America is in danger of becoming something of a legal backwater.
Justice Michael Kirby
High Court of Australia
Agenda

- Part I – Constitutional Law
- Part II – Administrative Law
- Part III – FBI UAS Operations
Part I

Is UAS surveillance constitutional?
FBI Core Value: Rigorous Obedience to the Constitution
1798
United States Constitution
First Congress proposes 12 amendments, 10 of which are quickly enacted and become the Bill of Rights.
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.
Policy Reasons

- Deter police misconduct
- Prevent tainting of justice system
Fruit of the Poisonous Tree

These plants can kill
Secondary Deterrence

- Civil Liability
- Disciplinary Action
J.S. Is Alone in Rejecting All Evidence if Police Err

From left, Associated Press; Coffee County Sheriff's Office; Detroit Police Department, via Associated Press

Ollree Mapp, left, was the defendant in a Supreme Court case that concluded that only the suppression of evidence can address wrongdoing by the police. The justices will hear arguments on Oct. 7 about whether methamphetamines and a gun belonging to Bennie Dean Herring, center, should be suppressed because of a mistake by the officers who conducted the search. Booker Hudson, right, was at the center of an earlier Supreme Court decision in which Justice Antonin Scalia seemed to say that the exclusionary rule had outlived its original purpose.

By ADAM LIPTAK
Published: July 19, 2008
Australian Approach
Balancing Test

- Seriousness of police misconduct
- Tolerance by police superiors
- Gravity of crime
- Power of the evidence
“Any unfairness to the particular accused ... will be of no more than peripheral importance.”

High Court of Australia, 1995
1908

Attorney General Charles Bonaparte assembles a team of Special Agents within the Department of Justice to investigate violations of federal law and threats to national security.
J. Edgar Hoover becomes Director

(serving until 1972)
1926

Congress passes the

*Air Commerce Act*
Federal Aviation Administration

- Fostering air commerce
- Enforcing air traffic rules
- Certifying pilots & aircraft
- Airways & aids to navigation
1947

First police helicopter enters service
1960s & Civil Rights
Katz v. United States
389 U.S. 347 (1967)

Reaffirmed, 2012.
Reasonable Expectation of Privacy
War on Drugs

February, 2012
Special Agents Basford & Kirkland killed in the line of duty during a surveillance mission.

Shepardized 02/08/2012
Police suspected Ciraolo of growing marijuana following anonymous tip
Ciraolo had a 6’ outer fence
And a 10’ inner fence
Nothing could be seen
Ciraolo

- Police flew over at 1000’ AGL
- Witnessed marijuana plants
- Naked eye observations used to obtain a search warrant
- Searched & arrested
- Convicted and appeals

February 2012
Ciraolo analysis

- *Katz* standard
  - Individual manifested a reasonable expectation of privacy?
  - Society willing to recognized that expectation?
Ciraolo reasoning

- “The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer’s observation from a public vantage point where he has a right to be and which renders the activities clearly visible.”

- Any member of the flying public could have seen what the officers saw
“The Fourth Amendment simply does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye.”
Ciracolo Holding, also:

- It does not make a difference whether the surveillance was targeted or routine patrol.
Later that day, the Court considered aerial photography...
Shepardized 02/08/2012
Facts

- *Dow* operated a 2000’ acre chemical plant
- EPA wanted to inspect
- Dow said no
- EPA could have obtained an administrative search warrant
- Instead, EPA flew over and took photographs using an expensive mapping camera from as low as 1,200 AGL
Procedural

■ Dow sues the govt claiming violation of 4th Amendment rights
■ Lower court enjoins EPA from further flights.
■ Ultimately arrives at the Supreme Court.
Analysis

- "The photographs at issue ... are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them."

- Technology changes with time and these changes affect law enforcement.
Dow Holding

Use of aerial observation and photography by government agencies is permitted without a warrant.

