

**ALASKA STATE LEGISLATURE  
HOUSE TRANSPORTATION STANDING COMMITTEE**

March 15, 2016

1:04 p.m.

**MEMBERS PRESENT**

Representative Neal Foster, Co-Chair  
Representative Shelley Hughes, Co-Chair  
Representative Benjamin Nageak  
Representative Louise Stutes  
Representative Matt Claman  
Representative Dan Ortiz

**MEMBERS ABSENT**

Representative Charisse Millett

**COMMITTEE CALENDAR**

HOUSE CONCURRENT RESOLUTION NO. 17

Supporting the aviation industry; and urging the governor to make state-owned land available to the unmanned aircraft systems industry for the management and operation of unmanned aircraft systems and related research, manufacturing, testing, and training.

- MOVED CSHCR 17(TRA) OUT OF COMMITTEE

PRESENTATION(S): BALANCING LIBERTY & PRIVACY - APPROACHES TO THE REGULATION OF PRIVATE DRONE PILOTING IN ALASKA

- HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: HCR 17

SHORT TITLE: SUPPORT AVIATION INDUSTRY; USE STATE LAND

SPONSOR(S): REPRESENTATIVE(S) HUGHES

01/29/16	(H)	READ THE FIRST TIME - REFERRALS
01/29/16	(H)	TRA
02/02/16	(H)	TRA AT 1:00 PM CAPITOL 17
02/02/16	(H)	Heard & Held
02/02/16	(H)	MINUTE(TRA)
02/04/16	(H)	TRA AT 1:00 PM CAPITOL 17
02/04/16	(H)	Moved CSHCR 17(TRA) Out of Committee

02/04/16 (H) MINUTE(TRA)  
03/15/16 (H) TRA AT 1:00 PM CAPITOL 17

#### **WITNESS REGISTER**

GINGER BLAISDELL, Staff  
Representative Shelley Hughes  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Presented the proposed committee substitute (CS) for HCR 17, on behalf of Representative Shelley Hughes, prime sponsor,

Sarah Williamson, Juris Doctorate Candidate  
Duke University School of Law  
Durham, North Carolina

**POSITION STATEMENT:** Provided a presentation entitled "Approaches to Regulating Recreational UAS [unmanned aircraft systems] Piloting in Alaska."

#### **ACTION NARRATIVE**

[1:04:52 PM](#)

**CO-CHAIR NEAL FOSTER** called the House Transportation Standing Committee meeting to order at 1:04 p.m. Representatives Stutes, Claman, Ortiz, Foster, and Hughes were present at the call to order. Representative Nageak arrived as the meeting was in progress.

#### **HCR 17-SUPPORT AVIATION INDUSTRY; USE STATE LAND**

[1:05:12 PM](#)

**CO-CHAIR FOSTER** announced that the first order of business would be HOUSE CONCURRENT RESOLUTION NO. 17, Supporting the aviation industry; and urging the governor to make state-owned land available to the unmanned aircraft systems industry for the management and operation of unmanned aircraft systems and related research, manufacturing, testing, and training.

[1:05:23 PM](#)

**CO-CHAIR HUGHES** moved to rescind the committee's action in moving CSHCR 17(TRA) out of committee.

[1:05:35 PM](#)

CO-CHAIR FOSTER objected for the purpose of discussion.

[1:06:13 PM](#)

The committee took an at-ease from 1:06 p.m. to 1:07 p.m.

