



Comments of

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In the Matter of

*Privacy, Transparency, and Accountability Regarding Commercial
and Private Use of Unmanned Aircraft Systems*

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Introduction & Summary

“Drones” are simply the next frontier on the Internet: the marriage of the camera, the kind of increasingly powerful mobile broadband-and-GPS-enabled computers we all carry around in our pockets, and more sophisticated versions of the remote-controlled small planes that so many of us fantasized about having (and a few of us actually had) as children (or even as adults). Like every new Internet technology, they will change our lives mostly for the good – and mostly in ways we either cannot foresee, or that might seem trivial today but will prove far more valuable in the future than we expect today. And like every new technology, they also inspire anxiety. Often, that technology anxiety veers into full-blown technopanics.²

When the camera no longer required the minutes-long poses we know from Civil War-era photography, it prompted hysterical reaction from Samuel Warren and Louis Brandeis (the future Supreme Court justice, “Progressive” idol, and father of the Federal Trade Commission): “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”³

We strongly suspect that much of the “privacy” anxiety about drones is really anxiety about their increasing use by law enforcement and national security agencies – a trend that has been developing for decades. The Supreme Court has failed to assuage such concerns because it has done little to protect Americans’ privacy from the kind of “invasion” that Brandeis and Warren feared. Through “numerous mechanical devices” ranging from small planes to helicopters to heat sensors, law enforcement has found creative new ways to peer into the sacred precincts of private and domestic life – mostly in pursuit of America’s counter-productive prohibition of marijuana and other controlled substances. More recently, the concern has become that the NSA and FBI desire “total information awareness” in order to monitor every aspect of society. The Supreme Court has failed to rein in such surveillance for essentially the same reason it has failed to protect Americans’ emails from snooping by the Federal government without proper judicial approval: the contorted, constrained view of the Fourth Amendment that began with the Supreme

² Adam D. Thierer, *Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle*, 14 MINN. J.L. SCI. & TECH. 1 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012494.

³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890), available at http://www.english.illinois.edu/-people/-faculty/debaron/582/582_readings/right_to_privacy.pdf.

Court's 1967 *Katz* decision,⁴ and Justice Harlan's concurring opinion in particular,⁵ which gave birth to a line of cases that allowed any surveillance that did not violate some amorphous "reasonable expectation of privacy" – even if it *did* violate other mechanisms by which individuals attempted to protect themselves from snooping, whether through physical means (*e.g.*, higher walls) or contract (*e.g.*, trusting a third party to hold private email).

Addressing *these* privacy concerns is difficult, so much of the anxiety about "drones" has been transferred onto how private companies use Unmanned Aerial Systems (UASs), from package delivery to newsgathering to better imaging cities. These concerns vary widely in their details but, conceptually, are roughly analogous to previous attempts to create photographic records of our world, from satellites to small planes to the cameras mounted on cars that Google has used to create "Street View" maps of cities around the world.

Of course, drones *are* different: they are *not* simply better Street View cameras. They *do* raise new concerns: unlike Street View cameras, which merely automate, systemize and preserve what anyone could already see from public streets, drones can observe us from completely new angles – and, potentially, from much closer distance, depending on how low they are allowed to fly. Certainly, drones can observe us in a level of detail that is far more granular than what satellites could do – and probably also more than what manned aerial systems could do. How private actors use such UASs creates legitimate grounds for concern – above and beyond what government might do with them – so we appreciate NTIA's request for input on this matter.⁶

Yet we urge caution in attempting to prescribe how such technologies are regulated for essentially the same reason we urge caution in regulating any aspect of the Internet: rules written in advance will tend to inflate hypothetical threats and under-estimate both the unseen benefits of new technologies and our collective ability to adapt our expectations and social norms.

America never had a federal camera law, nor a Federal Camera Commission. Nor did the Federal government of the early 20th century convene a "multistakeholder" process to set industry standards, which the Federal government would then enforce. Instead, concerns about the camera were addressed in the first instance through private ordering (social

⁴ See *Katz v. United States*, 389 U.S. 347 (1967).

⁵ See *id.*, at 360–63 (Harlan, J. concurring).

