

# BECOMING AN ORWELLIAN SOCIETY: BIG BROTHER IS WATCHING YOU

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“ In the far distance a helicopter skimmed down between the roofs,  
overhead for an instant like a bluebottle,  
and darted away again with a curving flight.  
It was the Police Patrol, snooping into people's windows.”<sup>1</sup>

## I. INTRODUCTION

First, the right to privacy extended all the way to the heavens<sup>2</sup> until planes and helicopters became an efficient means of transportation for the common good.<sup>3</sup> The “privacy to the heavens” became obsolete.<sup>4</sup> Now, we have drones.<sup>5</sup> They are unmanned. They do not provide transportation for the common good. They are used for police departments and governments. Society is not prepared to accept an invasion of privacy by drones,<sup>6</sup> nor is society prepared to accept spying drones as a reasonable search.

The use of drones has expanded dramatically in the last few decades.<sup>7</sup> The technology of unmanned aerial vehicles (“UAVs”) has become so advanced that the U.S. Government is entertaining the idea of allowing drones to monitor the interior of the country. Drones are currently used to monitor and strike in foreign territories. The legislation on these implementations sparks many heated debates amongst party lines.<sup>8</sup> However, when tragedy strikes home, the line becomes blurred.<sup>9</sup>

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1. GEORGE ORWELL, 1984 2 (Signet Classic 1977) (1949).

2. *Bury v. Pope*, (1587) 78 Eng. Rep. 375.

3. Air Commerce Act of 1926, ch. 344, 44 Stat.568 (codified as amended at Civil Aeronautics Act of 1938, 49 U.S.C. § 401).

4. *United States v. Causby*, 328 U.S. 256, 260-61 (1946).

5. Drones are also commonly referred to as unmanned aerial vehicles and unmanned aircraft. The author uses these terms interchangeably.

6. See Ben Wolfgang, *FAA Gauges Approval of Drone Privacy; Citizens Use Forum to Voice Displeasure*, WASH. TIMES, Apr. 4, 2013, at A6.

7. See *infra* Part II (discussing that the first drone is credited to the Wright brothers).

8. See, e.g., Declan McCullagh, *House Orders Pentagon to Disclose Domestic Drone Use*, CNET (Mar. 7, 2013), [http://news.cnet.com/8301-13578\\_3-57573183-38/house-orders-pentagon-to-disclose-domestic-drone-use/](http://news.cnet.com/8301-13578_3-57573183-38/house-orders-pentagon-to-disclose-domestic-drone-use/); Letter from Eric H. Holder, U.S. Attorney General, to Rand Paul, U.S. Senator (Mar. 7, 2013), available at <http://www.washingtonpost.com/blogs/post-politics/files/2013/03/Senator-Rand-Paul-Letter.pdf>.

This article examines the constitutional implications of the unmanned aircraft industry. Part II will review the past use of UAVs in foreign territories. Part III will critically evaluate the current and proposed uses of domestic drones in today's society. Part IV will provide a detailed constitutional evaluation on the future implications of unmanned aircraft on American soil. Finally, Part V will provide a proposal restricting the use of domestic drones.

II. "MR. SPEAKER, FOR YEARS, THE UNITED STATES HAS USED DRONES TO TRACK TERRORISTS OVERSEAS, CATCH OUTLAWS ALONG THE BORDER AND OTHER LAWFUL PURPOSES. . . ."<sup>10</sup>

Drones and unmanned aircraft have been around since 1903.<sup>11</sup> The Wright brothers worked out the physics of their manned flight by testing the flight on gliders.<sup>12</sup> After that, the creation of unmanned aerial vehicles soared. The most notable first use of the UAV was in "Operation Aphrodite" during WWII.<sup>13</sup> Although these bomber planes were not entirely unmanned, they were guided to their destination by radio control after the pilot jumped from the aircraft.<sup>14</sup> At the same time, Germany

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Additionally, Senator Rand Paul initiated a thirteen-hour filibuster in an effort to receive White House clarification regarding domestic drone strikes. Aaron Blake, *Poll Shows Huge Support for Rand Paul's Filibuster Stance on Drone Attacks*, WASH. POST (Mar. 25, 2013, 9:18 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/25/poll-shows-huge-support-for-rand-pauls-filibuster-stance-on-drone-attacks/>.

