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Joint Committee on Public Safety and Homeland Security
Rep. Harold P. Naughton, Jr., Chair
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SUPPORT FOR S.1349 and S.1348

Regulating the use of unmanned aerial vehicles, or drones

On behalf of the ACLU of Massachusetts and its more than 75,000 members and supporters statewide, we write in strong support of S.1349 and S.1348. These are important, timely efforts to regulate the use of unmanned aerial vehicles (UAVs), or drones, by establishing rules and standards for their operation, protections for individual privacy and critical infrastructure protection, and transparent public oversight. Massachusetts should give local communities the opportunity to be heard before municipal law enforcement entities acquire drones, and must ensure that police obtain warrants before using drones for criminal investigations, among other basic democratic safeguards.

The drone landscape in Massachusetts and the United States is changing rapidly—yet another reminder that technology moves much faster than the law, and that the law needs to catch up. At least 37 states have passed legislation to regulate the use of drones. Massachusetts should not wait any longer.¹

Drones are not the future—they are the present

Drone deployment in our great Commonwealth is no longer hypothetical. In the last days of 2013, we learned that officials at Joint Base Cape Cod were granted FAA authorization to test drones in the state.² Meanwhile, the Attleboro, Massachusetts police department began using surveillance drones in August 2015, when the local press reported it. The Attleboro police drones “can pinpoint the exact location of a person or object on the ground by GPS coordinates through the use of satellite technology,” are very quiet, and cost between \$1,400 and \$5,000.³ And in April 2017, the Town of Hanover announced it had received FAA authorization to fly a drone.

¹ Current Unmanned Aircraft State Law Landscape, National Conference of State Legislatures, May 24, 2017, available at <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx>.

² Michael P. Norton, Drone testing coming to Cape Cod, State House News Service, December 31, 2013, available at <http://www.capecodtoday.com/article/2013/12/31/23397-drone-testing-coming-cape-cod>.

³ George Rhodes, Sky Patrol: Attleboro police department has “fleet” of drones, August 1, 2015, The Sun Chronicle, available at http://www.thesunchronicle.com/news/local_news/sky-patrol-attleboro-police-department-has-fleet-of-drones/article_f5e7d4a7-171c-518d-b682-3b6d027030c2.html.

According to news reports, at least one of the six licensed town pilots is an employee of the local police department.⁴

The Department of Homeland Security and Federal Bureau of Investigation routinely fly drones above our airspace, without any outside oversight, judicial accountability, or demonstration of probable cause to believe that unlawful activity is the subject of drone surveillance.⁵ The FBI's official policy, disclosed through public records requests, allows its agents to fly surveillance drones over homes and record what's going on in backyards, behind private fences, all without warrants.⁶ Most importantly for Massachusetts legislators, federal agencies loan their drones to state and local law enforcement hundreds of times per year, a number that increases each day as law enforcement demand grows for these powerful and unregulated surveillance systems.⁷

While the Attleboro and Hanover police departments are the only law enforcement organizations in the state to publicly disclose their use of drones, many departments have tested the technology or expressed interest in acquiring it.⁸ About his department's view on buying drones, METROLEC SWAT team member Chris Baker told local reporters, "That's a no-brainer. If the [Federal Aviation Administration] says we can use them, then you can bet that we're going to put them up." The Massachusetts State Police and Boston Police Department have also "begun to consider" and in some cases "even budget for" drones, according to WBUR.⁹

Regulating drones is good for industry

Enactment of a statewide regulatory framework, like S.1349 and S.1348, will protect not only civil rights and civil liberties but also the drone industry itself. Proponents of drone technology say that the industry will bring thousands of jobs to the Bay State. But if the experiences of other cities and states are any indication, the absence of regulation may in fact hurt rather than help the nascent drone industry in Massachusetts.

