

D.C. Circuit Upholds Drone Remote ID Rule

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On July 29, 2022, the D.C. Circuit upheld the Federal Aviation Administration's (FAA) Remote ID Rule against a grab-bag of constitutional and procedural challenges brought by a drone user named Tyler Brennan and his company RaceDayQuads (collectively, "Brennan"). Remote ID capabilities, which the FAA has likened to a "digital license plate," are broadly supported by the drone industry, because they will allow for the expansion of safe and secure operations in U.S. airspace. Under the FAA's Rule, drones must emit radio signals that transmit identifying information while in flight. Once Remote ID is fully implemented, the FAA, other government entities, and members of the public will be able to identify any airborne drones (although, if the operator so chooses, only certain governmental entities will be able to link the aircraft to a specific registered operator). The FAA promulgated its Remote ID Rule in January 2021, and manufacturers must begin building compliant drones next month, but the Rule will not require operators to have Remote ID capable aircraft until September 16, 2023.

Petitioner Brennan sued to vacate the Remote ID Rule, alleging primarily that the Rule's requirements violated the Fourth Amendment. He argued that law enforcement could use the Remote ID Rule to carry out constant governmental surveillance without a warrant. In addition, Brennan brought other procedural challenges to the FAA's rulemaking under the Administrative Procedure Act (APA). Wiley filed an *amicus* brief in support of the Rule and the FAA on behalf of the Association for Uncrewed Vehicle Systems International (AUVSI), the world's largest nonprofit organization dedicated to the advancement of uncrewed systems and robotics.

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In rejecting Brennan's claims, the D.C. Circuit handed the FAA and the drone industry a major win. Remote ID will help pave the way for further drone integration into national airspace and allow a wide variety of industries to grow their drone operations.

The Remote ID Rule

Government regulators and the drone industry have long recognized the need for a comprehensive means of electronically identifying drones in flight, both to assist with public acceptance of drone operations and to ensure the safety and security of drone flights. In the FAA Extension Act of 2016, Congress directed the FAA to develop the ability to remotely identify flying drones. After developing remote identification standards, the FAA was also tasked with issuing related regulations or guidance. After an extensive period of public engagement, the FAA issued a Proposed Rule in 2019 and adopted its Final Rule in 2021. Over this rulemaking period, the FAA received approximately 53,000 comments.

The Final Rule differed from the Proposed Rule in a number of ways, but most significantly the FAA elected to go with a local broadcast standard, rather than require that drones be able to report Remote ID information to a centralized network via an internet connection. As adopted, the Remote ID Rule requires drones registered with the FAA and weighing more than 0.55 pounds to broadcast identifying information using unlicensed spectrum while the drone is in flight, in a format that can be received by the general public. This information includes location, altitude, velocity, and performance information, as well as a unique identification number for the drone itself. This number is either the drone's serial number, which is registered with the FAA in a publicly available database, or a "session ID," a randomly generated number that the FAA and law enforcement – but *not* the general public – will be able to correlate with the registered operator. This information will allow the FAA and law enforcement to track down the owners if drone operations go awry, and take any necessary enforcement actions.

Pilots can meet the Remote ID requirements if they operate a drone with built-in Remote ID or a drone with a broadcast module attached. Drones without Remote ID capabilities can be flown if they are within visual line of sight and inside an "FAA-Recognized Identification Area," which can only be requested by "community-based organizations" like the Academy of Model Aeronautics, and educational institutions.

The Court's Decision

Brennan brought two main challenges to the Final Rule. First, he alleged that the Rule constituted a warrantless search under the Fourth Amendment. Second, he claimed that the Rule was arbitrary and capricious under the APA. In a unanimous opinion authored by Judge Pillard, the D.C. Circuit rejected all of Brennan's claims.

Fourth Amendment:

Brennan argued that the Rule violated his reasonable expectation of privacy, constituting a search under the Fourth Amendment. Since Brennan was challenging the Rule before any enforcement took place, the court treated the claim as a facial challenge. To succeed, Brennan had to show that the Rule would be

unconstitutional in all circumstances.

The court held that drone pilots generally do not have a reasonable expectation of privacy in the location of their drones while flying. The court's Fourth Amendment analysis begins, "It is hard to see what could be private about flying a drone in the open air." Indeed, the court explained that drones flying in airspace are like cars on public streets; the activity is public, and increasingly so, as the number of drone flights increases by the day.

While some surveillance activities of public conduct may violate the Fourth Amendment, the court held that Remote ID was readily distinguishable from these circumstances. First, the Remote ID Rule does not involve constant monitoring by law enforcement. The Rule requires drones to continually *broadcast* identifying information, but it does not require the government to constantly *track* drones. The court held that a mere capability to surveil drone activity did not violate Fourth Amendment protections. Second, drone flights are not long enough, and the identifying broadcast would not be constant or widespread enough to make the Rule run afoul of existing electronic surveillance Fourth Amendment precedent. Lastly, the Remote ID Rule limits the accessible identifying information to the drone's unique identification number. Only the FAA has access to the drone owner's identifying information. Currently, neither the public nor law enforcement are authorized to view such information under the Rule. Given the limited information at issue, the court held that there was no interference with Brennan's reasonable expectation of privacy.

While it rejected Brennan's facial challenge, the court reserved judgment on the viability of any future as-applied challenges.

Administrative Procedure Act:

Brennan also advanced several procedural challenges. He claimed that (1) *ex parte* communications improperly shaped the Rule, (2) that the Final Rule was not a logical outgrowth of the Proposed Rule, (3) that the FAA failed to properly consult other organizations, and (4) the FAA did not properly respond to public comments. The D.C. Circuit found no merit in any of these arguments.

As to the first claim, the court held that the FAA's communications with an industry group and NASA, and a demonstration at the FBI Academy, did not impact the integrity of the notice and comment process. The court explained that the Final Rule relied on evidence that was independent of these communications.

For the second claim, the court held that the Final Rule's deviations from the Proposed Rule identified by Brennan – regarding altitude measurements and retrofitting drones with radio broadcast modules rather than an internet-based option – were justified since the FAA offered sufficient opportunity for comment on these approaches.

Brennan's third APA claim alleged that the FAA failed to adequately consult the President of the Radio Technical Commission for Aeronautics, Inc. (RTCA) and the Institute of Standards and Technology (NIST) as required by the 2016 Act. The court held that the FAA-convened Unmanned Aircraft Systems Identification and Tracking Aviation Rulemaking Committee – which included the two organizations – conducted sufficient

deliberation, even if RTCA and NIST did not “weigh in on every facet of the proposed rule.”

Lastly, with respect to the FAA’s response to comments in the record, the court held that the commenters’ constitutional claims identified by Brennan were mostly frivolous or only concerned as-applied challenges, and that the FAA adequately addressed commenter concerns regarding costs and hobbyist interests.

Conclusion

As the court concludes, “Drones are coming. Lots of them.” Citing Wiley’s *amicus* brief, the court highlighted many of the ways that drones are already changing numerous industries as well as physical landscapes. Now that the court has cleared the way for the Remote ID Rule to take effect, the foundation has been laid for even more expanded operations in the years ahead.