



NEWS FROM ABOVE

First Amendment Implications of the Federal Aviation Administration Commercial Drone Ban

Unmanned aircraft systems, commonly referred to as “drones,” have recently become a focus of the media, the public, and policymakers because of their use by the US military. But public- and private-sector interest in domestic use of drones is also growing, especially in the field of journalism. In light of privacy and safety concerns raised by the new technology, the Federal Aviation Administration (FAA) has sought to establish standards that limit the use of drones for “commercial” purposes while allowing experimental and recreational use.

In a new paper for the Mercatus Center at George Mason University, scholars [Cynthia D. Love](#), [Sean T. Lawson](#), and [Avery E. Holton](#) argue that the FAA’s actions to prohibit drone use by the media infringe on core First Amendment protections. The FAA should ensure that its efforts to regulate drones are consistent with constitutional principles. The agency should work with news media as key stakeholders in this discussion, and adhere to the Administrative Procedures Act by following a notice-and-comment rulemaking process, allowing all concerned parties, including amateur journalists and citizens, an opportunity to provide guidance about balancing safety, privacy, and freedom of the press.

For the complete study, see [“News from Above: First Amendment Implications of the Federal Aviation Administration Commercial Drone Ban.”](#)

ADVANTAGES OF DRONES IN NEWS JOURNALISM

- *Unique perspectives.* Drones provide unique perspectives unattainable with other means of news gathering. For instance, they can provide access to the area over a natural disaster.
- *Safety.* Drones are also safer than traditional means of aerial news gathering: helicopters are far more dangerous to humans than unmanned drones.

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- *Cost.* Operating helicopters is expensive, and ground reporting also often requires heavy, expensive equipment and manpower, while drones are relatively inexpensive to own and operate.

THE FAA’S DRONE DEFINITIONS AND ATTEMPTED BAN

The FAA definition of an **unmanned aircraft system** is overly broad, including radio-controlled model aircraft (RCMAs). RCMAs, the type of drones used for journalism, may be no larger than the radio-controlled flying devices marketed as children’s toys, and generally do not meet the definition of an “aircraft” subject to FAA jurisdiction.

The FAA’s broad definition of **commercial activity** makes no distinction between First Amendment-protected activity and nonprotected commercial enterprises. The primary way the FAA decides whether a drone is legal is by determining who will use it and why, not by checking its technical attributes or determining how, when, or where it will be used. “Commercial” uses of RCMAs, including journalism, must be approved by the FAA, but the FAA has not allowed aerial photography or news gathering.

FIRST AMENDMENT IMPLICATIONS

Aerial photography and videography are protected under the First Amendment’s free speech clause because they are part of the news-gathering process. The FAA’s requirement that journalists obtain a permit to fly a drone to gather the same type of information a member of the general public could use a drone to obtain without a permit is inconsistent with the First Amendment. Journalists have the same rights to access information as the general public, but the FAA’s regulation treats them differently.

Moreover, the FAA’s regulatory scheme is not content neutral and is an unconstitutional prior restraint on speech:

- *It concerns a public forum.* The airspace within a public forum, where drones can fly for news-gathering purposes, is itself a public forum, and the government may only restrict the journalistic use of drones with content-neutral regulations of time, place, and manner.
- *It bans on the basis of compensation.* The current FAA regulation does not stipulate when, where, or how a drone may be used, nor does it distinguish between types of drones. Instead, the FAA’s ban focuses on whether compensation is involved. Given that journalists for traditional news media are often compensated—a significant incentive for news gathering under any conditions—the government cannot make this distinction a justification for prohibiting drone use.
- *It is not narrowly tailored.* The FAA’s regulation of drones is not narrowly tailored to protect public safety—the receipt of compensation is wholly unrelated to the safety of drone use.
- *It is a prior restraint on speech.* When the government seeks to stop speech before it happens, it bears a heavy burden in justifying the restriction. In order to enforce a permitting

scheme, the government must provide narrowly drawn, reasonable, and definite standards for officials to follow. The FAA has failed to create these standards.

CONCLUSION

The FAA's attempts to prohibit the use of drones for aerial photography and news gathering violate the First Amendment, because journalists have a constitutional right to access the same information as the general public, and the FAA's standards lack the rigorously defined, narrowly tailored restrictions the Supreme Court has required for restraints on speech.

The FAA can reverse course by focusing on specific time, place, and manner restrictions, as the First Amendment requires—allowing the news media the opportunity to innovate and improve reporting while saving money and lives.