# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** November 4, 2015

**SUBJECT:** Airspace and video recording restrictions on unmanned aircraft systems (Work Order No. 29-LS1146)

**TO:** Representative Shelley Hughes
Attn: Ginger Blaisdell

**FROM:** Daniel C. Wayne
Legislative Counsel

You have asked two questions.

**1. Does the federal government have jurisdiction over private airspace, including the airspace above private dwellings?** The answer is yes. Under 49 U.S.C. 40103(a), "[T]he United States Government has exclusive sovereignty of airspace of the United States." In addition, 49 U.S.C. 40103(b)(2) reads, in part:

> **(2)** The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for--
> . . .
> **(B)** protecting individuals and property on the ground;
> . . .

Although it is sometimes argued that model aircraft are not "aircraft" for purposes of 49 U.S.C. 40103, the National Traffic Safety Board recently clarified otherwise, as follows:

> Title 49 U.S.C. § 40102(a)(6) defines "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air." Similarly, 14 C.F.R. § 1.1 defines "aircraft" for purposes of the FARs, including § 91.13, as "a device that is used or intended to be used for flight in the air." The definitions are clear on their face. Even if we were to accept the law judge's characterization of respondent's aircraft, allegedly used at altitudes up to 1,500 feet AGL for commercial purposes, as a "model aircraft," the definitions on their face do not exclude even a "model aircraft" from the meaning of "aircraft." Furthermore, the definitions draw no distinction between whether a device is manned or unmanned. An aircraft is "any"

> "device" that is "used for flight." We acknowledge the definitions are as broad as they are clear, but they are clear nonetheless.[1]

Although the federal government has jurisdiction to regulate airspace from the surface on up, private land owners retain certain rights in connection with airspace that is above their property. In *United States v. Causby*, the U.S. Military had begun flying as low as 83 feet above a chicken coop in the Causby family's yard, distressing the chickens so much that some of them died, prompting the family to allege an unconstitutional taking of their property. The U.S. Supreme Court held that a long established common-law rule—that private land owners owned the airspace above their land from the surface to a point extending indefinitely upward—had no place in the modern world.[2] However, the Court said that the military flights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[3] The Court said:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.[4]

Gregory S. McNeal, author of *Drones and Aerial Surveillance: Considerations for Legislators* wrote recently of the decision:

> The *Causby* opinion thus created two types of airspace, the public navigable airspace, a "public highway" in which the landowner could not exclude aircraft from flying, and the airspace below that which extends downward to the surface, in which landowners held some right to exclude aircraft. This discussion brings into focus the possibility that a landowner may exclude others from entering the low altitude airspace above their property, and as such may exclude drones (whether government or civilian operated) from entering that airspace. But, if such rights in fact exist, at what altitude are such property rights triggered? Unfortunately there is very little clarity on this point. The Supreme Court referred to this airspace

---

[1] *Huerta v. Pinker*, Docket CP-217, NTSB Order No. EA-5730 (November 17, 2014).

[2] *United States v. Causby*, 328 U.S. 256 (1946).

[3] *Id.*, 328 U.S. 256, 266 (1946).

[4] *Id.*, 264 (1946).

> as the "immediate reaches" above the land, into which intrusions would "subtract from the owner's full enjoyment of the property."[5]

There may be other legal or constitutional protections from unmanned air systems. The U.S. Supreme Court has recognized that an expectation of privacy protecting persons from searches by the government extend to certain areas near a dwelling, including the adjacent "curtilage."[6] The Court described curtilage as follows:

> "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.[7]

In that case, the Court upheld an aerial search by the government from a height of 1000 feet over Ciraulo's private property, however, based on a finding that 1000 feet is within "publically navigable airspace." The Court concluded:

> Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.[8]

A year later the U.S. Supreme Court explained that, with regard to curtilage questions, certain factors have bearing on the "centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." The Court said those factors include: (1) "the proximity of the area claimed to be curtilage to the home," (2) "whether the area is included within an enclosure surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by people passing by."[9]

---

[5] Pages 8 - 9 (November 11, 2014). Brookings Institution: The Robots Are Coming: The Project on Civilian Robotics, November 2014; Pepperdine University Legal Studies Research Paper No. 2015/3.

[6] *California v. Ciraolo*, 476 U.S. 207 (1986).

[7] *Id.*, 212 - 213 (citations omitted).

[8] *Id.*, 213 - 214.

[9] *United States v. Dunn*, 480 U.S. 294, 301 (1987).