February 2012 UNCLASSIFIED
Florida v. Riley

Shepardized 02/08/2012
Facts

- Anonymous tip that marijuana is being grown in roofed green house
- Police overfly in helicopter at 400’ AGL
- Officer observes marijuana through open roof panel
- Reports observation in affidavit & obtains warrant.
- Searched, arrested, convicted, appeals...
14 CFR § 91.119

- Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
  - (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
  - (b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
  - (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
14 CFR § 91.119

(d) Helicopters, powered parachutes, and weight-shift-control aircraft. If the operation is conducted without hazard to persons or property on the surface—

(1) A helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section, provided each person operating the helicopter complies with any routes or altitudes specifically prescribed for helicopters by the FAA;
Majority Analysis

- Reaffirms *Ciraollo*
- Because public could have legally flown over at 400' then the police are free to do so
- No right of privacy / no 4th Amendment protection
Concurrence Analysis

- The fact that FAA regulations weren’t violated does not automatically mean that the 4th Amendment is satisfied...

- On these facts, it’s ok. 😊
But one can go too far...
Kyllo v. United States, 533 U.S. 27 (2001)

Shepardized 02/08/2012
Facts

■ Kyollo was growing marijuana inside his house.
■ SA _____ suspected this
■ SA _____ knew that grow lamps produce heat
■ SA _____ used a _____
Facts

- Heat signatures observed
- Warrant applied for based on thermal imaging data
- Warrant granted / search conducted
- Subject arrested and convicted
Analysis

- "The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."

- \textit{Katz} test
Holding

- "Obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," ... constitutes a search – at least where (as here) the technology in question is not in general public use."
Put simply

You can’t look through walls of a home without a search warrant.
United States v. Jones
2012 LEXIS 1063 (2012)
Facts

- Agents obtain warrant to place GPS tracking device on subject’s vehicle.
- Warrant requires device to be installed in District of Columbia within 10 days.
- Agents install the device in State of Maryland on the 11th day.
- Information from device leads to search warrant, arrest, and conviction
Do you need a warrant to install a GPS device?
Majority Analysis

- Installation required a trespass to subject's "effects"

- 4th Amendment protects against this in addition to protecting a reasonable expectation of privacy.

- Thus, this was an invalid search

- Airborne surveillance reaffirmed as an acceptable alternative
The Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a “search.”
Concurrence Analysis

- Agree with majority but add...
- This violates a reasonable expectation of privacy
The good part:
All Justices endorse continued use of airborne surveillance without a warrant.
Question Left Open

What if there is no physical trespass to chattel?
Does warrantless Unmanned Aerial System Surveillance violate the 4th Amendment?
Which is it more like?

- No warrant needed
  - Airplane - naked eye
  - Airplane - camera
  - Helicopter

- Warrant needed
  - Thermal imager looking through walls
  - GPS tracker installed on subject’s vehicle
Part II

Administrative law of unmanned flight
National Airspace System
What motivates the FAA?

1986: Aeromexico 948 collides with Piper Arrow N4891F over Los Angeles.
14 CFR § 91.113(b)

“Vigilance must be maintained by each person operating an aircraft so as to see and avoid other aircraft.”
Shared Fate?

- Manned Aircraft
- Unmanned Aircraft

February 2012

UNCLASSIFIED
Mitigating the See & Avoid Requirement
How many terrorists, spies, & criminals live in restricted and warning areas?
Certificate of Waiver of Authorization
(in the FAA's own words)
COA is an authorization issued by the Air Traffic Organization to a public operator for a specific UA activity.
After a complete application is submitted, FAA conducts a comprehensive operational and technical review.
If necessary, provisions or limitations may be imposed as part of the approval to ensure the UA can operate safely with other airspace users.
In most cases, FAA will provide a formal response within the time a completed application is submitted.
COA online provides a simple 22 page form
Safety of Life
Emergency COA
COA available only if...
Part III
How the FBI works with the FAA
Safety of Life
Emergency COA
COA available only if...
Part III

How the FBI works with the FAA
Emergency COA
Coming, in the next 90 days

- Law enforcement streamlined procedures
- 4.4 pounds or less
- 400' AGL or less
- Meet requirements not yet published
Sep 30, 2015

New comprehensive rules for UAS in the national airspace system.
Questions?