9. For example, some Americans have altered their views on drone use after the Boston marathon bombings in April 2013. Jason Koebler, *Boston Bombing Changes Lawmakers' Views on Drone Killings of Americans on U.S. Soil*, U.S. NEWS (Apr. 23, 2013), <http://www.usnews.com/news/articles/2013/04/23/boston-bombing-changes-lawmakers-views-on-drone-killings-of-americans-on-us-soil>. Although this addressed the larger 5th Amendment implication, (*see infra*, Part IV(B)), it nevertheless supports my position that terror incites change, for better or worse.

10. 158 CONG. REC. H5133 (daily ed. July 24, 2012) [hereinafter 158 CONG. REC. H5133] (statement of Rep. Ted Poe).

11. RUSSELL FREEDMAN, *THE WRIGHT BROTHERS: HOW THEY INVENTED THE AIRPLANE* 31 (1991); LAWRENCE R. NEWCOME, *UNMANNED AVIATION: A BRIEF HISTORY OF UNMANNED AERIAL VEHICLES* 20 (2004).

12. FREEDMAN, *supra* note 11; NEWCOME, *supra* note 11.

13. A People at War, *The War in Europe*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, [http://www.archives.gov/exhibits/a\\_people\\_at\\_war/war\\_in\\_europe/lt\\_joseph\\_kennedy\\_jr.html](http://www.archives.gov/exhibits/a_people_at_war/war_in_europe/lt_joseph_kennedy_jr.html) (last visited Apr. 24, 2013).

14. *Id.*

released its “V-weapons,” which were pilotless aircrafts carrying explosives.<sup>15</sup> These UAVs were much larger than the models we have today.

After years of confusion, the government has yet to accept a universal definition for drones.<sup>16</sup> Congress attempted to define “unmanned aircraft” as “an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.”<sup>17</sup> Futile acts of congressmen have halted any specific definition.<sup>18</sup> A more specific, proposed definition, which was introduced—and subsequently died—in Senate, included, “any powered, aerial vehicle that (A) does not carry a human operator; (B) uses aerodynamic forces to provide vehicle lift; (C) can fly autonomously or be piloted remotely; (D) can be expendable or recoverable; and (E) can carry a lethal or nonlethal payload[.]”<sup>19</sup>

A specific definition is necessary to prevent model airplane hobbyists from being subject to governmental regulations. Because there is no universally accepted definition of “drones,” hobbyists cannot differentiate their model planes from unmanned aerial vehicles.<sup>20</sup> Drones are easily confused with model aircraft, but creating distinctions will protect the hobbyists from criminal prosecution. In drafting legislation, congressmen must be careful not to unintentionally impede on the model aircraft industry.<sup>21</sup> Some drone bills have neglected to carve out an exception for model airplanes.<sup>22</sup> The Federal Aviation Agency (“FAA”), however, has allotted a special provision for model aircraft.<sup>23</sup>

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15. *The WWII V-1 Doodle Bug Flying Bomb*, FIDDLERS GREEN, <http://www.fiddlersgreen.net/models/aircraft/V1.html> (last visited Apr. 25, 2013).

16. Benjamin Kapnik, *Unmanned but Accelerating: Navigating the Regulatory and Privacy Challenges of Introducing Unmanned Aircraft into the National Airspace System*, 77 J. AIR L. & COM. 439, 444 (2012).

17. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331(8).

18. See Rand Paul, *S. 3287—112th Congress: Preserving Freedom from Unwarranted Surveillance Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s3287#overview> (last visited Apr. 27, 2013).

19. *Id.* at § 2.

20. Timothy T. Takahashi, *Drones in the National Airspace*, 77 J. AIR L. & COM. 489, 507 (2012).

21. Ben Wolfgang, *Model Aircraft Owners Drawn into Privacy Debate on Drones*, WASH. TIMES, (Apr. 9, 2013), <http://www.washingtontimes.com/news/2013/apr/9/model-aircraft-owners-drawn-privacy-debate-drones/?page=all>. For example, New York recently passed the Secure Ammunition and Firearms Enforcement Act of 2013 banning assault-style weapons; however, it neglected to carve out a provision for the movie industry.