In the absence of statutes to balance law enforcement needs with legitimate privacy interests, a number of cities in other states have outright banned police drones.¹⁰ In Seattle, Washington, community outcry stopped the police department from acquiring a surveillance drone. Community members worried that, in the absence of regulations, the technology could easily be abused.¹¹ Commonsense regulation both fosters the Commonwealth's viability as a host for an emerging industry, and ensures that this prosperity doesn't come at the expense of individual freedoms.

⁴ Kristin Lafratta, Hanover becomes first Massachusetts community to have town drone, MassLive, April 25, 2017, available at http://www.masslive.com/news/boston/index.ssf/2017/04/hanover_becomes_first_massachu.html.

⁵ Jordy Yager, FBI admits using drones to spy in US, The Hill, June 19, 2013, available at <http://thehill.com/homenews/news/306703-fbi-admits-using-drones-to-spy-in-us>.

⁶ Shawn Musgrave, Revealed: The FBI's Internal Guidelines for Warrantless Drone Surveillance, Vice Magazine, December 2013, available at <http://motherboard.vice.com/blog/revealed-the-fbis-internal-guidelines-for-warrantless-drone-surveillance>.

⁷ Associated Press, DHS has lent border drones hundreds of times, The Washington Post, January 15, 2014, available at http://www.washingtonpost.com/world/national-security/dhs-has-lent-border-drones-hundreds-of-times/2014/01/15/2ec3f672-7e2d-11e3-97d3-b9925ce2c57b_story.html.

⁸ George Rhodes, Attleboro only local police using drones, August 1, 2015, The Sun Chronicle, available at http://www.thesunchronicle.com/news/local_news/attleboro-only-local-police-using-drones/article_7964375c-28af-5f83-85d3-5d4533cc8700.html.

⁹ Fred Bever, With Drones Rising, 'Rules of the Sky' Needed, January 24, 2014, WBUR, available at <http://www.wbur.org/2014/01/24/drones-massachusetts-regulations>.

¹⁰ Shawn Musgrave, Joining a Handful of Other Cities, Lincoln, Nebraska Bans Police Drones, January 16, 2014, Vice Magazine, available at <http://motherboard.vice.com/blog/joining-other-cities-lincoln-nebraska-preemptively-bans-police-drones>.

¹¹ Christine Clarridge, Seattle grounds police drone program, February 7, 2013, The Seattle Times, available at http://seattletimes.com/html/localnews/2020312864_spddronesxml.html.

Modern technology requires modern privacy and public safety law

Drone technology brings with it many opportunities – from more affordable ways to gather information for traffic reports to more efficient ways to count deer in the forest. Unregulated, however, warrantless drone operations could interfere with residents’ reasonable expectation of privacy, chill First Amendment-protected activities, threaten public safety, and lead to discriminatory targeting.

The drones that are taking to Massachusetts skies are powerful tools, and the technology is evolving rapidly. Currently in development are drones small enough to fly into houses undetected,¹² as quiet as a mouse.¹³ They can hover and observe people’s activity secretly, silently, and constantly.¹⁴ Drones are not just cameras; they can be equipped with a host of sophisticated surveillance technologies, including cell phone “sniffers” that intercept cell tower data¹⁵ and invasive biometric tools capable of tracking everyone in a given area, whether or not they are intended surveillance targets.¹⁶

Drones are not like helicopters or any other police vehicle. They aren’t subject to the same practical limitations as helicopters, which are costly and require trained, human pilots, launch pads, and flight and ground crews. Drones are cheap, small, and quiet. Therefore unlike with helicopters, every single town and city in the state could conceivably afford to fly multiple drones in secret.

How and why we must regulate drones in Massachusetts

The ACLU has significant concerns about the use of unmanned aerial surveillance technology to collect information about people suspected of no crime. If law enforcement officials want to use a drone to monitor someone for criminal or intelligence purposes, the police should be required to obtain a warrant.

