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Domesticating the "Drone": Toward Solutions Supporting the Use of Unmanned Aerial Systems within the U.S.

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Constitutional Protection?

“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.”

U.S. Const. Amend. IV.

Fourth Amendment Analysis

Does the conduct constitute a search?

1. Has the affected person exhibited "an actual (subjective) expectation of privacy?"
2. Is "the expectation one that society is prepared to recognize as (objectively) 'reasonable?'"

Katz v. United States, 389 U.S. 347 (1967).

Aerial Surveillance

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

Aerial Surveillance: Illustration of an Unlawful Search

	UNLAWFUL SEARCH	NOT A SEARCH
Altitude:	100 - 40 ft	217 ft
Flight Safety Regulations:	violation	no violation
Intensity of Surveillance:	10 - 15 minutes	unknown
Impact of Flight:	property damage	loud noise; minimal ground disturbance

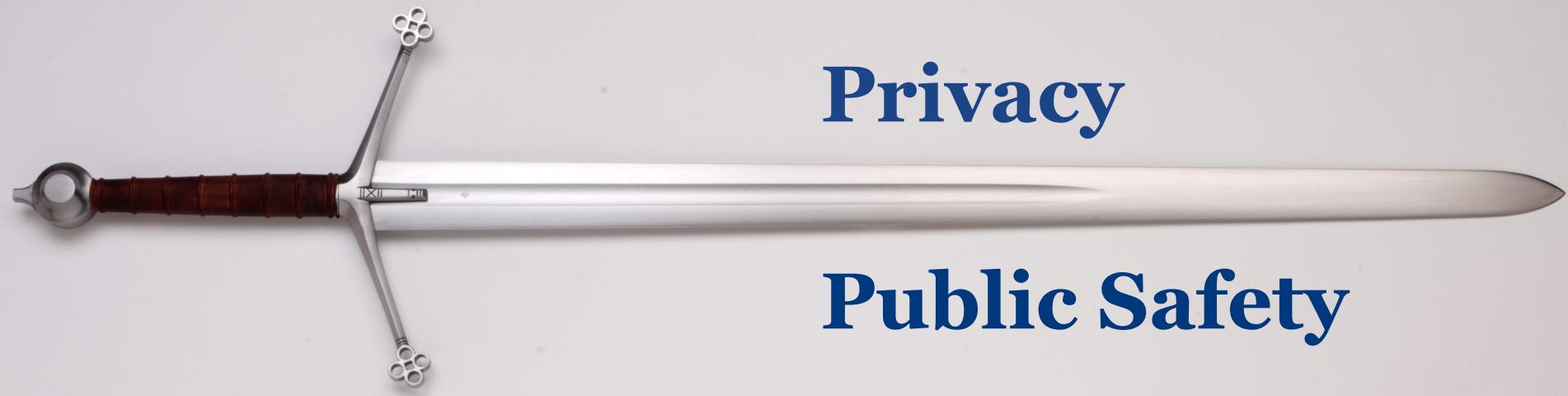
Pew v. Scopino, 904 F. Supp. 18 (D. Me. 1995).

Evolving Technology

Kyllo v. United States, 533 U.S. 27 (2001).



Public Debate: UAS a Dual-edged Sword?



Privacy

Public Safety

The "Super Bat"



