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# Drones at Home: Domestic Drone Legislation -- A Survey, Analysis and Framework

Colonel Dawn M.K. Zoldi

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## ARTICLE

### **Drones at Home:**

### ***Domestic Drone Legislation - A Survey, Analysis and Framework***

***Colonel Dawn M.K. Zoldi\****

#### ABSTRACT

*Can the government employ drones domestically without running roughshod over personal privacy? In an effort to preemptively rein in potential government overreach, most states have proposed legislation that restricts or forbids government drone use. The intent is to prevent drone use for warrantless information and evidence collection. Ironically, many of these proposals will have the opposite affect intended. State-by-state drone legislation may lead to consequences such as the erosion of Fourth Amendment jurisprudential principles, losses of life and property, procedural windfalls to criminals, and deleterious effects on the military.*

*Lawmakers should take a nuanced approach to government drone use rather than selectively revising constitutional protections. A nuanced approach would allow the federal government to use drones to their full potential while also protecting personal privacies. There are four principles that should guide drone legislation: (1) apply the Fourth Amendment agnostically; (2) ensure operational purpose language distinguishes between law enforcement and non-law enforcement professionals; (3) focus new regulations focus on information collection, dissemination, and retention; (4) develop narrowly tailored remedies that deter specific behavior consistent with their historical purpose. Drone legislation drafted with these principles in mind will protect our national security and our civil liberties.*

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### I. INTRODUCTION

Federal drone use does not have to come at the expense of protecting personal privacy. The Federal Aviation Administration (FAA) Modernization and Reform Act of 2012 mandates the “safe integration of civil unmanned aircraft systems” into the national airspace system by the end of 2015. It makes no mention however, of privacy protections. In the absence of Federal guidance, states have jumped into the fray. Most states have proposed restrictive legislation that limits government drone use for collecting information and evidence on residents or their property. In comparing state legislation and Department of Defense (“DoD”) policies within established constitutional principles, this article seeks to present a coherent framework that provides for the protection of civil liberties while unlocking the full potential of government drone use.

Part II of this article details the state legislative landscape. Part III discusses

current DoD policies that apply to drones, in contrast to proposed state legislation. Part IV explores the unintended consequences that state drone legislation may have on civilian and military drone operations and the Fourth Amendment. It also proposes four principles that should guide future state drone legislation.

## II. THE STATE LEGISLATIVE LANDSCAPE

Drone legislation and policy is a dynamic issue.<sup>1</sup> The overwhelming majority of states have proposed legislation to regulate drone use.<sup>2</sup> Almost half of the states are entertaining multiple bills simultaneously.<sup>3</sup> Eight states have already passed drone legislation.<sup>4</sup> The stated purpose or need for such action is generally to either protect citizens' privacy or to be free from "unwarranted" surveillance.<sup>5</sup> Most of these bills apply to local law enforcement agencies and prohibit them from using drones to collect information or evidence, with certain exceptions. Many levy administrative requirements on drone use and contain significant ramifications for violating them. A more detailed discussion of these state provisions follows.

### A. *Applicability of State Legislation*

Restrictive state drone proposals are often too broadly written. While most state drone proposals apply to state governmental actors, many are written broadly enough to apply to Federal government and military operators. Furthermore, they generally do not regard the unique responsibilities or requirements of each entity. All but nine of the eighty-six state drone bills surveyed across forty-seven states apply to state, county, or municipal agency officials or employees.<sup>6</sup> Most apply to local law enforcement agencies directly

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<sup>1</sup> Some of the bills discussed herein have already died in committee, and by the time of publication, more bills will have been introduced. The usefulness of this review is to understand trends as a likely predictor of future action.

<sup>2</sup> Only seven states have yet to introduce a bill: CO, CT, DE, LA, MS, SD, and UT.

<sup>3</sup> Twenty-four states (AK, AZ, AR, CA, GA, IL, IN, IA, KY, MA MI, MN, NJ, NY, NC, OK, OR, PA, RI, SC, TN, VA, WA, and WV) have introduced two or more bills.

<sup>4</sup> FL, ID, IL, MT, OR, TN, TX, and VA have all passed drone legislation.

<sup>5</sup> See *supra* note 2 for a review of the various bill titles.

<sup>6</sup> Almost ninety percent of bills apply to state employees. Of those that do not, five create task forces, committees or legislative study groups to make recommendations on the impacts of drone use on privacy. See Enrolled H.R. 6, 28th Leg. (Alaska 2013); H.B. 2269, 51st Leg., 1st Reg. Sess. (Ariz. 2013); S.R. 217, 2013 Leg., Gen. Assemb. (Ill. 2013); S.R. 27, 118th Gen. Assemb., 1st Sess., (Ind. 2013); H. Comm. Res. 101 (W. Va. 2013) Two either appropriate funds for drone operations or request the FAA to consider their state a test site. See Assemb. J. Res. 6, 2013-2014 Reg. Sess. (Cal. 2013); S.B. 385, 77th Leg. (Nev. 2013); Assemb. B. 507, 77th Leg.

or by implication.<sup>7</sup> Thirty-five state drone proposals also specifically apply to the federal government.<sup>8</sup> Other state drone provisions apply to “persons,”

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(Nev. 2013). The New Hampshire bill only applies to private persons and, in fact, specifically excludes government agencies from its prohibition on knowingly imaging the exteriors of residential dwellings. H.B. 619, ¶ IV-a, 2013 Sess. (N.H. 2013).

<sup>7</sup> S.B. 317, § 1(2) (Ala. 2013); H.B. 159a, 28th Leg., 1st Sess. (Alaska 2013) (amending § 4. AS 1865, Art. 13, § 18.65.900); H.B. 2574, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (amending § 1, Tit. 13, Ch. 30 ARS, 13-3007, § A); H.B. 1904, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (amending Ark. Code Tit. 12, as 12-19-103); Assemb. B. 1327, § 1, Tit. 14, 14350(b) (Cal. 2013); S.B. 15, § 5 (Cal. 2013); S.B. 92, § 1(3) (Fla. 2013); S.B. 200, § 4(1), Gen. Assemb. (Ga. 2013); H.B. 560, § 2 (Ga. 2013) (amending Art. 2 of Ch. 5 of Tit. 17 Code of Ga. Ann. as 17-5-33(1) and (2)); S.B. 83, § 2563B-2(b), Reg. Sess. (Haw. 2012); S.B. 1134, § 1, 21-213(2)(b), 62nd Leg., 1st Reg. Sess. (Idaho 2013); S.B. 1587, § 5, Gen. Assemb. (Ill. 2013); S.B. 20, 118th Gen. Assemb., Reg. Sess. (Ind. 2013) (amending Ind. Code, Ch. 10, § 1); S.B. 276, § 80C.1-1 1, Gen. Assemb. (Iowa 2013); H.B. 410, § 1.1 (Iowa 2013); H.B. 427, § 1.2 (Iowa 2013); H.B. 2394, § 1(a) (Kan. 2013); H.B. 454, § 1, Ch. 500(1)(b), Gen. Assemb. (Ky. 2013), Ky. 14 RS BR 1, § 1.1(b) (Ky. 2013); S.P. 72, 126th Leg., 1st Reg. Sess. (Me. 2013) (amends § 1, 25 MRSA Pt. 12, § 4501.1); H.B. 1233, 1-203-1(A)(3), Gen. Assemb. (Md. 2013); S.B. 1664, 188th Gen. Assemb. (Mass. 2013); H.B. 1357, § 1 (Mass. 2013) (amending Ch. 272 of Gen. Laws as 99C(c)); H.B. 4455, § 1(a) (Mich. 2013); H.F. 1620, § 3, Sub. 1(c) & (e), Leg. (Minn. 2013), S.F. 1506, § 1, Sub. 1(c) (Minn. 2013); H.F. 990, § 3, Subdiv. 1.(3) (Minn. 2013); H.B. 46, § 305.637.2, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); S.B. 196, 63rd Leg. (Mont. 2013); Legis. B. 412, § 2(2), 103rd Leg., 1st Sess. (Neb. 2013); S.B. 3157, § 2.a., Gen. Assemb. (N.J. 2012); S.B. 3929, Gen. Assemb. (N.J. 2012); S.B. 556, § 2.B, 51st Leg. (N.M. 2013); S.B. 4537, § 1, S 52-A.1 (N.Y. 2013); S.B. 6244, § 1.S 700.16, ¶ 1; H.B. 312, § 15A-232(b), Gen. Assemb. (N.C. 2011); S.B. 402, § 716(e), Gen. Assemb. (N.C. 2013); H.B. 1373, § 1.1, 63rd Leg. Assemb. (N.D. 2013); H.B. 207, § 4651.50(A), 130th Gen. Assemb., Reg. Sess. (Ohio 2013); H.B. 1556, 54th Leg., 1st Sess. (Okla. 2013); H.B. 2710, § 1(b), 2013 Leg. Sess. (Or. 2013), S.B. 524, § 1(1)(b) (Or. 2013); S.B. 71, § 4(1) (Or. 2013); S.B. 853, § 2(1) (Or. 2013); H.B. 961, 2013 Sess., Gen. Assemb. (Pa. 2013) (amending Ch. 57 of Tit. 18 of Pa. Cons. Stat., Sub. E.1., § 5776(a)); S.B. 875, § 3 (Pa. 2013); H.B. Jan. 2013 Sess. (R.I. 2013) (amending Tit. 12 of Gen. L., Ch. 5.3, 12-5.3-1); H.B. 3415, 120th Sess., Gen. Assemb. (S.C. 2013) (amending Ch. 13, Tit. 17 of 1976 Code as 17-13-180(A)(2)); Gen. Assemb. B. 395, § 6-39-30(A)); H.B. 591, § 1(b)(2), Gen. Assemb. (Tenn. 2013); H.B. 912, Ch. 423, § 423.002(8) (Tex. 2013); H.B. 540, Gen. Assemb. (Vt. 2013) (amending § 1 20 V.S.A. Ch. 205 as § 4622(a)); S.B. 16, Gen. Assemb. (Vt. 2013); H.B. 20012, 1 § 1, Gen. Assemb. (Va. 2013); H.B. 1771, § 2, 63rd Leg., 2013 Reg. Sess. (Wash. 2013); S.B. 5782, 63rd Leg., 2013 Reg. Sess. (Wa. 2013); H.B. 2732, Art. 7, § 1-7-2, (W.Va. 2013); H.B. 2948, Art. 7, § 1-7-3 (W.Va. 2013); H.B. 2997, Art. 7, § 1-7-1 (W.Va. 2013); S.B. 196 & Assemb. B. 203, § 2(2) (Wyo. 2013); H.B. 0242, 7-3-1002(a)(ii) (Wyo. 2013). An outlier, the Arkansas bill, which makes it a crime to knowingly use a drone to record another person or person’s property, specifically excludes law enforcement from its provisions. S.B. 1009, § 1(b)(2) (Ark. 2013).

<sup>8</sup> S.B. 317, § 1(2), 2013 Leg. (Ala. 2013) (“[A]ny municipal, county, state, or federal agency the personnel of which have (sic) the power of arrest and perform a law enforcement function.”); S.B. 1109, § 1, 5-60-106(b)(1)(A) – (B), 89th Gen. Assemb., Reg. Sess. (Ark. 2013) ([A] federal agency, unless acting at the request of a state law enforcement officer or emergency responder); S.B. 200, § 4(1), 2013 Gen. Assemb. (Ga. 2013); *See also* H.B. 560, § 2 (Ga. 2013) (amending Art. 2 of Ch. 5 of Tit. 17 Official Code of Ga. Ann. as 17-5-33(1) and (2)) (“[A] law

which includes officers of the United States.<sup>9</sup> Others extend their reach to “agents,” which act on behalf of state authorities.<sup>10</sup> Interestingly, only nine bills mention the U.S. military, or some component thereof.<sup>11</sup> Three of those bills

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enforcement officer of any department or agency of the United States who is regularly employed and paid by the United States, this state or any such political subdivision...”); H.B. 1556, § 3(B)(6), 54th Leg., 1st Sess. (Okla. 2013); S.B. 853, §1(2) (Or. 2013); H.F. 1620, § 3, Sub 1(c), 88th Sess. (Minn. 2013) (federal agenc(ies)”; H.B. 3415, 120th Sess., Gen. Assemb. (S.C. 2013) (amending Ch. 13, Tit. 17 of 1976 Code as 17-13-180.(A)(2); H.B. 2732, Art. 7, § 1-7-2, 2013 Leg. (W. Va. 2013); H.B. 0242, 7-3-1002(a)(ii), 2013 Leg. (Wyo. 2013) (including “federal agency” in their definition of the term “law enforcement agency”); Assemb. B. 3929, 215th Leg. Assemb. (N.J. 2013) (“[S]tate, local, or interstate law enforcement agency”); The Oregon bill specifically includes Department of Justice (DoJ) criminal investigators in its definition of law enforcement. Two Massachusetts bills apply to government entities or officials, without further definition. H.B. 2710, § 1(1)(b) (Or. 2013). S.B. 133.525 defines police officers as including DoJ criminal investigators. <http://www.oregonlaws.org/ors/133.525>.

<sup>9</sup> H.B. 2574, § 13-3007.B., 51st Leg., 1st Reg. Sess. (Ariz. 2013); S.B. 15, § 2(a) – (b), 2013 Leg. (Cal. 2013) (amending § 1708.8 of the Civil Code); S.B. 783, § 263B-2(b), 27th Leg. (Haw. 2013); S.B. 1134, § 1(2)(a), 62nd Leg., 1st Reg. Sess. (Idaho 2013); H.F. 990, § 3, Subd.1(b), 88th Sess. (Minn. 2013); S.B. 20, § 4(a), 118th Gen. Assemb. (Ind. 2013); H.B. 46, § 305.637.2, 97th Gen. Assemb. (Mo. 2013); S.B. 71, 77th Leg. Assemb. (Or. 2013); S.B. 853, §2(2) (Or. 2013); A.O. 8091, § 1, ¶ 5, 2013 Leg. Assemb. (N.Y. 2013); H.B. 312, §2(a)(2), 2013 Leg. Sess. (N.C. 2013); Gen. Assemb. Sess. Jan. 2013 (R.I. 2013) (amending Tit. 12 of Gen. Laws, Ch. 5.3, 12-5.3.-1); H.B. 912, Ch. 423, § 423.003(a), 2013 Leg. (Tex. 2013); H.B. 1771 § 6, 63rd Leg. (Wash. 2013); S.B. 5782, § 2(6), 63rd Leg. (Wash. 2013); S.B. 203/196, § 3(2), 2013-2014 Leg. Sess. (Wis. 2013).