22. See *id.*; 77 Or. S.B. 524 (2013) (Oregon legislation defines drones as “unmanned aerial vehicle[s]” without providing an exception for model airplanes). But see FAA

The biggest problem with drones is the incapability of “sensing and avoiding” other aircraft because the operator is on the ground controlling the camera.<sup>24</sup> This argument has been progressive in keeping drones out of domestic airspace.<sup>25</sup> Because the FAA is strictly concerned with the safety of aircraft, this downfall has stifled further implementation.<sup>26</sup> However, this problem may be remedied soon and the FAA will likely approve its safeness.<sup>27</sup> When that happens, the problem will explode and implicate constitutional issues of privacy and due process.

### III. “YES, MR. SPEAKER, THE DRONES ARE COMING.”<sup>28</sup>

Several uses for drones include authorizing foreign military operations,<sup>29</sup> securing the U.S.–Mexico border,<sup>30</sup> and gathering hurricane and atmospheric data.<sup>31</sup> Other uses include collecting scientific data, monitoring and fighting forest fires, and assisting law enforcement.<sup>32</sup> The FAA is charged with the task of regulating the safety of drones for all uses. The current consensus is that the FAA, which focuses on aviation safety, is not equipped or trained to deal with the excess of private information

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Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336 (“Special Rules for Model Aircraft”).

23. FAA Modernization and Reform Act § 336.

24. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-889T, UNMANNED AIRCRAFT SYSTEMS: USE IN THE NATIONAL AIRSPACE SYSTEM AND THE ROLE OF THE DEPARTMENT OF HOMELAND SECURITY 5-6 (2012).

25. *See id.*

26. FAA Modernization and Reform Act § 333(a); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-889T, *supra* note 24, at 5; W.J. Hennigan, *Copter Drones Grounded After Crashes: Navy Halts Flights of Fire Scouts, Another Stain on Defense Giant Northrop Grumman*, L.A. TIMES, Apr. 11, 2012, at B1.

27. Progress is slowly being made and may soon satisfy the FAA safety requirements. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-981, UNMANNED AIRCRAFT SYSTEMS: MEASURING PROGRESS AND ADDRESSING POTENTIAL PRIVACY CONCERNS WOULD FACILITATE INTEGRATION INTO THE NATIONAL AIRSPACE SYSTEM 15 (2012).

28. 158 CONG. REC. H5133, *supra* note 10.

29. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 10; Richard Conniff, *Drones are Ready for Takeoff*, SMITHSONIAN MAGAZINE, June 2011, <http://www.smithsonianmag.com/science-nature/Drones-are-Ready-for-Takeoff.html>.

30. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 9; Conniff, *supra* note 29.

31. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 10; Kapnik, *supra* note 16, at 440.

32. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-889T, *supra* note 24, at 4.

gained through drones.<sup>33</sup> The FAA's responsibilities do not include the protection of privacy or use of data.<sup>34</sup>

Currently, drones are required to fly under 400 feet with an FAA permit.<sup>35</sup> The maximum elevation requirement changes aerial surveillance and makes it easier for police to search and seize, via lethal and non-lethal weapons, without a warrant. This new area is forecasted to grow rapidly.<sup>36</sup> By 2030, the FAA has estimated that 30,000 drones will hover above the United States.<sup>37</sup> There currently is no single federal agency designated to regulate the privacy implications of UAVs.<sup>38</sup>

Drones are not controversial because of their current uses. They are controversial because of their potential use by overreaching governments and rebellious civilians. "The yin and yang of technology have both benefited and haunted humans over the centuries, catapulting us forward in progress, but also bringing destruction. Without [a] proactive approach towards technology, we risk allowing ill-meaning corporations and governments to manipulate us through machines, stripping us of privacy in the progress."<sup>39</sup>

Not only is there great potential for police abuse, but civilian abuse is also troublesome in two ways. First, civilians can use the technology to spy on neighbors and other civilians, opening the door for more analysis on "Peeping Tom" laws. Private ownership can also prove dangerous if citizens arm their own personal fleet.<sup>40</sup> Although far-fetched, the courts would likely face an evaluation of the Second Amendment.<sup>41</sup> Second,

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33. See Wolfgang, *supra* note 6.

