



America is in danger . . .  
of becoming something  
of a legal backwater.

Justice Michael Kirby  
High Court of Australia





Nutty Neighbor

SSA [redacted]

Nov 2004

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b7E



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5

CREW-74



# Agenda

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



# Part I

Is UAS surveillance constitutional?

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7

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# FBI Core Value: Rigorous Obedience to the Constitution

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1776

Like flying  
a kite?

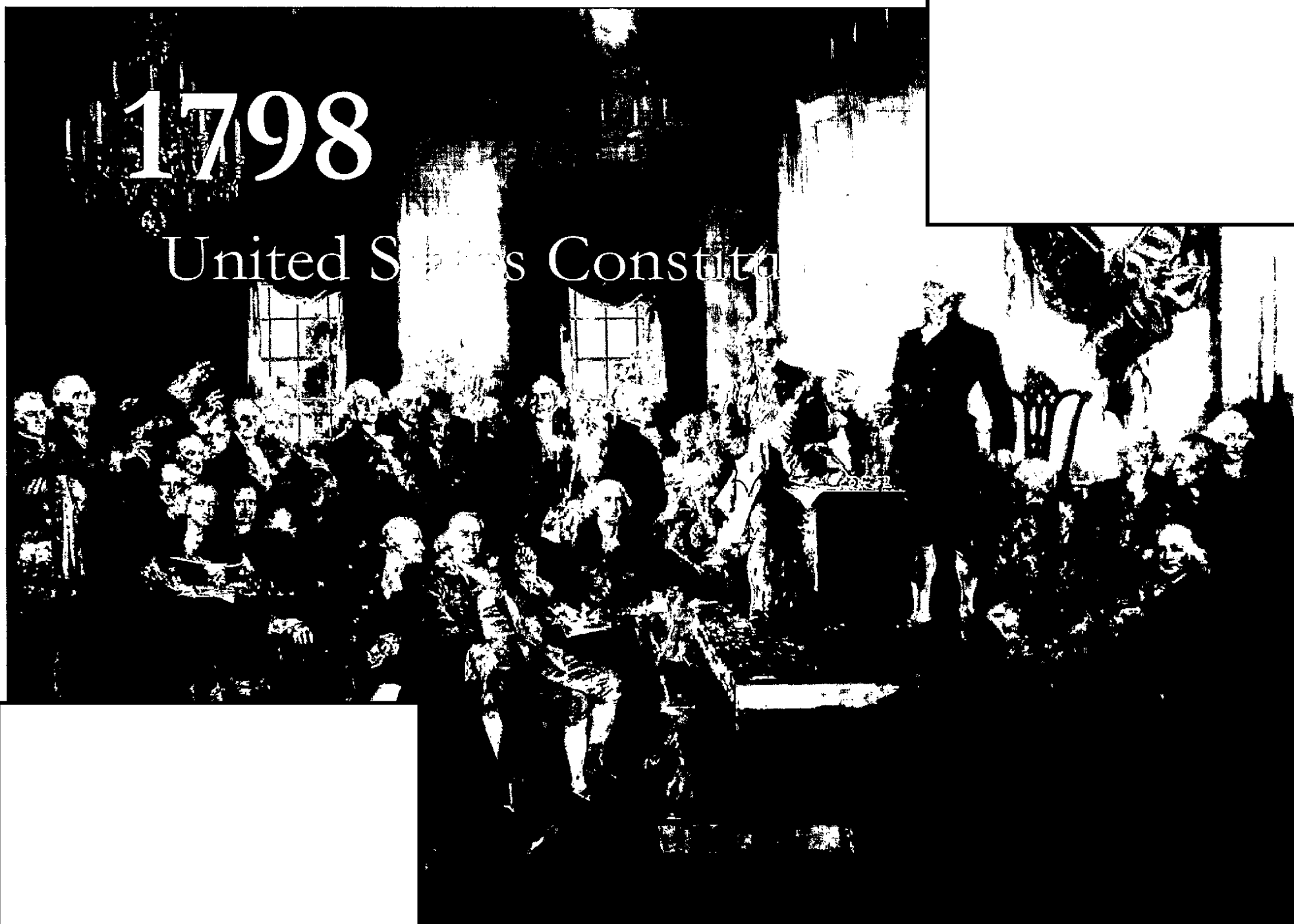
Declaration of Independence  
Articles of Confederation



22

# 1798

## United States Constitution



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**First Congress proposes  
12 amendments, 10 of  
which are quickly enacted  
and become the Bill of  
Rights.**



1791

# Amendment IV

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12

CREW-81



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.