[1:07:17 PM](#)

GINGER BLAISDELL, Staff, Representative Shelley Hughes, Alaska State Legislature, on behalf of Representative Hughes, prime sponsor of HCR 17, reviewed that [on 2/4/16] the committee had adopted two amendments [to the original version of HCR 17]. She explained that the first amendment had replaced the word "aviation" with "unmanned aircraft systems", as well as added a reference for the economic data within the resolution. The second amendment had provided a list specifying where copies of the resolution would be sent. She explained that the latter amendment had caused a drafting issue with Legislative Legal and Research Services: It would have changed the status of the resolution from concurrent to joint, because people outside of state government were identified to receive copies. She explained that the Unmanned Aircraft Systems (UAS) Legislative Task Force could distribute copies to any individuals that they deemed appropriate. In response to a question from Representative Claman, she clarified that the appropriate action would be to rescind the previous committee action [moving CSHCR 17(TRA) out of committee], and adopting the proposed committee substitute (CS).

[1:10:28 PM](#)

CO-CHAIR FOSTER removed his objection to the motion to rescind the committee's action in moving CSHCR 17(TRA) out of committee [on 2/4/16].

[1:10:49 PM](#)

The committee took an at-ease from 1:10 p.m. to 1:11 p.m.

[1:11:16 PM](#)

CO-CHAIR FOSTER announced there being no further objection, [HCR 17, as amended], was before the committee.

[1:11:47 PM](#)

CO-CHAIR HUGHES moved to adopt the proposed committee substitute (CS) for HCR 17, Version 29-LS1327\E, Wayne, 2/4/16, as the working draft.

[1:12:06 PM](#)

CO-CHAIR FOSTER objected for the purpose of discussion.

[1:12:14 PM](#)

MS. BLAISDELL described the changes that would be made under Version E. She stated that on page 1, lines 13 and 15, "aviation" would be replaced with "unmanned aircraft systems". On page 2, line 1, the following language would be added: "as identified in the McDowell Group's May 2013 report for the Alaska Center for Unmanned Aircraft Systems Integration at University of Alaska Fairbanks", which is a reference for the economic data in the resolution.

CO-CHAIR HUGHES reiterated that that the UAS Task Force would be happy to send copies to the FAA, to industry associations, and to [Alaska's] U.S. Congressional delegation.

[1:13:22 PM](#)

CO-CHAIR FOSTER removed his objection to the motion to adopt CS for HCR 17, Version 29-LS1327\E, Wayne, 2/4/16, as a work draft. There being no further objection, Version E was before the committee.

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CO-CHAIR HUGHES moved to report CS for HCR 17, Version 29-LS1327\E, Wayne, 2/4/16, from committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHCR 17(TRA) was reported from the House Transportation Standing Committee.

[1:14:13 PM](#)

The committee took an at-ease from 1:14 p.m. to 1:16 p.m.

**PRESENTATION(S): Balancing Liberty & Privacy - Approaches to the Regulation of Private Drone Piloting in Alaska**

[1:16:35 PM](#)

CO-CHAIR FOSTER announced that the final order of business would be a presentation on "Balancing Liberty & Privacy Approaches to the Regulation of Private Drone Piloting in Alaska," by Sarah Williamson, JD candidate, Duke Law School.

[1:16:50 PM](#)

CO-CHAIR HUGHES recounted that she and Ms. Williamson had connected during some drone-related work, but that she had met her previously when Ms. Williamson was an intern [in Alaska]. She stated that Ms. Williamson is a Juris Doctorate candidate and related her understanding that since Alaska does not have a law school, Duke Law School works with the state on the Alaska Law Review. She said that among Ms. Williamson topics is the use of drones as relating to liberty and privacy. She posited that concerns regarding drones have less to do with the aviation aspect and more to do with the cameras that can be attached, and due to oversight requirements by the Federal Aviation Administration (FAA), usage regulation is complicated.

[1:18:12 PM](#)

SARAH WILLIAMSON, Juris Doctorate Candidate, Duke University Law School, paraphrased from the following written document, which read as follows, [original punctuation provided]:

**Slide 1**

Mr. and Madam Co-Chairs, Committee Representatives - Thank you very much for your time today. For the record, my name is Sarah Williamson. I am a JD Candidate at Duke University School of Law and an Executive Editor of the *Alaska Law Review*, a scholarly journal based out of Duke Law and under contract with the Alaska Bar Association to study and publish on Alaska legal issues.

