

SENATOR MIKE LEE QUESTIONS FOR THE RECORD
Prof. Laura K. Donohue

(1) What constitutional concerns, if any, do you see with the current federal counter-UAS regime as applied to sensitive locations such as federal prisons, the border, federal buildings, and airports?

Response:

Current counter-UAS authorities, codified at 6 U.S.C. § 124n, raise troubling First, Fourth, and Tenth Amendment concerns.

The statute's broad definition of a "covered facility or asset" and its authorization to "detect, identify, monitor, and track" UAS and to control, seize, confiscate, disable, damage, or destroy drones risk putting the Secretary of Homeland Security and the Attorney General in the position of preventing citizens and media from engaging in audio and video observation and recording of government actions in public space, which courts recognize as protected First Amendment expressive activity.¹ The statutory definition of covered facilities includes all Department of Homeland Security missions related to Customs and Border Protection (including along the border, which under federal regulations constructively extends 100 miles inside the United States) as well as efforts to protect any "buildings, grounds, and property that are owned, occupied, or secured by the Federal Government."² This would include any federal activity along the borders as well as within hundreds of miles from any international airport, or near any federal facility, across the United States. The statute also includes all Department of Justice missions pertaining to buildings or grounds leased or owned by the department, as well as Federal courts, again potentially sweeping in a significant amount of activity which citizens otherwise have the right to observe.³ The decision of which facilities to subject to enhanced protections, and the duration, is left entirely up to the executive. Because the Attorney General's guidelines implementing 6 U.S.C. § 124n requires the government to assess the content and nature of events which require threat-mitigation efforts, the provisions trigger strict scrutiny.⁴ Even under intermediate scrutiny, current counter-UAS provisions burden substantially more speech than necessary by allowing the government to disrupt, seize, or destroy drones without regard to distance, activity, or property rights.⁵ Taken together, current drone provisions risk having a chilling effect and restricting the ability that undergirds one of the primary aims of the First Amendment, which is to hold officials accountable.⁶

Current counter-UAS laws also raise Fourth Amendment concerns because they empower the government to intercept drones and search their contents without a warrant. The statute gives the federal government the authority to access all communications between the drone operator and

¹ See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2014) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."); *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 82434 (4th Cir. 2023).

² 6 U.S.C. § 124n(k)(3)(C)(i), referencing 40 U.S.C. § 1315(a).

³ See 6 U.S.C. § 124n(k)(3)(C)(ii).

⁴ William Barr, Attorney Gen., Guidance Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems, at III(a) (April 13, 2020), X(F), <https://www.justice.gov/archives/ag/page/file/1268401/dl?inline> (defining a National Special Security Event as "a designated event that, by virtue of its political, economic, social, or religious significance, may be the target of terrorism or other criminal activity.")

⁵ See 6 U.S.C. § 124n (b)(1)(C)–(F).

⁶ See *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017).

the UAS, as well as to disrupt and control all UAS systems.⁷ The government can seize not just communications directing the drone where to fly, but also communications related to what the drone itself is collecting, observing, and communicating back to the drone operator. It also means that the government may gain access to any devices used over the course of such transmissions, whether it be radio frequency signals, Wi-Fi, or satellites, which play a critical role in communicating with drones.⁸ Lacking any statutory limits, the current counter-UAS regime essentially operates as a general warrant. To address these issues, counter-UAS laws moving forward should operate within the limits of current Constitutional restraints and set clear boundaries of what information the government may access without warrants.

Lastly, the statute risks intruding on traditional state police powers over low-altitude airspace and property rights. Federal authority over navigable airspace is clear, but states retain sovereignty over drones operating at low altitudes above state and private land.⁹ Current counter-UAS laws risk encroaching on such state authority.

(2) You have analogized the collection of information from drones to practices under the Foreign Intelligence Surveillance Act (FISA). Could you expand on how you see these two being related, and what lessons from FISA reform Congress could apply to forthcoming counter-UAS legislation?