# Exclusionary Rule

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# Policy Reasons

- Deter police misconduct
- Prevent tainting of justice system



# Fruit of the Poisonous Tree



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16

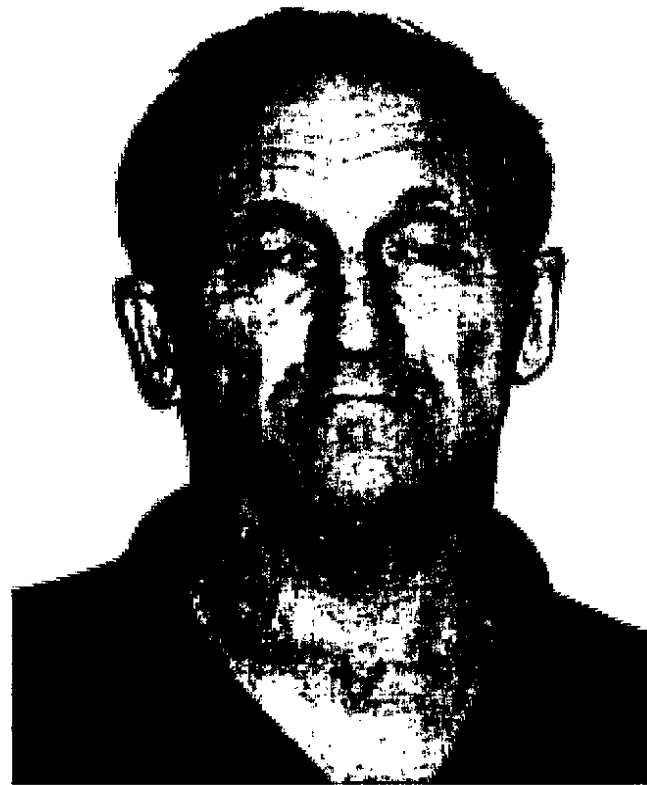


# Secondary Deterrence

- Civil Liability
- Disciplinary Action



# U.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

Illree 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

CREW-87



# Australian Approach

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19

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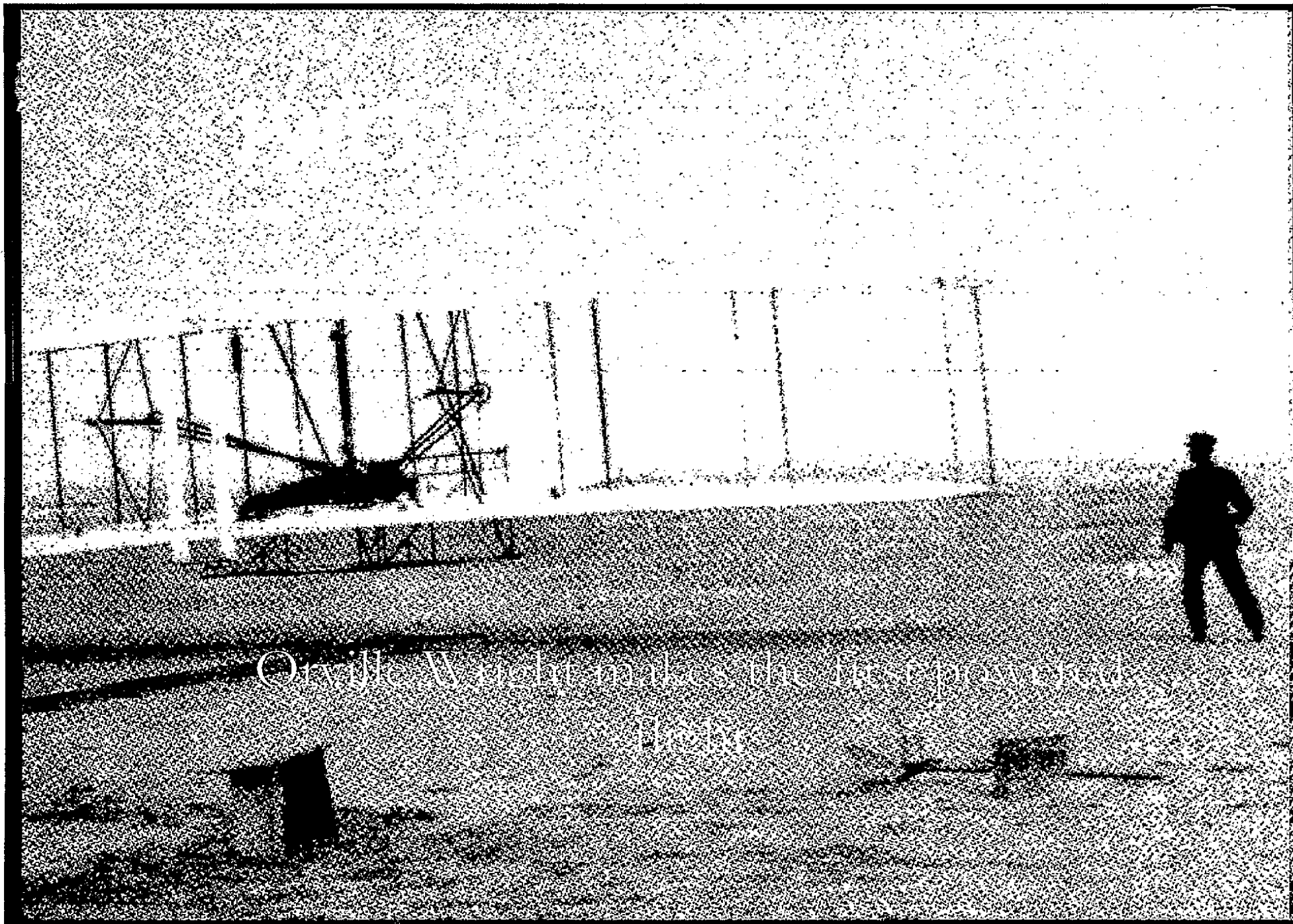


# Balancing Test

- 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



Orville Wright makes the first powered flight



# 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)

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# 1926

Congress passes the  
*Air Commerce Act*

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25

CREW-94





# Federal Aviation Administration



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



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# 1947

First police helicopter enters service



# 1960s & Civil Rights





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

Reaffirmed, 2012.



# Reasonable Expectation of Privacy

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30

CREW-99



# War on Drugs

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Partnership for a Drug-Free America



1977



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



# *California v. Ciraolo, 476 U.S. 207 (1986)*

Shepardized 02/08/2012





# Ciraolo

- 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



# 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



# Ciraolo Holding

- “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.”



## Ciraolo Holding, also:

- It does not make a difference whether the surveillance was targeted or routine patrol



Later that day, the Court  
considered aerial  
photography...



*Dow Chemical v.  
United States, 476 U.S.*

*227 (1986)*

*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 4<sup>th</sup> 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.



*Florida v. Riley*  
488 U.S. 445 (1989)

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 4<sup>th</sup> Amendment protection



# Concurrence Analysis

- The fact that FAA regulations weren't violated does not automatically mean that the 4<sup>th</sup> 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 [REDACTED] suspected this
- SA [REDACTED] knew that grow lamps produce heat
- SA [REDACTED] used a [REDACTED]

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# 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.”
- *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)

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59

CREW-128



# 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 11<sup>th</sup> day.
- Information from device leads to search warrant, arrest, and conviction



# Do you need a warrant to install a GPS device?

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61

CREW-130



# Majority Analysis

- Installation required a trespass to subject's "effects"
- 4<sup>th</sup> 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 4<sup>th</sup> Amendment?