⁶ Nat'l Telecomm. & Info. Admin., U.S. Dept. of Commerce, *Request for Public Comment, Privacy, Transparency, and Accountability Regarding Commercial and Private Use of Unmanned Aircraft Systems*, Docket No. 150224183–5183–01, 80 Fed. Reg. 11,978 (Mar. 5, 2015) [hereinafter "RFC"], available at http://www.ntia.doc.gov/files/ntia/publications/rfc_uas_privacy_03052015.pdf.

norms about when it is appropriate to photograph people) and only secondarily through law. That law which did develop was primarily property law (property owners might restrict photography on their premises), common law, or statutes that modified the common law and had been applied on a case-by-case approach.

The same is true of the Internet: Congress, in 1996, chose to take a hands-off approach to regulation – except, notably, for two attempts to censor online content. Fortunately, the courts blocked both of those censorship efforts,⁷ leaving us only with Section 230, which declares, in key part:

The Congress finds [that]... The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

...

It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;⁸

On the whole, this was very much the right approach: regulating the Internet in its early stages almost certainly would have done more harm than good, and the hands-off approach has yielded tremendous and undeniable benefits over the years.

Given long-standing skepticism about “regulating the Internet” across the political spectrum, it is not surprising that we are not today discussing legislation or a new agency rulemaking. Instead, the White House has ordered the NTIA to convene yet another of its “multistakeholder processes” – this time, on the privacy implications of UAS.⁹ In principle, we are not opposed to such a process. No doubt, such processes could probably have played a useful role in addressing past anxieties – and, yes, real problems – created by technological change.

Yet they, too, would have suffered from much the same problem as regulation: no one could have foreseen quite how any technology, from the “instantaneous camera” to the Internet would develop. Finding the right balance of costs and benefits is necessarily an

⁷ See *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

⁸ 47 U.S.C. § 230(a)–(b).

⁹ See Office of the Press Secretary, White House, *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems* (Feb. 15, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>.

ongoing discovery process, one that requires continual reassessment based on new data. The cost of getting it wrong is greatly amplified the more closely such processes resemble regulation in being binding, specific, prescriptive, and comprehensive, applying to all players in the market across the country and regardless of size. The harder it is to update a “multistakeholder code,” the less feedback is available about the costs of the code and the unseen benefits of real-world alternatives made impossible by the code, the more static the process is – and the more it resembles traditional regulation.

Simply put, the concept of “multistakeholder” approaches is woefully under-theorized – specifically, how to ensure that such processes are not, in practice, simply ways for government actors to “regulate” without the hassle of administrative due process or the political costs of admitting the true nature of what is happening. We have raised this concern in previous filings to the NTIA about its past processes.¹⁰ If anything, our concern has grown, as such processes have clearly become expected to handle anxieties about all new technologies.

Below, we explain our two core concerns:

1. That what is described as a “multistakeholder” process may be, or may become in the future, what is more accurately described as co-regulation;
2. Prescribing how UASs may collect information is, in fact, attempting to constrain the process of “speech” protected by the First Amendment, and thus government should be exceedingly careful in any role it might play in such prescription.

We take no view on most of the questions asked by the NTIA. Rather, we focus on the RFC’s initial questions about how this “multistakeholder” process should operate – and on what the purpose of the process is. The RFC notes that “the Presidential Memorandum establishes a ‘multi-stakeholder engagement process to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use in the [National Air Space].”¹¹ The key term “best practices” is left undefined by either the Presidential Memorandum or the NTIA’s RFC, thus obscuring a vital distinction: if a company or industry agree to abide by such “best practices,” they become, in fact, *required* practices – that is, the Federal Trade Commission will consider that company’s failure to implement those practices to the letter to be a deceptive trade practice punishable under Section 5 of the Federal Trade Commission Act. What

¹⁰ Comments of TechFreedom to the NTIA on Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct (April 2, 2012), *available at*

http://www.ntia.doc.gov/files/ntia/szoka_comments_4_2_12_final.pdf

¹¹ RFC, at 11,979.

constitutes “adoption” of “best practices” is not entirely clear: In theory, the FTC is required to show that a company not merely said one thing and later did another, but that this deception was “material.” But in practice, the FTC has extended a presumption developed in traditional marketing that *any* statement is material, thus holding companies responsible even for statements made in isolated contexts, such as online help pages.¹² In short, a company “agreeing,” in some sense, to a set of “best practices” may quickly find itself to have “agreed” to *de facto* regulation. Or, the FTC might incorporate the “best practices” into whether the company’s practices were “reasonable” and therefore “unfair” – as it has done in dozens of data security enforcement actions settled out of court – in which case the FTC could extend *de facto* regulation even to companies that have not agreed to it.