34. See *id.*

35. Matthew L. Wald, *Current Laws May Offer Little Shield Against Drones, Senators are Told*, N.Y. TIMES, Mar. 20, 2013, at A20, [http://www.nytimes.com/2013/03/21/us/politics/senate-panel-weighs-privacy-concerns-over-use-of-drones.html?\\_r=0](http://www.nytimes.com/2013/03/21/us/politics/senate-panel-weighs-privacy-concerns-over-use-of-drones.html?_r=0); Unmanned Aircraft Operations in the National Airspace System, Docket No. FAA-2006-25714, Notice of policy; opportunity for feedback (Feb. 6, 2007).

36. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 5.

37. 158 CONG. REC. H5133 *supra* note 10; S. Smithson, *Drones Over U.S. Get OK by Congress*, WASH. TIMES, Feb. 7, 2012, <http://www.washingtontimes.com/news/2012/feb/7/coming-to-a-sky-near-you/>.

38. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 35.

39. Ayesha Khanna, *The Mouse May be Extinct in 2030*, STRAITS TIMES (Singapore), (Apr. 10, 2013).

40. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 30 ("A recent incident in which a man pled guilty to plotting to use a large remote-controlled model aircraft filled with plastic explosives to attack the Pentagon and U.S. Capitol highlights the potential for UAVs being used as weapons.").

41. See generally U.S. CONST. amend. II.

civilians can hack into the GPS signal to redirect government drones to new locations.<sup>42</sup> This interception would create serious problems for law enforcement and other government agencies.

The technology embedded in UAVs far exceeds the boundaries allowed by the Supreme Court. Drones located at the borders currently contain infrared technology. This technology is used to identify anything creating a heat source, such as a human<sup>43</sup> or marijuana operation.<sup>44</sup> The Supreme Court has invalidated the use of thermal imaging devices to determine illegal activities inside a home.<sup>45</sup> It would be rather difficult to deploy the infrared-equipped drones in the interior without facing severe constitutional violations.

IV. “MR. SPEAKER, TECHNOLOGY MAY CHANGE WITH TIME, BUT THE CONSTITUTION DOES NOT.”<sup>46</sup>

The legal system has routinely provided a sloth-like response to technological developments, and the technology age is not slowing down anytime soon.<sup>47</sup> This new aerial technology will undoubtedly unveil constitutional violations.

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42. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-981, *supra* note 27, at 36-37 (“The jamming of the GPS signal being transmitted to the UAS could also interrupt the command and control of UAS operations. . . . GPS spoofing has also been identified as an emerging issue.”); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-889T, *supra* note 24, at 12-13; BBC, *Researchers Use Spoofing to ‘Hack’ into a Flying Drone*, BBC NEWS, June 24, 2012, <http://www.bbc.co.uk/news/technology-18643134>.

43. This was the same technology used to locate Dzhokhar Tsarnaev in a privately owned boat. See Kelsey D. Atherton, *How It Works: The Thermal Camera That Found The Boston Bomber*, POPSCI (Apr. 25, 2013, 4:00 PM), <http://www.popsci.com/technology/article/2013-04/how-works-awesome-thermal-camera-found-boston-bomber>.

44. See *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001).

45. *Id.* at 40.

46. 158 CONG. REC. H5133 *supra* note 10.

47. Jay Stanley, *Five Reasons Why the Courts Aren't Enough to Ensure Drone Privacy*, ACLU (Mar. 15, 2013, 12:07 PM), <http://www.aclu.org/blog/technology-and-liberty/five-reasons-why-courts-arent-enough-ensure-drone-privacy>.

*A. Fourth Amendment Analysis*

The Fourth Amendment protects citizens from unreasonable searches and seizures without a warrant and without probable cause.<sup>48</sup> Americans have the right to be free from arbitrary government invasions.<sup>49</sup> Imagine the implications on privacy of a thirty-floor condominium, whose owners assumed no one would ever peer into their living room through a window.