I have been conducting legal research to support the mission of the UAS Legislative Task Force under HCR 15 to "identify potential privacy concerns associated with unmanned aircraft systems" (**UAS**) and to recommend to the legislature a "comprehensive state policy for unmanned aircraft that protects privacy and allows the use of UAS for public and private applications." While the term "drone" has captured the public debate, I will use the term UAS because, as defined by the Federal Aviation Administration (FAA), these craft are indeed aircraft under federal law, no matter how

small. This does have significant legal implications which I'll discuss in more detail momentarily.

I will briefly present my research and then will be happy to take any questions you may have.

**Slide 2**

The Task Force has identified citizen concerns and anxieties about private individuals using UAS to remotely invade their privacy, from harassment and stalking to trespass. The scope of my research has therefore focused on legal implications arising specifically from **recreational** uses of UAS that create **privacy** concerns.

My research has addressed three key questions. First, do states actually have authority to regulate recreational UAS uses creating privacy concerns? This is the issue of federal preemption of state law. My conclusion is that states most likely do have the authority to regulate in this area, allowing consideration of the next two questions. What approaches have other states taken in response to UAS privacy concerns. And what can Alaska learn from the experiences of other states in developing its own legislative response to this issue.

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Based on the policy goals identified in HCR 15, the best options to respond to the identified concern will be those that simultaneously embrace the variety of UAS uses that could benefit Alaskans and the Alaskan economy, while not overregulating the fledgling technology. And those approaches that maximize privacy protections while not unnecessarily impeding on those beneficial, non-privacy violating uses.

Now I will move on to discuss my findings on these three questions.

[1:20:58 PM](#)

**Slide 3**

As I stated earlier, states most likely do have the authority to legislate in this area without the risk of federal preemption.

This legal question arises because 49 U.S.C. 40103 declares "[t]he United States Government has exclusive sovereignty of airspace of the United States." This power to regulate this airspace has of course been granted to the FAA. Prior to the widespread use of UAS, the FAA only regulated airspace 500 feet above ground level. Now, the FAA has claimed jurisdiction down to the blade of grass to address the proliferation of UAS and develop a plan to safely integrate UAS into the national airspace as required by the FAA Modernization and Reform Act of 2012.

However, the FAA has only practiced and claimed exclusive federal jurisdiction over air **safety** concerns and licensing requirements. Under this scheme, any state action on safety, including restrictions on flight paths, altitude, equipment, standards, and the like would be preempted.

But states have maintained the ability to act in limited areas impacting airlines and the national airspace including taxing airlines and the regulation of air advertising. Several court cases from state and federal courts, including the US Supreme Court support this.

Additionally, the FAA has made several statements directly stating or implying that it does not want to tackle privacy concerns and that the states are the appropriate locus for such laws. In its recent UAS Fact Sheet, the FAA gave an example of a state UAS voyeurism law as an appropriate piece of legislation. The Congressional Bi-Partisan Privacy Caucus, about 40 members strong, also supports strong state privacy laws. And the FMRA bars the FAA from any regulation of small "model aircraft" used for **recreational** purposes, a provision several scholars believe could include at least some kinds of UAS. (49 U.S.C. § 40101).

However, the Electronic Privacy Information Center has challenged the FAA and is before the DC Circuit now to argue that the FAA must consider privacy in its rulemakings on UAS. Their argument is based on portions of a CRS report, that the "plan to safely integrate civil UAS into the national airspace" required by the FMRA reasonably includes privacy, not

just safety. This argument lost in the lower court. Additionally, the National Telecommunications & Information Administration (NTIA) was directed in a Presidential Memorandum of February 2015 to look at UAS privacy concerns with the goal to "mitigate consumer concerns while promoting growth and innovation in this exciting sector." NTIA has to-date been occupied with commercial UAS uses and is currently running a working group with representatives of key stakeholders to create a *voluntary* best-practice guide. The current draft features high-level recommendations for recreational users, but it is clearly not an attempt to regulate the field. So given the pace of progress in Washington and the overall supporting evidence, it likely is safe for states to regulate in this area.

