aerial surveillance of private property by law enforcement.⁷⁹ Although the Supreme Court has yet to determine exactly how drone surveillance applies to the reasonable expectation of privacy test, the Court has acknowledged that the privacy protections guaranteed by the Fourth Amendment are continuously affected by developments in technology.⁸⁰

Despite the lack of case law to assist in making the determination of what expectations of privacy society recognizes as reasonable in regards to drone

⁷⁴ *Id.*; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights*, ACLU: FREE FUTURE (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

⁷⁵ Wessler, *supra* note 74.

⁷⁶ *Id.*; FED. AVIATION ADMIN., *supra* note 73.

⁷⁷ Scott Broom, *Drones in Hands of Police Demonstrated in St. Mary’s Co*, WUSA (Aug. 4, 2015, 6:55 PM), <http://www.wusa9.com/story/news/local/maryland/2015/08/04/public-safety-agencies-targeted--new-drone-customers/31129197/>.

⁷⁸ *See Fact Sheet-Unmanned Aircraft Systems (UAS)*, FED. AVIATION ADMIN. (Feb. 15, 2015), https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297; Villasenor, *supra* note 51 (“Although the Supreme Court has never specifically ruled on the question of UAS privacy, it has examined the Fourth Amendment implications of aerial surveillance on several occasions.”).

⁷⁹ *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. 445; *see infra* note 83; *see supra* note 53 and accompanying text.

⁸⁰ *Kyllo*, 533 U.S. at 33-34.

surveillance, states have responded to the lack of federal protections by passing laws aimed at protecting their citizens' privacy from drone surveillance.⁸¹ For instance, in the absence of federally mandated warrant requirements, many state and local legislators have filled the void by passing laws that require warrants for drone surveillance by law enforcement.⁸² The legislative reaction by these states,⁸³ as well as county officials in Maryland, should provide some insight into society's current expectation of privacy from drone surveillance.⁸⁴ However, Maryland's new drone law preventing local governments from reacting, leaves them without Fourth Amendment protections from drone surveillance by law enforcement.⁸⁵

C. CURRENT TRESPASS AND NUISANCE LAWS ARE INSUFFICIENT TO FILL THE VOID

Property owners in Maryland would have little success attempting to protect their privacy rights against drone surveillance through a claim of trespass or nuisance in the absence of privacy-specific drone laws.⁸⁶ Maryland courts have yet to hear a case involving a claim of aerial trespass by drone, but the Supreme Court has previously held that aerial flight over an individual's property does not amount to a trespass of that person's land.⁸⁷ Moreover, Maryland's trespass laws make no mention of what would constitute a trespass by an aerial vehicle such as a drone.⁸⁸ Furthermore, property owners in Maryland generally have no right to exclude any aircraft from flying over their property because national airspace is considered part of the public domain.⁸⁹

It also appears unlikely that Maryland citizens could bring cause of action under Maryland's current nuisance laws.⁹⁰ For drone surveillance to constitute a nuisance in Maryland, the drone would likely have to be operated at "so low an altitude as to interfere with any lawful existing use of the land"⁹¹ Therefore, it appears that the interference with one's use of

⁸¹ IDAHO CODE ANN. § 21-213; TEX. GOV'T CODE ANN. § 423.003 (West 2018); VA. CODE ANN. § 19.2-60.1.

⁸² *Id.*

⁸³ Hayes, *supra* note 20.

⁸⁴ *See id.*; Katz, 389 U.S. at 361.

⁸⁵ *See* MD. CODE ANN., ECON. DEV. § 14-301.

⁸⁶ MD. CODE ANN., TRANSP. § 5-1001 (requiring that the overhead flight cause an interference with the lawful use of the land below).

⁸⁷ Laird v. Nelms, 406 U.S. 797, 800 (1972).

⁸⁸ MD. CODE ANN., CRIM. LAW § 6-402; MD. CODE ANN., TRANSP. § 5-1001.

⁸⁹ *See* MD. CODE ANN., TRANSP. § 5-1001.