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67

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# 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

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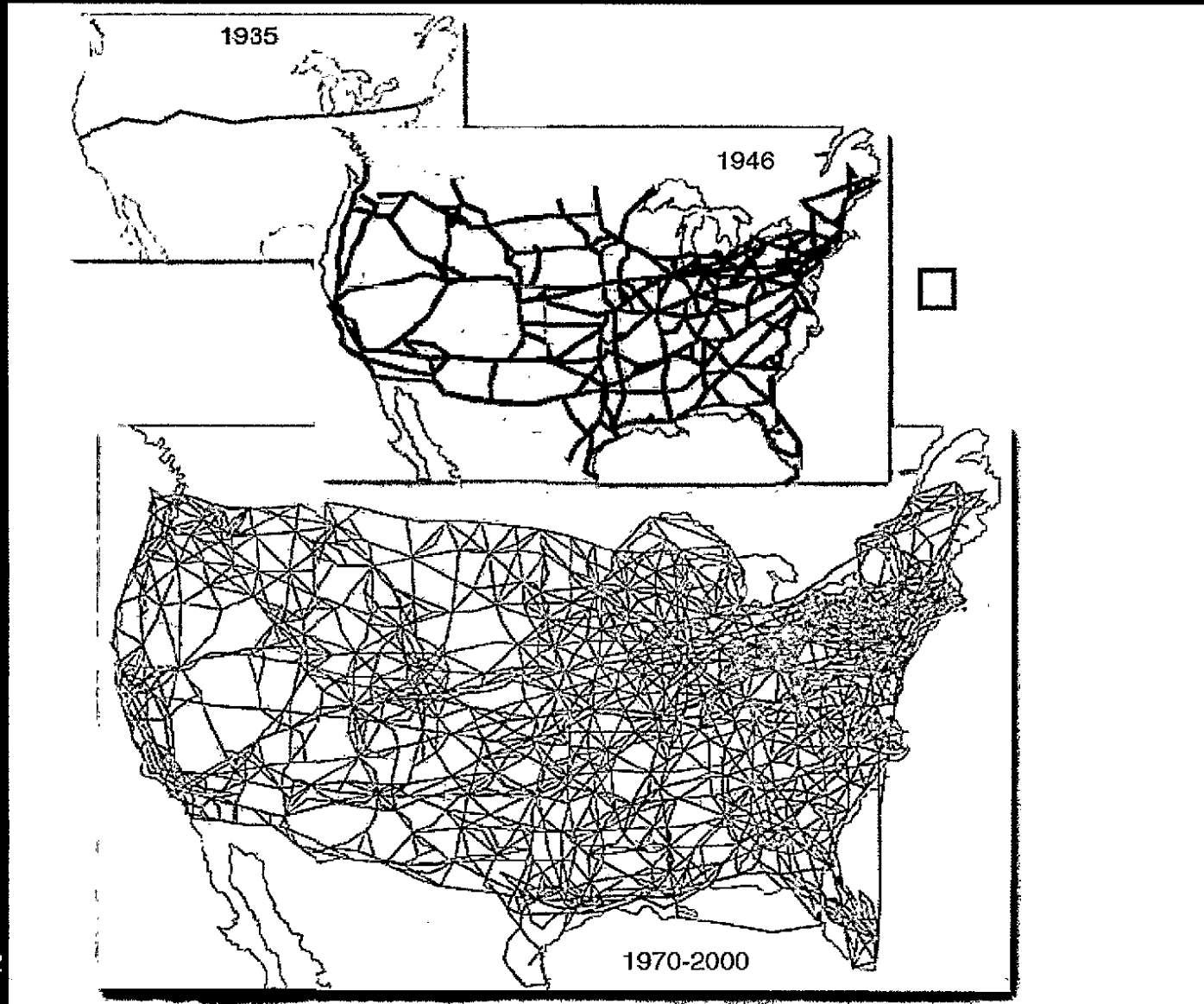
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70

CREW-139



# National Airspace System



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71

# What motivates the FAA?



1986: Aeromexico 948 collides  
with Piper Arrow N4891F over  
Los Angeles.