These concerns about a multistakeholder process having *de facto* legal effect accentuate our second concern: that subtle decisions about process design could give government significant, if not easily perceptible, ability to steer the outcome of the process. Together, these two concerns boil down to this: that the multistakeholder process may be a way for regulators to circumvent traditional regulatory processes with all their associated concerns, ensuring “flexibility” not primarily for innovators but for themselves.

We urge the NTIA to focus on truly voluntary exploration of best practices, and to focus on playing a truly neutral role as a convener of the discussion. That means withholding editorial control over the process and avoiding any appearance of “jawboning” either participation in the process or steering the outcome to a direction that reflects not the consensus of non-governmental stakeholders but the will of the State. Specifically, we urge the NTIA to:

1. Make clear that it does not expect participants to agree to any code of conduct enforceable by the FTC unless there is a clear consensus that some aspect of “Best practices” produced by the group can appropriately be elevated to the status of an enforceable code;
2. Make clear that it does not intend these “best practices” to be part of any official recommendation to Congress or state legislators for legislation;
3. Limit its role to scheduling and hosting meetings, paying for the expenses associated with each meeting (refreshments, live-streaming, facilitating remote participation, etc.);

¹² See, e.g., Fed. Trade Commission, *Statement by FTC Bureau of Consumer Protection Director David Vladeck Regarding Judges Approval of Google Safari Settlement* (Nov. 20, 2012), available at <https://www.ftc.gov/news-events/press-releases/2012/11/statement-ftc-bureau-consumer-protection-director-david-vladeck>.

4. Avoid even the appearance of substantive decision-making by government employees;
5. Leave the role of “facilitator” to someone who can be agreed upon by all private sector participants – at most, this person could be a professional facilitator paid by government, but should not be a regular government employee;
6. Specifically consider the adequacy of current legal laws to address potential privacy harms and focus on identifying gaps in existing law; and
7. Actively engage First Amendment experts in the process to explore how new UAS technologies involve collection, processing and distribution of information protected by the First Amendment and how best to address privacy concerns without infringing upon free speech rights.

The Past is Prologue: Multistakeholder Approaches & Jawboning

The Administration recognizes the difficulty in regulating new technologies, and proposes instead to address concerns such as those raised by drones through multistakeholder processes. As the Administration’s 2012 Consumer Privacy Bill of Rights said, “open, transparent multistakeholder processes ... can ... when appropriately structured... provide the flexibility, speed, and decentralization necessary to address Internet policy challenges.”¹³ But what is a multistakeholder process, really? What does it mean for it to be “appropriately structured?” And flexibility – for *whom*?

As explained below, neither “multistakeholder” processes nor “jawboning” is anything new in American history.¹⁴ The term entered the American political lexicon in 1962, when President Kennedy succeeded in getting U.S. steel manufacturers to rescind price increases –by opening an investigation into their business practices, threatening to sell government stockpiles of steel at lower prices and to cut off government contracts from companies that did not comply.¹⁵ The term has since become a shorthand for informal government coercion of private decisionmakers.

In principle, multistakeholder processes can be useful vehicles for private ordering. Suppose that, after the introduction of the first inexpensive consumer-grade camera, Eastman Kodak’s Brownie, in 1900, the Chamber of Commerce in some middle American town convened businesses, church groups and a few wizened and respected arbiters of

¹³ The White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, 23 (Feb. 2012) [hereinafter “2012 White House Privacy Report”], available at <https://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

¹⁴ Derek E. Bambauer, *Against Jawboning*, (March 23, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581705

¹⁵ See, e.g., Irvin Tucker, *MACROECONOMICS FOR TODAY* at 441 (2008), available at <http://goo.gl/V92ehD>.

