

Brookings Paper Pushes Back on Claims that UAS Threaten Unique Privacy Harm

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As the Federal Aviation Administration's (FAA) rulemaking for the integration of unmanned aerial systems (UAS) into domestic airspace approaches, privacy advocates are sounding the alarm, claiming that increased use of UAS will harm privacy and lead to an erosion of civil liberties. Aggressive lobbying has led to the enactment of laws in thirteen states regulating law enforcement use of UAS.^[1] Such lobbying efforts are likely to increase as the FAA moves forward with rulemaking proceedings, and as local law enforcement agencies continue to roll out new uses for UAS.

Some scholars, however, are beginning to push back on what they consider to be the exaggerated claims of privacy advocates. A recent paper published by the Brookings Institution, "Drones and Aerial Surveillance: Considerations for Legislators," makes the case that the focus on UAS technology is misguided and counterproductive. According to the paper's author, Professor Gregory McNeal of the Pepperdine University School of Law, "legislation being pushed by privacy advocates has been explicitly directed at drone technology, not because the technology represents an actual threat to civil liberties, but because someday in the future, the technology may be intrusive." He argues that legislators should adopt a technology-neutral approach that aims to achieve privacy and other goals without singling out emerging UAS technology that is no more harmful—and may in fact be more beneficial—than other methods used by law enforcement.

The paper makes five legislative recommendations for pursuing this goal.

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Practice Areas

Uncrewed Aircraft Systems (UAS)

- First, legislators should adopt a “property rights approach” to aerial surveillance that respects the right of landowners to exclude and is consistent with freedom of navigation above a certain altitude. Although targeted at law enforcement, this approach may also have the effect of alleviating other public and private harms associated with UAS.
 - Second, legislators should design duration-based surveillance legislation that limits the aggregate amount of time the government can surveil specific individuals.
 - Third, legislators should adopt data retention policies and procedural protections limiting access to stored data and the amount of time it can be kept.
 - Fourth, legislators should enact transparency and accountability measures requiring government agencies to make certain disclosures about their surveillance practices.
 - Finally, legislators should recognize that technologies such as geo-fencing and auto-redaction may make UAS-based surveillance more protective of privacy than other forms of surveillance.
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[1] See Michael L. Smith, *Regulating Law Enforcement’s Use of Drones: The Need for State Legislation* (September 5, 2014). Harvard Journal on Legislation, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2492374>.