# 14 CFR § 91.113(b)

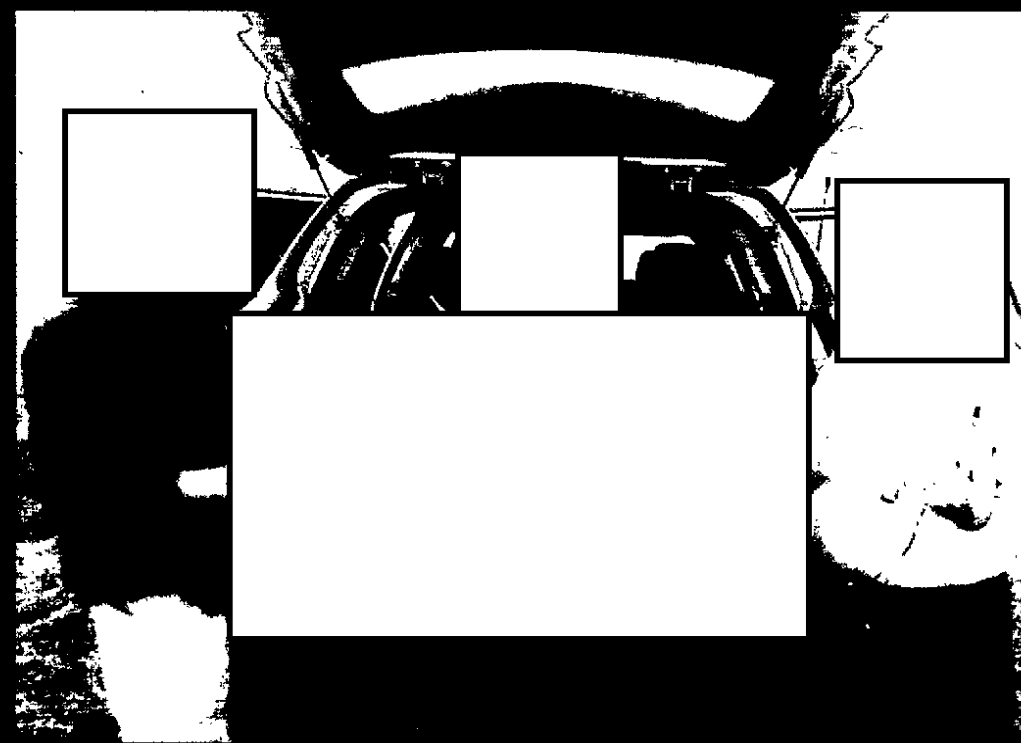
“Vigilance must be maintained by each person operating an aircraft so as to see and avoid other aircraft.”



# Shared Fate?

■ Manned Aircraft

■ Unmanned Aircraft



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# Mitigating the See & Avoid Requirement

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75

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How many terrorists,  
spies, & criminals live in  
restricted and warning  
areas?



# COA

## Certificate of Waiver or Authorization (in the FAA's own words)

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79

CREW-148



**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 [REDACTED] from the time a completed application is submitted.

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# COA online provides a simple 22 page form

