



## **Three Lawyers and a Drone Episode 4: Public and government uses**

Transcript: Interview with Sean McGowan, Tyler Black and Mike Deutsch of the Thompson Coburn LLP Drone Practice

Episode posted: August 6, 2019

Sean McGowan: Good morning, everyone, and welcome back to “Three Lawyers and a Drone,” a podcast coming to you from Thompson Coburn LLP’s Washington, D.C. office. My name is Sean McGowan and I’m joined once again by Tyler Black and Michael Deutsch. The last couple of times we’ve talked about drone usage for commercial and the hobbyist uses. Today, we thought we’d take a look at public uses and government uses, take a look at three or four examples of such, talk about some of the legal ramifications, if any. So first off, you’ve obviously seen many, many news articles lately about search and rescue use of drones. They obviously can cover a large area in a short amount of time including over land and ocean, and they can easily spot human subjects when these drones are equipped with thermal imaging cameras. And there have been some recent examples of search and rescue successes. Mike?

Mike Deutsch: Yes. Two examples of local governments using drones would be a Palm Beach County Sheriff’s office (my home town) and Virginia Beach. And what’s noteworthy about these two examples is that they’re both coastal cities. So they both utilize drones for search and rescue operations and they’re particularly useful in looking for lost boaters or swimmers or divers in distress, boating accidents, things like that that ordinarily would not be accessible. You certainly can’t drive to a boating accident because of things like that, you don’t have to send out police boat which would take a lot longer. Or if not I can send a drone. It’s much faster and much more efficient. And both Palm Beach County Sheriff’s office and Virginia Beach have made use of drones in that regard. Palm Beach County Sheriff’s office also used drones to aid in

post-hurricane Irma disaster relief down in the Florida Keys. And again that was another area where they will be able to get the drone down there much faster. The drone had just a unique vantage point that wouldn't otherwise be accessible. A large fire, firefighter scenes are another scene where if you have a large fire a drone can come in and help firefighters see the scope of the blaze and can aid in determining where to send resources. And what's also noteworthy again about Palm Beach County is that they specifically only use drones for search and rescue. They do not use drones in they emphasize this. They do not use drones for surveillance because there are a lot of us around for their concerns, as we will discuss later in the podcast. That's not necessarily the case for all local governments, but at least of Orange County does.

**Tyler Black:** So essentially a lot of these police departments, all the safety organizations are using the technology as a force multiplier to get more aircraft on the scene. They're using it as a cost-savings measure. It's cheaper than putting out a manned aircraft, a helicopter, fixed-wing or a boat in the case of a water incident. And it's also something that allows for more rapid response times. So it really hits a lot of important factors for law enforcement to make things more efficient.

**Mike Deutsch:** Yes, that's absolutely right, Tyler.

**Sean McGowan:** And Michael, you just raised a couple of interesting points about using drones for surveillance. You know we often see on CNN news broadcasts, etc. that there is more and more use of drones in those types of situations and police are also using drones for surveillance and crowd monitoring. Obviously it gives them a better vantage point and allows them to zoom in and out situation and know how many people to use, or how many people need to be sent to a certain location, but, what kind of examples do

you have, specific examples and maybe some legal aspects that we need to think about for that, Tyler.

Tyler Black: Well, I think that the potential of drone use by police for specific surveillance activities or general observations of crowds and public places has raised some controversy and public concern. Regarding specific surveillance of individual people, certainly you have to think about how does the Fourth Amendment come in to play. The Fourth Amendment guarantees the right for people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. So generally speaking the Supreme Court has told us that if a person exhibits an expectation of privacy that society recognizes as reasonable, the government can't intrude upon that expectation without a warrant. How does that come into play when you have the police using aerial technology, aircraft, to make those observations and intrusions? Well, what's interesting is that the second part of that task which is, "what does society recognize as reasonable?", is a malleable concept that can change over time as technology changes and society's expectations change. So two major Supreme Court cases are somewhat instructive, even though they're not directly on point, regarding the public or police use of unmanned aircraft. The first is *Florida v. Riley*, 488 U.S. 445. And that was a case where the Supreme Court decided that police officers did not need a warrant to use a police helicopter to observe details about an individual's property from a public airspace vantage point. And so the court focused on "was the police helicopter flying legally at the time?" Which it was at about 400 feet. But importantly, FAA regulations