<sup>10</sup> H.B. 159, § 13(b), 2013 Leg. (Alaska 2013); S.B. 783, § 263B-2(b), 27th Leg., Reg. Sess. (Haw. 2013); H.B. 11, § 1(1)(c), Reg. Sess. (Ky. 2014); H.B. 207, § 4651.50(A), 130th Gen. Assemb., (Ohio 2013); H.B. 4455, § 1(a), 79th Leg., Reg. Sess. (Mich. 2013); Assemb. B. 6244, § 1, ¶ 1, 236th Leg. Sess., (N.Y. 2013); Assemb. B. 6370, ¶ 5(C), 236th Leg. Sess., (N.Y. 2013); S.B. 4537, § 52-a., 236th Leg. Sess., (N.Y. 2013); H.B. 5780, Ch. 5.3, 12-5.3-2(b), 2013 Leg. Sess., (R.I. 2013); H.B. 912, Ch. 423, § 423.002(8), 83rd Leg., (Tex. 2013); While none of these bills define the term “agent,” an agency relationship is typically characterized as one in which “a person is authorized by another to act for him.” BLACK’S LAW DICTIONARY 59 (5th ed. 1979). To conclusively determine the parameters of an agency relationship, one would have to research applicable criminal or civil precedent in the relevant state or federal forum.

<sup>11</sup> H.B. 11, § 1(4)(b), Reg. Sess. (Ky. 2014). The Kentucky General Assembly proposed a bill that would permit the “U.S. Armed Forces” stationed in the State to “use drones for purposes of training”; H.B. 1556, § 5.C., 1st Reg. Sess. of 54th Leg., (Okla. 2013). The Oklahoma bill, which was held over until next session and replaced with a call for an interim study on drone privacy issues, specifically permitted the “United States military” to operate “weaponized” drones over public land for purposes of testing and training; H.B. 1771, § 2 and 9(c), 63rd Leg., (Wash. 2013). This would exclude application of its prohibitions to the “Washington National Guard in title (sic) 32 U.S.C. status” and permit training exercises “conducted on a military base....” where the drone “does not collect personal information on persons located outside the military base”; Assemb. B. 3157, ¶ 5., 215th Leg., (N.J. 2013). The New Jersey proposal, which would make the purchase, ownership or possession of a drone a “disorderly persons offense,” exempts “any member of the Armed Forces of the United States or member of the National

have become law.<sup>12</sup>

Bills that prohibit use of “weaponized” drones would also seemingly apply to the DoD, unless exempted.<sup>13</sup> The state proposals that overtly address the U.S. military have applicability language so broad that could be interpreted to include military use. If so, those proposals could have deleterious effects on military training, operations and combat readiness. Specifically, about one-third of the drone restriction bills are ambiguous enough to implicate the DoD. Several bills, which purport to apply to those acting under state authority, may apply to the National Guard in Title 32 or State Active Duty (SAD) status.<sup>14</sup> As discussed above, state bills that apply to any “person” or “entity,” could apply to DoD officials, employees or personnel.<sup>15</sup> The same logic applies to bills that

Guard while on duty or traveling to or from an authorized place of duty.”; S.B. 875, § 5(1)-(3), 197th Gen. Assemb., (Pa. 2013). The Pennsylvania Senate Bill, which remains in committee, exempts its National Guard.; H.B. 46, § 305.639(2), 97th Gen. Assemb., First Reg. Sess., (Mo. 2013), The Missouri bill permits higher education institutes to conduct educational, research or training programs in collaboration with the DoD.; S.B. 853, § 12(1), 77th Leg. Assemb., (Or. 2013). Finally, a draft Oregon bill, would have excluded “the Armed Forces of the United States...or any component of the Oregon National Guard from using drones during a drill, training exercise or disaster response.”

<sup>12</sup> H.B. 2710, § 16, 77th Leg. Assemb., (Or. 2013). The Oregon law explicitly exempts the “Armed Forces of the United States” from its provisions. The law references ORS 351.642, which defines “Armed Forces of the United States” as including: (A) The Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; (B) Reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; and (C) The National Guard of the United States and the Oregon National Guard.; H.B. 912, § 423.002(3), 83rd Leg., (Tex. 2013). The Texas law contains a lengthy “non-applicability” section which excludes drone use that is, “part of an operation, exercise, or mission of any branch of the United States military.”; H.B. 2012, ¶ 1, § 1, 2013 Reg. Sess., (Va. 2013), The Virginia bill, which was approved on April 3, 2013, contains verbatim language of a Pennsylvania Senate Bill: S.B. 875, § 5(1)-(3), 197th Gen. Assemb. (Pa. 2013), which exempts its National Guard from prohibitions on drone use before 2015. Both state, “The prohibitions in this section shall not apply to the (State) National Guard while utilizing unmanned aircraft systems during training required to maintain readiness for its federal mission, when facilitating training for other United States Department of Defense units, or when such systems are utilized for the Commonwealth for purposes other than law enforcement, including damage assessment, traffic assessment, flood stages, and wildfire assessment...”

<sup>13</sup> States containing a ban against use of weaponized drones, as well as the concept of federal pre-emption, are discussed below.

<sup>14</sup> “Title 32” status is usually a “training” status, where the federal government provides training funds to National Guard units.

<sup>15</sup> S.B. 1134, § 21-213, ¶ (2)(a), 62nd Idaho Leg., 1st Reg. Sess., (Idaho 2013). Idaho applies their restrictions to any “entity” (undefined) or “person” using a drone to conduct surveillance. S.B. 1664, § 99C, ¶ (c), 188th Gen. Ct., (Mass. 2013). The Massachusetts proposal applies to government entities or officials, but does not define the term. See S.B. 20, Chap. 10, § 4, 118th Gen. Assemb., (Ind. 2013); H.B. 46, § 305.637, 97th Gen. Assemb., 1st Reg. Sess., (Mo. 2013); H.B. 912, § 423.002, (Tex. 2013). H.B. 1771, § 2, ¶ (6) and § 13, (Wash. 2013). These bills apply

extend their reach to “agents” of state law enforcement.<sup>16</sup>

### B. *Drone Prohibitions and Exceptions*

Restrictive state legislative proposals will have unintended consequences. To preemptively rein in potential government overreach, most states have proposed legislation that forbids government officials from using drones to collect information or evidence without a warrant. However, many proposals selectively apply the judicially accepted exceptions to the warrant requirement. For this and other reasons, these proposals will have significant second and third order effects to the detriment of our greater society, including eroding long-standing Fourth Amendment jurisprudence.

Almost universally, state drone bills prohibit drone users from collecting or receiving “information and evidence” on persons within that State.<sup>17</sup> There are

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to any “person” operating a drone, and the Wash. bill defines a “person” broadly as “any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision or any other legal or commercial entity and any successor, representative, agent, agency or instrumentality thereof.”

<sup>16</sup> An agency relationship between the DoD and State or local governments could occur during a Defense Support for Civil Authorities (DSCA) operation, such as assisting law enforcement or during disaster relief.

<sup>17</sup> S. B. 317, § 1(b)(1), 2013 Reg. Sess. (Ala. 2013); H.B. 159a, 28th Leg., (Alaska 2013). Amending § 4.; H.B. 2574, 51st Leg., First Reg. Sess., (Ariz. 2013). Amending § 1, Title 13, Ch. 30 ARS, 13-3007, § A.; H.B. 1904, (Ark. 2013). Amending AR Code Title 12, as 12-19-104(a); S.B. 15, Title 14, § 14352(a), 2013-2014 Reg. Sess., (Cal. 2013) and Assemb. B. 1327, § 1, Title 14, 14350(a), 2013-2014 Reg. Sess., (Cal. 2013); S.B. 92, § 1(3), 115th Reg. Sess., (Fla. 2013); S.B. 200, § 5(b), 152nd Gen. Assemb., (Ga. 2013); S.B. 1134, § 1., 21-213(2)(a), 62nd Idaho Leg., 1st Reg. Sess., (Idaho 2013); S.B. 1587, § 10, (Ill. 2013); S.B. 20, (Ind. 2013). Amending Ind. Code, Ch. 10, Sec 4(a); H. File 410, §1.1., 85th Gen. Assemb., (Iowa 2013) and H. File 427, §1.2., 85th Gen. Assemb., (Iowa 2013); H.B. 2394 § 1(a), 85th Gen. Assemb., (Kan. 2013); H.B. 454, § 1 of KRS Ch. 500(2), 2013 Reg. Sess. (Ky. 2013) and H.B. 11, § 1(4)(b), Reg. Sess. (Ky. 2014); S. Paper 72, 126th Leg., (Me. 2013). Amends § 1, 25 MRSA Pt. 12, § 4502.2.; H.B. 1233, 1-203-1(B)(1), 433rd Sess. of Gen. Assemb., (Md. 2013); S.B. 1664, § 1, 188th Gen. Ct. (Ma. 2013). Amending Ch. 272 of Gen. Laws as 99C(c); H.B. 1357, 188th Gen. Ct. (Ma. 2013); H. B. 4455, § 3(3); H. File 990, § 3, Subd.2, 1st Reg. Sess., 88th Leg. Sess., (Minn. 2013) and S. File 1506, § 1, Sub 2., 1st Reg. Sess., 88th Leg. Sess., (Minn. 2013); H.B. 46, § 305.637.2, 97th Gen. Assemb., 1st Reg. Sess., (Mo. 2013); S.B. 196, § 1(1), 63rd Leg., (Mont. 2013); Leg. B. 412, § (3), 103rd Leg., (Neb. 2013); Assemb. B. 3157, §2.b., 215th Leg., (N.J. 2013) and Assemb. B. 3929, § 1.b. 215th Leg. (N.J. 2013); S.B. 556, § 3.A. - B., 51st Leg. Sess., (N.M. 2013); Assemb. B. 6244, § 1. S 700.16, ¶ 1, 236th Leg., (N.Y. 2013), Assemb. B. 6541, Sec 66-A.2, 236th Leg.; (N.Y. 2013), and S.B. 4537 § 1, S52-A.1, 236th Leg., (N.Y. 2013); H.B. 1373, § 2.1., 63rd Leg. Assemb. (N.D. 2013); H.B. 207, § 4561.50(A), 130th Gen. Assemb. (Ohio 2013); H.B. 1556, § 3.A., 54th Leg., 1st Reg. Sess., (Okla. 2013); H.B. 2710, § 3.(1), 77th Leg. Assemb., (Or. 2013), S.B. 524, §1(2), 77th Leg. Assemb. (Or. 2013), S.B. 71, 77th Leg. Assemb., (Or. 2013), and S.B. 853 § 2(1), 77th Leg. Assemb. (Or. 2013); H.B. 961, Subch. E.1., § 5776 (a), 197th Gen. Assemb., (Pa. 2013). Amending Ch. 57 of Title 18



a few outliers. New Hampshire for example, specifically provides that legislation will “not... impair or limit otherwise lawful activities of law enforcement personnel...”<sup>18</sup> Additionally, one Arkansas bill exempts law enforcement officers and emergency responders operating drones as part of their official job duties.<sup>19</sup> Similar bills in Michigan and North Carolina allow drone use for purposes other than intelligence or law enforcement.<sup>20</sup>

Despite the general rule prohibiting drone use to collect information, most state legislation contains exceptions that allow drone use for limited purposes. The most common exceptions occur when law enforcement obtains a judicial or court order, a basic Fourth Amendment tenant.<sup>21</sup> Indiana, Nebraska, New Jersey and West Virginia, however, have all proposed bills that fail to include a warrant exception, a minority view, which is more stringent than the Constitution would perhaps allow.<sup>22</sup>

Other common exceptions that allow the robust use of drones include imminent danger and the protection of life and property. Nineteen bills permit drone use in circumstances where there is a credible and high risk of a terrorist attack.<sup>23</sup> Bills from West Virginia and Kansas for example, would allow drones

of PA Cons. Stat.; S.B. 411, 2013 Leg. Sess., (R.I. 2013). Amending Title 12 of General Laws, Ch. 5.3, 12-5.3.-2. and R.I. LC00564, § 1, § 12-5.3-2(a); H.B. 3415, 120th Sess., (S.C. 2013). Amending Ch. 13, Title 17 of 1976 Code as 17-13-180.(b); S.B. 395, § 1., Ch. 39, § 6-39-30(A), 120th Sess., (S.C. 2013); H.B. 591, § 1(c), 108th Gen. Assemb., (Tenn. 2013); H.B. 912, Ch. 423, § 423.003(a), 83rd Leg., (Tex. 2013); H.B. 540, 2013-2014 Leg. Sess., (Vt. 2013). Amending § 1 20 V.S.A. Ch. 205 as, § 4622(a); H.B. 1771, § 3., 63rd Leg., 2013 Reg. Sess., (Wash. 2013) and S.B. 5782, § 3, 63rd Leg., 2013 Reg. Sess., (Wash. 2013); H.B. 2732, 81st Leg., 2013 Reg. Sess., (W.Va. 2013) and H.B. 2948, Art. 7, § 1-7-3, 81st Leg., 2013 Reg. Sess., (W.Va. 2013); S.B. 196 and Assemb. B. 203, § 2, 175.55(2), 101st Leg., (Wis. 2013); H.B. 242, § 7-3-1003, 62nd Leg., (Wyo. 2013); See H.B. 4455, § 5, ¶(e), 97th Leg., Reg. Sess., (Mich. 2013) and H.B. 312, § 2(b), 2013 Gen. Assemb., (N.C. 2013). States that specifically allow drone use if not for an intelligence or law enforcement purpose. See S. File 276, 80C.1., 85th Gen. Assemb., (Iowa 2013); S.B. 875, § 3, 197th Gen. Assemb., (Pa. 2013), and H.B. 2012, 1. § 1., 2013 Reg. Sess., (Va. 2013). States that prohibit drone use, with limited exceptions, prior to July 1, 2015.

<sup>18</sup> NH HB 619, § 2, 2013 Sess. (N.H. 2013).

<sup>19</sup> S.B. 1109, § 1, 5-60-3(b)(1)(A)-(B) (Ark. 2013).

<sup>20</sup> H.B. 4455, § 5 ¶ (e.), 2013 H.R. (Mich. 2013); H.B. 312, § 2(b), 2013 Gen. Assemb. (N.C. 2013).¶

<sup>21</sup> Katz v. United States, 389 U.S. 347, 351 (1967).

<sup>22</sup> The crux of the Indiana bill is obtaining consent. S.B. 20, 118th Gen. Assemb., 1st Reg. Sess. (In. 2013). The NE bill prohibits law enforcement from using a drone to gather evidence and does not contain a warrant exception. It does, however, include a “terrorist attack” exception. Leg. B. 412, § 4, 103rd Leg., 1st Sess. (Ne. 2013). Although neither New Jersey nor West Virginia contain a warrant exception, they both permit drone use for terrorist attacks. NJ also permits use during disasters or emergencies. Assemb. B. 3929, 215th Leg. (N.J. 2013); H.B. 2948, 81st Leg., 1st Sess. (W. Va. 2013).

