

# Don't Drone On: A Synopsis of Federal And State Law On Unmanned Aerial Vehicles

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In February 2012, President Barack Obama signed the FAA Modernization and Reform Act into law, encouraging the Federal Aviation Administration (FAA) to create a comprehensive plan for the acceleration and integration of unmanned aircrafts into United States airspace.

With the passage of this bill, the U.S. Congress paved the way for the proliferation of drones in American skies. In fact, the FAA predicts that as many as 7,500 small commercial unmanned aircrafts may occupy the nation's skies by 2018.

A growing number of governmental agencies have applied for, and received, permission to operate drones to assist in search and rescue missions, crime scene reconstruction, and emergency situations. The ability of drones to carry cameras and various other electronic monitoring and sense-enhancing technology has raised questions about the constitutionality of drone surveillance under the Fourth Amendment.

The Fourth Amendment to the U.S. Constitution provides:

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 an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the U.S. Supreme Court has not specifically addressed the constitutionality of drone surveillance, it has issued a series of rulings regarding the use of manned aircrafts to conduct aerial surveillance and the use of electronic surveillance and sense enhancing technology that are particularly informative and likely applicable to the Fourth Amendment drone analysis.

In *California v. Ciraolo*, 476 US 207, 209 (1986) police received an anonymous telephone tip that Ciraolo was growing marijuana in his backyard, which was enclosed by two fences and shielded from view at ground level. Officers, trained in marijuana identification, obtained a private airplane and flew over Ciraolo's home. At an altitude of 1,000 feet, officers were able to identify and confirm the plants growing in Ciraolo's back yard were, in fact, marijuana.

The Supreme Court held the warrantless aerial observation of Ciraolo's yard, did not violate the Fourth Amendment.

Applying the reasonable expectation of privacy test, the court acknowledged that Ciraolo manifested a subjective expectation of privacy in this area, evidenced by the 10-foot fence surrounding his yard. However, officers were lawfully positioned, within publicly navigable airspace, at a vantage point from which any member of the public flying in the airspace could have seen everything the officers observed. Accordingly, Ciraolo's "expectation that his garden was protected from such aerial observation was unreasonable and not an expectation society [was] prepared to honor." *Ciraolo*, 476 US at 214

The Supreme Court reached a similar conclusion in *Florida v. Riley*, 488 US 445, 450 (1989) holding that an officer's naked eye observation of the interior of a partially covered greenhouse, located in the backyard of a residence, from a helicopter 400 feet above the residence was not a "search" under the Fourth Amendment.

Applying the Supreme Court's analysis in *Ciraolo* and *Riley*, drone surveillance will likely be permissible under the Fourth Amendment, provided the drone is lawfully positioned in publicly navigable airspace, and the item observed is in plain view.

However, advancements in technology allowing for more invasive and intrusive surveillance by drones present unique issues that will likely require an analysis and application of prior Supreme Court's decisions addressing the constitutionality of electronic surveillance and sense-enhancing technology.

In *Katz v. United States*, 389 US 347, 353 (1967) the Court held that the government's use of an electronic listening device to listen to and record an individual's private conversation constituted a search under the Fourth Amendment. Similarly, in *Kyllo v. United States*, 533 US 27, 33 (2001) the court held that the government's use of thermal imaging device, not generally used by the public, to determine whether marijuana was being grown in a home was a violation of the Fourth Amendment.

More recently, in *United States v. Jones*, 132 S Ct 945, 949 (2012) the Supreme Court held that the government's use of a global positioning system to track the location of an individual violated the Fourth Amendment. Based on the court's decisions in *Katz*, *Kyllo* and *Jones*, the sophistication of the technology used and its availability and use by the public will be imperative to any Fourth Amendment drone surveillance analysis.

Despite the lack of regulations at the federal level, many states have enacted legislation addressing privacy concerns raised by law enforcement use of drones. In Michigan, House Bill 5026 is currently making its way through the Legislature. If passed, this bill would prohibit law enforcement agencies and other political subdivisions of the state from the following: equipping drones with weapons of any sort; operating drones over private property, absent a search warrant; and disclosing information acquired through the operation of a drone (except in limited circumstances). The bill does, however, provide an exception in emergency situations. If a believed imminent threat to life or safety of a person exists, law enforcement agencies may use drones to assist in their operations, provided a warrant is obtained within 48 hours of the start of the operation.

This proposed legislation raises the important and related question of whether governmental agencies and their employees can be held liable for tort liability occasioned by improper operation of drones or drone-related injuries (whether to person or property).

Under Michigan's Governmental Tort Liability Act, a governmental agency, such as a city or township, "is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Employees of governmental agencies are afforded similar immunity from tort claims for injury to a person or property provided that they are (a) acting within the scope of their authority, (b) engaged in the exercise or discharge of a governmental function, and (c) not grossly negligent. MCL 691.1407(2)(a)-(c)

The definition of "governmental function" requires only that there be some constitutional, statutory, or other legal basis for the activity in which the governmental agency or employee is engaged. The focus is on the general activity (i.e., operation of a drone for police purposes) and not the specific conduct involved at the time of the alleged tort (i.e., operating the drone in an unauthorized air space). Currently, no Michigan cases have addressed this issue, and there are also no Michigan statutes on point.

With all this uncertainty, however, what we do know is this - governmental liability for the use of a drone is not implicated in any of the five areas where the Michigan legislature has carved out exceptions to governmental immunity.

The Governmental Tort Liability Act provides for the following exceptions to the broad grant of immunity: (1) the highway exception; (2) the motor vehicle exception; (3) the public building exception; (4) the proprietary function exception and (5) the governmental hospital exception.

Drone use does not fit into any of these exceptions. Therefore, at least under current Michigan law, governmental entities should be able to enjoy governmental immunity for the use of a drone. The same should hold true for governmental employees, again provided they are acting with the scope of their authority and are not acting so reckless as to demonstrate a complete lack of concern for whether an injury results.

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The next few years will be a critical time in the development of drone law, both in the legislative and judicial arenas. We may see legislation passed like House Bill 5026, which would set strict parameters for state and local government workers regarding drone use. At the federal level, the constitutionality of drone use may be examined by an appellate circuit court or even by the U.S. Supreme Court.

In the context of state governmental immunity, it will be particularly interesting to see how the courts will apply Michigan's current statutory immunity scheme to claims against governmental entities and/or their employees involving the use of drones.

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