⁹⁰ *Id.*

⁹¹ *Id.*

their land would have to be highly significant in order to obtain recourse through current nuisance laws in Maryland.⁹²

III. MARYLAND SHOULD IMPLEMENT A NEW DRONE LAW WITH PRIVACY-CENTERED PROVISIONS OR ALLOW FOR LOCAL GUIDELINES BY AMENDING § 14-301

Maryland lawmakers should address the concerns of local government authorities and repeal and replace the existing law with provisions that would permit local governments to protect their residents' privacy from drone surveillance by state and local law enforcement agencies.⁹³ The provisions in the current law requiring the Aviation Commission to study the benefits of drone use are necessary and should remain in the law, but the preemption provision, prohibiting local authorities to pass regulations on drone use, leaves Maryland residents at risk of privacy intrusions.⁹⁴

Although proponents of the law believe that allowing the State to supersede local and county officials from creating drone regulations is necessary with any new technology, drones are unlike any new technology Maryland has ever experienced.⁹⁵ Therefore, requiring Maryland residents to remain without privacy-centered drone restrictions until research concludes in 2018 will potentially result in significant privacy intrusions with no repercussions.⁹⁶ Furthermore, any concerns about the implications of the lack of uniformity among local regulations of drones will be resolved once the federal government is able to create comprehensive federal regulations.⁹⁷

A. OTHER STATES PROVIDING BLUEPRINTS FOR PRIVACY-CENTERED DRONE LAWS IN MARYLAND⁹⁸

When making this new law, Maryland legislators should seek insight on citizens' current expectations of privacy against drones by looking to existing statutes in other states restricting the use of drones by law enforcement.⁹⁹

⁹² See *id.*

⁹³ See Clark, *supra* note 17; Hayes, *supra* note 83.

⁹⁴ See MD. CODE ANN., ECON. DEV., § 14-301.

⁹⁵ See WMAR Staff, ABC News, *Maryland Lawmakers Want Control of Drone Laws*, ABC2NEWS (Mar. 10, 2015 7:53 PM),

<http://www.abc2news.com/business/technology/maryland-lawmakers-want-control-of-drone-laws>.

⁹⁶ See *id.*; MD. CODE ANN., ECON. DEV. § 14-301.

⁹⁷ See *supra* note 70.

⁹⁸ ME. REV. STAT. tit. 25; § 4501; IDAHO CODE ANN. § 21-213; TEX. GOV'T CODE ANN. § 423.003; VA. CODE ANN. § 19.2-60.1.

⁹⁹ See National Conference of State Legislatures ("NCSL"), *Current Unmanned Aircraft State Law Landscape*, NCSL (Jan. 13, 2016),

The law should also implement provisions of past bills introduced in Maryland that proposed restrictions on drone use by law enforcement.¹⁰⁰

Allowing local government to regulate drones would not disrupt state and federal efforts to better understand the technology, but, rather, it would merely permit local governments to provide sufficient privacy protections to their residents while studies are being conducted.¹⁰¹ In order to suggest possible guidelines for local regulations on drones, it is helpful to refer to some of the current state and local privacy restrictions on drone usage by law enforcement.¹⁰²

The first, and most important, aspect that should be addressed in a new Maryland drone law is the absence of any federal or state warrant requirement for law enforcement drone surveillance.¹⁰³ Several states currently impose a range of warrant requirements¹⁰⁴ for drone surveillance, including strict bans on law enforcement drone operation without a warrant for any purpose,¹⁰⁵ except in limited circumstances such as responding to an Amber Alert.¹⁰⁶ Some states have gone a step further by explicitly mandating that any evidence obtained through drone surveillance without a warrant is inadmissible in any judicial proceeding.¹⁰⁷ Permitting each local government to choose specific warrant requirements that fit its jurisdictional needs would allow residents of that municipality to feel that their privacy rights are being protected by government officials with similar interests.¹⁰⁸

While the necessity of a warrant requirement seems obvious, there are many other necessary restrictions on drone use that state and local

<http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx>. (the NCSL provides an up-to-date overview of current State and local drone laws).

¹⁰⁰ See *supra* note 71.

¹⁰¹ See MD. CODE ANN., ECON. DEV. § 14-301; Clark, *supra* note 17.