<sup>23</sup> All bills that contain a “terrorist attack” exception use similar language, “To counter a high

to be used for purposes of an “imminent terrorist attack,” but only after obtaining a warrant.<sup>24</sup> This too, flies in the face of Fourth Amendment jurisprudence insofar as exigent circumstances constituting an imminent danger to life are a judicially recognized exception to the warrant requirement.<sup>25</sup>

Whether express or implied, and consistent with Fourth Amendment law, most state bills would permit drone use to save lives in emergency situations.<sup>26</sup> Seventy-two bills contain an explicit “imminent danger to life” exception.<sup>27</sup>

risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security...determines that credible intelligence indicates that there is such a risk.” See AL SB 317, § 1(b)(2)(a); FL SB 92, § 1(4)(a); IA HF 427, § 1.3.(a); IL SB 1587, § 15(1); KS HB 2394, § 1(c); KY HB 454, § 1 of KRS Ch. 500, § 1.(1)(3)(a); MD HB 1233, 1-203-1(B)(2)(I); MN SF 1506, § 1, Sub 3. (1) and MN HF 990, § 3, Subd.4(4); NE LB 412, § (4); NJ AB 3929, ¶ 1.c.; NY AO 6370/ SO 4537, § 1, S 52-A..3.A.(4); OH HB 207, § 4561.50(A)(1); SC HB 3415, amending Ch. 13, Title 17 of 1976 Code as 17-13-180.(B)(1); TN HB 591, § 1(d)(1); WV HB 2732, Art. 7, § 1-7-4, WV HB 2948, § 1-7-4; and WY HB 0242, 7-3-1004(a)(ii). ME SP 72, § 4503.1.A.(1)-(2) contains an emergency enforcement exception for threats to national, state or local security. KS HB 2394, § 1(c) and WV HB 2732, § 1-7-4 require a warrant to use a drone in terrorist attack scenarios.

<sup>24</sup> See H.B. 2394, § 1(c) (Kan. 2013); H.B. 2732, § 1-7-4, 81st Leg., 1st Sess. (W. Va. 2013).

<sup>25</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1970) (“[I]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect’s premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of ‘exigent circumstances’”).

<sup>26</sup> *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967) (“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.”).

<sup>27</sup> For “danger to life” exceptions, see S.B. 317, § 1(b)(2)(c), 2013 Leg., Reg. Sess. (Ala. 2013); H.B. 1904, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); A.B. 1327, §1, Title 14, §14550(c)(1), 2013 Leg., Reg. Sess. (Cal. 2013-14); Assemb. B. 1327, § 1, Title 14, 14352, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 92 § 1(4)(c), Reg. Sess. (Fla. 2013); ¶S.B. 200, § 5(e)(1) (Ga. 2013); S.B. 2563B-4(1)(A) (Haw. 2013); S.B. 1134, §21-213(2), 62nd Leg., Reg. Sess. (Idaho 2013); S.B. 1587, §15(5), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S.B. 276 § 2.c. (Iowa 2013) and H.F. 410, § 3.c. (Iowa 2013); H.B. 454, § 1, Reg. Sess. (Ky. 2013); S.P. 72, § 1, 25 MRSA Pt. 12, § 4503.1(A)(3), 126th Leg., Reg. Sess. (Me. 2013); H.B. 1233, § 1-203-1(B)(2)(II), Reg. Sess. (Md. 2013); H.F. 1506, § 1(4), 88th Leg., Reg. Sess. (Minn. 2013); S.F. 1620, § 3(5), 88th Leg., Reg. Sess. (Minn. 2013); H.F. 990, § 1(6)(b), 88th Leg., Reg. Sess. (Minn. 2013); H.B. 46, § 305.639.1, 97th Leg., Reg. Sess. (Mo. 2013); A.O. 3157, ¶ 1.d., Reg. Sess. (N.J. 2013); A.O. 6370, § 1, S 52-A.1., Reg. Sess. (N.Y. 2013); A.O. 6541, § 66-A.3.(B), Reg. Sess. (N.Y. 2013); H.B. 1373, § 3.2, 63d Leg., Reg. Sess. (N.D. 2013); H.B. 207, § 4561.50(A)(3), Reg. Sess. (Ohio 2013); H.B. 1556, § 3.B.3, 54th Leg., Reg. Sess. (Okla. 2013); H.B. 2710, § 1(2)(b), 77th Leg., Reg. Sess. (Or. 2013); RI Gen. Assemb. Jan. 2013, amending title 12 of Gen. Laws, Ch. 5.3, 12-5.3.-2.(f)(1); H.B. 3415, § 2(c), 120th Leg., Reg. Sess. (S.C. 2013); H.B. 591, § 1(e), Reg. Sess. (Tenn. 2013); H.B. 912, § 423.002(a)(12), Reg. Sess. (Tex. 2013); H.B. 540, amending § 1.20 V.S.A. Ch. 205 (Vt. 2013); H.B. 1771, § 9(1)(a), 63d Leg., Reg. Sess. (Wash. 2013); H.B. 2997, § 1-7-3(a), Reg. Sess. (W. Va. 2013); S.B. 196, § 2, 175.55(s), Reg. Sess. (Wis. 2013). ¶ H.B. 619 (N.H. 2013) does not contain an explicit “danger to life” exception but its bill was written so as not to be “construed to impair or limit any otherwise lawful activities of law enforcement personnel” See §2.V. Even

Sixteen bills allow drone use for disaster response, whether natural or man-made.<sup>28</sup> A slightly fewer number, about fourteen, expressly delineate Search and Rescue (SAR) operations as a drone use exception.<sup>29</sup> Along the same lines, bills from Iowa, Pennsylvania and Virginia contain exceptions that would allow drone use in support of “Amber” or similar missing person alerts.<sup>30</sup>

Eighteen bills include a provision to allow drone use to protect property from damage.<sup>31</sup> Protection of property, is also arguably inherent in drone use exceptions relating to disasters, firefighting, terrorist attacks, or emergency services.<sup>32</sup>

Other, less common drone use exceptions, relate to circumstances evoking judicially recognized exceptions to the warrant requirement.<sup>33</sup> In fact, only five

though the following do not contain an explicit “danger to life” exceptions, other provisions would fairly embrace it: S.B. 1109 (Ark. 2013) (permits law enforcement to use drones for any purpose) and A.O. 6244 (N.Y. 2013) (permits lawful exceptions to the warrant requirement). Only fourteen bills do not include such language: H.B. 159a (Alaska 2013); H.B. 2574 (Ariz. 2013); H.B. 560 (Ga. 2013), S.B. 20 (Ind. 2013); H.B. 2394 (Kan. 2013); S.B. 196 (Mont. 2013); L.B. 412 (Neb. 2013); A.B. 3157 (N.J. 2013); S.B. 71 (Or. 2013), H.B. 961 (Pa. 2013), RI LC00564, Gen. Assemb. 395 (S.C. 2013), H.B. 2732 (R.I. 2013) and H.B. 2948 (W. Va. 2013).

<sup>28</sup> Disaster response clauses can be found at: CA Assembly Bill 1327, § 14350(c)(1) and (e)(1)-(2); GA SB 200 § 5, ¶ (e)(2); IA SF 276; ME SP 72, § 4503.2.(A), (B), (D); MN HF 1620 § 3, Sub. 4 ¶ (4) and MN HF 440, § 3, Subd.4(6); ND HB 1373 § 3, ¶ 3; NJ Assembly No. 3157, ¶ 4 and NJ AB 3929, §1.d.; OK HB 1556, §3.B.4.; OR HB 2710, § 5(3) and OR SB 853, § 8(1); TX HB 912, § 423.001(c)(3); PA SB 85, § 5(3) and VA HB 2012, 1. § 1; and WV HB 2997, Sec 1-7-3(b).

<sup>29</sup> For SAR clauses, see CA AB 1327 § 14350, ¶ (c)(1); FL SB 92 § 1, ¶ (4)(c); ID SB 1134, § 21-213, ¶ (2); IL SB 1587, § 15(4); IA SB 276 § 12 and IA HF 410, § 2.c.; ME SP 72, § 4503.2.E.; OK HB 1556 § 3.3; OR HB 2710, § 5(1); PA SB 875, §4; TN SB 796, §1(d)(5); TX HB 912 § 423.002(8)(D); VA H 2012 § 1, ¶ (iv) and WI SB 196/AB 203, §2(2). Of these, some require an imminent danger to life before a drone can be used for SAR: CA AB 1327 § 14350, ¶ (c)(1); IA HF 410, Sec 2.c.; OK HB 1556, § 3.B.3. ;PA SB 875, § 4; VA H 2012 § 1, ¶ (iv).

<sup>30</sup> IA SF 276 and IA HF 410, § 2.b.; PA SB 875, §4; and VA HB 2012, § 1, ¶ 1. Even where such specialized carve outs for imminent terrorist attacks, SAR, Amber or similar alerts and/or response to natural disasters do not exist, a plausible argument can be made that such situations would qualify under a State’s more general provisions permitting drone use to alleviate danger to life.

<sup>31</sup> Danger to property provisions include: CA AB 1327 § 14350, ¶ (d)(2); FL SB 92 § 1, ¶ (4)(c); GA SB 200 § 5(e)(2); IL SB 1587, § 15, ¶ (3); IA SB 276 § 11, ¶ (b), IA HF 410, §1.2.c., and IA HF 427, §1.2.c.; KY HB 454 § 1, ¶ 3(c); MD HB 1233 § 1-203, ¶ (B)(II); MN HF 1620 § 3, Sub. 4, ¶ (3) and MN HF 990, § 3, Subd.4(5); NC HB 312 § 2(c)(3); ND HB 1373 § 3.3.; OH HB 207, § 4561.50(A)(3); SC H3415 § 2, ¶ (B)(3); OR HB 853, §8(1); PA SB 875, § 4; and TX HB 912 § 423.002.

<sup>32</sup> See *supra* notes 26-28 & 31.

<sup>33</sup> See *supra* note 24. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1970) (“[I]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect’s premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of ‘exigent circumstances’”); *Schmerber v. California*, 384 U.S. 757 (1966); *consent, Schneckloth v.*

states explicitly codify such an exception, meaning that all other states either ignore or only partially recognize these existing Fourth Amendment jurisprudential exceptions.<sup>34</sup> For example, even though the Supreme Court has determined that a consensual search is consistent with the Fourth Amendment, less than a quarter of the bills surveyed expressly permit drone use where the individual has consented.<sup>35</sup> Similarly, despite the fact that Supreme Court has held exigent circumstances exist when a felon or suspect is fleeing and destruction of evidence is imminent, only sixteen bills include a “fleeing felon” exception and even fewer provide a carve-out to prevent the destruction of evidence.<sup>36</sup>

On the other hand, a small number of states would permit drone use in support of particular investigations in a manner that, arguably, ignores Fourth

Bustamonte, 412 U.S. 218 (1973) and for plain view as it relates to aerial surveillance, *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Florida v. Riley*, 488 U.S. 445, 448 (1989).

<sup>34</sup> AK HB 159a, amending § 2(b)(2); CA Senate Bill No. 15, § 5 amending 14352 of Penal code, ¶ (b); IL SB 1587, § 30; MT SB 196, § 1(1)(b); NY AO 6244, § 1.1; and TN SB 796, §1(g)(2).

<sup>35</sup> *Schmerber v. California*, 384 U.S. 757 (1966). Bills with consent provisions include: AK HB 159a, amending § 2(b)(4); AZ HB 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § D.2.; AR HB1904, amending AR Code Title 12, as 12-19-104(a)(1); HI SB, 263B-2(c)(1); ID SB 1134, § 1., 21-213(2)(a)(i)-(ii); IL SB 1586, § 15(5); IN SB 20, § 4(a); ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4502.2. (B); MA SB 1664, § 1(e); MI HB 4455, § 5(a); MN HF 1620/ 1706, § 2, Sub 2.; MO HB 46, § 305.637.2.; NM SB 556, § 3.A.; ND HB 1373, § 4.2.; OK HB 1556, § 3.B.5; OR HB 2710, § 4 and SB 853, § 5; and TX HB 912, Ch. 423, § 423.002(6). Consent would presumably be implied for State bills containing a proviso allowing drone use in accordance with judicially recognized exceptions to the warrant requirement. MA and NY bills contain provisions that only permit dissemination or receipt of information with the individual’s consent. MA SB 1664/BH 1357, § 99-C(e) and NYAO 6541, § 66-A.3.(A).

<sup>36</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985) (law enforcement may use non-lethal force to deter a fleeing felon); *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) (“Where there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation”). “Fleeing felon” language is included in the following bills: AL SB 317 § 1, ¶ (a)2(c); CA AB 1327, § 1, Title 14, § 14350(c) and CA HB No. 15, amending penal code § 14352(b); FL SB 92 § 1, ¶ (4)(c); IL SB 1587 § 15 (3); KY HB 454 §1, ¶ 3(c); IA HF 427, § 1.3.c.; MN HB 1620 § 1, Sub. 3 and MN HF 990, § 3, Subd.4(5)(iii); NC HB 312 § 2, ¶ (c)(3)(iii); OH HB 207, § 4561.50(A)(3); SC H 3415 § 2, ¶ (B)(3); TN SB 796, § 1(d)(4); TX HB 912, Ch. 423, § 423.002(8)(A); WI SB 196/AB 203, § 2, 175.55(2); WY HB 242 § 1, ¶ 7-3-1004(a)(iv). Depending on interpretation, the following additional State bills may apply to fleeing suspects: CA AB 1327 § 14350, ¶ (c); ID SB 1134 § 1, ¶ 21-213(2); MD HB 1233 § 1-203.1(B)(2)(II); and ND HB 1373 § 3, ¶ 3. States that include the “destruction of evidence” exception for drones all use the same language, “to forestall (or prevent)... the destruction of evidence.” See FL SB 92, § 1(3)(c); IL SB 1587, § 15(3); IA HF 427, § 1.3.c.; KY HB 454, § 1(3)(c); MN HF 1620/ 1706 § 3, Sub. 4(3) and MN HF 990, § 3, Subd.4(5)(iv); ND HB 1373, § 2.(c)(3)(iv) (adds the qualifier “imminent”); OH HB 207, § 4561.50(A)(3); SC H 3415, § 2.(B)(3) and WI SB 196/AB 203, § 2, 175.55(2).

<sup>36</sup> AK HB 159a, amending § 2(b)(2); CA Senate Bill No. 15, § 5 amending 14352 of Penal code, ¶ (b); IL SB 1587, § 30; MT SB 196, § 1(1)(b); NY AO 6244, § 1.1; and TN SB 796, §1(g)(2).

