

MEMORANDUM FOR: Sheriff

SUBJECT: Using Drones as an Investigative Tool Without a Warrant

The controversy over use of drones, without a warrant, has been an ongoing struggle that has delayed the use of a tool that is integral to the technological advancement of law enforcement investigations. I would like to refer this potential course of action as a study in which the command staff of this agency may use to draft a thorough and informed agency policy that allows the permitted use of drones within the confines of the law without abusing the privilege or relinquishing public trust. The allowances of aerial observation are already granted to law enforcement by the following case laws, which state:

“United States v. Causby, 328 U.S. 256 (1946): The air above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority is a public highway and part of the public domain, as declared by Congress in the Air Commerce Act of 1926, as amended by the Civil Aeronautics Act of 1938.”

“California v. Ciraolo, 476 U.S. 207 (1986): The Fourth Amendment was not violated by the naked-eye aerial observation of respondent's backyard. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible.”

“Florida v. Riley, 488 U.S. 445 (1989): Fourth Amendment purposes that the helicopter was flying below 500 feet, was not violating the law, and any member of the public or the police could legally have observed respondent's greenhouse from that altitude. Moreover, there is no evidence that there was undue noise, wind, dust, or threat of injury.”

In short, making observations from any other public domain of higher elevation, e.g.: the adjacent hillside, the neighbor's upstairs window that overlooks the subject's yard (with permission of the homeowner), or the public airspace above the home, are all legal methods of observation. The use of a drone to conduct these observations are essentially equivalent to an officer climbing up to higher ground with a telescope and camera. Requesting the flyover of the agency's helicopter is legal, therefore, not only is utilization of a drone legal, it is also fiscally responsible and less invasive.

The real question is to what level of technology is authorized when conducting these aerial observations. This issue has also been addressed in both *Katz v. United States*, 389 U.S. 347 (1967) and *Kyllo v. United States* 533 U.S. 27 (2001). In the case of *Katz*, investigators recorded a conversation the subject made when he used a public telephone. The ruling was against “the Government's eavesdropping activities” stating it “violated the privacy upon which petitioner justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.” Additionally, in the case of *Kyllo*, law enforcement used heat sensing technology to determine if a marijuana grow was inside the home. The ruling held that, “Government uses of a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion,

the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant."

I have, in my possession, a drone equipped with a standard purchase high resolution camera, and a Technician Class Amateur Radio License, all of which are readily accessible to the general public. I am capable of launching and flying my drone from a distance that would be undetectable from anyone on the property to be observed, thus not interfering in their normal operations, and not causing undue noise, wind, dust, or threat of injury. I have already conducted over an hour of surveillance on this property with negative results. In less than 5 minutes I could, legally, survey the property in question and determine if the citizen's complaint is founded or unfounded. If illegal activity is observed, the legally obtained observations will serve as probable cause for the search warrant. This five minute action would save the agency hours of additional time and money in both manpower and resources. There is no immediate threat from this property, so I have yet to conduct this aerial observation, however, this case could have potentially been open and shut within minutes. I am seeking approval before testing this technology out of respect for this agency and would implore its results be considered toward the drafting of agency policy approving the use of drones for general investigative observations.

*Elisha Hubbard*

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Deputy Sheriff

San Diego Sheriff's Department

Resources:

Justia, <https://supreme.justia.com/cases/federal/us/328/256/case.html>

Schlag, Chis, "The New Privacy Battle: How the Expanding use of Drone Continues to Erode Our Concept of Privacy and Privacy Rights," University of Pittsburgh Journal of Technology Law and Policy, Spring 2013.