

Privacy INTERESTS

FAA DRONE REGULATION SURVIVES
CONSTITUTIONAL CHALLENGE.

WRITTEN BY PIERRE GROSIDIER

DRONES ARE FUN TOYS AND INCREASINGLY USEFUL WORK TOOLS, but that does not mean that they are safe and that they cannot be nuisances or even threats. With that in mind, Congress enacted legislation in 2016 and 2018 requiring the Federal Aviation Administration, or FAA, to develop drone regulations. In response, the FAA promulgated a Remote Identification, or Remote ID, Rule that requires drones to broadcast the digital equivalent of a vehicle license plate. The rule applies to drones weighing over 0.55 pounds (250 grams) and takes effect on September 16, 2023. Tyler Brennan, a drone user and retailer, facially challenged the rule's constitutionality

under the Fourth Amendment.¹ He argued, *inter alia*, that the rule interfered with his reasonable expectation of privacy without requiring a warrant, and that it allowed the government to easily and inexpensively track drone operators without judicial oversight. The U.S. Court of Appeals for the District of Columbia Circuit rejected all of his arguments.

The Remote ID Rule requires drones in flight to publicly broadcast their serial number, their location (latitude, longitude, and altitude) and velocity, the location of their control station, a time stamp, and any applicable "emergency status" flag like low fuel or battery. The rule does not apply to drones that are flown within enclosed spaces. The drone's data can be captured and displayed by apps within signal range, so anyone can be made aware of drones' presence around them, and irresponsible operators can be identified and held to account.

Separately, the FAA collects drone owners' personal identifying information when owners register their drones, but this information is confidential and protected by the Privacy Act of 1974.² A drone's flight data can only be matched to these non-public records by authorities "when necessary and relevant to a[n] FAA enforcement activity" and within legal and constitutional bounds.³ The rule also does not contemplate public actors recording and storing drone flight data.

Under *Katz v. United States*, a Fourth Amendment search occurs when the government intrudes on a person's subjective expectation of privacy that society accepts as reasonable under the circumstances. Here, the court reasoned that drones are no exception to the rule that pilots generally have no reasonable expectation of privacy in flight activities that they conduct outdoor in public view.⁴

The court also noted that the rule requires the broadcast of drone flight information to the public, not its tracking and storage by the government for later law enforcement querying. Technology implicates the Fourth Amendment only when it is exploited, not merely because it exists. Moreover, the brevity and local nature of a drone's flight mean that flight data is nowhere as threatening to privacy as the wealth of personal information in a smart device.⁵ Drone data broadcasts result in no

physical trespass and cannot provide an "intimate window into a person's life" as can cellphone tracking data.⁶

Finally, the personal information that the FAA gathers from drone owners, such as name, address, and phone number, remains protected through the Privacy Act. Remote ID does not disclose any of this information to the public. The FAA may only match drone data to owner information when issues arise related to the safety and security of the drone's operation. Even then, use of drone data by the FAA and law enforcement authorities acting with the FAA must comply with all constitutional and legal safeguards. As things stand, the rule would have to be changed to allow law enforcement authorities to access the FAA's database to match flight data to owner operation "for uses beyond aviation safety and security." The court, therefore, rejected Brennan's claim that the rule amounted to a warrantless intrusion into drone owners' "constitutionally cognizable privacy interests."⁷ **TBJ**

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NOTES

1. *Brennan v. Dickson*, 45 F.4th 48, 53–54 (D.C. Cir. 2022). This article does not address Brennan's procedural challenges to the rule, which the court also rejected.
2. 5 U.S.C. § 552a.
3. *Brennan v. Dickson*, 45 F.4th 48, 54 (D.C. Cir. 2022).
4. *Id.* at 61 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
5. *Id.* at 62 (citing *United States v. Jones*, 565 U.S. 400, 430 (2012) ("relatively short-term monitoring of a person's movements" in public places recognized as reasonable) (Alito, J., concurring)).
6. *Id.* at 62–63 (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018)).
7. *Id.* at 64–65.

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