Amendment principles. Arkansas, Hawaii, Maine and Michigan for example, provide *carte blanche* to State or federal agencies when using drones for emergencies involving “conspiratorial activities threatening the national security interest” or “conspiratorial activities characteristic of organized crime.”<sup>37</sup> Idaho would permit drone use, without a warrant, to investigate controlled substance crimes.<sup>38</sup> Additionally, California, Illinois, Oregon and Texas would also allow drones to assess crime scenes *sans* warrant.<sup>39</sup>

A few state bills provide for land-centric exceptions for drone use analogous to the plain view doctrine.<sup>40</sup> Nine permit drone use on or over public lands.<sup>41</sup> The Alaska, New York, North Dakota and Texas bills would permit drone use to monitor borders as well.<sup>42</sup> A handful of states allow for aerial inspections.<sup>43</sup>

While there are also states who would permit drone use for other purposes, most bills merely reiterate, in whole or in part, Fourth Amendment protections that already exist – and do so only because the tool to be used is a drone.<sup>44</sup>

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<sup>37</sup> See H.B. 1904, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S.B. 783, 27th Leg., Reg. Sess. (Haw. 2013); H.B. 4455, 96th Leg., Reg. Sess. (Mich. 2012).

<sup>38</sup> “Absent a warrant, and except for . . . controlled substance investigations, no person, entity, or State agency shall use an unmanned aircraft system to intentionally conduct surveillance . . .” S.B. 1134, §21-213(2), 62nd Leg., Reg. Sess. (Idaho 2013).

<sup>39</sup> A.B. 1327, §1, Title 14, §14550(c)(2), 2013 Leg., Reg. Sess. (Cal. 2013-14); S.B. 1587, §15(5), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); H.B. 2710, §6(1), 77th Leg. Assemb., Reg. Sess. (Or. 2013) and S.B. 853, §7(1), 77th Leg. Assemb., Reg. Sess. (Or. 2013); H.B. 912, § 423.002(8)(B)-(C), 82nd Leg., Reg. Sess. (Tex. 2011).

<sup>40</sup> See *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Florida v. Riley*, 488 U.S. 445, 448 (1989).

<sup>41</sup> Public land exception bills include: H.B. 159, §2(b)(3) 28th Leg., 1st Sess. (Alaska 2013); H.B. 2574, §1(D)(2), 51st Leg., 1st Reg. Sess. (Ariz. 2013); A.B. 1327, §1, Title 14, §14550(c)(2), 2013 Gen. Assemb., Reg. Sess. (Cal. 2013-14); S.B. 1587, §15(5), 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013); H.B. 4455, §9(1), 97th Leg., Reg. Sess. (Mich. 2013); S.B. 196, §2(2)(B), 63rd Leg., Reg. Sess. (Mont. 2013); H.B. 1556, §4.A., 54th Leg., 1st Reg. Sess. (Okla. 2013) (allowing drones to transit public land (over flight) including military aircraft carrying weapons); H.B. 912, §3(B)(6), 83rd Leg., Reg. Sess. (Tex. 2013).

<sup>42</sup> H.B. 159, §2(b)(3), 28th Leg., 1st Reg. Sess. (Alaska 2013) (allowing drone use on public land and for border monitoring); S.B. 4537, §1.3.A(3), 2013 Leg., 236th Sess. (N.Y. 2013); H.B. 1373, §3(1), 63rd Leg. Assemb., Reg. Sess. (N.D. 2013); H.B. 912 Ch. 423, §423.002(a)(14), 83rd Leg., Reg. Sess. (Tx. 2013)(allowing drone use on public land and for border monitoring).

<sup>43</sup> See A.B. 1327, §14350(e)(1), 2013 Gen. Assemb., Reg. Sess. (Cal. 2013); S.B. 1134, §1(4) and §1.21-213(1)(b)(ii), 62nd Leg., 1st Reg. Sess. (Idaho 2013); A.B. 6541, §66-A.3(D), 2013 Leg., 236th Leg. Sess. (N.Y. 2013); H.B. 912, Ch. 423, §423.002(a), 83rd Leg., Reg. Sess. (Tex. 2013); S. Paper 126-72, 1<sup>st</sup> Reg. Sess., at § 4503 (Me. 2013). See also footnotes *infra* 47, 49 (discussing drone use provisions allowing for assessment of damage to land as part of natural disasters and for criminal or administrative investigations).

<sup>44</sup> A minority of bills allow drone use for non-governmental or benign governmental use, such as higher education, training, research, or recreation. See H.B. 46, §305.639(2), 98th Gen. Assemb., 1st Reg. Sess. (Mont. 2013); S.B. 4537, §1.B, 2013 Leg., 236th Leg. Sess. (N.Y. 2013)

### C. *Operational and Procedural Considerations*

Disjointed state legislative drone proposals often contain procedural hurdles and operational constraints that exceed the warrant requirements for privacy. In addition to when operators may use drones, states have also attempted to legislate how they may be used through a series of operational restrictions and procedural requirements beyond obtaining a warrant and collecting only on “the place to be searched or persons or things to be seized.”<sup>45</sup> For example, before an agency can acquire a drone, several states require explicit legislative approval to do so.<sup>46</sup> A discussion of other such considerations follows.

#### i. Weapons Restrictions

Nearly one-third of states restrict any drone operator from carrying or employing weapons from drones. Of these, several preclude equipping drones with non-lethal weapons, pepper spray, bean bag guns, mace and sound-based weapons as well.<sup>47</sup> Imagine a scenario where a law enforcement agent could use a drone to find a fleeing suspect, but could not use that same drone to stop him if he started indiscriminately killing innocent civilians. These prohibitions

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(excluding recreational use of model airplanes); A.B. 6541, §66-A.3.(D), 2013 Leg., 236th Leg. Sess. (N.Y. 2013); H.B. 1373, §3(4), 63rd Leg. Assemb., Reg. Sess. (N.D. 2013); H.B. 2710, §1.7(a)-(d), 77th Leg. Assemb., Reg. Sess. (Or. 2013); S. Paper 126-72, 1st Reg. Sess., at § 4503.3 (Me. 2013); H. File 2013-990, §3(2), 88th Leg. Sess., at § 3 (Minn. 2013). But see Section A *supra* (permitting the U.S. Military to train with drones).

<sup>45</sup> U.S. CONST. amend IV.

<sup>46</sup> Acquisition provisions can be found in: Assemb. B. 1327, § 1, Title 14, 14351 (Cal. 2013) and S.B. 15, § 14355 (Cal. 2013); S.B. 20, § 6 (Ind. 2013); S.P. 72 amends § 1, 25 MRSA Pt. 12, § 4502.1 (Me. 2013); S.B. 1664, § 1 amending Ch. 272 of General Laws as 99C(b) (Mass. 2013) and Mass. H.B. 1357, § 99C(b); H.B. 4455, § 3(2) (Mich. 2013); B. A06451, § 66-A.1. (N.Y. 2013); H.B. 2710, § 1.(8) (Or. 2013) and S.B. 524, § 1(8) (Or. 2013); Gen. Assemb., Ch. 5.3, 12-5.3.-2.(b) amending title 12 of Gen. Laws (R.I. 2013); H.B. 1771, § 4(1) (Wash. 2013) and S.B. 5782, § 4(1) – (2) (Wash. 2013).

<sup>47</sup> The following drone bills contain weapons restrictions: H.B. 1904 § 12-19-104 (d) (Ark. 2013); S.B. No. 15, § 5, amending Title 14, § 14350 of the Penal Code, § 14351(a) (Cal. 2013) and A.B. 1327, § 14354.5 (Cal. 2013); S.B. 200 § 3(1) (Ga. 2013); S.B. 783 § 1 263B-2(e) (Haw. 2013); S.B. 276 § 14 (Iowa 2013) and H.F. 410, § 1.3 (Iowa 2013); H.B. 2394 § 1(b) (Kan. 2013); 14 Reg. Sess. BR 1, § 1(2) (Ky. 2013); S.P. 72 § 4502.3 (Me. 2013); S.B. 1664 § 1(b) (Mass. 2013) and H.B. 1357, § 99-C(b) (Mass. 2013); H.B. 4455 § 3(4) (Mich. 2013); H.F. 990, § 3, Subd. 3 (Minn. 2013); H.B. 1373 § 4(1) (N.D. 2013); B. A06541 § 66-A.5. (N.Y. 2013); H.B. 1556, § 5.A (Okla. 2013); H.B. 2710, § 10 (Or. 2013) and S.B. 524, §1(6) (Or. 2013); S.B. 875, § 5 (Pa. 2013); Gen. Assemb. B. 395, Ch. 39, § 6-39-20 (S.C. 2013); H.B. 540 § 4622 (e) (Vt. 2013); H.B. 2012 § 1(1) (Va. 2013); H.B. 2732 § 1-7-3 (b) (W. Va.) and H.B. 2997, § 1-7-4(a) (W.Va. 2013); and S.B. 196/Assemb. B. 203, § 3 (Wis. 2013).

are analogous to telling a police officer that he can search a house, but cannot bring his gun.

## ii. Collection, Retention and Dissemination Requirements

Many bills also restrict the time, place, and manner of drone operation. One of the most common time restrictions on drone use is a forty-eight hour mission execution window.<sup>48</sup> States with place restrictions focus primarily on the home and areas surrounding it, places of worship, as well as farms and agricultural areas.<sup>49</sup> Most states that include manner restrictions in their legislation generally require users to collect information only on the target and to avoid or minimize data collection on others.<sup>50</sup> Some states contain unique one-off manner restrictions or constraints. For example, one New Jersey bill would forbid drone use to enforce violations of motor vehicle or traffic violations.<sup>51</sup> Massachusetts, North Dakota, and West Virginia for example, preclude drone surveillance of citizens exercising their constitutional rights relating to freedom of speech and freedom of assembly.<sup>52</sup>

States often fail to consider the impact restrictions have on operational effectiveness. In addition to manner restrictions on drone operations, many states restrict how the information collected is used, disseminated, or retained. A number of bills reviewed prohibit use of facial recognition or other biometric matching technology, primarily on information collected on non-targets.<sup>53</sup> Very few bills address dissemination of information beyond the

<sup>48</sup> For time limitations on drone operations see A.B. 1327 § 14350, (d)(2) (Cal. 2013) (two hours); H.B. 560, § 2(a)(4) (Ga. 2013); S.B. 783 § 1, 263B-2(c)(3)(B) (Haw. 2013); S.B. 1587, § 15(3) (Ill. 2013); S.P. 72, § 4502.2. D (Me. 2013); H.B. 4455 § 5(d) (Mich. 2013); and H.B. 1771 § 6.(4) and S.B. 5782, § 8(1)(c) (Wash. 2013).¶¶

<sup>49</sup> For place restrictions, see H.B. 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § B (Ariz. 2013); S.B. No. 15, § 3(j) (Cal. 2013); S.B. 2563B-2(c)(3)(A)-(B) (Haw. 2013); S.B. 1134, § 1.21-213(2)(a)(i)-(ii) (Idaho 2013); S.B. 556, § 3.B. (N.M. 2013); B. A06370/ S04537, § 1, S 52-A.2. (N.Y. 2013); H.B. 1373, § 6.4 (N.D. 2013).

<sup>50</sup> Manner restrictions with an emphasis on collecting only on the target include: H.B. 1904, amending Ark. Code Title 12, as 12-19-104(b)(1) (Ark. 2013); S.B. 15, Title 14, § 14354(a) (Cal. 2013); S.B. 263B-2(d) (Haw. 2013); S.P. 72 amends § 1, 25 MRSA Pt. 12, § 4502.3 (Me. 2013); S.B. 1664, § 1, amending Ch. 272 of General Laws as 99C(d)(1) and (3) (Mass. 2013); H.B. 4455 § 5(e) (Mich. 2013); H.B. 312, § 15A-232.(d) (N.C. 2013); B. A06541, § 66-A.4. (N.Y. 2013); H.B. 1556, § 3.F (Okla. 2013); H.B. 2710, § 1.(4) (Or. 2013) and S.B. 524, § 1(4) (Or. 2013); Gen. Assemb., Ch. 5.3, 12-5.3.-2.(h) amending title 12 of General Laws (R.I. 2013); H.B. 540/S.B. 16, amending § 1 20 V.S.A. Ch. 205 as, § 4622(c)(1) (Vt. 2013); H.B. 1771, § 4 (Wash. 2013).

<sup>51</sup> Assemb. No. 3157, § 2.e (N.J. 2012).

<sup>52</sup> S.B. 1664, § 1, amending Ch. 272 of Gen. Laws as 99C(d)(3) (Mass. 2013); H.B. 1373, § 4.3 (N.D. 2013) and H.B. 2997, § 1-7-4(c) (W.Va. 2013).

<sup>53</sup> See H.B. 1904, § 1(b)(2), 89th Gen. Assemb. Reg. Sess. (Ark. 2013); S.B. 2563B-2(d) (Haw.);

collecting agency.<sup>54</sup> That said, some states require dissemination, in the form of notice, to the subject of drone monitoring.<sup>55</sup> On the other hand, the majority of bills address retention. The primary theme on retention is to delete information collected unlawfully or on non-targets within twenty-four hours of collection.<sup>56</sup> Other states have retention limits on information lawfully collected on a target of surveillance, unless needed for a criminal investigation or prosecution.<sup>57</sup> Only California seems to understand the need for operators, whether military or civilian, to train to their required task by allowing images to be kept beyond their normal time limit for “training purposes.”<sup>58</sup> To the extent the desired endstates for drone operations consist of both privacy protection and operational effectiveness, training for such operations is a critical necessity.

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S.P. 72, § 4502.3.C., 1st Reg. Sess. (Me. 2013); S.B. 1664, § 1(d)(2) (Mass. 2013); H.B. 4455 § 5(e) (Mich. 2013); A.O. 6541, § 66-A.4, 2013-2014 Leg., Reg. Sess. (N.Y. 2013-2014); H.B. 312, § 15A-232.(d), 2013 Gen. Assemb. (N.C. 2013); S.B. 853 § 4.1, 77th Leg. Assemb. (Or. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; H.B. 540, § 4622(c)(3) (Vt. 2013); H.B. 1771, § 6(3), 63rd Leg. Sess. (Wash. 2013).

<sup>54</sup> See, e.g., S.B. No. 15, § 5, amending Title 14, of the Penal Code 14350(b) (Cal. 2013) (stating that a law enforcement agency cannot receive drone information from another agency unless they have a warrant); A.B. 1327, § 14350(e)(3) (Cal. 2013) (“Data collected pursuant to this subdivision shall not be disseminated outside the collecting agency . . . .”); S.B. 1587, § 25 (Ill. 2013) (forbidding disclosure to another government agency unless there is evidence of criminal activity or evidence relevant to an ongoing investigation or trial); H.B. 1357, § 99C(e) (Mass. 2013) (disallowing disclosure of non-target information for any purpose without written consent); H.B. 2997, Art. 7, § 1-7-6(c) (W. Va. 2013) (permitting distribution only where data collected is evidence of a crime and complies with evidentiary rules).

