

Drones and the Potential Redefinition of Privacy

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The term “drones” — or UAVs, unmanned aerial vehicles — may be most commonly associated with overseas military activity, but the use of such technology domestically, on a smaller physical scale, is set to explode. Unlike traditional model airplanes, UAVs are typically equipped with sophisticated cameras, and they can also be equipped with eavesdropping devices or even small arms.

At present, individuals are using UAVs for general recreation or photography, while state and local agencies, as well as private companies in anticipation of regulatory changes, have been exploring UAVs for a range of uses including land surveying, crop management, parcel delivery, security, and public safety.

As is often the case, law and regulatory policy have lagged behind the light-speed of technology. This is creating challenges for state and local governments as they await guidance but nonetheless must begin confronting not only how to regulate private use of drones in their jurisdictions — but how and whether to incorporate drone technology into various governmental operations.

A look at the nature of new and proposed legislation and the developing dialogue about surveillance, voyeurism and privacy rights sheds some light on the shape of law to come.

Existing Landscape: The FAA and FMRA

Federal and state aviation laws do not currently permit the widespread use of UAVs. The Federal Aviation Administration currently classifies aircrafts, whether manned or unmanned, as either “public” or “civil.” Public aircrafts are operated by governmental agencies while civil aircrafts are operated by nongovernmental entities or individuals. Existing law mandates that UAVs cannot be used for commercial purposes in any capacity.

“Public” (Governmental) Use

Currently, any public UAV operator must obtain a certificate of authorization, which places conditions on UAV use. The FAA Modernization and Reform Act of 2012, signed into law by President Obama two years ago, enables public UAV operators to obtain expedited certificates of authorization for the use of UAVs that weigh up to 25 pounds, that are utilized within operator line of sight, and operated at less than 400 feet above ground during daylight conditions.

“Civil” (Nongovernmental) Use

Under current federal law, UAV operators utilizing civil aircrafts must obtain a “special airworthiness certificate.” These authorizations do not allow commercial operations and are designed instead for manufacturers to do research and development, market surveys, and crew training.

Such authorizations need to be distinguished from model aircrafts, the rules for which were established in 1981. Under the FAA’s current guidelines for flying model aircrafts, operators are advised to avoid noise sensitive areas, fly below 400 feet above the surface, and operate within visual line-of-sight. Thus, UAVs can be operated without a special airworthiness certificate if they fall within FAA’s guidelines for model aircrafts.

In a recent development that adds to the lack of clarity regarding the current status of FAA regulations over UAVs, a National Transportation Safety Board administrative law judge recently ruled that an FAA fine issued to an individual using a UAV for commercial purposes was invalid because there was no enforceable rule or regulation applicable to model

aircraft or for classifying model aircraft as a UAV. The FAA has appealed the decision.

Deadlines for New Regulations

Congress has directed the FAA to devise a framework to integrate UAVs into the national airspace. Per the FMRA, the FAA must develop regulations for the use of small civil UAVs by August 2014; regulations for the use of public UAVs by Dec. 31, 2015; and civil UAVs by Sept. 30, 2015.

California: Restricting Government Use of UAVs

The California State Assembly recently passed Assembly Bill 1327 (“AB1327”), which has moved to the California State Senate for further consideration. AB1327 is aimed at restricting the use of UAVs by public agencies.

Warrant Required; 911 Exception

AB1327 would generally require law enforcement agencies to obtain a warrant based on probable cause prior to using a UAV. However, law enforcement agencies would not have to obtain a warrant to use a UAV if reasonably necessary to prevent harm to others in an “emergency situation,” such as a fire or hot pursuit. Additionally, law enforcement agencies would not be required to obtain a warrant in search and rescue operations, or if the UAV is used to assess the need for first responders in a traffic accident or to inspect parks and wilderness areas for illegal vegetation or fires.

AB1327 is more lenient on nonlaw enforcement UAV-related governmental uses, simply providing that a public agency may use UAVs to achieve the core mission of the agency as long as the purpose is unrelated to the gathering of criminal intelligence. AB1327 makes it illegal to arm a UAV with a weapon under any circumstances.

Public Notice, Public Records and Room to Further Regulate

Additionally, AB 1327 would require a governmental agency to provide, at minimum, a one-time announcement regarding its intent to utilize the UAV along with a description of the UAV’s technical abilities. To the extent that a public agency obtains images or other data with a UAV, such information must be destroyed within six months subject to certain specified exemptions. However, all information obtained through UAV use would be a public record pursuant to the California Public Records Act.

In addition to the state law restrictions on governmental UAV use under AB 1327, the legislation explicitly gives local governmental agencies the authority to adopt more restrictive policies on UAV use and acquisition.

City of Rancho Mirage: Proposed Regulation of Private UAVs

California’s city of Rancho Mirage recently considered an ordinance aimed at restricting UAV use by private citizens. The ordinance would have entirely prohibited UAV use over residential areas subject to certain limited exemptions — and also would have granted authority to law enforcement to operate UAVs over residential areas for “lawful purposes and in a lawful manner.”

The Rancho Mirage ordinance included a mechanism by which a UAV operator could obtain a “drone permit” from the city of Rancho Mirage and visually record a single residence with the assistance of a UAV with written consent from the property owner. The purpose of this exemption was to permit realtors to use UAVs to advertise properties. The city ultimately decided to postpone enacting the ordinance pending state legislation related to UAV use.

