

2015 NATOA Annual Conference

and
LEGAL

GETTING AWESOME SHOTS: Current Drone Law

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*These slides are accompanied by an oral presentation and are
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Regulatory Goal: Balancing Interests

Liberty

- Free speech
- Free press
- Free assembly
- Privacy

Safety

- Safe operation
- Preventing
interference with
aircraft

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Current Federal Regulations

- “Unmanned Aircraft System” – an “aircraft” with no pilot on board, and its “associated elements,” including its ground control system (FAA Modernization and Reform Act of 2012)
- FAA classifies drone use into 3 categories (other than military):

Public Operation (federal, state, and local governments)	Requires certificate of waiver or authorization (COA) from FAA.
Civil Operation (non-governmental)	Requires either: 1) A special airworthiness certificate; or 2) A FMRA, § 333 exemption (less than 55 lbs.; below 400') + COA.
Model Aircraft (hobby or recreational operation)	No FAA authorization required. • FAA Advisory Circular 91-57A; • FMRA, § 336; and • June 2014 Interpretation of the Special Rule for Model Aircraft.

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Proposed FAA Rulemaking

- The FMRA requires the FAA to safely integrate civil (non-governmental) UAS into the national airspace by September 30, 2015 and public UAS by December 31, 2015.
 - FAA is unlikely to meet the civil UAS deadline.
- FAA released a NPRM in February 2015, inviting comments on its proposed rules to permit civil uses of small UAS (< 55 lbs.).
- While the rulemaking is pending, FAA has started to approve Section 333 exemptions to permit limited civil UAS operations.

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- As of 9/1/15: 1,407 exemptions granted.

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Presidential Memorandum

- In February 2015, President Obama issued a memo: “Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems.”
- The memo directs:
 1. Federal government agencies to consider UAS policies related to collection, use, retention, and dissemination of information.
 2. The Department of Commerce, through the National Telecommunications and Information Administration (NTIA), to facilitate “a multi-stakeholder engagement process to develop a privacy framework regarding privacy, accountability, and transparency for commercial and private UAS use.” The goal is to create a set of voluntary best practices to address privacy issues related to UAS.
 - Initial meeting held August 3rd; Upcoming meetings on September 24th, October 21st; November 20th.

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Potential Legal Issues

To date:

1. Congress has not enacted any federal law regulating the privacy impacts of drones.
2. The courts have not addressed the constitutionality of drone surveillance by the government.
3. FAA’s guidance and proposed rule does not include privacy-related provisions.

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State Law

- As of July 2015, 26 states have enacted laws specifically related to UAS – some with privacy provisions.

Scope of State Law	States
Law enforcement use	AK, FL, ID, IL, IN, IA, ME, MT, NV, NC, ND, OR, TN, TX, VA, UT, WI
Retention of Information	AK, IL, UT, TN, TX
Private Use	AR, FL, ID, LA, NV, NH, NC, OR, TN, TX, WV
Criminal Charges	IN, LA, MS, NV, NC, OR, TN, TX, WI
Funding for Research/Training	AK, HI, MD, NV, ND, OH
No Interference with Hunters/Fisherman	IL, MI, NC, OR, TN

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Privacy Issues – First Amendment

Government violations:

- Do the FAA's current framework and proposed rule on drone use interfere with free speech?
- Does state legislation impermissibly interfere with free speech?
 - NJ's Assembly Bill No. 4344 prohibition on photographing "critical infrastructure."
 - NC's ban on drone photography of people without permission.

Unprotected speech:

- Privacy torts will likely curb some drone use.

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Privacy Issues – Fourth Amendment

- The courts have not yet addressed whether government use of drones to collect information requires a warrant.
- Precedent suggests that the warrant issue could go either way.



Florida v. Riley, 488 U.S. 445 (1989).
California v. Ciraolo, 476 U.S. 207 (1986).
Dow Chemical Co. v. U.S., 476 U.S. 227 (1986).



U.S. v. Jones, 132 S. Ct. 945 (2012).
Kyllo v. U.S., 533 U.S. 27 (2001).

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Trespass or Taking?

- The courts have not yet addressed whether a drone flight at a certain height above private property amounts to a trespass, or where done repetitively by a government actor, a Fifth Amendment taking.
- In 1946, the U.S. Supreme Court determined that persistent flight 83 feet above private property did not amount to a taking. *U.S. v. Causby*, 328 U.S. 256 (1946).
- But, the Court did indicate that invasions into airspace situated within “the immediate reaches” of land are the same as invasions to the land itself, where such invasions affect the use and enjoyment of the surface of the land.
 - In light of new technology, is 83 feet meaningful?

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Getting Legal Shots

- Follow Federal regulations and State law where applicable.
- Where law is not applicable and questions arise, seek legal advice.
- Develop a policy or set of best practices for drone use and follow it.
- Use the rule of reason: how would you react if it were your home, property, or person in the shot?

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