¹⁰² See *supra* note 99.

¹⁰³ See MD. CODE ANN., ECON. DEV. § 14-301.

¹⁰⁴ See ME. REV. STAT. tit. 25; § 4501; IDAHO CODE ANN. § 21-213; TEX. GOV'T CODE ANN. § 423.003; VA. CODE ANN. § 19.2-60.1.

¹⁰⁵ VA. CODE ANN. § 19.2-60.1.

¹⁰⁶ *Id.* at § 19.2-60.1(B) (“No state or local government department, agency, or instrumentality having jurisdiction over criminal law enforcement or regulatory violations, including but not limited to the Department of State Police, and no department of law enforcement as defined in § 15.2-836 of any county, city, or town shall utilize an unmanned aircraft system except during the execution of a search warrant issued pursuant to this chapter or an administrative or inspection warrant issued pursuant to law.”). U.S. Dep. Of Justice, Office of Justice Programs, *Amber Alert, America’s Missing: Broadcast Emergency Response*, <https://www.amberalert.gov/faqs.htm>. (An “Amber Alert” is an emergency broadcast system implemented to assist in locating abducted children).

¹⁰⁷ OR. REV. STAT. ANN. § 837.310.

¹⁰⁸ See Clark, *supra* note 17.

governments across the country have imposed, which could provide for useful consideration for certain municipalities in Maryland.¹⁰⁹ For instance, a new law in Maine provides a great example of a state actively taking control of drone use while studies are conducted to gain a better understanding of how to safely use this new technology to its full potential.¹¹⁰ The law prohibits law enforcement agencies from engaging in drone surveillance of private citizens who are peacefully exercising their constitutional rights of free speech and assembly.¹¹¹ Additionally, the law imposes certain training and certification standards that must be met before an agency is permitted to use drones, and implements procedures to minimize the possibility that lawful surveillance captures third parties not under investigation.¹¹² Furthermore, the law prohibits any use of weaponized drones as well as explicitly limits the use of drones equipped with thermal imaging, night vision, high-powered zoom lenses, and facial recognition technology.¹¹³

Drone laws, such as the one recently passed in Maine, shed light on the fact that Maryland lawmakers should be capable of implementing comprehensive drone surveillance restrictions without impeding the state's ability to research the benefits of drone use in the interim.¹¹⁴ If Maryland were to pass similar restrictions on drone usage, or in the alternative, allow for similar local regulations, residents would be assured that their privacy rights are protected without leaving the issue unaddressed or impeding the safe and effective incorporation of drones into Maryland airspace.¹¹⁵

CONCLUSION

Although new developments in technology such as drones present many potential benefits to society, they often bring certain unintended consequences that cannot be ignored.¹¹⁶ Maryland's current drone law, prohibiting the involvement of local government in creating restrictions for drone use, illustrates an example of the state government allowing citizens' constitutional privacy rights to be subordinated to the development of an exciting new technology.¹¹⁷ Citizens' constitutional rights should be paramount, and only once those rights are fully protected should the

¹⁰⁹ NCSL, *supra* note 99.

¹¹⁰ ME. REV. STAT. ANN. tit. 25, § 4501.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ ME. REV. STAT. ANN. tit. 25, § 4501; MD. CODE ANN., ECON. DEV. § 14-301.

¹¹⁶ *See Silverman*, 365 U.S. at 511.

¹¹⁷ *See id.*

implementation of newly developed technology as a tool for law enforcement take place.¹¹⁸

Therefore, Maryland should not ignore this threat to privacy rights and instead should act to protect these rights in a way that other states have already done.¹¹⁹ This would not hinder the development of this new technology, rather it would simply allow Maryland citizens to feel safe knowing that their privacy rights are being protected while legislators develop a better understanding of how to safely and effectively implement drones into society.¹²⁰

¹¹⁸ *See id.*

¹¹⁹ *See* ME. REV. STAT. ANN. tit. 25, § 4501; IDAHO CODE ANN. § 21-213; TEX. GOV'T CODE ANN. § 423.003; VA. CODE ANN. § 19.2-60.1.

¹²⁰ *See Silverman*, 365 U.S. at 511.