Draganflyer X8



Public Safety Uses

Hot Pursuit

Traffic Safety

Armed Standoffs

Search & Rescue

Public Event Security

Firefighting Assistance

Disaster Response

Neighborhood Watch

Domesticating the Drone

- Legal Efforts to Date
- Basic Legislative Model
- Points of Contention

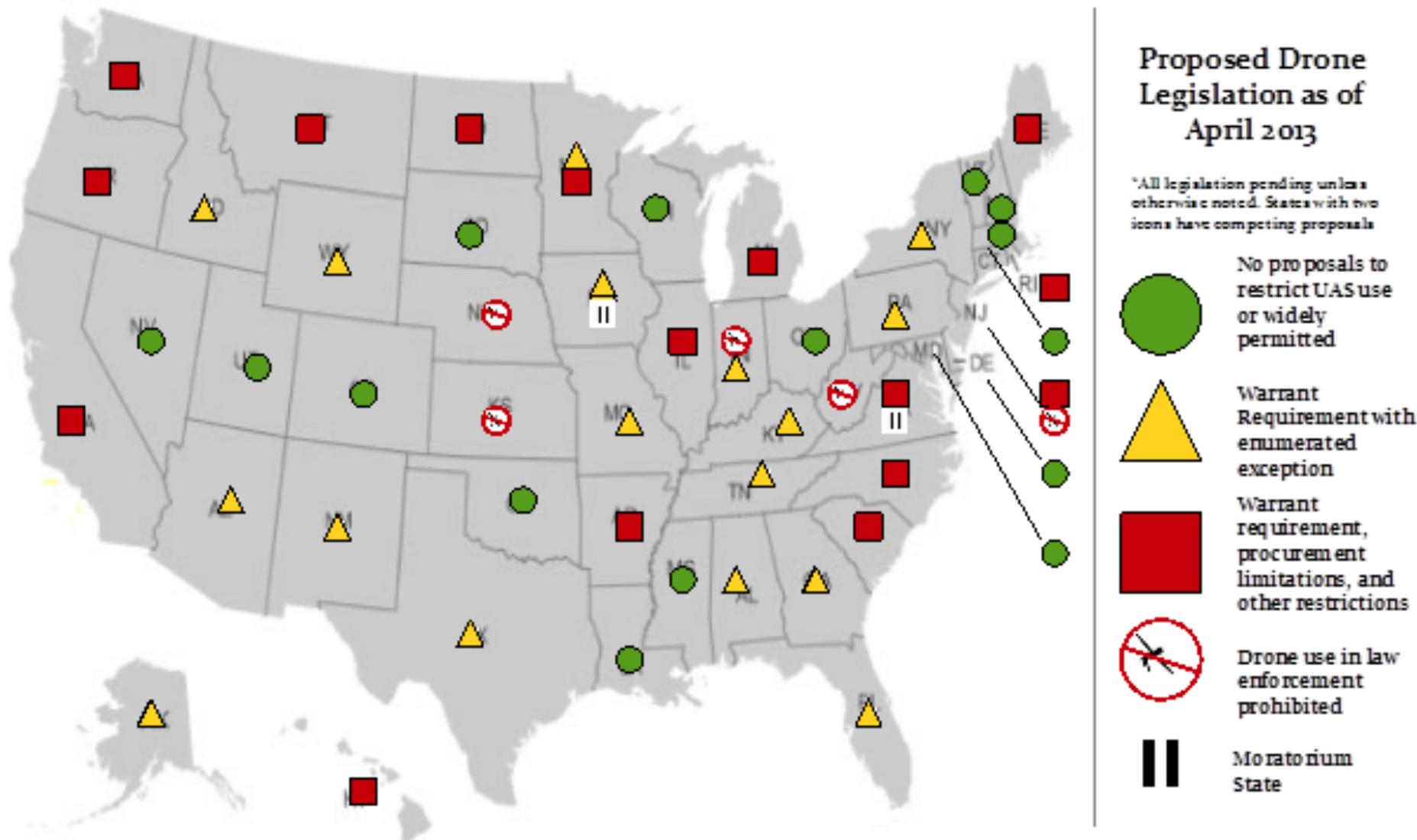
Why We Favor State Level Leadership

- Potential inflexibility federal regulatory models
- Ability to account for different regional public safety priorities and privacy values
- Lessons learned from the "laboratories of democracy" phenomenon may assist in informing a federal floor

The Basic Model

- (1) A general prohibition against un-enumerated uses of drones**
- (2) A list of enumerated exceptions including at least:**
 - (a) If law enforcement officers first obtain a warrant**
 - (b) To counter a high risk of terrorist attacks (as determined by the Department of Homeland Security)**
 - (c) Where swift action is needed to prevent imminent danger to life or serious damage to property or to prevent the escape of a fleeing suspect**
- (3) A prohibition on the use of evidence obtained in violation of the statute in any judicial proceeding in any jurisdiction within the state.**

Proposed Drone Legislation as of 2013



Variations on the Basic Model: House Bill 1616: The Virginia Model

Automatic Review:

In situations which require UAS use before a warrant can reasonably be obtained:

- (1) A warrant must be applied for within 48 hours after the operation has occurred or begins to occur.
- (2) If denied, any information obtained is treated as unlawfully obtained and automatically excluded.