propriety to agree on standard policies regarding whether or when they should each allow photography on their premises – instead of having an inconsistent patchwork of policies. Or suppose that the Chamber of Commerce did something similar nationwide, or that it brought Kodak and other camera manufacturers to the table, and that they agreed to include a pamphlet with each new camera sold advising buyers on photography etiquette. Or suppose that, as cameras became smaller and quieter, they convinced manufacturers to agree to keep the sound of the shutter click and the roll of the film louder than it needed to be – to ensure that surreptitious photography would be more difficult. Or suppose that major retailers agreed not to sell cameras to those under a certain age. These would all be “multistakeholder” processes, blending the views of industry and civil society. Whether any of these hypothetical outputs of such processes would have been wise is beside the point: the processes themselves would have distilled local knowledge of the circumstances of the time, both in terms of technology and shifting social mores, into some equilibrium of market and social forces. Such intermediation might have made Tocqueville proud. As he famously said:

Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. **Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.**

I have often admired the extreme skill with which the inhabitants of the United States succeed in proposing a common object for the exertions of a great many men and in inducing them voluntarily to pursue it.¹⁶

Of course, such bottom-up “associations” tend to be spotty and inconsistent, to vary from place to place or from issue to issue, if they happen at all. But this lack of comprehensiveness is itself an advantage: it lowers the cost of getting it wrong. A

¹⁶ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Volume II, Section 2, Chapter 5 (1840), available at http://xroads.virginia.edu/~hyper/DETOC/ch2_05.htm.

comprehensive solution (say, a nationwide one) may seem optimal at any one point in time, but by not leaving room for experimentation, it could deny us the unseen benefits of new technology and innovation.

For example, suppose that a single town had, through a proto-multistakeholder process, developed a norm against photography in restaurants, to which every restaurant in the city agreed to abide and have their waiters enforce. Apart from the occasional birthday party or anniversary dinner, such a rule might have seemed to have few costs. Indeed, it likely would have evolved to recognize an implicit exception for such special occasions. How would that town have responded to the ubiquitous incorporation of cameras into mobile phones? If it were only a single town, the rule would probably have been abandoned quickly once the craze for photographing meals and your friends at every meal swept the country. If, say, the Lutheran Synod had convinced towns across the Midwest to ban photography in restaurants, the region might have been slower to adopt the trend – perhaps even slower to buy smartphones at all if use of the camera was sufficiently critical to the value proposition for adoption – but would probably still have caved. If such a code had been developed for the entire country, though, using cameras in restaurants might never have taken off. While the individual act of photographing one’s food might seem trivial (or even annoying to those who must suffer through arrangement of the perfect entrée photograph), the collective benefits of in-restaurant photography are greater, though probably more subtle: sites like Yelp and TripAdvisor now allow users to explore not just what the restaurant management wants potential customers to see, but how the food, décor and human ambience look to actual patrons. No one could have foreseen such benefits when the Brownie camera was introduced in 1900, or when the first Polaroid instant camera was introduced in 1947, making photography – and sharing its results immediately – a social experience for the first time. Or suppose that the code, adopted at whatever level, had proscribed photography of homes even from public streets. Would Google’s Street View ever have taken off?

Such comprehensive, nationwide standards-setting is not hypothetical – and neither is our concern about its “voluntary” nature. At the end of 1908, New York Mayor George McClellan shut down all of the city’s movie theatres, in response to complaints about indecency on screen. Early in 1909, the National Board of Censorship was created to represent multiple, yes, stakeholders: both movie industry players eager to avoid such shutdowns and the arbiters of mainline Protestant opinion among New York’s upper crust.¹⁷ Although the “National Board” quickly changed its name to the National Board of

¹⁷ FRANCIS G. COUVARES, *MOVIE CENSORSHIP AND AMERICAN CULTURE*, 129–33 (Francis G. Couvares, ed., 2nd ed. 2006), available at

Review of Motion Pictures, its purpose was clear: to stave off direct regulation by “voluntary” censorship. It was clear that Mayor McClellan had “jawboned” the self-censorship by industry.