Response:

Both FISA and § 124n aim to address national security threats. Unlike FISA, however, the counter-UAS regime lacks prior judicial review. In *U.S. v. U.S. District Court*, the Supreme Court held that electronic surveillance inside the United States on matters related to domestic security must satisfy some sort of warrant procedure in which a neutral and detached magistrate plays a role.¹⁰ As the court explained, “The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute.”¹¹

Congress responded with the Foreign Intelligence Surveillance Act of 1978, under which the government must demonstrate probable cause that the target is a foreign power or an agent thereof, and probable cause that the target is likely to use the facilities to be placed under surveillance, prior to interception.¹² The determination is made by an Article III judge appointed by the Chief Justice to the Foreign Intelligence Surveillance Court.¹³ Surveillance is only approved for limited periods.¹⁴ The statute gives the government the flexibility to respond in an emergency, followed by application within seven days to the court for an order to continue surveillance.¹⁵ Any U.S. person information obtained must comport with the standard minimization procedures and, if requested by the court, additional protective measures to ensure that information is neither retained nor disseminated in a matter that undermines the Fourth

⁷ See 6 U.S.C. § 124n(b)(1)(A), (C),(D).

⁸ See 18 U.S.C. § 2510 (1).

⁹ See *United States v. Causby*, 328 U.S. 256, 265 (1946); *Griggs v. Alleghany*, 369 U.S. 84, 85 (1962).

¹⁰ *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, S. Div., 407 U.S. 297, 323–24 (1972) (Keith).

¹¹ 407 U.S. at 317.

¹² See 50 U.S.C. § 1805(a). Every court to consider the Constitutionality of FISA has found it sufficient. See, e.g., *United States v. Nicholson*, 955 F. Supp. 588, 590-91 (E.D. Va. 1997); *United States v. Cavanagh*, 807 F.2d 787, 790–92 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir.1984); *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982). See also *Ellsberg v. Mitchell*, 709 F.2d 51, 66 n. 66 (D.C. Cir. 1983) (noting that FISA had theretofore survived all constitutional challenges), cert. denied, sub nom. *Russo v. Mitchell*, 465 U.S. 1038 (1984).

¹³ See 50 U.S.C. §§ 1803(a)(1); 1805(a)(2).

¹⁴ See 50 U.S.C. § 1805 (d)(1).

¹⁵ See 50 U.S.C. § 1805(e)(1).

Amendment.¹⁶ If surveillance is directed at a different facility over the course of the surveillance, the government must promptly inform the court, transmitting additional information.¹⁷ Any judicial opinions which result in a significant interpretation of the law must then be reported to Congressional committees, and annual statistics must be provided to Congress on various aspects of government use of the authorities, such as the number of applications, any full or partial denials, and the number of applications granted.¹⁸ Finally, the court has the possibility of appointing amici curiae for any novel matters of law.¹⁹

In contrast, as it currently stands, 6 U.S.C. § 124n operations require only the approval of the Deputy Attorney General or, in emergencies, the head of an authorized agency.²⁰

Implementing FISA-like procedures that protect constitutional rights, where, outside of exigent circumstances, agencies would need to demonstrate some sort of probable cause to a third party magistrate before taking action against a drone, any U.S. person information collected would be minimized, significant interpretations of law would be presented to Congress, and statistical information would be made available could and should apply to any future counter-UAS legislation.

(3) In your testimony, you raised Tenth Amendment concerns about the federal counter-UAS regime potentially abridging state sovereignty. What do you see as the proper balance between federal and state authority in the counter-UAS domain?

Response:

Distinguishing between higher navigable airspace, where federal authority for air commerce is clear, and the low-altitude space where state police powers and property rights have been traditionally recognized would give the federal government the authority to protect federally-owned property and higher, navigable airspace without raising Tenth Amendment concerns. Almost every state has already implemented drone laws, many of which already address the concerns raised at the federal level.²¹ States should continue to exercise their traditional power to manage UAS activity in low-altitude airspace over state and private land and forthcoming legislation should complement, not overrule, these efforts.

¹⁶ See 50 U.S.C. § 1805(a)(3).

¹⁷ See 50 U.S.C. § 1805(C)(3).

¹⁸ See 50 U.S.C. §§ 1871(a)(1), 2, 4, 5.

¹⁹ See 50 U.S.C. § 1803(i).

²⁰ William Barr, Attorney Gen., Guidance Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems, at III(a) (April 13, 2020), X(D), <https://www.justice.gov/archives/ag/page/file/1268401/dl?inline>.

²¹ See Federal Aviation Administration, Updated Fact Sheet (2023) on State and Local Regulation of Unmanned Aircraft Systems (UAS) <https://www.faa.gov/sites/faa.gov/files/State-Local-Regulation-of-Unmanned-Aircraft-Systems-Fact-Sheet.pdf> (noting “at least 44 States have enacted laws relating to UAS, addressing issues such as privacy, delivery of prison contraband, firefighting, law enforcement use of UAS, and UAS registration.”).