Federal agencies are not held accountable when drones violate the Fourth Amendment.<sup>50</sup> It should not be assumed that the FAA will respect privacy and uphold the Fourth Amendment. The FAA is concerned with flight safety, and that is all.<sup>51</sup> The FAA develops its laws around air safety; it is not equipped to interpret or uphold the Constitution.<sup>52</sup> A judicial officer must decide the extent of the right to privacy.<sup>53</sup> Consequently, we cannot use the FAA regulations to determine if a person has a reasonable expectation of privacy.

There are many legitimate uses for domestic drones including “search drones” to locate missing persons and bodies, “fire drones” to delve into active fire scenes and identify trapped persons, and “border drones” to monitor for fugitive outlaws and strengthen the U.S. borders. However, the road to constitutional destruction is paved with the best intentions.<sup>54</sup> We must be wary of intrusive drones overstepping their legitimate functions.

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48. U.S. CONST. amend. IV.

49. See *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 528 (1967) (“The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

50. The Editors, *As Spy Drones Come to the U.S., We Must Protect Our Privacy*, SCIENTIFIC AM. (Mar. 25, 2013), <http://www.scientificamerican.com/article.cfm?id=spy-drones-come-us-we-must-protect-privacy>.

51. *Florida v. Riley*, 488 U.S. 445, 452 (1988) (O'Connor, J., concurring).

52. Compare U.S. CONST. art. I, § 3 (the Executive Branch, including Federal Agencies, is charged with enforcing the laws), with U.S. CONST. art III, § 1 (the Constitution is interpreted by the Judicial Branch).

53. *United States v. Knotts*, 460 U.S. 276, 282 (1982) (citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

54. Author's adaptation of the proverb “The road to Hell is paved with good intentions.” Actual origination is unknown, but original proverb credited to Virgil's *Aenid* (29-19 BC), Saint Bernard of Clairvaux (1091-1153), and John Ray (1690).

Drones cannot be compared with helicopters. First, helicopters must operate at a minimum of 500 feet.<sup>55</sup> UAVs, on the other hand, cannot fly *above* 400 feet.<sup>56</sup> Additionally, helicopters are typically used for the transportation of a person from one place to another. Drones are not capable of transporting anyone anywhere. This distinction is necessary to avoid misapplication of cases regarding helicopters.<sup>57</sup>

The Supreme Court has approved new technology when the devices, which are available to the general public,<sup>58</sup> merely provide sense-enhancing capabilities.<sup>59</sup> However, “as the technology advance[s] and the cost decreases . . . the market for . . . [UAVs] grow[s] rapidly.”<sup>60</sup> When the market grows faster and the devices become more accessible, the Supreme Court’s “available to the general public”<sup>61</sup> argument will become moot.

The Supreme Court has routinely held that sense-enhancing devices do not violate the Fourth Amendment.<sup>62</sup> What sense does a drone enhance, exactly? The use of beepers attached to cars has been upheld when the vehicle is monitored within a close distance.<sup>63</sup> However, in *Jones*, the Supreme Court held that remotely monitoring a vehicle from a fixed location for an extended time violated the Fourth Amendment.<sup>64</sup> Domestic drones essentially provide the same remote monitoring that was prohibited in *Jones*.

Justice Brennan’s dissent in *Florida v. Riley*, which was written in 1989, provides a mind-boggling look into the future, which is imminent now:

Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all — and, for good measure, without posing any threat of injury. Suppose the police employ this miraculous tool to discover not only what crops

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55. General Operating and Flight Rules, 14 C.F.R. § 91.119 (2013).

56. *Fact Sheet – Unmanned Aircraft Systems*, FED. AVIATION ADMIN. (Sept. 6, 2014, 1:17 PM), [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=14153](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153).

57. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445-49 (1989) (police used a helicopter to fly over a greenhouse on defendant’s property, which provided the probable cause needed to secure a search warrant).

58. *See* *Kyllo v. United States*, 533 U.S. 27, 34, 40 (2001).

59. *Illinois v. Caballes*, 543 U.S. 405, 413 (2005) (Souter, J., dissenting).

60. H.R. Con. Res. 1262, 113th Cong. § 2(3) (2013) (enacted).

61. *Kyllo*, 533 U.S. at 34, 40.