In 1986, during the same term as *Ciraulo*, (cited above) the Supreme Court in *Dow Chemical Co. v. United States* confronted the question of whether aerial photography by the government from above an industrial site was a search, and whether the search was subject to the warrant requirement under the Fourth Amendment of the U.S. Constitution.[10] The Court held that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."[11] The Court distinguished the facts in *Dow* from hypothetical future cases—where technology might be used to penetrate walls or windows to obtain information that an unaided human eye is not able to obtain—as follows:

> Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as 1/2-inch in diameter.
>
> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.

In some search and seizure cases where "naked-eye" observation was enhanced by technology, courts have found the search to be unreasonable and violative of the Fourth

---

[10] 476 U.S. 227 (1986).

[11] *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986). Note, however, that at least one court has declined to apply *Dow*, as well as *Ciraulo*, (cited above) to search and seizure cases involving an expectation of privacy within a residence, on the basis that a state constitution may provide greater protection of privacy than the protection provided by federal law. *People v. Mayoff*, 42 Cal. 3d 1302, 1310-14, 729 P.2d 166, 170-73 (1986).

Amendment to the U.S. Constitution. For example, as noted in the following excerpt from *Kyllo v. United States,* the Court found that the use of sense-enhancing technology (thermal imaging) to gather information regarding the interior of a home was a search—analogous to a physical intrusion into a home without a warrant—and therefore the evidence obtained should be suppressed. The Court said:

> The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical,* we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened."
>
> It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.
>
> * * *
>
> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.[12]

Interestingly, after *Dow* the Court held (in *Florida v. Jardines)* that even when law enforcement's observation of a dwelling is enhanced by a police dog sniffing for evidence after being dispatched to a location within the curtilage surrounding the dwelling, the observation is a search subject to the warrant requirement. The Court said:

> The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text.

---

[12] *Kyllo v. United States*, 533 U.S. 27, 33 - 41 (2001) (emphasis in original, internal citations omitted).

> But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.
>
> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes."[13]

In that case, the Court acknowledged that private individuals and law enforcement officers alike are free to approach the front door of a dwelling in many instances, without express permission or invitation, but explained limits on that freedom as follows:

> "A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."
>
> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.[3] To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in

---

[13] *Florida v. Jardines,* 133 S. Ct. 1409, 1414 (2013) (internal citations omitted).

> the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.[14]

A court may extend an analysis similar to the ones in *Kyllo* and *Florida v. Jardines* to the use of UAS to enhance naked-eye observation of a dwelling. If so, it may determine that an uninvited UAS has very limited legal license to enter the curtilage surrounding a dwelling or from there to observe or record images or sounds that are inside the dwelling.

In *Florida v. Riley*, the U.S. Supreme Court upheld the search of a greenhouse in someone's private yard, conducted from a helicopter flying 400 feet above the yard, partly because the helicopter was flying in what the Court determined was navigable airspace, and since any member of the public would be free to fly over the property and observe from that height, it was not unconstitutional for the government to do so as well.[15] In a concurring opinion, Justice Sandra Day O'Connor said:

> Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary before the Florida courts, I conclude that Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one. However, public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.[16]

Very recently, in a case in New Mexico involving an aerial search by the government with a manned aircraft, the New Mexico Supreme Court discussed *Riley* and said:

> First, unobtrusive aerial observations of space open to the public are generally permitted under the Fourth Amendment. Even a minor degree of annoyance or irritation on the ground will not change that result.
>
> . . .
>
> Our second conclusion, however, is that when low-flying aerial activity leads to more than just observation and actually causes an unreasonable intrusion on the ground—most commonly from an unreasonable amount of wind, dust, broken objects, noise, and sheer panic—then at some point

---

[14] *Id.*, 1415 -1416 (emphasis in the original) (internal citations and original footnotes omitted).

[15] *Florida v. Riley*, 488 U.S. 445 (1989).

[16] *Id.*, 455.