But a basic warrant protection will not arrive from heaven, or likely even from the courts—at least for many years. The pace at which surveillance technology has evolved in recent years has far outstripped the pace at which laws have adapted to protect individuals’ privacy. Congress required the Federal Aviation Administration (FAA) to open domestic airspace more widely to drones, but the FAA has made clear that its mandate is airspace safety, *not* privacy. Lawmakers in Washington have not moved on drone privacy legislation, and it is unlikely the existing proposals will move any time soon. Therefore, it is incumbent upon state lawmakers to protect Massachusetts residents’ privacy by modernizing the law to fold drone surveillance into the Fourth Amendment gold standard: the probable cause warrant requirement.

S.1349 and S.1348 strike the right balance by permitting law enforcement use of drones only in emergencies or with a probable cause warrant issued by a judge. These commonsense proposals

¹² Elisabeth Bumiller and Thom Shanker, War Evolves With Drones, Some Tiny as Bugs, June 19, 2011, The New York Times, available at http://www.nytimes.com/2011/06/20/world/20drones.html?pagewanted=all&_r=0

¹³ Robert Beckhusen, Super-Silent Owl Drone Will Spy on You Without You Ever Noticing, July 19, 2012, Wired Magazine, available at <http://www.wired.com/dangerroom/2012/07/owl/>

¹⁴ Ryan Gallagher, Could the Pentagon’s 1.8 Gigapixel Drone Camera Be Used for Domestic Surveillance?, February 6, 2013, Slate, available at http://www.slate.com/blogs/future_tense/2013/02/06/argus_is_could_the_pentagon_s_1_8_gigapixel_drone_camera_be_used_for_domestic.html

¹⁵ Declan McCullagh, DHS built domestic surveillance tech into Predator drones, March 2, 2013, CNET, available at http://news.cnet.com/8301-13578_3-57572207-38/dhs-built-domestic-surveillance-tech-into-predator-drones/

¹⁶ Noah Shachtman, Army Tracking Plan: Drones That Never Forget a Face, September 28, 2011, Wired Magazine, available at <http://www.wired.com/dangerroom/2011/09/drones-never-forget-a-face/>

outlaw the weaponization of drones; prohibit law enforcement from using drone surveillance footage to identify anyone other than the target specified in the warrant; bar the warrantless use of facial recognition and other biometric tracking; forbid the use of drones for monitoring First Amendment protected speech and association; and require that data collected on bystanders be promptly deleted. When drones are used for purposes other than authorized criminal investigations by law enforcement, the data they collect would, under the statutes, be disallowed as evidence in court.

Additionally, the bills contain two important mechanisms for public accountability. First, they would require law enforcement agencies obtain approval from their local governing body before acquiring drones. That's good democratic practice. Second, they would establish a robust reporting requirement to keep policymakers and the public informed about drone use in the Commonwealth. Transparency is key in a democratic society, and technology shouldn't change that.

Finally, S.1348 forbids members of the public from knowingly flying drones less than 400 feet above a critical infrastructure facility, or in a manner that interferes with the operations of the facility. Keeping our water treatment stations, nuclear power plant, and other critical infrastructure sites safe and secure is necessary for public safety, and this provision in S.1348 is an important step toward ensuring that our critical infrastructure protection laws keep pace with developments in consumer technology.

Massachusetts should join Florida, Idaho, Illinois, Indiana, Iowa, Montana, Oregon, Tennessee, Texas, Utah, Virginia, and Wisconsin in passing legislation to mandate warrants for law enforcement deployment of this powerful technology, before our friendly skies are swarming with video cameras and other high tech surveillance tools.

Before drones become ubiquitous in our airspace, we need clear rules so that we can enjoy the benefits of this technology without needlessly sacrificing our privacy and liberty. S.1349 and S.1348 will provide the needed checks and balances to prevent indiscriminate mass surveillance, and will create a clear standard for police, ensuring the integrity of criminal investigations and prosecutions.

We urge the committee to give legislation such as S.1349 and S.1348 a favorable report, and we offer ourselves as a resource to address any concerns regarding this very necessary legislation.