Procurement Restrictions:

No state or local law enforcement agency shall procure a public unmanned aircraft system without the approval of the General Assembly and the relevant local governing body.

Reporting Requirements: Requires the retention, analysis, and reporting of certain data relevant to law enforcement use of drones.

Other Variations on the Basic Model



HB 1904 Arkansas: Allows for a broad exception for "conspiratorial activities threatening the national security"

H.B. 2516 Pennsylvania:

- Requires attorney general application, merges standards for drone use with wiretap and electronic surveillance.
- Limits use to a list of crimes "involving danger to life or limb"

SB 196 Montana: Undermines its own warrant requirement by recognizing "established judicial exceptions."

Can State Leadership on this Issue Inform a Federal Floor?

We think it already is:

HR 637: Congressman Ted Poe (R) Texas

- Introduced in mid-february
- Initially written as HR 6199 as a bare warrant requirement
- New rendition now contains the same minimum exceptions seen in most state proposals
- Requires data minimization procedures be adopted
- Prohibits weaponization

Oregon SB 71

A proposal introducing the concept of
“Oregonian Airspace”

Massachusetts HB 1357 & North Dakota 1373

Proposals limiting UAS use targeting the exercise of 1st Amendment rights.

Missouri HB 46

Just passed by the Missouri House of Representative. Bans all aerial surveillance (manned and unmanned) from a public vantage point.

"Weaponization"

- One size fits all?
 - Lethal vs. non-lethal
 - Is lethal always bad?



Beyond Legal Limitations: Software Solutions?



- Encryption
- Automatic logs/built-in use restrictions?
 - Surveillance restricted to warrant-fixed GPS parameters?
 - Biometrics: automatic blurring of non-target individuals?

Domesticating Drones:



**Not Big
Brother,
but Your
Neighbor**



Laws Applicable to Civilian Use of UAVs

- Trespass
- Nuisance
- Intrusion Upon Seclusion
- Anti-Voyeurism Laws
- Anti-Paparazzi Laws

Trespass

Restatement (Second) of Torts § 159

(2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,

(a) it enters into the **immediate reaches of the air space** next to the land, and

(b) it interferes substantially with the other's use and enjoyment of his land.

Private Nuisance

Restatement (Second) of Torts § 822:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the **private use and enjoyment of land**, and the invasion is either:

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Intrusion Upon Seclusion

Restatement (Second) of Torts § 625B:

“[o]ne who intentionally intrudes, physically or otherwise, **upon the solitude or seclusion of another or his private affairs or concerns**, is subject to liability to the other for invasion of privacy, if the intrusion would be **highly offensive to a reasonable person.**”

Anti-Voyeurism Laws

Video Voyeurism Prevention Act of 2004:

(a) Whoever...has the intent to **capture an image of a private area of an individual** without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.

Anti-Paparazzi Laws: Physical Invasion of Privacy

“...the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff **with the intent to capture** any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is **offensive to a reasonable person.**”

See Cal. Civ. Code § 1708.8 (a).

Anti-Paparazzi Laws: Constructive Invasion of Privacy

“...attempts to capture, in a manner that is **offensive to a reasonable person**, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had **a reasonable expectation of privacy**, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.”

See Cal. Civ. Code § 1708.8 (b).

Difficulties in Applying the Present Laws to UAVs

Trespass

- Requires a Physical Intrusion

Nuisance

- Requires an Intrusion with Some Physical Aspect
 - Odors; Light; Noise; Vibration

Intrusion Upon Seclusion

- Requires the Intrusion be “Highly Offensive”

Anti-Voyeurism Laws

- There Must be an Intent to Capture an Image of a Private Area of the Body

Anti-Paparazzi Laws

- Currently has only been applied to situations where the media or fans capture images



Questions?