> courts are compelled to step in and require a warrant before law enforcement engages in such activity.
>
> . . . as the U.S. Supreme Court said in *Riley,* an observation will not always be lawful under the Fourth Amendment simply because the plane is operating within navigable airspace. *Riley,* 488 U.S. at 451, 109 S.Ct. 693.
>
> . . .
>
> we conclude that the official conduct in this case went beyond a brief flyover to gather information. The prolonged hovering close enough to the ground to cause interference with Davis' property transformed this surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into Davis' expectation of privacy. We think what happened in this case to Davis and other persons on the ground is precisely what *did not* occur in either *Ciraolo* or *Riley* and what *did* occur in both *Oglialoro* and *Pollock.* Accordingly, we hold that the aerial surveillance over Davis' property was an unwarranted search in violation of the Fourth Amendment.[17]

The New Mexico Supreme Court further noted in *Davis*, that New Mexico's state constitution explicitly creates a constitutional right of privacy in that state, and implied that consideration of privacy interests under that provision might require a different kind of analysis than one based on intrusiveness, in a case involving UAS. But the court declined to speculate further about UAS because the case before the Court involved surveillance by manned helicopters.[18] Under art. I, sec. 22, Constitution of the State of Alaska, the "right of the people to privacy is recognized and shall not be infringed," and under art. I, sec. 14, Constitution of the State of Alaska, "unreasonable searches and seizures" are prohibited.[19] The Alaska Supreme Court has held that the right to privacy

---

[17] *State v. Davis*, No. S-1-SC-34548, 2015 WL 6125580, at pages 10 - 13 (N.M. Oct. 19, 2015).

[18] *Id.*

[19] Generally, a warrant is required in order for the state to search private property in Alaska. Alaska courts have recognized exceptions, however, including a search of abandoned property, a search in pursuit of a fleeing felon, a search to avoid destruction of a known sizable item, a pre-incarceration "inventory" search, a search where voluntary consent has been granted, a search in rendering emergency aid, a "stop and frisk" search, and a search incident to arrest. Harrison, *Alaska's Constitution: A Citizen's Guide*, 5th Ed., at 32.

under the Alaska Constitution is broader in scope than that under the federal constitution.[20]

In my opinion, a court in Alaska would consider law enforcement use of a UAS to conduct surveillance inside a dwelling, from a location outside of the dwelling, is a search. Searching a person's home implicates the right to privacy and protection against unreasonable search and seizure under the United States Constitution and the Constitution of the State of Alaska. In *Ravin v. State*, the Alaska Supreme Court found the right to privacy in the home to be a right of the highest importance and most deserving of constitutional protection. In *Ravin*, the Court wrote "[T]he home, then, carries with it associations and meanings which make it particularly important as the situs of privacy. Privacy in the home is a fundamental right, under both the federal and Alaska constitutions."[21]

As noted by the US Supreme Court in *Florida v. Jardines*, cited above, there is a common law right for a member of the public, including a police officer, to approach a residence via the normal methods of ingress and egress. This right can apply even when "No Trespassing" signs have not been posted, according to the Alaska Court of Appeals, in *Michel v. State.*[22] The Court held that "the law presumes that a homeowner generally consents to 'allow visitors to take reasonable steps to make contact with the occupant,'" and this presumption "can be overcome only when a homeowner manifests a clear intent to prohibit all visitors from even approaching the house."[23] In *Michel*, a state trooper approached a residence that was not visible from the highway via a 300-yard-long driveway that had four "no trespassing" signs posted, knocked on the door, and eventually gained a search warrant based on observations made while talking to the homeowner. The court agreed with other state courts that found that "No Trespassing" signs do not, by themselves, manifest a homeowner's intent to keep away all visitors. Under the circumstances of *Michel*—a long driveway in rural Alaska—the court found that a visitor would reasonably conclude that the "No Trespassing" signs were aimed at people who might be tempted to use the driveway as an access route for their own purposes such as hunting, camping, or hiking, and were not directed at prohibiting entry by people visiting for social or commercial purposes.[24]

---

[20] *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P.2d 138, 150 (Alaska 1977).

[21] *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

[22] *Michel v. State*, 961 P.2d 436 (Alaska Ct. App. 1998).

[23] *Id.*, 438.

[24] *Id.*

**2. Does the one party consent exception to the legal prohibition on secretly recording a conversation apply to videos?** The answer is yes, probably. Generally, the undisclosed recording by one party to a conversation is lawful in the State of Alaska.[25] However, it is difficult to see how this would be applicable to a recording made by a UAS since neither the UAS nor the person operating it is likely to be identifiable as a party to the recorded conversation. Furthermore, the rule applies only to conversations, not to private and nonverbal communication or activities.