62. *Caballes*, 543 U.S. at 413; *United States v. Knotts*, 460 U.S. 276 (1982).

63. *United States v. Jones*, 132 S. Ct. 945, 951-52 (2012).

64. *Id.* at 953-54.

people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably “where they had a right to be.”<sup>65</sup>

This futuristic view is precisely the issue that is coming to our attention now.

### B. Fifth Amendment Analysis

The Fifth Amendment of the U.S. Constitution forbids the use of lethal force without specific, concrete evidence under due process of law.<sup>66</sup> However, the U.S. Government is not granting due process before executing lethal strikes with drones.<sup>67</sup> Traditional drone strikes required concrete evidence and extensive analysis by teams tasked with this duty.<sup>68</sup> Miniature drones, on the other hand, are controlled by ground-level soldiers, who have neither the time nor the experience to evaluate the due process implications of issuing a kill strike on an American on foreign soil.<sup>69</sup>

Manufacturers have developed—and are actively marketing—domestic drones armed with nonlethal weapons, such as tasers, tear gas, and rubber bullets.<sup>70</sup> In fact, Montgomery County, located in Texas, already has the ability to arm its drone with nonlethal weapons.<sup>71</sup> It received a lot of attention when the county crashed a drone into a S.W.A.T. team’s tank.<sup>72</sup>

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65. Riley, 488 U.S. at 462 (1989) (Brennan, J., dissenting).

66. U.S. CONST. amend. V; *Targeted Killings*, AM. CIV. LIBERTIES UNION (last visited Apr. 27, 2013), <http://www.aclu.org/national-security/targeted-killings>.

67. Luis Miranda, *Assassinating Americans is ‘Legal’, ‘Wise’, and ‘Ethical’*, THE REAL AGENDA (Feb. 6, 2013, 12:06 PM), <http://real-agenda.com/2013/02/06/assassinating-americans-is-legal-wise-and-ethical/>.

68. W.J. Hennigan, *Pentagon to Soon Deploy Pint-Sized but Lethal Switchblade Drones*, L.A. TIMES (June 11, 2012), <http://articles.latimes.com/2012/jun/11/business/la-fi-kamikaze-drone-20120611>; see Brief for American Civil Liberties Union at 18, *N. Y. Times Co. v. U.S. Dep’t of Justice*, 872 F. Supp. 2d 309 (2012) (No. 13-0445), 2013 WL 1739685, at \*5.

69. Hennigan, *supra* note 68.

70. Glenn Greenwald, *Domestic Drones and Their Unique Dangers*, THE GUARDIAN (Mar. 29, 2013, 10:48 PM), <http://www.guardian.co.uk/commentisfree/2013/mar/29/domestic-drones-unique-dangers>.

71. *Groups Concerned Over Arming of Domestic Drones*, CBS (May 23, 2012, 1:18 PM), <http://washington.cbslocal.com/2012/05/23/groups-concerned-over-arming-of-domestic-drones/>.

72. Kashmir Hill, *The Drone That Crashed Into A S.W.A.T. Team’s Tank*, FORBES (Mar. 5, 2012, 3:28 PM), <http://www.forbes.com/sites/kashmirhill/2012/03/05/the-drone-that-crashed-into-a-s-w-a-t-teams-tank/>.

Most recently, the drone that was purchased with a federal homeland security grant is now “too heavy” to fly under FAA standards.<sup>73</sup>

The use of drones for targeted killing is so controversial that the Central Intelligence Agency (“CIA”) attempted to conceal its involvement in the program.<sup>74</sup> The CIA continues to fight its involvement in the use of drones to carry out targeted killings.<sup>75</sup> However, the public is fully aware that drones are being used in targeted killings.<sup>76</sup> And, that is a very compelling reason for why there is a strong demand to keep drones out of the U.S. interior.