<sup>55</sup> See S.B. 2563B-5 (Haw.) ; S.P. 72, § 4505(1), 1st Reg. Sess. (Me. 2013); S.B. 1664, § 99C(h) (Mass. 2013); H.B. 4455, § 11(1) (Mich. 2013); S.B. 853, § 9.(1), (3), 77th Leg. Assemb. (Or. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; H.B. 1771, § 6(5) and S.B. 5782, § 6(5), 63rd Leg. (Wash. 2013)

<sup>56</sup> See H.B.1904, § 1.12-19-105(a)(1) (Ark. 2013); S.B. 263B-3(a) (Haw. 2013); S.P. 72, § 4503 (Me. 2013); S.B. 1664, § 99C(e) (Mass. 2013); H.B. 4455, § 7(1) (Mich. 2013); A.O. 6541, § 66-B (N.Y. 2013); Assemb. No. 3157, 215th Leg. § 2.d, (N.J. 2013); H.B. 312, § 15A-232(g) (N.C. 2013); H.B. 1373, 63d Leg. Assemb., Reg. Sess. § 6.3 (N.D. 2013); H.B. 1556, 54th Leg, 1st Sess. § 3.F (Okla. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; S.B. 796, 108th Gen. Assemb., Reg. Sess. §1(f) (Tenn. 2013); H.B. 540(c)(2)(B) (Vt. 2013); H.B. 1771, § 11 (Wash. 2013); H.B. 2997, § 1-7-6(b) (W. Va. 2013).

<sup>57</sup> See, e.g., A.B. 1327, § 1, Title 14, 14353 (Cal. 2013); S.B. No. 15, § 5 (Cal. 2013); S.B. 1587, § 20(1)-(2) (Ill. 2013); H.B. 1373, 63rd Leg. Assemb., § 6.2 (N.D. 2013); H.B. 2710, 77th Or. Leg. Assemb. Reg. Sess. § 3.(1)(a) (Or. 2013); S.B. 524, 77th Or. Leg. Assemb., Reg. Sess. § 1(5) (Or. 2013); S.B. 796, 108th Gen. Assemb., Reg. Sess. §1(f) (Tenn. 2013); H.B. 1771, § 12 (Wash. 2013); H.B. 2997, § 1-7-6(c) (W. Va. 2013).¶

<sup>58</sup> See A.B. 1327, § 1, Title 14, 14353(a) (Cal. 2013); S.B. No. 15, § 5, Title 14, 14354(b) (Cal. 2013).



### iii. Oversight and Reporting Regimes

Oversight of information collected and transparency of operations are reasonable safeguards to protect civil liberties. However, a majority of bills contain documentation, oversight, and reporting requirements that test the limits of reasonableness. For example, even in emergent circumstances, many states require responders to file a sworn statement or warrant application, stating the grounds for the emergency drone use within 24 to 48 hours.<sup>59</sup> Most have reporting rules that require law enforcement, the Attorney General, the judiciary and court administrators, or a combination of these to file extensive reports on drone activities annually.<sup>60</sup> Other proposals are more moderate, such as those from Maine, North Dakota, Washington and West Virginia for example, which explicitly require record keeping on drone operations.<sup>61</sup> Oversight is also exercised through public transparency. A handful of states require public notice of drone operations, images, and government agency drone reports filed.<sup>62</sup> Care must be taken in any public disclosure to ensure that investigations or operations are not compromised and that personal privacy is not - ironically - violated, in the name of transparency.

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<sup>59</sup> States with post-emergency documentation requirements include: H.B. 1904, § 1, Ch. 19, 12-19-104.(a)(2)(B)(i) (Ark. 2013); S.B. 263B-4(a)(4) (Haw. 2013); S.B. 1587, §15(3) (Ill. 2013); S.P. 72, § 4503.1.B. (Me. 2013); S.B. 1664, § 1(c)(3)(ii) (Mass. 2013); H.B. 4455, § 5(b)(i)-(ii) (Mich. 2013); H.F. 990, 103 Leg., 88th Sess. § 3, Subd. 5 (Minn. 2013); H.B. 312, § 15A-232.(c)(3)b. (N.C. 2013); H.B. 1556, § 3.B.3. (Okla. 2013); S.B. 853, § 6(2) (Or. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; H.B. 540, § 4623(a)(2) (Vt. 2013); H.B. 1771, § 6(2) (Wash. 2013).

<sup>60</sup> See e.g., H.B.1904, §12-19-106(a) (Ark. 2013); A.B. 1327, § 14351(b) (Cal. 2013); S.B. 263B-7 (Haw. 2013); S.B. 1587, § 35 (Ill. 2013); S.P. 72, § 4507 (me. 2013); S.B. 1664, § 1 (Mass. 2013); H.B. 4455, § 15(1)-(3) (Mich. 2013); A.O. 6541, § 66-D (N.Y. 2013); H.B. 312, § 15A-232.(h) (N.C. 2013); S.B. 71 § 4(1) (Or. 2013); S.B. 853, § 10 (Or. 2013); H.B. 2710, § 8 (Or. 2013); RI Gen. Assemb. Jan. 2013, amending title 12 of General Laws, Ch. 5.3, 12-5.3.-12; H.B. 912, § 423.008 (Tex. 2013); H.B. 540 (Vt. 2013); H.B. 1771, § 15-18, 21 (Wash. 2013); S.B. 5782, § 15-18, 22 (Wash. 2013).

<sup>61</sup> See ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4506.4; ND HB 1373, § 7; WA HB 1771, § 20 and WV HB 2997, § 1-7-7.

<sup>62</sup> CA Assembly Bill 1327, § 1, Title 14, 14352 and § 14352 and CA SB No. 15, amending Penal Code 14354(c); IL SB 1587, § 35; ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4507.3; NJ Assembly No. 3157, § 3.a.; NY AO 6541, § 66-D; NC HB 312, § 15A-232.(h); OR SB 853, § 10 and OR 2710, § 8 and WA HB 1771, § 19, 21 and WA SB 5782, § 15-18.

#### iv. Unique Conditions

Besides the more common language discussed above, some states have unique drone requirements. California and Michigan require marking the body of a drone in some distinctive manner.<sup>63</sup> Oklahoma contains a non-liability clause that protects drone manufacturers and sellers.<sup>64</sup> Oregon and Virginia direct drone operating agencies to adopt policies for their use that establish training requirements for operators; criteria for when drones will be used; a description of the areas in which drones will be used; and a procedure for informing the public of those policies.<sup>65</sup>

This disjointed state approach, regulating everything from whether an aircraft can be equipped with weapons, to forbidding the transfer of the information it collects to other agencies, to unique oversight and reporting regimes, goes well beyond the standard warrant requirement.

#### D. *Violation Ramifications*

State drone proposals contain a wide range of ramifications for violating their provisions, including exclusionary rules, personal liability provisions, and forward-leaning preventive measures which could have direct as well as second and third order impacts on drone operators. Given that the focus of most of the state drone legislative proposals is on law enforcement activities, the most common ramification for violating state drone provisions is excluding information or evidence collected in violation of state procedures from admission in court. More than half of the state bills contain a criminal exclusionary rule.<sup>66</sup> Slightly more than a third contain provisions excluding

<sup>63</sup> S.B. 15, § 5 amending 14356 of Penal Code (Cal. 2013); H.B. 4455, § 3(5) (Mich. 2013).

<sup>64</sup> H.B. 1556, § 6 (Okla. 2013).

<sup>65</sup> H.B. 2710 (Or. 2013), § 1.(7)(a)-(d) and SB 853, § 11 (1); VA HB 2012, 1. § 1.1.

<sup>66</sup> States with criminal exclusionary rules include AL SB 317, § 1(d); AK HB 159a, § 3(a); AZ HB 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § C; AR HB1904, amending AR Code Title 12, as 12-19-105(b); FL SB 92, § 1(5); HI SB, 2563B-3(b); IL SB 1587, § 30; IN SB 20, Sec (5); IA HF 427, §1.5; KS HB 2394 § 1(e); KY HB 454, § 5 and KY 14 RS BR 1, § 1(5); ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4503; ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4506.3.; MD HB 1233, 1-203-1(D); MA SB 1664, § 1, amending Ch. 272 of General Laws as 99C(f) and MA HB 1357, § 99-C(f); MI HB 4455 § 7(2); MN HF SF 1506, § 1, Sub 5, MN 1620/1706, § 3, Sub. 5 and MN HF 990, § 1, Subd. 7; MO HB 46, § 305.641.2; MT SB 196, § 1(1)(b); NE LB 412, § 6; NJ Assembly No. 3157, §2.d. and NJ AB 3929, ¶ 3; NM SB 556, § 5.B.; NY AO 6370/SO 4537, § 1, S 52-A.4.B., NY AO 6244, § 1. S 700.16, ¶ 3 and NY AO 6541, § 66-B.2.; NC HB 312, § 15A-232.(f); ND HB 1373, § 6.1; OH HB 207, § 4561.50(B); OK HB 1556, § 3.E. and § 4.E.; OR HF 2710, § 11, OR SB 71, § 4(3) and OR SB 853, § 4(2)(a) and 8(2)(a); RI Gen. Assembly Jan. 2013, amending title 12 of General Laws, Ch. 5.3, 12-5.3.-8, .9 and 11.; RI LC00564, § 12-5.3.2; SC H 3415, § 2(D); TN HB 591, § 1(f) and TN SB 796, § 1(g)(2); TX HB 912, Ch. 423, § 423.005(1); VT HB 540/SB 16,

information gathered by drones from civil or administrative hearings.<sup>67</sup> Several bills contain a “fruit of the poisonous” tree exclusionary rule, which prohibits use of information and evidence derived from information gathered by drones.<sup>68</sup> Montana and Oregon expressly ban the government from including information acquired by drones in an affidavit to obtain a warrant.<sup>69</sup>

More than half of the state bills create civil liability for violators.<sup>70</sup> Many

amending § 1 20 V.S.A. Ch. 205 as, § 4622(d); WA HB 1771/WA SB 5782 § 10; WI SB 196/AB 203, § 5, amending § 972.113; WV HB 2732, Art. 7, § 1-7-6., WV HB 2997, § 1-7-6(a); WY HB 0242, 7-3-1005. Even if the State fails to include a specific criminal exclusionary provision in their bill, it is safe to assume that the courts would still exclude the evidence consistent with their constitution or other law if law enforcement did not obtain a warrant, unless a judicial exception to the warrant requirement applied.

<sup>67</sup> For civil or administrative exclusionary rules see: AK HB 159a, § 1(a); AZ HB 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § C; AR HB1904, amending AR Code Title 12, as 12-19-105(b); GA HB 560, § 2(e); HI SB, 2563B-3(b); IL SB 1587, § 30; IN SB 20, Sec (5); KY HB 454, § 5; ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4503 and KY 14 RS BR 1, § 1(5); ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4506.3.; MA SB 1664, § 1, amending Ch. 272 of General Laws as 99C(f) and MA HB 1357, § 99-C(f); MI HB 4455 § 7(2); MN HF 990, § 1, Subd. 7; MO HB 46, § 305.641.2; MT SB 196, § 1(1)(b); MT SB 196, § 2(3); NM SB 556, § 5.B.; NY AO 6370/SO 4537, § 1, S 52-A.4.B. and NY AO 6541, § 66-B.2.; NC HB 312, § 15A-232.(f); OH HB 207, § 4561.50(B); OK HB 1556, § 3.E. & 4.E.; OR HF 2710, § 11, OR SB 71, § 4(3) and OR SB 853, § 4(2)(a) and 8(2)(a); RI LC000564, § 12-5.3-2; TX HB 912, Ch. 423, § 423.005(1); VT HB 540/SB 16, amending § 1 20 V.S.A. Ch. 205 as, §4622(d); WA HB 1771/WA SB 5782 § 10 and WV HB 2997, § 1-7-6(a).

<sup>68</sup> Derivative evidence exclusions include AR HB1904, amending AR Code Title 12, as 12-19-105(b); GA HB 560, § 2(e); IN SB 20, Sec (5); KS HB 2394 § 1(e); MA SB 1664, § 1, amending Ch. 272 of General Laws as 99C(f); MI HB 4455 § 7(2); NJ Assembly No. 3157, §2.d.; NY AO 6370/SO 4537, § 1, S 52-A.4.B.; OH HB 207, § 4561.50(B); OK HB 1556, § 3.E. & 4.E.; OR HF 2710, § 11, OR SB 853, § 4(2)(a); RI LC000564, § 12-5.3-2; WA HB 1771/WA SB 5782, § 10.

<sup>69</sup> S.B. 196, § 2(3), 63rd Leg., Reg. Sess. (Mont. 2013); H.B. 2710, § 11(2), 77th Leg., Reg. Sess. (Or. 2013); S.B. 853, § 2(1)(b), 77th Leg., Reg. Sess. (Or. 2013).

<sup>70</sup> The following bills create civil liability for drone users who violate State provisions: H.B. 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § E, 51st Leg. Reg. Sess. (Ariz. 2013); Assemb. B. 1327, § 1, Title 14, 14352, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 92 § 1(5), Reg. Sess. (Fla. 2013); S.B. 15, § 2 amending § 1708.8, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 1134, § 1.21-213(3)(a), 62d Leg., Reg. Sess. (Idaho 2013); H.F. 427, § 1.4, 85th Leg., Reg. Sess. (Iowa 2013); H.B. 2394, § 1(d), Reg. Sess. (Kan. 2013); H.B. 454, § 4, Reg. Sess. (Ky. 2013); S.P. 72, § 1, 25 MRSA Pt. 12, § 4505, 126th Leg., Reg. Sess. (Me. 2013); H.B. 1233, § 1-203-1(C), Reg. Sess. (Md. 2013); H.F. 1506, § 1(4), 88th Leg., Reg. Sess. (Minn. 2013); S.F. 1620, § 3(5), 88th Leg., Reg. Sess. (Minn. 2013); H.F. 990, § 1(6)(b), 88th Leg., Reg. Sess. (Minn. 2013); H.B. 46, § 305.641.1-.3, 97th Leg., Reg. Sess. (Mo. 2013); L.B. 412, § 5, 103d Leg., Reg. Sess. (Neb. 2013); S.B. 556, § 5(A), Reg. Sess. (N.M. 2013); A.O. 3929, § 2, Reg. Sess. (N.J. 2013); A.O. 6370, § 1, S 52-A(4)(C), Reg. Sess. (N.Y. 2013); A.O. 6244, § 1 S 700.16(3), Reg. Sess. (N.Y. 2013); H.B. 312, § 15A-232.(e), Reg. Sess. (N.Y. 2013); H.B. 1373, § 4, 63d Leg., Reg. Sess. (N.D. 2013); H.B. 207, § 4561.50(C), Reg. Sess. (Ohio 2013); H.B. 1556, § 3(D), 54th Leg., Reg. Sess. (Okla. 2013); H.B. 2710, § 14-15, 77th Leg., Reg. Sess. (Or. 2013); RI Gen. Assemb. Jan. 2013, amending title 12 of Gen. Laws, Ch. 5.3, 12-5.3.-10.; H.B. 3415, § 2(c), 120th Leg., Reg. Sess. (S.C. 2013); H.B. 591, § 1(e), Reg. Sess. (Tenn. 2013); H.B. 912, § 423.006(2-3), Reg. Sess. (Tex. 2013); H.B. 1771, § 13,

include civil equitable relief, including injunctions to preclude drone use in advance of employment or to prevent the use of information collected.<sup>71</sup> Many bills contain a wide spectrum of potential civil penalties ranging from actual damages, to punitive and treble damages.<sup>72</sup> Almost thirty percent of states make it a crime, ranging from misdemeanor to a felony, to use drones in violation of their provisions.<sup>73</sup> A few bills even provide for administrative discipline for such violations.<sup>74</sup>

Exclusionary rules, and concomitant disciplinary measures, are time-honored remedies in a Fourth Amendment setting, yet bills that lack the full panoply of Fourth Amendment exceptions are fatally flawed.