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84





# Safety of Life Emergency COA

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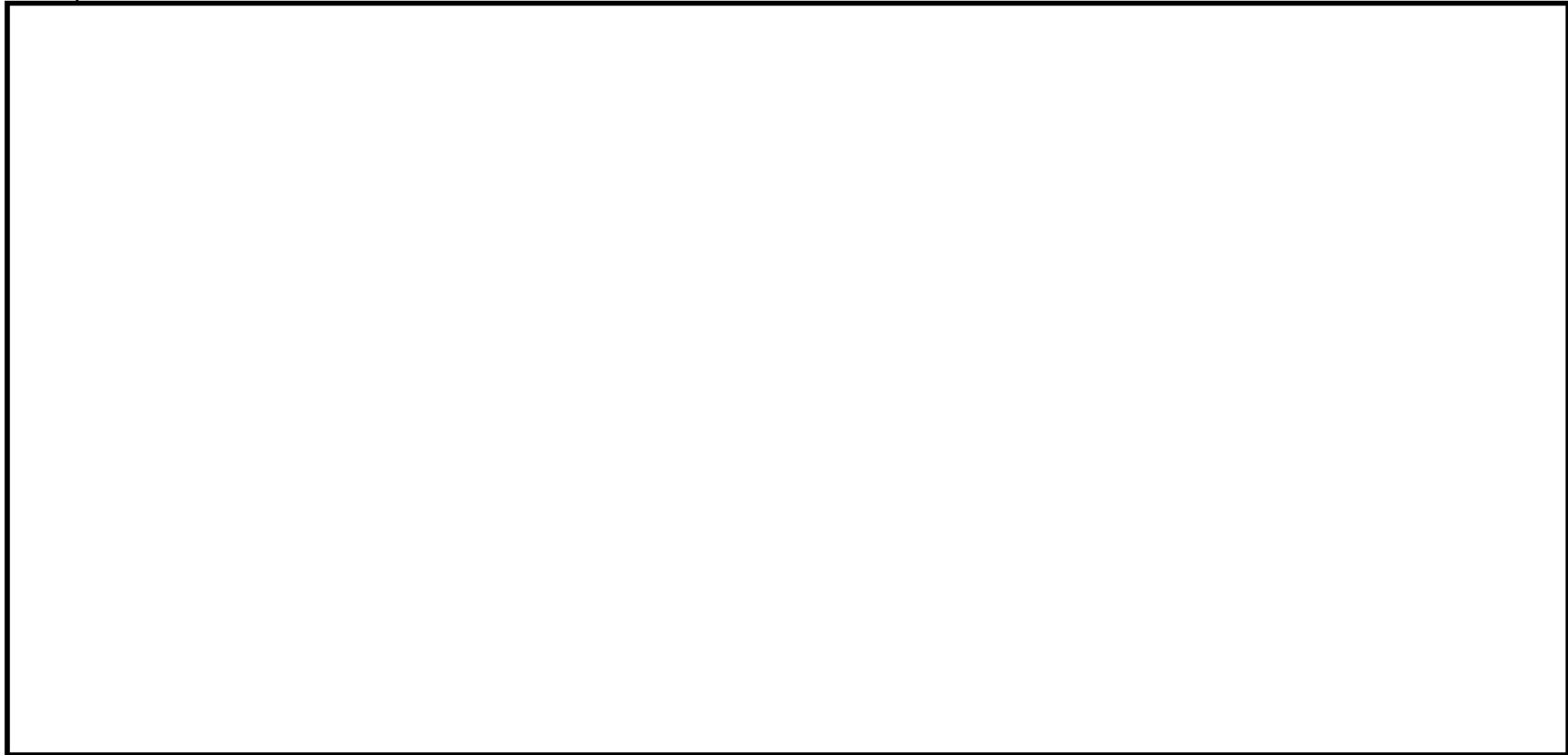
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85

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# COA available only if...