And many states have. To date, 45 states have considered over 200 bills broadly relating to UAS use at the state level. 25 of those states have considered nearly 100 bills relating to the privacy implications of UAS uses by private citizens. So I come to the second key question of this research which is "what approaches have these states taken?" And the approaches have been quite literally all over the map. There is certainly no uniform bill in the UAS area. However, state approaches to date can generally be grouped into three categories. These are:

1. Common law approaches or the "leave it to the courts" approach
2. UAS-specific civil or criminal code approaches
3. State privacy law integration approaches

Now I will review each approach and its benefits and challenges. My recommendation is that Alaska should take the last approach, integration with existing state privacy laws.

[1:26:08 PM](#)

#### **Slide 4**

First, the common law approach. This approach does not necessarily require statutory language. It leaves most of the burden of determining reasonable standards of operation to the courts within existing tort law. The State of Alaska recognizes three broad privacy torts: intrusion upon seclusion, defamation, and false light and of course the property torts of trespass and

nuisance. It is difficult to get a count of states taking this approach because suits have been filed in some, but not in others. States also recognize different names and elements of these torts. At least CT and IL have considered privacy tort cases. 15 state courts have considered trespass or nuisance cases, but most have considered only one or two. Since this type of litigation can occur independent of legislative action, many of those states are considering other bills as well.

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This is one of the key weaknesses of solely relying on this approach. Enforcement of this approach essentially requires a civil suit by harmed individuals. While this approach is flexible and could provide protection against overregulation of this fledgling technology, it is not at the moment going to be a good approach for developing a norm and preventing harm before it occurs. The remote-piloting features of UAS introduce accountability and attribution challenges for citizens trying to identify precisely who is encroaching on their space. The lack of clearly identifiable airspace boundaries between properties implicates issues of consent to trespass on the one hand and intent to trespass on the other. Reasonableness requires citizens to undertake a sort of cost-benefit analysis that may demand too much or rely on value judgments that aren't yet commonly held. And it will necessarily be limited by people being unable to know the particular capabilities of any given UAS - it may have a camera, it may not.

Citizens may also be tempted to disable or capture UAS on their property in self-defense rather than file a lawsuit. This type of self-defense is currently prohibited by FAA guidelines because again, UAS are **aircraft** and could result in even greater damage from what could be an unintentional or relatively harmless action.

Privacy torts are also relatively rare creatures. The doctrine in most states, including Alaska is not frequently applied.

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**slide 5**

Moving on to the second approach, UAS-specific civil and criminal code provisions. By this, I mean a piece of comprehensive legislation targeted at regulating UAS. I have given a few examples on the slide of states that have enacted such laws, again each one different from the last. Texas' is to date one of the most comprehensive, laying out lawful uses and unlawful uses which are criminal, but also allow citizens to recover civil damages.

Idaho's current law is similar to the general permissive use policy in Alaska, allowing UAS use to be generally lawful except where it interferes with an owner's property or is imminently dangerous. However, it also prohibits gathering images or recordings of individuals or property without explicit written consent. This might be troublesome as I'll explain in a moment.

TN on the other hand, has been very specific in its laws, only making it a criminal offense to use footage of a hunter or angler without their consent. A couple other states have passed a similar provision and it appears to have been in response to tactics used by PETA.

So what are the benefits and challenges. Obviously these laws are very specific, which can be very good for creating clear and consistent expectations of lawful behavior by the public. These laws are also directly responsible to citizen concerns, indicated by their very targeted nature. **However...**as with the Idaho law, many likely prohibit activities that are protected by the First Amendment as "news gathering." Federal Circuit Courts have been in agreement that the First Amendment permits a private citizen to at least record the actions of people in a public space. So such specific written consent laws would be in great jeopardy if challenged.