### III. DEPARTMENT OF DEFENSE POLICIES

DoD policies take a nuanced approach that maximizes drone use without sacrificing civil liberties. The disjointed state approach to drone operations is a striking contrast to DoD policies. Even before the DoD operated drones, a

63d Leg., Reg. Sess. (Wash. 2013); H.B. 2732, § 1-7-5, Reg. Sess. (W. Va. 2013); H.B. 2997, § 1-7-5, Reg. Sess. (W. Va. 2013). ¶

<sup>71</sup> Injunctive relief provisions include: S.B. 317, § 1(c), 2013 Leg., Reg. Sess. (Ala. 2013); H.B. 2574, § 1, 13-3007(e), 51st Leg., Reg. Sess. (Ariz. 2013); Assemb. B. 1327, § 1, 14352, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 15, § 2(h), 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 92, § 1(5), Reg. Sess. (Fla. 2013); H.B. 2394, § 1(d), Reg. Sess. (Kan. 2013); H.B. 454, § 4, Reg. Sess. (Ky. 2013); S.P. 72, § 4506, 126th Leg., Reg. Sess. (Me. 2013); H.B. 1233, § 1-203-1(c), Reg. Sess. (Md. 2013); MN 1620/ 1706, § 3, Sub. 5; H.B. 46, § 305.641.1, Reg. Sess. (Ohio 2013); S.B. 556, § 5(A), 51st Leg., Reg. Sess. (N.M. 2013); Assemb. O. 3929, § 2, Reg. Sess. (N.J. 2013); Assemb. O. 6370, § 1 S 52-A.4C, Reg. Sess. (N.Y. 2013); Assemb. O. 6370, § 1 S 700.16(3), Reg. Sess. (N.Y. 2013); H.B. 1373, § 4, 63d Leg., Reg. Sess. (N.D. 2013); H.B. 3415, § 2(c), 120th Leg., Reg. Sess. (S.C. 2013); H.B. 912, § 423.006(1), Reg. Sess. (Tex. 2013); H.B. 1771, § 13, 63d Leg., Reg. Sess. (Wash. 2013); H.B. 2732, § 1-7-5, Reg. Sess. (W. Va. 2013); H.B. 2997, § 1-7-5, Reg. Sess. (W. Va. 2013).

<sup>72</sup> For specific information on civil damages, see provisions outlined in footnote 82.

<sup>73</sup> See H.B. 159, § 2(d), 28th Leg., Reg. Sess. (Alaska 2013); H.B. 2574, § 1, title 13, Ch. 30, 13-3007(f), 51st Leg., Reg. Sess. (Ariz. 2013); S.B. 15, § 3(j), 2013-14 Leg., Reg. Sess. (Cal. 2013); H.B. 560, § 2(b-d), Reg. Sess. (Ga. 2013); S.B. 20, § 4(b), 118th Leg., Reg. Sess. (Ind. 2013); H.B. 4455, § 17, Reg. Sess. (Mich. 2013); H.B. 1620, § 3(2), 88th Leg., Reg. Sess. (Minn. 2013); H.F. 990, § 1(6)(a), 88th Leg., Reg. Sess. (Minn. 2013); S.B. 196, § 1(1)(c), 63d Leg., Reg. Sess. (Mont. 2013); H.B. 619, § IV(a); Reg. Sess. (N.H. 2013); Assemb. B. 3157, § 5, 215th Leg., Reg. Sess. (N.J. 2013); S.B. 556, § 5(c), 51st Leg., Reg. Sess. (N.M. 2013); Assemb. O. 6370, § 1, S 52-A.4.A, Reg. Sess. (N.Y. 2013); H.B. 312, § 15A-232(e), Reg. Sess. (N.C. 2013); H.B. 1556, § 4(d), 5(b), 54th Leg., Reg. Sess. (Okla. 2013); H.B. 2710, § 13(1), 77th Leg., Reg. Sess. (Or. 2013); S.B. 71, § 2-3, 77th Leg., Reg. Sess. (Or. 2013); H.B. 912, § 423.004, Reg. Sess. (Tex. 2013); S.B. 5782, § 13, 63d Leg., Reg. Sess. (Wash. 2013); S.B. 196, § 3, Reg. Sess. (Wis. 2013).

<sup>74</sup> Administrative disciplinary provisions can be found in S.B. 263B-3(c), 263B-6, 27th Leg., Reg. Sess. (Haw. 2013); H.B. 4455, § 13(1), Reg. Sess. (Mich. 2013).

series of Intelligence Oversight (IO) policies were created to govern the intelligence capabilities when collecting images and information.<sup>75</sup> The DoD has a wide range of national security responsibilities that may require collection of imagery domestically using manned and unmanned airborne vehicles, including drones.<sup>76</sup> However, in general, the DoD cannot do so unless some very specific conditions are met. These conditions are codified in a host of IO and other policies and rules.<sup>77</sup>

Executive Order (EO) 12333, *United States Intelligence Activities*, applies to all intelligence platforms that domestically collect information on U.S. persons (USPER) using airborne assets.<sup>78</sup> EO 12333 guides the conduct of intelligence activities<sup>79</sup> within a strict framework that balances the need for effective intelligence with the “protection of constitutional rights” through collection, retention, dissemination, and oversight processes.<sup>80</sup> Under this framework drones can only collect information on USPER in limited circumstances.<sup>81</sup> In

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<sup>75</sup> See Executive Order (EO) 12333, *United States Intelligence Activities* (As amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008), <http://www.archives.gov/federal-register/codification/executive-order/12333.html>. DoDD 5200.27, Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, applies to non-intelligence capability (IC) collection of information on persons and organizations not affiliated with the DoD. The National Guard has adopted a similar IO rules. Chief National Guard Bureau Manual 2000.01, National Guard Intelligence Activities, 26 November 2012, *available at* [http://www.ngbpd.cngb.army.mil/pubs/CNGBI/CNGBM2000\\_01\\_20121126.pdf](http://www.ngbpd.cngb.army.mil/pubs/CNGBI/CNGBM2000_01_20121126.pdf).

<sup>76</sup> For example, the DoD needs to train using drones for combat proficiency, to give support to civil authorities during crisis situations or to protect the people, facilities and equipment under their charge. Whereas support to civil authorities is not a primary mission of the Services, organizing, training and equipping combat ready forces to be prepared to fight our nation’s wars is a statutory duty. 10 U.S.C. § 8013 (2006).

<sup>77</sup> Drones are an Intelligence, Surveillance and Reconnaissance (ISR) platform and, as such, are considered an intelligence capability to which IO rules apply. This article focuses only on IO policies. However, other mission-specific and drone-centric policies are described in greater detail in Col. Dawn M. K. Zoldi, USAF, *Protecting Security and Privacy: An Analytical Framework for Airborne Domestic Imagery*, forthcoming, 70 AIR FORCE LAW REV. (forthcoming Spring 2013), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379141](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379141).

<sup>78</sup> See U.S. Intelligence Activities, 73 Fed. Reg. 45, 325 (Aug. 2008), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2008-08-04/pdf/E8-17940.pdf>.

<sup>79</sup> U.S. DEP’T OF DEF., DIR. 5240.01-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Dec. 1982), *available at* [www.dtic.mil/whs/directives/corres/pdf/524001r.pdf](http://www.dtic.mil/whs/directives/corres/pdf/524001r.pdf) (describing how the EO defines intelligence activities as countering foreign threats but DoD and Service directives broaden this definition to “intelligence related activities.”).

<sup>80</sup> See U.S. Intelligence Activities, 73 Fed. Reg. 45,325, 2 (Aug. 2008), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2008-08-04/pdf/E8-17940.pdf>.

<sup>81</sup> U.S. DEP’T OF DEF., DIR. 5240.01-R, ¶ C.2.3, at 16; U.S. DEP’T OF AIR FORCE, INSTR. 14-104, ¶ A2.3 (explaining how under the EO 12333, USPER “means a United States citizen, an alien known by

contrast to many state legislative proposals, DoD policy clearly states that collection of USPER information by intelligence assets “shall be accomplished by the least intrusive means.”<sup>82</sup> DoD policy also contains specific guidance on retaining USPER identifying data. If properly collected, USPER data may be retained. Otherwise, with limited exception, USPER information “acquired incidentally” will be retained only temporarily, for no more than ninety days, unless it indicates involvement in activities that may violate Federal, State, local or foreign law.<sup>83</sup> Once properly collected and retained, USPER information may only be disseminated to limited government recipients for the “performance of a lawful governmental function.”<sup>84</sup> Any other dissemination requires approval of the DoD component’s legal office, the Department of Justice, and the DoD General Counsel.<sup>85</sup>

Under IO rules, the approval authority to collect USPER information varies depending on which special collection procedure is used.<sup>86</sup> Most activities or

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the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.” DoD can only collect on USPER if information is obtained with the individual’s consent; is publically available; constitutes foreign intelligence or counter intelligence (FI/CI); concerns potential intelligence sources or agents; is needed to protect intelligence sources or methods; is related to threats to or to protect the physical security of IC-affiliated persons, installations; is needed to protect intelligence and CI methods, sources, activities from disclosure; is required for personnel security or communications security investigations; is obtained during the course of a lawful FI/CI or international narcotics or terrorism investigation; is necessary for administrative purposes; is acquired by overhead reconnaissance not directed at USPER and is incidentally obtained that may indicate involving in activities that may violate Federal, State, local or foreign laws.

<sup>82</sup>U.S. DEP’T OF DEF., DIR. 5240.01-R, ¶ C2.4.1.- C2.4.2 (discussing how collection rules are contained in “Procedure 2” of DoD 5240.1-R. This means, generally, to the “extent feasible” that information should be collected from publically available sources or with the consent of the person concerned. Should publically available information or consent not be feasible or sufficient, other means of obtaining the information include: collection from cooperating sources, through the use of other lawful investigative techniques that do not require a warrant or approval of the Attorney General or by obtaining a judicial warrant).

<sup>83</sup>*Id.* at ¶ C3.3.4. and C3.3.2.4 (discussing how the 90 day period is “solely for the purpose of determining whether that information may be permanently retained under” the DoD procedures. Other exceptions for retaining USPER data are outlined in Procedure 3).

<sup>84</sup>*Id.* ¶ at C4.2 (describing how the “performance of a lawful government function” is also called “Procedure 4.” This includes DoD employees and contractors; Federal, State or local government law enforcement (if the information involves activities that may violate the laws for which they are responsible to enforce); intelligence agencies; authorized Federal Government agencies or foreign governments when pursuant to an agreement with them).

<sup>85</sup>*Id.* at ¶ C4.3.

<sup>86</sup>*Id.* at ¶ C5.1.2 (conducting, in non-emergent situations, electronic surveillance, referred to as a “Procedure 5,” may only be conducted pursuant to a warrant under the Foreign Intelligence

missions involving a drone outside of DoD-controlled airspace require approval from the Secretary of Defense (SecDef) or his delegee.<sup>87</sup> Conducting surveillance on specifically identified USPER with a drone is prohibited, absent explicit SecDef approval.<sup>88</sup> For training, use of drones outside of DoD-controlled airspace requires notification to the Chairman of the Joint Chiefs of Staff (CJCS).<sup>89</sup> This notice includes a Proper Use Memorandum (PUM) and a Federal Aviation Administration (FAA) Certificate of Authorization (CoA) or license.<sup>90</sup> A license requires sufficient information on the suspected activity to permit an informed judgment of its propriety. Violation or “questionable activity” regarding any of these stringent directives, policies, orders, or procedures may trigger special notifications, investigations and reporting to the SecDef and to Congress.<sup>91</sup>

Collectively, these mission-centric DoD IO policies allows drones to be used to their full potential while also protecting privacy through useful collection, dissemination, retention and oversight processes. States should consider these policies as templates for legislative action.

#### IV. A PROPOSED MODEL FOR DRONE LEGISLATION

The stated purpose of state drone legislation is critical. A logical starting point for analyzing any drone proposal is to review its purpose. As mentioned,

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Surveillance Act of 1978 (FISA). Only the SecDef, DepSecDef, the Service Secretaries or the Director of the National Security Agency can submit a such a FISA request. DoD 5240.1-R, ¶ C5.1.2.

<sup>87</sup> Memorandum from The Sec’y of Def., U.S. Dep’t of Def., subject: Interim Guidance for the Domestic Use of Unmanned Aircraft Systems (28 Sept. 2006); *See also* U.S. DEP’T OF DEF., INSTR. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES (26 Jul. 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/302522p.pdf>.

<sup>88</sup> *Id.* at ¶ 9,6,2.

<sup>89</sup> Memorandum from the Sec’y of Def. at 2.

<sup>90</sup> Air Combat Command’s (ACC) Operations Center’s Dynamic/Immediate ISR/Non-Traditional ISR Request (DIIR) includes these requirements in an 8-line Request form for U.S. Missions and Off-Installation Training. The ACC 8-line is *available at* <https://acc.eim.acc.af.mil/org/A3/A30/A3O3OP/default.aspx>. PUMs are required by regulation and signed by an officer in a position of authority, normally after legal review, who certifies the legitimacy of proposed DI requirements and the appropriateness of use parameters as well as legal and policy compliance. AFI 14-104, ¶ 9.5, Attachment 1 Terms and Attachment 4. Additionally, airborne assets used for training in conjunction with ground forces “off federal real property” also have unique approval authorities and notification procedures based on the risk associated with the event. DoDI 1322.28, Realistic Military Training (RMT) Off Federal Real Property. DoDI 1322.28, *supra*.

<sup>91</sup> *See* DoD 5240-1R and DepSecDef Directive-Type Memorandum (DTM) 08-052 – DoD Guidance for Reporting Questionable Intelligence Activities and Significant or Highly Sensitive Matters (June 17, 2009), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/DTM-08-052.pdf>, which outlines required information for such QIA reports.

the state drone bills introduced thus far purport to protect citizens' privacy and bolster the right to be free from "unwarranted" surveillance. To do this, states restrict law enforcement drones use for collecting and gathering information. These restrictions are generally prohibitive unless a warrant is obtained or a stated exception applies. These restrictions are reinforced by significant penalties for violations, which may even include criminal liability for law enforcement officers.