For this concept to strike closer to home, the Justice Department recently leaked a confidential sixteen-page report explaining that an imminent threat outweighs the due process protections afforded to Americans through the Constitution.<sup>77</sup> It essentially condones targeted killings aimed at U.S. citizens.<sup>78</sup> The report details that the United States does not need clear evidence of a specific attack in the immediate future.<sup>79</sup> Although the document focuses on lethal operations outside of the United States, it only takes one American al-Qaida leader located within the U.S. territory to turn these strikes into domestic killings. This report confirms the United States’ participation in the targeted killing of New Mexico-born al-Qaida extremist Anwar al-Awlaki.<sup>80</sup> Weeks later, al-Awlaki’s sixteen-year-old son was killed by another drone strike while eating at an outdoor

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73. Shawn Musgrave, *Montgomery County, TX Drone Too Heavy to Fly Under FAA Rules*, MUCKROCK NEWS (Jan. 16, 2013, 8:00 AM), <https://www.muckrock.com/news/archives/2013/jan/16/montgomery-county-tx-drone-too-heavy-fly-under-faa/>.

74. See *American Civil Liberties Union v. CIA*, 710 F.3d 422, 422 (D.C. Cir. 2013) (reversing lower court after CIA acknowledged its participation by prior disclosure); *American Civil Liberties Union v. DOJ*, 808 F. Supp. 2d 280 (D.D.C. 2011) (summary judgment granted because CIA neither confirmed nor denied existence in targeted killing program), *rev’d*.

75. See *American Civil Liberties Union*, 710 F.3d at 422.

76. Interview with Barack Obama, President, U.S. Gov’t, in D.C. (Jan. 30, 2012), available at <http://www.whitehouse.gov/photos-and-video/video/2012/01/30/president-obama-s-google-hangout>.

77. *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al’Qa’ida or An Associated Force*, DEPARTMENT OF JUSTICE WHITE PAPER, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (last visited Apr. 28, 2013).

78. *Id.* at 2 (“[If] the target of a lethal operation [is] a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, [then] that individual’s citizenship would not immunize him from a lethal operation.”).

79. *Id.* at 7.

80. Spencer Ackerman, *Qaida’s YouTube Preacher Is Killed In Yemen*, WIRED (Sept. 30, 2011, 8:26 AM), <http://www.wired.com/dangerroom/2011/09/awlaki-dead-yemen/>.

restaurant.<sup>81</sup> What reason was given for killing the sixteen year old without due process? He should “have had a more responsible father.”<sup>82</sup> The evidence supporting the killing of these Americans was never presented to a court.<sup>83</sup> The U.S. District Court for D.C. granted President Obama’s motion to dismiss citing, among other things, the separation of powers.<sup>84</sup>

## V. PROPOSAL

As research and development continues to grow, manufacturers are finding cheaper ways to make new “spy” gadgets. When new devices become cheaper, they penetrate the market at a faster rate.<sup>85</sup> The economic evaluation establishes that the product can become available to the general public. By this reasoning, drones could quickly become a household device and essentially could require the Supreme Court to revise the reasoning in *Kyllo v. United States*.<sup>86</sup> Perhaps the *Kyllo* Court did not anticipate the influx of cheap, technological devices; however, the opinion will not stand the test of time when infrared cameras become cheap enough for most households to afford. By the Court’s logic, the restriction against peering through walls will be “a thing of the past” as that technology becomes more available to the general public in a relatively short time frame. The Founding Fathers never intended to allow the police to see into private residences by peering through walls with infrared technology.<sup>87</sup>

One of the biggest issues is the use of domestic drones to invade curtilage. The police cannot use a dog to sniff a house without a warrant.<sup>88</sup> This is synonymous to police standing on a porch with high-powered binoculars to see inside the home.<sup>89</sup> The issue of curtilage has traditionally extended *out*, not *up*. Helicopters and airplanes are too large to invade the

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81. *Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings*, ACLU, <http://www.aclu.org/national-security/al-aulaqi-v-panetta> (last visited Apr. 28, 2013).

82. Conor Friedersdorf, *How Team Obama Justifies the Killing of a 16-Year-Old American*, THE ATLANTIC (Oct. 24, 2012, 7:02 AM), <http://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028/>.

83. *Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings*, ACLU, <http://www.aclu.org/national-security/al-aulaqi-v-panetta> (last visited Apr. 28, 2013).

84. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (mem. op.).