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These laws are also often duplicative of other state laws, which can create challenges for courts interpreting the intent of the legislature. Are the same standards supposed to apply or are UAS slightly

different, very different? Overall, it creates a consistency problem.

Such specific laws are also likely to produce unintended consequences. For instance, what if someone capturing video from a UAS in a public place happens to catch footage of a crime in progress on private property? What if the collection of an image of private property using a UAS piloted by a 7 year old he got for Christmas is purely incidental? Such standards of written consent would also be less feasible for commercial operators where flying over private property may be necessary in some cases. These are the types of targeted laws that could impede the development of beneficial uses of UAS technology.

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**Slide 6**

So now for the final type of state approach, integration with existing state privacy laws. At least 10 states have either enacted or are considering bills in this category. This is my recommendation for AK.

Most prominently is California which amended its paparazzi statutes to include use of UAS to capture images as an unlawful behavior. The California governor has been reluctant to create any standards for UAS so far, but even this was one he considered necessary and targeted enough at the specific troublesome behavior to not have unintended consequences. Arkansas has enacted a similar law, integrating UAS-specific language into its voyeurism and video-voyeurism statutes.

I have included some of the Alaska Code provisions that could be surgically amended to prohibit UAS as a means through which to commit these offenses. These focus on state laws already implicating a sense of privacy, but others could be included like reckless operation of aircraft or even to change the definition of assault and battery to include fear of bodily harm from a drone.

The benefits of this approach capture those of the UAS-specific holistic legislation, but are much less

duplicative, integrate UAS into existing state law and standards, and still send a clear message that using UAS for certain purposes will not be accepted. These provisions would not force citizens to rely on their own resources to bring a civil lawsuit, but could be enforced by the police and the attorney general. Prohibiting UAS use in this fashion for specific offenses is also much less likely to have unintended consequences because such legislation, as I said earlier, targets the undesirable **behavior** not the machine itself.

Of course the challenges are that many scattered code sections will require amendment under this approach, somewhat of a piecemeal approach. But a complete survey for the appropriate places should not be difficult, just potentially a bit time-consuming. And finally, there may be some question here with the Alaska constitutional right to privacy. As the right has been interpreted by the courts in Ravin [Ravin v. State, 537 P.2d 494 (Alaska 1975)] (especially in combination with the First Amendment) may somewhat ironically force the state to place more emphasis on a citizen's right fly a UAS without limits in his backyard, no matter what the neighbor thinks. But those rights are likely to be implicated in such a targeted approach looking at offenses that are already on the books.

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REPRESENTATIVE ORTIZ confirmed that the subject matter of the presentation was exclusive to UAS devices used for recreation, and asked whether necessary safeguards for privacy and similar concerns were already in place for commercial drone use.

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MS. WILLIAMSON replied that there has been some action at the federal level regarding the commercial use of drones. She said that it would be more likely for the state to run into preemption issues regarding actions relating to commercial uses, which was the driver for her decision to limit this presentation to recreational and hobbyist use by private citizens.

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REPRESENTATIVE CLAMAN asked whether the federal regulation is pursuant to commerce clause powers exercised by congress.

MS. WILLIAMSON replied affirmatively and said regulation is also based on the FAA's authority over airspace.

REPRESENTATIVE CLAMAN inquired whether regulatory authority is tied to anything beyond the commerce clause.

MS. WILLIAMSON replied that to some extent it could be related to "necessary and proper," as that is the basis of having one national airspace and [the federal government] having the power to make the necessary regulations for governance.

REPRESENTATIVE CLAMAN asked for clarification that the commercial regulation is being defined by the FAA, but the federal government is allowing the states to regulate recreational use.