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# Part III

## How the FBI works with the FAA



# Safety of Life Emergency COA

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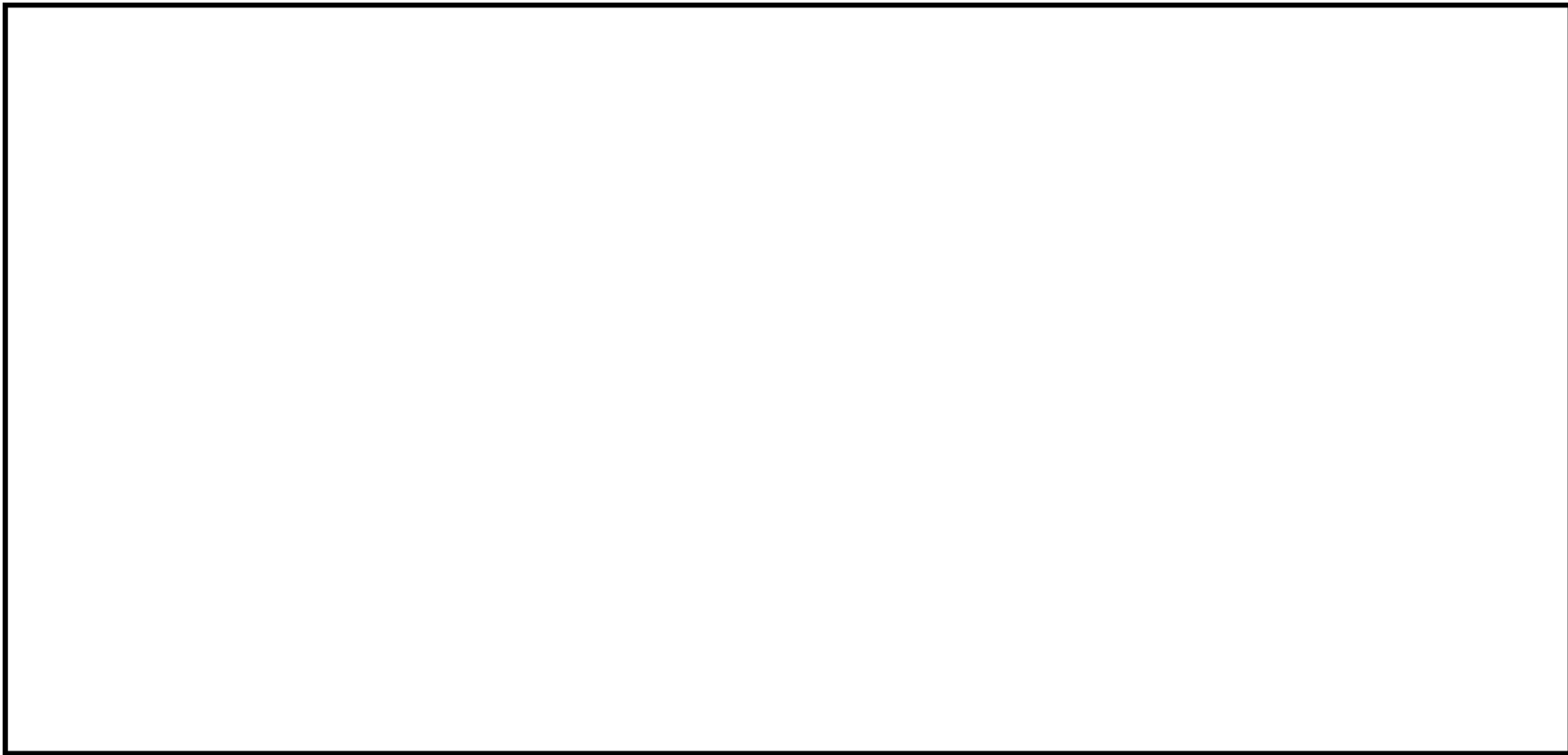
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85



# COA available only if...



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# Part III

## How the FBI works with the FAA



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CREW-903



# Emergency COA



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# Coming, in the next 90 days



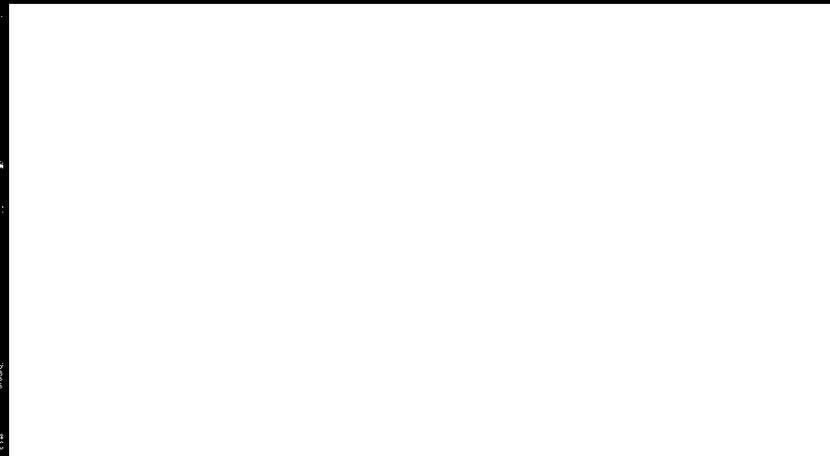
- Law enforcement streamlined procedures
- 4.4 pounds or less
- 400' AGL or less
- Meet requirements not yet published



# Sep 30, 2015

New comprehensive rules for UAS in  
the national airspace system.

QUESTIONS?



b7E

2011/2