85 H.R. Con. Res. 1262, 113th Cong. § 2(3) (2013) (enacted).

86. See *Kyllo v. United States*, 533 U.S. 27 (2001).

87. See *id.* at 37.

88. *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).

89. *Id.* at 1418 (Kagan, J., concurring).

vertical curtilage of the house. For this reason, the Supreme Court has never needed to address the vertical curtilage of the home. However, the Supreme Court should adopt the existence of vertical curtilage to protect citizens from invasive drones. This new concept will not affect planes or helicopters flying at least 400 feet above ground level.<sup>90</sup> But, it will prevent unmanned aerial cameras from peering into homes.

As far as the implication of the Fifth Amendment, drones simply should not be used to kill Americans without due process of law. In a letter addressed to Senator Rand Paul, Attorney General Eric Holder conceded that it might “be necessary . . . for the President to authorize the military to use lethal force within the territory of the United States.”<sup>91</sup> In a separate letter, Holder expressly stated that the President is not authorized to kill a non-combative American on U.S. soil.<sup>92</sup> But, “combat” is a very loose term. In order to prevent a due process violation, we simply cannot entertain the idea of using domestic drones to target Americans on American soil.

Thus, to protect the Fourth Amendment, the courts should recognize vertical curtilage, which will extend vertically. This will provide a bubble-like protection for the home. To protect the Fifth Amendment due process, lethal domestic drones should never be used against American citizens.

## VI. CONCLUSION

The use of UAVs undeniably contains great societal contributions, such as hurricane tracking and locating missing persons in dense forests. On the other hand, the potential abuse of this technology can greatly outweigh the benefit to society. These abuses penetrate the very core of our constitutional foundation.

The courts are not equipped to address these violations in a timely manner; it may take years for a constitutional issue to reach the Supreme Court. The Supreme Court cannot address this issue right now; it is not ripe for review<sup>93</sup> and the Supreme Court is not authorized to issue advisory

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90. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 455 (1989).

91. Letter from Eric H. Holder, U.S. Attorney Gen., U.S. Dep’t of Justice, to Rand Paul, U.S. Senator, U.S. Senate (Mar. 4, 2013).

92. Letter from Eric H. Holder, U.S. Attorney General, U.S. Dep’t of Justice, to Rand Paul, U.S. Senator, U.S. Senate (Mar. 7, 2013).

93. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

opinions.<sup>94</sup> Government agencies are not likely to curtail the problem because they cannot be punished for such constitutional violations.<sup>95</sup> Additionally, the agency in the strongest position to regulate drones is the FAA, and that agency is more focused on the safety of the aviation industry.

As with most constitutional evaluations, the balancing test must be deployed. The Constitution, even over 200 years old, still provides American citizens with the right to be free from unreasonable searches and the right to receive due process of law. The modern implications of domestic drones have only just arrived in the past decade. On a pure seniority issue, the Constitution clearly prevails. And on a deeper review of the potential violation of fundamental rights, the Constitution prevails again. The societal benefits that drones provide do not outweigh the costs of violating constitutional rights. These rights were vocalized by the Founding Fathers. They, presumably, wanted to prevent the type of monarchy from which they fled.<sup>96</sup> Although they could not have envisioned a technological creation as advanced as drones, they knew the potential strength of a government and they wanted to protect the people from an abuse of power.<sup>97</sup>

We can provide a loud voice to prevent the United States from becoming the horrid state depicted in George Orwell's 1984. Domestic drones should not be an option. Drones are best suited for foreign combat. The United States Government has no reason to declare war on its people.

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94. See U.S. CONST. art. III § 2, cl. 1.

95. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-981, UNMANNED AIRCRAFT SYSTEMS: MEASURING PROGRESS AND ADDRESSING POTENTIAL PRIVACY CONCERNS WOULD FACILITATE INTEGRATION INTO THE NATIONAL AIRSPACE SYSTEM 15, 35 (2012).

96. See James Madison, *The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, in 47, THE FEDERALIST, ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); See also, *N.Y. Times Co. v. United States*, 915 F. Supp 2d 508, 521 (S.D.N.Y. 2013).

97. See *New York Times Co.*, 915 F. Supp. 2d at 521.