MS. WILLIAMSON explained that the difference is primarily with action that is occurring at the National Telecommunications and Information Administration (NTIA). She related that NTIA is creating a voluntary set of best practices for commercial users. The best practices are specifically related to the privacy implications and, although not mandatory, have invoked some actions. She stated that there is also concern at the federal level related to the press, because of their right to gather information. The press is pushing for a voluntary code of conduct, in order to protect their First Amendment right for gathering news. She explained that there would likely be similar concerns regarding privacy issues for commercial users, at the state level, and likely a preference for voluntary guidelines. She related that there are model aircraft associations that have always operated under a code of conduct, and said something similar has been recommended to the state. She indicated that she has not done as much research in those areas because she has focused on the recreational side.

REPRESENTATIVE CLAMAN asked for comment on Alaska's constitutional right to privacy, which provides a greater right to privacy than the federal constitution. Clarifying, he asked whether the right to privacy applies more to a person's right to fly their drone wherever they wish or is it directed to the home and the curtilage.

MS. WILLIAMSON suggested that the scenario of a citizen flying a drone in their back yard seemed to be very much in line with the

way the courts have interpreted the privacy provision under the Ravin [Ravin v. State, 537 P.2d 494 (Alaska 1975)] line of cases. She said that regardless of whether it creates a feeling of violation of privacy, on the part of the neighbor whose fence the user can now see over, the activity of the user might be more protected, over that of the neighbor, as the device may or may not have an attached camera.

REPRESENTATIVE CLAMAN requested confirmation that the constitutional right to privacy pertains more to privacy from the government than privacy from a neighbor. He gave the example that if he was throwing a ball for his dog in the backyard, his neighbor may or may not have a right to know what he is doing, and pondered whether the constitutional right to privacy comes into play.

MS. WILLIAMSON concurred with the members understanding, and said that there are also some interesting intersections with the Fourth Amendment to the constitution. She explained that many states have taken up the issue of police warrants and use of drones to fly over property. She opined that it is a very interesting question and will be a tricky legal issue as states move forward, specifically in Alaska, because of the aforementioned constitutional provision.

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CO-CHAIR FOSTER mentioned that there are severe consequences for tampering with an aircraft, whether it's a jet or a Cessna 172, which he said he understands because it is a safety issue. He asked if there was a minimum punishment for destroying or tampering with a privately owned drone.

MS. WILLIAMSON surmised that the topic would be included in the FAA regulations. She elaborated that the FAA issued draft regulations in February 2015, and received substantial commentary on provisions that were not included in the draft. She stated her belief that the topic raised by Representative Foster would be addressed by the revised regulations. She noted that as of December 21, [2015], users were required to register their drones and the penalty for not doing so was the same civil fine for not registering an aircraft. She said that is an example of [FAA] applying manned aircraft standards to unmanned aircraft regulations.

CO-CHAIR FOSTER asked if, under current law, a person would spend as much time in jail for tampering with a drone as they would for pulling a spark plug on a plane.

MS. WILLIAMSON responded that currently, based on the FAA's actions, manned and unmanned aircraft tampering would be treated similarly, and she opined that a lot of people would take issue with the same standard being applied to both manned aircraft and UAS. She related her understanding that the FAA has received comments regarding the issue and which are presumably being addressed.

CO-CHAIR FOSTER asked Ms. Williamson to elaborate on the third question on slide 2, "What approach should Alaska take to increase privacy protections without precluding reasonable non-privacy violating uses?"

MS. WILLIAMSON stated that her recommendation for Alaska is to target user behavior to prevent people from flying drones for stalking or harassment purposes; specific language should be included in statute that targets behavior rather than the mechanism. She stated that if the device itself is targeted it may impede as yet unknown, beneficial applications. She noted that there is a federal test site located in Alaska, thus making it important to be open to potential uses, and she reiterated that the behavior is really the issue.

[1:48:15 PM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Transportation Standing Committee meeting was adjourned at 1:47 p.m.