In 1930, the Motion Picture Producers and Distributors of America (MPPDA) created the Hays Code, promising that films shall not “lower the moral standards” of viewers and that “the sympathy of the audience shall never be thrown to the side of crime, wrongdoing, evil, or sin.”¹⁸ The code was initially ignored, but in 1934, the new Production Code Authority begins enforcing the code strictly – reinforced by the power of the newly created Catholic “Legion of Decency.” Together, these groups severely curtailed what could be shown on American screens. Initial changes to the code were made in 1956, as the two groups began to divide over film certification. Only in 1966, did Jack Valenti begin to liberalize the code, creating a new “Suggested for Mature Audiences” category, first used by the then-shocking (now classic) film *Who’s Afraid of Virginia Wolf?* Behind the scenes lay a shift in the Supreme Court’s First Amendment jurisprudence, extending free speech protection to adultery (1959) and other previously shocking concepts.¹⁹ In 1968, after court rulings that different First Amendment standards apply to adults and minors, the Motion Picture Association of America (MPAA) finally created the G/M/R/X ratings that still form the heart of movie-rating today.

So... what would Tocqueville say? Remember, he had said:

Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

Astute observer as he was of power dynamics, it is difficult to imagine that he could have failed to understand that the Review Board, MPPDA, MPC and MPPA were, in fact, ultimately extensions of state power – that they may have the form of the other American associations he celebrated, but that they were ultimately not so very different from the top-down *dirigiste* France he knew all too well. Since the middle ages, the French economy had been dominated by guilds – associations that rested on state power (exclusive grants of monopoly from the king), which we would today call cartels. Under Colbert – Louis XIV’s Finance Minister (1665-1683), the first great central-planner of the early Modern Era,

[https://books.google.com/books?id=D5R7NNAuH1AC&pg=PA131&lpg=PA131&dq="National+Board+of+Censorship"+protestant&source=bl&ots=X37k7UxG7O&sig=awvMCjZ2aXryQspSPMPsAZpZYGg&hl=en&sa=X&ei=N78yVcuDLcLHsQS6l4BI&ved=0CCsQ6AEwAg-](https://books.google.com/books?id=D5R7NNAuH1AC&pg=PA131&lpg=PA131&dq=)

¹⁸ See ACLU & NCAC, *Film Censorship: Noteworthy Moments in History* (last visited Apr. 20, 2015),

<https://www.aclu.org/files/multimedia/censorshiptimeline.html>.

¹⁹ See *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

and father of mercantilism – such cartels became conscious instruments of state policy. This thinking was revived in the late 19th century as “corporatism,” which a Papal Commission defined in 1881 as a “system of social organization that has at its base the grouping of men according to the community of their natural interests and social functions, and as true and proper organs of the state they direct and coordinate labor and capital in matters of common interest.”²⁰

In the 1920s, corporatism was implemented on a large scale in Benito Mussolini’s fascist Italy, which, in turn, excited the imagination of American New Dealers.²¹ In 1933, as the signature achievement of Franklin Roosevelt’s “First Hundred Days,” Congress passed FDR’s National Industrial Recovery Act (NIRA), which authorized industry boards to generate codes of fair competition, which would be enforced by the Federal Trade Commission as binding upon the entire industry. (National Recovery Administration Administrator Hugh Johnson would later, in his farewell address upon leaving the NRA, would invoke the “shining name” of Benito Mussolini as the inspiration for the NIRA.²²) Section 3 of the NIRA provided:

(a) Upon the application to the President by one or more trade or industrial associations or groups the President may approve a code or codes of fair competition for the trade or industry or sub- division thereof, represented by the applicant or applicants, if the President finds:

(1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and

(2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices...

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or

²⁰ See HOWARD J. WIARDA, *THE SOUL OF LATIN AMERICA: THE CULTURAL AND POLITICAL TRADITION*, at 251 (2001) (discussing the papal commission and origin of corporatism), available at <http://bit.ly/1GdBYbW>.

²¹ See, e.g., James Q. Whitman, *Of Corporatism, Fascism and the First New Deal*, 39 AM. J. COMP. L. 750 (1991), available at

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1656&context=fss_papers.

²² Peter H. Irons, *The New Deal Lawyers* at 27 (1993), available at <http://goo.gl/GDJ3AU>.

industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

....