UAVs and Privacy Concerns

While AB 1327 and the Rancho Mirage ordinance reflect the two challenges that governments face with emerging technology — in the case of AB 1327, the government as a user of technology, and in the case of the Rancho Mirage ordinance, the government as a regulator of technology — the purpose of each proposed law is to protect the privacy rights of individual citizens.

What Is “Reasonable”?

As technology evolves, people’s expectations about privacy under civil and criminal law also are constantly changing. In the area of civil tort law, an expectation of privacy is generally determined by whether such an expectation is considered

reasonable expectation of privacy to avoid being observed within his or her own home. UAVs make it possible to observe an individual in either situation.

Efforts to limit use of UAVs — the Rancho Mirage ordinance, for example — are grounded in the expectation of privacy that an individual has from being observed by a UAV in and on one's own home and property. If governments were to broadly permit UAV use and they became an ubiquitous part of urban life, the circumstances in which one has a reasonable expectation of privacy would be fewer.

Of course, such a state of affairs would suggest that society, through its elected officials, has accepted the nearly unrestricted use of UAVs at the expense of privacy inside the home and on one's property. It is more likely that, to the extent permitted by state and federal law, constituents will demand that policymakers pass state laws and local ordinances, such as the Rancho Mirage ordinance, designed to limit the ability of UAV operators to observe areas that are traditionally considered "private," such as the interior of a home.

Privacy Expectations: Potential Impact of UAV Proliferation

AB1327 is another limitation on UAV use, but one that is imposed on governmental agencies rather than private individuals and entities. Practically, UAV use by law enforcement agencies is akin to a law enforcement agency's use of a helicopter. However, privacy rights groups have accurately noted that utilizing UAVs is significantly cheaper than using a helicopter or other manned aircraft — leading to the possibility of much greater surveillance.

The U.S. Supreme Court has ruled that individuals do not have a reasonable expectation of privacy under the Fourth Amendment of the U.S. Constitution where the government uses a plane or a helicopter to observe criminal activity visible from publicly navigable airspace that is in a physically nonintrusive manner. However, the Supreme Court emphasized that it may have found a violation of the Fourth Amendment if the government had observed intimate details connected with the individual's use of the home.

Traditional expectations of privacy are informed and shaped by federal, state and local laws. If individuals are permitted to operate UAVs with limited or no restrictions, the reasonable expectation of privacy that one has from private operators and the government is likely to be less. However, if individuals and the government have significant restrictions on UAV use, the expectation of privacy is likely to be greater.

Preemption

While state and local governments are currently considering, or in some cases have already adopted, regulations on UAV use, it is necessary to address the prospect that any such regulation could be federally preempted. The height at which the UAV is flown does not affect whether the FAA regulates it, as the FAA regulates all airspace.

Implied vs. Express Preemption

Under existing law, the most likely grounds for preemption is implied field preemption, as the FMRA does not include an express preemption clause. However, courts have made clear that air safety regulations and aviation noise regulations are preempted by the FAA. For instance, the Ninth Circuit has held that the FAA established complete safety standards which cannot be further regulated by state laws.[1] The U.S. Supreme Court held that a local ordinance restricting the time frame during which planes could take off was preempted by federal law.[2] However, the California Supreme Court held that tort claims based on nuisance due to aircraft use were not federally preempted because the FAA does not have adjudicatory power over noise disputes between airport owners and property owners.[3]

Thus, it is arguable that not all state and local regulations on UAV use are preempted. Laws that attempt to regulate safety are more likely to be preempted while laws that are aimed at providing a remedy for traditional torts are less likely to be preempted. Of course, the ability of state and local governments to regulate UAV use is likely to be affected in the near future by the upcoming federal regulations under the FMRA.

Summary

As legislators at the federal, state and local level develop a framework for the operation of UAVs, constituents will no doubt seek protections against surveillance and voyeurism. As it relates to governmental UAV use, privacy rights groups and concerned constituents have noted that the costs associated with using a UAV are significantly less than the costs associated with using a helicopter, increasing the possibility of unwarranted surveillance.

Laws such as AB1327, which restrict the government's ability to use UAVs, are aimed at checking the government's use of this newer and cheaper technology. As it relates to private use of UAVs, concerned constituents in some cities have seen the expanded use of UAVs within their community and are uneasy at the thought of UAVs flying through their neighborhoods, able to observe their every move.

In each instance, laws restricting UAV use will arguably strengthen the reasonable expectation of privacy that one has in both the civil context and the Fourth Amendment context. Given the proposed laws thus far, UAVs are likely going to be cautiously regulated to limit the potential infringement on an individual's right to privacy as new laws are passed to develop a framework for this rapidly growing technology.

AUTHOR



Kristopher Kokotaylo
kkokotaylo@meyersnave.com
510.808.2000

Kristopher Kokotaylo serves as Deputy City Attorney for the City of Union City, Assistant City Attorney for the City of San Leandro, and General Counsel for the West Contra Costa Transportation Advisory Committee. He also represents the Stege Sanitary District and numerous other public agencies on a regular basis. Kris focuses his practice on public law matters related to land use, real estate, construction, constitutional law, code enforcement, the Public Records Act, and the Brown Act.

[1] *Montalvo v. Spirit Airlines* (9th Cir. 2007) 508 F.3d 464, 468.

[2] *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 639.

[3] *Greater Westchester Homeowners Assoc. v. L.A.* (Cal. Supreme Court 1979) 26 Cal. 3d 86, 100.

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