Many drone bills contain language that policy makers should pursue. Many however, miss the mark in their stated purpose which will have significant second and third order impacts. They selectively revise Fourth Amendment Constitutional and judicial protections that are already in place for criminal matters. Worse yet, some take a cookie cutter approach in applying these criminal law processes to drone users regardless of whether the information collected is for a law enforcement, intelligence, or legitimate military purpose. Often, the penalty is disproportional to the violation. Finally, many bills fail to adequately focus on the privacy-centric issues of collection, retention, and dissemination. The collective result of these disjointed state policies is that suspects will likely benefit from procedural windfalls; lives and property may be lost for fear of personal liability; and military training and operations will be degraded to the detriment of our greater society. This section of the article elaborates on these flaws and provides guiding principles for future drone legislation.

A. *Principle #1: Apply the Fourth Amendment As Written – Agnostically*

The Fourth Amendment of the U.S. Constitution should be applied as written and as interpreted by the courts. All state bills reviewed apply to government actors, primarily to law enforcement. All the bills, except that from Nebraska, prohibit law enforcement agencies from using drones to gather evidence absent a warrant or court order or in other limited, and generally exigent, circumstances. While on the surface these procedures appear to provide new privacy protections, in reality, they merely reiterate Fourth Amendment, Constitutional and jurisprudential protections that already exist. The troubling point here is that many drone bills selectively choose to use some, but not all, Fourth Amendment principles. Although state legislation can place restrictions on government action in addition to what is constitutionally required, the question here is why? The answer appears to be the mere fact that the tool used for the search is a drone. The result of selectively applying Fourth Amendment principles leads to unnecessary privacy restrictions and decreased safety protections. The solution is to apply the Fourth Amendment



agnostically, just as it is written in the Constitution and applied by the courts. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized...<sup>92</sup>

The Fourth Amendment warrant requirement applies to government action that amounts to a search. The test to determine whether or not a search has occurred (or will occur) can be traced back to the U.S. Supreme Court's decision in *Katz v. United States*: whether the person has a subjective expectation of privacy in the area to be searched and whether society is prepared to deem that expectation reasonable.<sup>93</sup> If the answer to the *Katz* questions are both affirmative, the Fourth Amendment requires the government to obtain a warrant, unless a specifically established and well-delineated exception to the warrant requirement applies.<sup>94</sup> These exceptions include, but are not limited to, exigent circumstances, consent searches, and plain view.<sup>95</sup> The Supreme Court has deemed exigent circumstances exist in the case of imminent danger to life, where a felon or suspect is fleeing and where the destruction of evidence is imminent.<sup>96</sup>

The remedy for violating the Fourth Amendment is the exclusionary rule and its corollary, the fruit of the poisonous tree doctrine.<sup>97</sup> The fruit of the

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<sup>92</sup> U.S. CONST. amend IV. The focus will remain on the U.S. CONST., which is applicable to the federal government, but which has been applied to the states through the Due Process clause of the Fourteenth Amendment through the selective incorporation doctrine.

<sup>93</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>94</sup> *Id.*

<sup>95</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1970)("[I]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'"); *Schmerber v. California*, 384 U.S. 757 (1966); consent, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and for plain view as it relates to aerial surveillance, *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Florida v. Riley*, 488 U.S. 445, 448 (1989).

<sup>96</sup> *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967)("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others"); *Tennessee v. Garner*, 471 U.S. 1 (1985)(law enforcement may use non-lethal force to deter a fleeing felon); *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973)("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation").

<sup>97</sup> The seminal case on the exclusionary rule is *Weeks v. United States*, 232 U.S. 383 (1914) and

poisonous tree doctrine extends the exclusionary rule to evidence that was illegally obtained.<sup>98</sup> The stated purpose of the exclusionary rule, and its corollary doctrine, is to deter police from engaging in misconduct, or at least conduct that violates our Constitution.

Just as the warrant requirement has exceptions, so too does the exclusionary rule. The good faith exception permits the admission of evidence that law enforcement, in good faith, gathered based on a warrant that is later deemed facially invalid.<sup>99</sup> The rationale being that excluding evidence where there was no law enforcement misconduct would not advance the purpose of the exclusionary rule, which is to deter. Likewise, the inevitable discovery doctrine allows evidence to be admitted if the evidence would have been discovered "inevitably" by other lawful means.<sup>100</sup> The rationale for this doctrine is the same as that for the good faith doctrine. Accordingly, police misconduct is not deterred where the prosecution is in no better position than it would have been absent law enforcement's conduct.

State drone privacy policies should be consistent with well-established privacy laws. The requirement that law enforcement obtain a warrant before searching for evidence where there is a reasonable expectation of privacy is well established. Similarly, permitting law enforcement to search without a warrant in exigent circumstances, where there is consent or where information is in plain view constitutes Black-letter law. However, when it comes to drones, states unevenly apply these well-established Fourth Amendment principles. Case in point, the *least* common exception in any drone bill is an explicit proviso to permit drone use where "judicially recognized exceptions to the warrant requirement" would otherwise apply. Likewise, less than a quarter of states would permit law enforcement to use a drone even when a suspect has consented, despite longstanding Fourth Amendment jurisprudence that consent constitutes an exception to the warrant requirement.

Bills such as those from Arizona, Indiana, Kansas, Nebraska, New Jersey, Pennsylvania, and West Virginia fail to include an imminent danger to life exception and very few states carve out exceptions for search and rescue operations or natural disaster response assessment.<sup>101</sup> Several state bills that

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as applicable to State authorities, *Mapp v. Ohio*, 367 U.S. 643 (1961). "Fruit of the poisonous tree" doctrine was first applied in *Silverthorne Lumber Co., Inc., et al. v. United States*, 251 U.S. 358 (1920) (copies of tax records were ruled inadmissible for being derivative of illegally seized evidence).

<sup>98</sup> *Silverthorne*, 251 U.S. 385; *Mapp*, 367 U.S. 643..

<sup>99</sup> *United States v. Leon*, 468 U.S. 897 (1984). Generally, facially invalid warrants are ones that lacked sufficient probable cause by mistake, as opposed to law enforcement's misrepresentation.

<sup>100</sup> *Nix v. Williams*, 467 U.S. 431 (1984).

<sup>101</sup> See *supra* notes 28 & 31.

include an emergency response exception then require law enforcement to obtain a judicial warrant within 48 hours after-the-fact. Presumably all of these states would permit their law enforcement to fly a helicopter with a full motion video capability in the same exact circumstances, and without these procedures.

The seventy-seven state proposals that would require a warrant to view a person walking in an open or public field with a drone erode the plain view doctrine. Specifically with regard to domestic aerial surveillance with manned aircraft flying within navigable airspace, the Supreme Court has held this is tantamount to the plain or public view exception, for which a search warrant is not required.<sup>102</sup> This same logic would, and should, apply to unmanned aircraft. The fact that states like Arkansas and eight like-minded others felt the need to include a public land exception speaks volumes about the extent to which legislators have selectively chosen to utilize long-held Fourth Amendment principles.<sup>103</sup> In short, the full panoply of Fourth Amendment requirements should apply to drone use for law enforcement purposes.

Admittedly, drones are an emerging technology and there may be special considerations in their use, as the Supreme Court alluded to in the *United States v. Jones* and *Kyllo v. United States* decisions.<sup>104</sup> Potential reasonableness factors that emerge from these cases include: review of exact location of the search, such as a home, open spaces, and public places; the sophistication of the technology used; whether commonly available or pre-technology; the length of time an individual is kept under surveillance or duration of the activity; pervasiveness in the form of the breadth of data collected through surveillance; as well as society's conception of privacy and fairness.<sup>105</sup> This focus on time, place, and manner is much a more constructive path for drone legislators than whole-cloth or piecemeal revision of the Fourth Amendment.

State restrictions that protect non-public places from law enforcement's intrusion on private areas, such as the home and the curtilage surrounding it,

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<sup>102</sup> See *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Florida v. Riley*, 488 U.S. 445, 448 (1989).

<sup>103</sup> See sources cited *supra* note 43 (regarding public land use exceptions).

<sup>104</sup> *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001) (Government agents' use of thermal imaging while standing outside a house to infer what is going on inside the house constituted a search; technology not in "general public use" enabled the government to gather information about activities inside the home that would not have otherwise been obtainable except by entering the home.); *United States v. Jones*, 132 S.Ct. 945 (2012) (Government agents placed a global positioning system (GPS) on a car and tracked the car's movements over a period of a month, constituting an unreasonable search. Justice Alito concurred but said the reasonable expectation was based on the fact that that government used "pre-technology" – a technology that the government had, but that others did not.)

<sup>105</sup> Richard A. Thompson III, Legis. Att'y, Cong. Research Services Rep., *Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses* (Sept. 6, 2012).

are consistent with the Fourth Amendment's protections, and frankly, are expected.<sup>106</sup> The 48-hour operational execution windows arguably constitute reasonable duration limitations.<sup>107</sup> The manner of clearly marking the drone as required by both California and Michigan makes sense if the aircraft is not a classified test prototype.<sup>108</sup> Oregon, for example, has taken an approach to drone legislation that should be emulated. In Oregon the legislature has directed its agencies to adopt policies that focus on drone use. These policies are akin to DoD policies that establish training requirements for operators, criteria for drone use, descriptions of the areas in which drones will be used, and procedures for informing the public of these policies.<sup>109</sup> Likewise, as will be discussed, the few States that focus on regulating the manner of collection, retention and dissemination, are on the right track. On the other hand, those that distort the Fourth Amendment under the banner of protecting personal liberties erodes the very liberties they are intended to be preserve.

B. *Principle #2: Take a Nuanced Approach to Operational Purpose*

States must consider the impact on law enforcement, the intelligence community and the DoD before passing drone legislation. A nuanced approach would not just differentiate between different actors, it would both permit drone use across the full spectrum of operations *and* protect personal privacy. Before discussing collection, dissemination, and retention regimes, it is important to appreciate that different agencies have different purposes for collecting information, whether using a drone or not. Law enforcement,

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<sup>106</sup> See sources cited *supra* note 51 (detailing a list of place restrictions).

<sup>107</sup> S.B. 783, 27th Leg., Reg. Sess., § 1, ¶ (3)(B)(Haw. 2013) (allowing the ability to receive a judicial order to operate drone for "no period greater than 48 hours" and within 30 days of issuance); S.B. 1587, 2013 Leg., 98th Sess., § 15(2)-(3) (Ill. 2013) (describing that a search warrant "limited to period of 45 days" and renewable; emergency operations limited to 48 hours); S.P. 72, 126th Leg., 1st Reg. Sess. (Me. 2013) (amending § 1, 25 MRSA Pt. 12, § 4502.2. E (court order..."may not allow operation for a period greater than 48 hours"...but not to exceed 30 days)); H.B. 4455, 97th Leg., Reg. Sess., § 5(d) (Mich. 2013) (enforcing court orders valid for 48 hours, with possibility of extension up to 30 days); H.B. 312, 2013 Gen. Assemb., Reg. Sess., § 2(3)(c)(b) (N.C. 2013) ("no later than 48 hours" from the date drone was used); H.B. 1771, 63rd Leg., Reg. Sess., § 6.(4) (Wash. 2013) ("Warrants shall not be issued for a [surveillance] period greater than 48 hours...for no longer than 30 days").

<sup>108</sup> H.B. 4455, 97th Leg., Reg. Sess., § 3(5) (Mich. 2013); S.B. 15, 2013 Leg., Reg. Sess. (Cal. 2013) (amending Penal Code § 14356).

<sup>109</sup> H.B. 2710, 77th Leg., Reg. Sess., § 1.(7)(a)-(d) (Or. 2013) (showing how similarly, Va. H.B. 2012, § 1.1 requires the Va. Department of Criminal Justice and Office of AG to develop "model protocols for use of UAS by LEA and report findings to the Governor and General Assembly" by November 1, 2013).

intelligence, and military training operations are not the same. A one-size-fits-all approach should be eschewed in favor of a more nuanced one.

The intelligence community (IC) and law enforcement have different focuses. Law enforcement focuses on criminal evidence-gathering in furtherance of punishing past acts; the purpose of intelligence collection is to prevent future ones.<sup>110</sup> The IC needs “to be able to do more than connect the dots when we happen to find them; we need to be able to find the right dots in the first place.”<sup>111</sup> It is for this reason that, while the Fourth Amendment still applies, the IC, including the DoD IC, has its own legal framework that includes and IO policies discussed above. To the extent that drone proposals like those in California, Hawaii, Missouri, Rhode Island, Washington and others apply to all persons or U.S. officers, they fail to distinguish between law enforcement and intelligence paradigms.<sup>112</sup> This matters. For example, in California, Senate Bill 15, which is currently under advisement, states “an unmanned aircraft system may not be equipped with a weapon.” Doing so is punishable by a fine and imprisonment.<sup>113</sup> The proposal contains no military exemption, yet California is replete with military ranges, bases and test sites for the Active, Reserve and Guard components of virtually all the military Services.<sup>114</sup>

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<sup>110</sup> William Lietzau, Deputy Assistant U.S. Sec’y of Def. for Detainee Policy, *Twenty-First Century Detention for Terrorists* (Feb. 18, 2011), *available at* [http://www.law.harvard.edu/news/2011/02/18\\_understanding-detention-predicting-prosecutions.html](http://www.law.harvard.edu/news/2011/02/18_understanding-detention-predicting-prosecutions.html).

<sup>111</sup> Robert S. Litt, ODNI Gen. Counsel, Office of the Dir. Of Nat’l Intelligence, Privacy, Technology and National Security: An Overview of Intelligence Collection (Jul. 19, 2013), *available at* <http://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews-2013/896-privacy,-technology-and-national-security-an-overview-of-intelligence-collection>.

<sup>112</sup> *See supra* note 11 (citing drone proposals).

<sup>113</sup> S.B. 15, § 14351 (Cal. 2013).