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.²³

The bill's language about not promoting monopoly was pure window-dressing: creating government-sanctioned cartels was the entire purpose of the NIRA. ("The statute doth protest too much!") But the key to understanding the NIRA was its pretense of voluntarism: As in fascist Italy, it was, ostensibly, up to each industry to decide whether to propose a code and what would go into the code. In practice, the Federal government coerced participation in three ways: First, the bill gave the President authority to impose a code if one was not submitted to him, or if he did not like those proposed. Second, manufacturers and retailers indicated their compliance with a NIRA-certified code by displaying a "Blue Eagle" stamp on their product, the absence of which indicated something akin to sedition. As NIRA Administrator Johnson, an enthusiast for fascist aesthetics as well as its reliance on jawboning, declared:

When every American housewife understands that the Blue Eagle on everything that she permits into her home is a symbol of its restoration to security, may God have mercy on the man or group of men who attempt to trifle with this bird.²⁴

²³ National Industrial Recovery Act, Sec. 3 (1933) [hereinafter "NIRA"], *available at* <http://www.ourdocuments.gov/doc.php?flash=true&doc=66&page=transcript>.

²⁴ *See, e.g.,* ARTHUR MEIER SCHLESINGER, *THE COMING OF THE NEW DEAL, 1933–1935*, at 114 (1986) (attributing the quote to then head of the NRA Hugh S. Johnson), *available at* <http://bit.ly/1Ozmka1>.

The NIRA was, of course, struck down by the Supreme Court in 1935 in *ALA Schechter Poultry Corp. v. U.S.*, as a delegation of unconstitutionally vague discretion to the President:

Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.²⁵

Congress did not replace the NIRA, fortunately, yet the idea of browbeating industry into operating as medieval guilds once did lives on.

What lessons should be drawn from the experience of the NIRA? First, details aside, it was the clearest embodiment of the cozy relationship between government and the private sector of the 1930s. It is certainly no coincidence that the Hays Code developed at the same time: both were manifestations of the same corporatist idea, an essential blurring of the lines between public and private, and a preference for delegating awkward decisions to private bodies, which would operate outside the normal legal system. This desire to free

The NIRA's proponents might have said much the same thing about the NIRA code-setting boards: "when appropriately structured, they can provide the flexibility, speed, and decentralization necessary to address [new] policy challenges."²⁶

Second, *Schechter Poultry* was part of a line of cases that gave birth to modern administrative law, most notably the passage of the Administrative Procedure Act in 1946. The APA attempts to ensure some minimal degree of reasoned decisionmaking, that regulated parties receive adequate notice of how regulation might affect them, that they have an opportunity to comment on proposals before rules are issued, and so on. Congress has, in fact, attempted to address such concerns while also offering greater "flexibility"

²⁵ 295 U.S. 495, 541–42 (1935).

²⁶ 2012 White House Privacy Report, *supra* note 13, at 23.

through something like a multistakeholder process: the Negotiated Rulemaking Acts of 1990 and 1996 create a process by which regulatory agencies can develop rules that reflect the consensus of an industry group. Using multistakeholder processes to produce what amount to binding law instead of either the APA or the negotiated rulemaking process would be to sidestep existing processes created to balance due process concerns with the need for regulatory discretion and flexibility. There *are* other models, such as the Financial Accounting Standards Board (FASB)'s development of accounting standards, which the Securities and Exchange Commission (SEC) signs off on through its advice letter process, thus creating a legal safe harbor for a multistakeholder code,²⁷ but, importantly, the FASB is a *private* process, not one convened by government.

Simply put, there is a spectrum of potential “multistakeholder” model: the subtle differences among them matter in ways that are not well understood, but whether the process is initiated and convened by the government matters enormously. When a President declares, in a memorandum that “There is hereby established a multistakeholder engagement process to develop and communicate best practices...” and that “The process will include stakeholders from the private sector,” he is doing something fundamentally different from what FASB does – and far more akin to what President Roosevelt attempted to do through the NIRA: order what could amount to a negotiated rulemaking if, as we fear, companies will be pressured to accede the resulting code and it will be enforced by the FTC through its deception power – or, failing that, through its unfairness power.

That concern, in turn, is greatly amplified by our larger concern that the FTC has managed to exercise both powers in privacy, data security and, increasingly, high-tech product design cases without effective constraint from Article III courts – simply by creating (or amplifying) an set of incentives that render companies unwilling to litigate such cases and all too eager to settle them out of court.²⁸ Overall, this gives the FTC vast discretion to create *de facto* regulation, including around multistakeholder codes.

