



Weaponized Drones and the Constitution

Recently, the San Francisco Board of Supervisors voted 8-3 to suspend its pursuit of a policy of weaponizing drones.

While that decision may appear to be a victory for the Constitution and for personal and civil liberty, there is little doubt that the City by the Bay will not delay deployment of these deadly robots for much longer.

There are many critical issues of constitutional importance that must be addressed when considering the deployment of drones by law enforcement.

First, there is the centuries-old right of due process.

This fundamental restraint on the royal presumption of the power to lop off heads on command was incorporated by our Founders in the Bill of Rights, particularly in the Fifth Amendment, which says in relevant part: “No person shall ... be deprived of life, liberty, or property, without due process of law.”

Due process is one of the pillars of liberty upon which our Constitution is built.

The constitutional preeminence of due process is found in *The Federalist Papers*, where Alexander Hamilton warned against its violation in any form: “The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”

Due process as a check on monarchical power was included in the Magna Carta of 1215. This list of grievances and demands codified the king’s obligation to obey written laws or be punished by his subjects. Article 39 of the Magna Carta says, “No freemen shall be taken or imprisoned or dispossessed [dispossessed] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

Over the years, the Magna Carta was occasionally revised and amended. In 1354, the phrase “due process of law” appeared for the first time. The Magna Carta as amended in 1354 says, “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.”

Next point of constitutional concern is the Fourth Amendment’s guarantee of the right to be free from unwarranted searches and seizures.

The Framers abhorred the practice of having their persons and property searched without a warrant. They believed that “papers are often the dearest property a man can have” and that permitting the government to “sweep away all papers whatsoever,” without any legal justification, “would destroy all the comforts of society.”

In 1776, George Mason, the principal author of the Virginia Declaration of Rights — a document of



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profound influence on the construction of the federal Bill of Rights — upheld the right to be free from such searches, as well: “That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence [sic] is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.”

Thus, the Fourth Amendment:

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.

The rights guaranteed by the Fourth Amendment are under nearly constant assault by the forces of the federal government. From NSA surveillance to IRS use of tax records as a political tool, the papers, effects, and homes of all Americans are now de facto denied the protections our Founders held so dear.

The undeniable truth is that not a single one of our Founding Fathers, not even the most ardent advocate of a powerful central government, would have remained even one day at the Philadelphia Convention if he had believed that the government they were creating would become the instrument of tyranny that it has become.

Taken together, the federal government’s consolidation of control and cognizance reduces every American to the status of “suspect.”

Finally, consider the Sixth Amendment implications. The Sixth Amendment protects the right of people accused of a crime “to be confronted with the witnesses against him.”

How can someone confront a robot in court? How could a robot testify as to the circumstances surrounding a person’s apprehension or, worse, the killing of an alleged criminal?

Of course, the manufacturers of the weaponized robots and drones insist that there will be a person controlling the devices, that they won’t be self-directing. That’s little comfort to those being targeted by the police drones, particularly in light of the significant number of innocent people killed by law enforcement every year.

I’ll close with this from Slate:

The fact that today’s police robots are remotely controlled, rather than autonomous or “smart,” is far from an assurance. While we should be concerned about the development of AI-enabled deadly robots, the ones controlled by people pose their own risks, too. Most might agree about the extreme use cases for lethal robots (such as an ongoing terrorist attack), but the real question is what other emergencies qualify. The exact uses of robots, armed lethally or otherwise, are going to be left up to the police themselves absent bans or detailed regulations. San Francisco’s own policy of determining imminence, for instance, is a standard that leaves little room for outside guidance or prior notice. And even the mere presence of a lethally armed robot in a neighborhood or in a peaceful protest will rightfully be seen as a tactic of intimidation.



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