<sup>114</sup> *See* Thomas J. McLaughlin, Mary P. Gaston, and Jared D. Hager, *Navigating the Nation’s Waterways and Airways: Maritime Lessons for Federal Preemption Airworthiness Standards*, 23 *THE AIR & SPACE LAWYER* 2 (2010), *available at* [http://www.perkinscoie.com/files/upload/10\\_27\\_ABAArticle.pdf](http://www.perkinscoie.com/files/upload/10_27_ABAArticle.pdf); *See also* *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 639, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) and *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303, 64 S.Ct. 950, 88 L.Ed. 1283 (1944) (Jackson, J., concurring). Some may argue that State drone laws are pre-empted by federal law. The topic of federal pre-emption of State drone law’s merits its own article and is beyond the scope of this one. Even assuming pre-emption applies, as a practical matter, a federal officer would have to be summoned into court, request DoJ substitution or representation, and then litigate pre-emption. The better course of action would be for States to exclude federal officers from their laws from the inception, especially the U.S. military. Apparently, numerous States believe they can legislate federal and military actors’ drone use. However, suffice it to say that a plausible argument for preemption would be that the Federal Aviation Act (FAA) of 1958, its supplements, including the 2012 FAA Modernization and Reform Act, when combined with

Whether or not state drone laws directly or indirectly apply to the DoD, most state proposals will nevertheless impact military training and operations. By way of example, Air Force Instruction (AFI) 14-104, *Oversight of Intelligence Activities*, requires Air Force intelligence components to report “incidentally acquired information... reasonably believed to be a violation of law,” whether Federal, State, local or foreign, to the appropriate civilian law enforcement agency, through the Air Force Office of Special Investigations (AFOSI).<sup>115</sup> The AFI also requires reporting of incidentally acquired information relating to “potential threats to life or property (whether DoD personnel, installations or activities, or civilian lives or property)...” to “appropriate authorities.”<sup>116</sup> It is not difficult to imagine a case in which a United States Air Force (USAF) drone incidentally acquires information about threats or the commission of a crime. In a State that prohibits local law enforcement agencies from receiving information or evidence acquired by a drone, such as MI House Bill 4455, the service would be forced to violate its own regulations.<sup>117</sup> More disturbingly, lawfully acquired information relating to a threat or crime might go unheeded by State agencies in a position to take action.

These are but a few reasons why a military exemption is critical. Yet, with one notable exception, the language contained in the bills that thus far address the topic do not go far enough. By focusing on the National Guard, the Washington and Virginia bills neglect to address the Total Force as defined by Secretary of Defense, James Schlesinger,<sup>118</sup> including the Active Duty and

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comprehensive FAA regulations found at 14 CFR illustrate Congress’s intent that the FAA occupy the entire field of aircraft safety.

<sup>115</sup> U.S. DEP’T OF AIR FORCE, INSTR. 14-104, OVERSIGHT OF INTELLIGENCE ACTIVITIES, ¶ 11.12.1, 11.12.2.2 (Apr. 23, 2012), available at [http://static.e-publishing.af.mil/production/1/af\\_a2/publication/afi14-104.pdf](http://static.e-publishing.af.mil/production/1/af_a2/publication/afi14-104.pdf).

<sup>116</sup> *Id.* at ¶ 12.

<sup>117</sup> H.B. 4455, 97th Leg., Reg. Sess., § 3(3) (Mich. 2013) (“Except as provided in section 5, a law enforcement agency of this state or a political subdivision of this state shall not disclose or receive information acquired through the operation of an unmanned aerial vehicle.” Section 5 of the bill contains exceptions based upon consent, imminent threat to life, search warrant, court order or for non-evidentiary or non-intelligence purposes. It is difficult to imagine why a law enforcement agency would want to receive drone information that has no evidentiary or intelligence value).

<sup>118</sup> Sec’y. of Def. James Schlesinger declared the Total Force concept as policy in 1973, which included the comparable structuring of units, equal training and evaluation standards for active and reserve forces, and an integrated approach to equipping, supporting, and exercising all units. See AIR FORCE RESERVE COMMAND HISTORY, 1969-1989, available at <http://www.afrc.af.mil/library/history/1969-1989/index.asp>. Lt. Col. USAF, Richard Toner, A Total Force Concept: An Air Force View, AIR U. REV. (June 1, 2004), available at <http://www.airpower.au.af.mil/airchronicles/aureview/1972/nov-dec/toner.html>.

Reserve components.<sup>119</sup> New Jersey's "disorderly persons offense" for the purchase, ownership or possession of a drone exempts the Total Force "while on duty or traveling to or from an authorized place of duty;" but military members do not "possess or own drones," they operate them.<sup>120</sup> The Oklahoma bill, which also applies to the Total Force, protects military equities by specifically allowing armed drones, over-flight of private land between military installations and testing and training over public land.<sup>121</sup> It also permits the military to test and train with weaponized drones. States that prohibit this create a huge barrier for statutorily mandated military requirements.<sup>122</sup> Even the Oklahoma bill, which is the most permissive towards military operations, precludes drone use across the potential full range of DoD missions, including DSCA, SAR, support to civil law enforcement, and force protection, to name a few.

Oregon's approach strikes the right balance with regard to the DoD and is worth emulating as regards to its military exemption. It explicitly exempts the "United States Armed Forces," defined as including: the Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; Reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; and the National Guard of the United States and the Oregon National Guard.<sup>123</sup> By exempting the Total Force from its drone bill provisions, Oregon is one of the few states that permits critical military training to occur unimpeded and bolsters readiness for combat and other missions. Conversely, the "one-size-fits-all" state approach which fails distinguish between drone users has unintended consequences for our national security by impeding critical training and operations.

C. *Principle #3: Renew Focus on Collection, Dissemination and Retention*

States should also take a more privacy-centric approach to drone legislation that focuses on how users collect information, with who they may share it and for how long they can keep it. Some state bills approach privacy protection through collection, dissemination, retention and oversight rules similar to, but distinguishable from, DoD IO policies, like those which require drone operators

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<sup>119</sup> *Id.*

<sup>120</sup> S.B. 3157, § 2.a., Gen. Assemb. (N.J. 2012), ¶ 5.

<sup>121</sup> H.B. 1556, Section 5.C; § 4.A, 54th Leg., 1st Sess. (Okla. 2013).

<sup>122</sup> See footnote 45, *supra*, for lethal and non-lethal weapons restrictions. 10 U.S.C. § 8013 (b) (2010) is the "organize, train and equip" authority of the Service Secretaries and charges them to prepare combat-ready forces to aid in our nation's defense.

<sup>123</sup> H.B. 2710, § 16, 77th Sess., Reg. Sess. (Or. 2013).

to focus on the target of the collection and avoid or minimize data collection on other individuals, homes, or areas.<sup>124</sup> This is a positive development and should be further pursued. Like the DoD, some also address retention by requiring the deletion of information improperly collected, or collected on non-targets.<sup>125</sup> For a law enforcement paradigm, this makes sense unless incidentally, within the legitimate scope of the collection, law enforcement captures images of another crime in progress. Envision a situation where law enforcement has a drone warrant to image a drug dealer but then cannot use the same video feed against the drug buyer. Without rehashing the Fourth Amendment discussion above, requiring the deletion of this information does more societal harm than good.

The DoD IO policy's incidental collection rules are slightly broader and allow retaining images of criminal acts captured consistent with official records disposition schedules.<sup>126</sup> USPER information acquired incidentally can also be retained for up to ninety days to determine if there is a legitimate purpose to keep it under the IO rules.<sup>127</sup> Perhaps for drone legislation, the line to retain incidental information lies somewhere more than 24 hours but less than 90 days. Retention criteria for incidentally acquired information should also include criminal acts.<sup>128</sup> California's provisions that allow images to be kept for "training purposes" is a necessity for the military and worth repeating.<sup>129</sup>

Similarly, most drone bills prohibit dissemination of information gathered on non-targets. The DoD IO dissemination policy, that USPER information may be disseminated to limited government recipients for the "performance of a lawful governmental function" is a useful approach.<sup>130</sup> Requiring extensive approvals from high-level legal counsel for any other dissemination is a practice that can be duplicated in equivalent State legal counsel offices.<sup>131</sup> In addition, many bills prohibit use of facial recognition or other biometric matching

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<sup>124</sup> See footnotes 48-50, *supra*, for state collection restrictions.

<sup>125</sup> See footnotes 54-56, *supra* for retention rules.

<sup>126</sup> In the Air Force, the applicable instruction is AFI 33-364, Records Disposition – Procedures and Responsibilities (Dec. 22, 2006), *available at* <http://www.e-publishing.af.mil/index.asp> by reference to its number.

<sup>127</sup> DoD 5240.1-R, ¶ C3.3.4. One legitimate reason to retain incidental information would be where it indicates involvement in activities that may violate federal, state, local, or foreign law. Other exceptions for retaining USPER data are outlined in Procedure 3.

<sup>128</sup> S.B. 1587, § 25. (Ill. 2013), permits a supervisor to disclose to another government agency information collected if there is reasonable suspicion it contains evidence of a crime or is relevant to ongoing investigation or pending criminal trial (and thus retain at least for this purpose).

<sup>129</sup> H.B. 1327, 2013 Assemb., Reg. Sess. (Ca. 2012).

<sup>130</sup> DoD 5240.1-R, ¶ C4.2., also called "Procedure 4."

<sup>131</sup> *Id.* ¶ C4.3.



technology on non-target information.<sup>132</sup> This may be understandable in a law enforcement context, but in an intelligence environment, this is unduly restrictive. The same can be said for dissemination, in the form of notice, to the subject of the drone monitoring, which is workable for law enforcement, but not for intelligence professionals.<sup>133</sup>

Documentation, oversight and reporting requirements is a given in this arena. It applies in a DoD context, to the IC and unquestionably should apply to law enforcement use of drones in the States.<sup>134</sup> The public and media expect transparency. States that require public notice of drone operations, images, and government agency drone reports filed are likely ahead of the power curve on that issue.<sup>135</sup> Exceptions must be made for sensitive or classified intelligence and military operations.

#### D. *Principle #4: Mold the Remedy to the Violation*

States must also rethink the remedies prescribe for drone bill violations. In addition to selectively using particular exceptions to the warrant requirement, many proposed drone bills compound this error by including non-compliance ramifications. Non-compliance ramifications often fail to distinguish between government and private actors, are redundant of existing law or are otherwise draconian in effect.

As previously mentioned, the remedy for law enforcement's violation of the Fourth Amendment search and seizure provision is to exclude the evidence, or information derived from it, at a criminal trial.<sup>136</sup> These provisions are problematic only insofar as the parent bill fails to include the full spectrum of Fourth Amendment exceptions, like the good faith and inevitable discovery doctrinal exceptions to the exclusionary rule. For example, the Alabama bill only contains allows for drone use in these circumstances: when a warrant has been obtained; a terrorist attack is imminent; there is danger to life; or to pursue a fleeing suspect. Thus, in a case where law enforcement obtains consent and uses a drone, an Alabama court would be required, under the bill, to exclude it.<sup>137</sup> Likewise, if no enumerated drone bill exception applies, but the Alabama State Police would have inevitably discovered the information by means other than a drone, the proposed bill would also exclude its admission. This type of separation of the remedy from its historical purpose, to deter law

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<sup>132</sup> See *supra* note 51.

<sup>133</sup> For notice provisions see *supra* note 53.

<sup>134</sup> See *supra* note 60 (discussing oversight and reporting requirements).

<sup>135</sup> See *supra* note 58-60 (discussing recordkeeping and public reporting requirements).

<sup>136</sup> See *supra* note 64 (discussing criminal exclusionary rule citations).

<sup>137</sup> S.B. 317, 148624-2, 2013 Reg. Sess. (Ala. 2013).

enforcement misconduct, creates an unnecessary windfall for criminal suspects. The windfall of disconnected remedy and purpose is not just limited to criminal suspects. Some states preclude admission of drone information from civil and administrative hearings.<sup>138</sup> Generally speaking, evidence obtained in violation of the Fourth Amendment's warrant requirements does not preclude admission in civil cases.<sup>139</sup> This is a basic due process tenant. In criminal cases, where life and liberty are at risk, the stakes are higher and protections greater than in civil cases – or even lower on the sliding scale, administrative cases—that typically involve property.

Several state drone bills also create civil and criminal liability against law enforcement agencies or individual officers for failing to abide by their requirements. These provisions may very well have a chilling effect on public safety. Imagine the decision making process of a Missouri police officer faced with the choice of flying his unmanned drone or a manned helicopter over an evacuated housing area in the direct path of a raging wildfire. To obtain better situational awareness of the incident, he either risks the life of his pilot, flies a drone in the face of being dragged into civilian court for wrongfully imaging private property without consent or he does nothing.<sup>140</sup> A less enviable situation would be that of the state or, as written, federal law enforcement agent in Georgia who, to save a life, uses a drone without a warrant and subsequently gets convicted of a misdemeanor.<sup>141</sup>

This latter point highlights a significant flaw in the majority of drone bills reviewed. They tend to focus on government actors. However, government actors are already bound by the constraints of the Constitution. Private actors are not. Only California, Hawaii, Rhode Island, Texas and Washington extend their bills to persons or individuals.<sup>142</sup> Even these conflate the duties imposed on government and private actors using drones. For example, Hawaii purports make it unlawful for an "individual" to operate a drone absent consent or pursuant to a warrant or order, yet the remainder of the bill's requirements applies to, "agents of the state or any political subdivision thereof."<sup>143</sup> Only California Senate Bill No. 15 clearly delineates between governmental and

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<sup>138</sup> See *supra* note 69.

<sup>139</sup> *U.S. v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976)(holding that a determination of whether the exclusionary rule should be applied in a civil proceeding involved weighing the deterrent effect of application of the rule against the societal costs of exclusion. Up to that point, the Court had never applied the exclusionary rule to exclude evidence from a civil proceeding, federal or state).

<sup>140</sup> H.B. 46 §§ 305.641.1-.3, 97th Gen. Assemb., First Reg. Sess. (Mo. 2013).

<sup>141</sup> H.B. 560, § 2(b)-(c), 68th Reg. Sess. (Ga. 2013) (any LEA of the US or GA who uses a drone without a warrant, or assists them, "shall be guilty of a misdemeanor").

<sup>142</sup> See *supra* note 17.

<sup>143</sup> S.B. 783, § 2563B-2(b), 27th Leg., Reg. Sess. (Haw. 2013).

private drone users.<sup>144</sup> As mentioned, of all the bills surveyed, only the New Hampshire bill focuses exclusively on private actors.

## V. CONCLUSION

A review of state drone bills, current DoD domestic IO policies and existing Constitutional principles highlighted that the focus of legislative activity remains on government actors, with an emphasis on law enforcement. There is with little regard for the second and third order effects of others with significant equities in domestic drone use, particularly the U.S. Armed Forces. The way ahead for future law and policy is simple: differentiate between users; focus on the purpose of the collection; and apply already existing relevant principles. In the case of law enforcement drone collection, apply the full range of Fourth Amendment protections and remedies. Furthermore, it is critical that state legislatures propose nuanced language that appropriately distinguishes law enforcement, the intelligence community, the military and the private sector. The ground rules for each type of actor should be stated unambiguously. The exemptions for statutorily mandated military training and operations should be clearly stated and free of the threat of litigation. The intelligence community and the DoD have tried and true mission-centric intelligence oversight policies that allow drones to be used to their full potential and also protect privacy through rules focused on collection, dissemination, retention and oversight. States should emulate them. Getting drone legislation right is critical because failing to do so could have significant consequences that could negatively impact on our lives property, liberty and our national security.



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<sup>144</sup> S.B. No. 15, 2013 Leg., Reg. Sess. (Cal. 2013) (discussing the offense of “Illegal Use of Unmanned Vehicle or Aircraft to Capture Image” in terms of any “person” who commits the offense).