are not privacy regulations. They are safety regulations. So they don't necessarily have the Fourth Amendment in mind. This has been a point of some concern as the aerial technology that police are using improves. And that's somewhat exemplified in the *Kyllo v. United States* decision from 2001 at 533 U.S. 27. That was a 5-4 decision involving the use of thermal imaging technology. And the court determined that the police's use of thermal imaging technology to look through the walls of a private residence was a search, but mostly because that kind of technology was not commonly used by the public. It's not something that a member of the public would reasonably expect to be subject to. So you take these two cases together and you have to ask, what would the public expect about the use of unmanned aircraft, especially as those technologies improve. The aircraft are flying at lower altitudes and more numerous. How does the public expectation change over time as to what activities they would want to be shielded from and what they would not want to be shielded from? So these are open questions and the subject of much controversy, and it'll be interesting to see how police departments balance those requests and those activities with the Fourth Amendment in mind.

Mike Deutsch: It sure will, Tyler. What's so interesting about both of those cases is not just the law itself, but also, and you hit on it, *Kyllo v. United States* was 2001 and *Forder v. Riley* was 1989, and those were years where the jurors probably couldn't even imagine the drones that we currently have and thinking about how common drones are today and the growth of drones that we're expecting to see in the next 5, 10, 15, 20 years. It's not inconceivable to expect that in

the next decade almost everyone can own personal drone. And what are the expectations then? How will a court 10 years from now re-evaluate this case law looking at and realizing that it's no longer a unique novelty? Almost everyone owns a drone. What are the expectations then?

Sean McGowan: So Tyler, you raise a great point about what people are going to have an expectation of seeing these drones fly around, invading their space, if you will. I think nowadays it's getting to be more and more common to see drones used by public officials, whether it be in traffic collision reconstruction or active shooter type of situations. Are there any good examples of either of those two uses, traffic collision or active shooter that we have today?

Mike Deutsch: Yeah, absolutely. I mean you think about drones and active shooter situations would be really a natural place for local law enforcement to use. They can send an unmanned aircraft in to get a vantage point that wouldn't otherwise be accessible without sending in a manned officer and this way they're not risking another life and are able to aid an investigation. One example that pops into my head is Pittsburgh. Pittsburgh used a newly acquired drone to gather information for the swat team during the course of an armed suspect barricade situation. And they were able to fly that drone in and that drone was able to provide the police real-time video and other data and allowed the swat team to aid their decision process during what was a very tense situation. Another example...

Tyler Black: And that would be Pittsburgh, California; not Pittsburgh, Pennsylvania. (10:55)

Mike Deutsch: That's right.

Tyler Black: The other Pittsburgh.

Mike Deutsch: Yes, the other Pittsburgh. And then, another example of an accident scene. Tazewell County, Illinois and Wilson, North Carolina. They're two examples of sheriff's offices who used drones to take photographs of accident scenes to help investigators reconstruct the crashes later on using software. And again, the major benefit of that is the drone is just able to provide the investigators with a vantage point that they wouldn't otherwise have. And one other major benefit is that it allows the subject matters to collaborate with all having to be on-scene together. You think about what goes into an accident scene investigation. There are engineers, public safety officers – it's a whole team of people and to get them all in one place at one time can sometimes be challenging. But a drone allows them to capture and provide the footage so that they don't all actually have to be physically in one place at one time, and that makes a huge difference.

Tyler Black: So clearly there are a lot of uses for police departments and other public organizations to use on manned aircraft. I think the takeaway is that these uses are going to become more common and as technology improves, new uses will open up. The question is, how will the law react, how will the federal government regulating these aircraft react, and how will the people react to these increasing incidences of public unmanned aircraft. Many of these are developing areas of the law and developing social issues, so stay tuned.

Mike Deutsch: And just one more point to add to that, Tyler. It's going to be interesting to see, not just from a national perspective but from a local perspective, are we going to see law enforcement agencies develop a uniform platform or will there continue to be divided between different local law enforcement agencies based on local policy. The example that pops into my mind, some law enforcement agencies like we discussed use it for surveillance. Others like Palm Beach County refuse to use it for surveillance and say that it's strictly for search and rescue. So it's going to be an interesting niche area to watch.

Sean McGowan: Definitely will be. So everybody please stay tuned and come back for more additions of our Three Lawyers and a Drone podcast. As always, if you have any questions or comments, please find us at [www.ThompsonCoburn.com](http://www.ThompsonCoburn.com) and on our Twitter feed at TCDroneLaw. Thanks very much.

THE END