According to one recent report:

> UAS, commonly referred to as "drones," can range from the size of an insect—sometimes called nano or micro drones—to the size of a traditional jet. Drones can be outfitted with an array of sensors, including high-powered cameras, thermal imaging devices, license plate readers, and laser radar (LADAR). In the near future, drones might be outfitted with facial recognition or soft biometric recognition, which can recognize and track individuals based on attributes such as height, age, gender, and skin color. In addition to their sophisticated sensors, the technical capability of drones is rapidly advancing.[26]

The evolving surveillance capabilities of drones, and the growth in their affordability and availability, raises a number of issues related to privacy, as it becomes possible for a person to be surveilled in their home by law enforcement and other persons, government and non-government, in a manner and to a degree that has not been possible until recently.

Margot E. Kaminski writes, in *Drone Federalism: Civilian Drones and the Things They Carry*:

> One intuition that frequently arises in privacy cases, both under tort law and under the Fourth Amendment, is that the location of the recording matters. A First Amendment right to record is most likely to outweigh privacy concerns in a public space, where one person's privacy collides with other peoples' experience and memory.[27]

Her prediction that a court may determine that a private individual has a first amendment right under the U.S. Constitution, to make an audio or video recording, is not without

---

[25] *State v. Murtagh*, 169 P.2d 200, 208 (Alaska Ct. App. 1997).

[26] *Congressional Research Report: "Domestic Drones and Privacy: A Primer*," page 3, by Richard M. Thompson II, Legislative Attorney (March 30, 2015).

[27] 4 California Law Review 57, 62 - 63 (2013).

support in case law. One federal court has said:

> "The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected."[28]

However, when it comes to recordings made by law enforcement, courts in Alaska have focused on the right to personal privacy, under art. I, sec. 22, Constitution of the State of Alaska, and the prohibition, under art. I, sec. 14, Constitution of the State of Alaska, on "unreasonable searches and seizures." In *State v. Glass*, a police informant took part in a private conversation with a suspected drug dealer, while wearing an electronic transmitter so the police could secretly record the conversation.[29] The Alaska Supreme Court upheld a warrant requirement, and holding that "one who engages in a private conversation is . . . entitled to assume that his words will not be broadcast or recorded absent his consent or a warrant."[30] The Court found that at the time of a conversation a party to it knows his or her words might be repeated later by another party who is present, but does foresee that his or her voice will be recorded or broadcast secretly.[31]

In *State v. Page*, the police secretly recorded a drug transaction between a police informant and a suspect, intentionally with only video, no audio, by hiding a camera in the informant's apartment ahead of time.[32] The Court held that a party in a private conversation has a right to visual privacy under the Constitution of the State of Alaska, and the police should have obtained a warrant even though the sound on the video camera was turned off.[33]

In a later case, involving the use of a hidden video camera in a workplace, the Alaska Supreme Court described a two part test for determining whether surveillance assisted by

---

[28] *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) cert. denied, 133 S. Ct. 651 (2012).

[29] *State v. Glass*, 583 P.2d 872, 874 (Alaska 1978).

[30] *Id.*, 875

[31] *Id.*, 877.

[32] *State v. Page*, 911 P.2d 513, 515 (Alaska App. 1996).

[33] *Id.*

technology is a search. The Court said:

> The United States and Alaska Constitutions prohibit not only unreasonable physical searches, but also unreasonable technological searches. Thus placing a hidden video camera in a house in order to record activities there without a warrant is prohibited just as is a warrantless entry to search for evidence. But not all technological monitoring of places or individuals is regarded as a search for constitutional purposes. Photographing a person as she walks in a public park does not raise constitutional concerns. But photographing a person in an enclosed public restroom stall is a search.[34]
>
> The general test used to determine whether particular technological monitoring is a search is the expectation of privacy test. Under this test courts ask: "(1) did the person harbor an actual (subjective) expectation of privacy, and, if so, (2) is that expectation one that society is prepared to recognize as reasonable?"[35]

The Court said that answering the question posed in the second part of this test requires, in each case, considering the facts, including the police conduct involved, and "assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." The Court determined that the public nature of the location in *Cowles* tipped the balance in favor of the government in that case, noting the following:

> Cowles's desk could be seen by members of the public through the ticket window and the open door, and by her fellow employees who were walking around the office almost continuously during the videotaping. Activities that are open to public observation are not generally protected by the Fourth Amendment. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection."[36]

The Court also discussed the difference between private locations and public locations, and said:

> . . . a person engaging in illicit conduct in a doorless restroom stall may have a reasonable expectation that she will not be observed from a hidden vantage point above her, even though it would have been unreasonable for

---

[34] *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001) (internal citations omitted).

[35] *Id.*, (internal citations omitted).

[36] *Id.*, 1171 (internal citations omitted).

> her to expect that she would not be seen through the doorless opening. Where incriminating conduct occurs in a public area, however, participants in that conduct already risk observation, and so have "no constitutional right . . . to demand that such observation be made only by some person of whose presence they [are] aware."[37]

This suggests that in at least some circumstances a person in Alaska may have a right, regardless of the one-party consent exception, against an audio or video recording of their private conduct being made by a person of whose presence they are not aware. This may be further supported by the holding by the Alaska Court of Appeals, in *State v. Boceski*, that when a police officer eavesdrops using only the officer's natural senses, "the prevailing rule is that such uses of the senses 'made from a place where a police officer has a right to be do not amount to a search in the constitutional sense.'"[38] Under the federal wiretap statute, it is unlawful for anyone to intentionally intercept an "oral communication"[39] by a person "exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . . "[40] There are various exceptions to the prohibition, including exceptions for one party consent and law enforcement in some circumstances. Alaska has similar prohibitions under AS 42.20.300 - 42.20.390, and a similar exception for one party consent.[41] Nothing suggests that these

---

[37] *Id.*, 1172 (internal citations omitted).

[38] *State v. Boceski*, 53 P.3d 622, 625 (Alaska Ct. App. 2002) (internal citations omitted).

[39] 18 U.S.C. 2511(1)(a).

[40] 18 U.S.C. 2510(2).

[41] AS 42.20.320(a) reads

> (a) Except for a party to a private conversation, a person who receives or assists in receiving, or who transmits or assists in transmitting, a private communication may not divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication, except through authorized channels of transmission or reception
>
> (1) to the addressee or the agent or attorney of the addressee;
>
> (2) to a person employed or authorized to forward a communication to its destination;
>
> (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed;
>
> (4) to the master of a ship under whom the person is serving;
>
> (5) to another on demand of lawful authority; or
>
> (6) in response to a subpoena issued or order entered by a court of competent jurisdiction.

prohibitions and (for recording conversations) the one party consent exception do not apply to UAS.

Under AS 12.37 law enforcement is granted authority to secretly intercept private communications and record them electronically, after obtaining a warrant, subject to certain limitations on the use and retention of the recorded information. The electronic recording can be audio or video. The Alaska Supreme Court has said that the legislative history of AS 12.37 was enacted to parallel the federal law under 18 U.S.C. §§ 2510 - 21, which provides for exceptions to the general prohibition against the interception of communications unless at least one party consents.[42] 18 U.S.C. 2511(2)(d) reads:

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

---

AS 42.20.310 (Eavesdropping) reads:

> (a) A person may not
> (1) use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation;
> (2) use or divulge any information which the person knows or reasonably should know was obtained through the illegal use of an eavesdropping device for personal benefit or another's benefit;
> (3) publish the existence, contents, substance, purport, effect, or meaning of any conversation the person has heard through the illegal use of an eavesdropping device;
> (4) divulge, or publish the existence, contents, substance, purport, effect, or meaning of any conversation the person has become acquainted with after the person knows or reasonably should know that the conversation and the information contained in the conversation was obtained through the illegal use of an eavesdropping device.
> (b) In this section "eavesdropping device" means any device capable of being used to hear or record oral conversation whether the conversation is conducted in person, by telephone, or by any other means; provided that this definition does not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

[42] *Bachlet v. State*, 941 P.2d 200, 208 (Alaska Ct. App. 1997).

Although a one party consent exception under federal or state law may apply in particular circumstances, keep in mind, that, as with any recording made without the consent of all parties, the one-party consent exceptions do not allow unrestricted use of a recording, whether audio or video. And, keep in mind that the warrant requirements under state and federal constitutions, as discussed in *Glass*, *State v. Page*, *Cowles* and the other authorities cited above may further limit the use of a one party consent exception by law enforcement. Finally, notwithstanding the one-party consent, a person may be held liable, criminally or civilly, depending on the facts, for the misuse of recorded audio or video material; the one-party consent exception does not legalize stalking, harassment, or trespass when it would otherwise be a crime.[43]

DCW:lem
15-407.lem

[43] The potential private criminal use of UAS is discussed more fully in a previous memorandum to you from this office, authored by Legislative Counsel Hilary Martin, dated June 8, 2015, entitled "Unmanned Aircraft Systems."