Really, how different would the NIRA have been – or would the Court's concerns in *Schechter* have been – if the NIRA had been slightly less aggressive? Would it have changed

²⁷ See Fin. Accounting Standards Bd., *FASB Codification and Simplification Efforts* (last visited Apr. 20, 2015), http://www.fasb.org/project/standards_overload.shtml.

²⁸ FTC: Technology & Reform Project, *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission* (Dec. 2013), available at http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf; see also Berin Szoka & Geoffrey Manne, *The Second Century of the Federal Trade Commission*, TECHDIRT (Sept. 26, 2013), available at <https://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml>.

the outcome of the case if Section 3(d) had not given the President the formal power to impose a code upon an industry sector that refused to produce one on its own, or to edit a code submitted for formal certification – and if Sections 3(a) (voluntary submission of codes) and 3(b) (FTC enforcement of such codes once certified) had stood on their own? In other words, would the NIRA have been significantly less unconstitutional if it had been more subtle, if it had relied on the Blue Eagle program or other use of the bully pulpit to coerce participation, or if it had left ambiguous whether the resulting codes were directly legally binding as “unfair methods of competition” or simply through the FTC’s deception authority? We think not. The NIRA offers a cautionary tale in the dangers of trying to control the economy through informal, government-sanctioned cartels, whether the substantive output of the cartel is collusion on prices or any other variable of competition. Indeed, the NIRA would have been *more* troubling, not less, if it had tried to constrain the ability of emerging sectors of the economy to experiment with untried technologies.

In general, we worry that ostensibly voluntary processes will be more prone to error, and less likely to correct it over time, the more they resemble traditional government-led regulatory processes in their essential characteristics: prescription of still unknown (and probably unknowable) practices *ex ante* and comprehensiveness, applying to all actors everywhere, thus leaving little room for experimentation with alternative approaches. These concerns are far greater when what is at issue are not merely trade practices, but speech itself – when the multistakeholder process is more akin to the “private censorship” of movies through the MPPDA, MPC, or MPAA than to the NIRA. Our concerns are greatest when these approaches blur together into the amorphous neo-corporatist amalgam that is behind much thinking of multistakeholder processes.

The First Amendment and “Drones”

We begin with what should be obvious, but is all too often forgotten: the Fourth Amendment shields us against the government’s intrusions into our private affairs and the First Amendment shields us against the government’s intrusions upon our right to “speak” – a term the courts have rightly interpreted broadly, to include not only the right to obvious forms of self-expression but also the creation and use of information,²⁹ regardless of technological medium.³⁰ But nothing in the Constitution protects us from truly private action: if private restaurants ban photography in their premises, if movie studios agree only to show films that receive appropriate ratings from a national “Review Board,” if drone makers agree to deliberately “cripple” functionality in their devices in some fashion (say, by

²⁹ See, e.g., *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2667 (2011).

³⁰ See *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (2011).

reducing camera resolution or the ability to teleoperate the device beyond line of sight, or at night), none of these things implicate (let alone violate) the First Amendment – unless “state action” is involved.³¹

For all the reasons explained above, it is far from clear where courts would draw the “state action” line in considering codes produced by a multistakeholder process through some state pressure – especially if the process were “established” by government with the clear threat of legislative alternatives and produced a code that was ultimately enforced by the FTC. For the present purposes, the arcane doctrinal question is far less important than the principle at stake: Do we want the government skirting the First Amendment, even if the courts allow it to, by corraling private parties into an agreement that may constrain their speech rights – just as the mayor of New York City forced the beginning of today’s system of movie self-censorship? We believe not.

We would prefer that this process not have come about by Presidential decree. But now that it has begun, we urge the NTIA to:

1. Minimize its own role throughout the process to that of a facilitator to avoid any impression that it is either coercing participation or steering the process substantively;
2. Ensure that the resulting “best practices” will be just that – and *not* de facto regulations enforced by the FTC, unless it is unquestionably clear that private companies truly voluntarily want to make those “practices” binding rules; and
3. Actively consider the First Amendment interests at stake throughout the regulatory process.

Of course, even when state action is clearly involved, the First Amendment is *not* a bar to any regulation; it merely constrains *how* government can intervene to protect non-speech interests through the regulation of speech.

Drones could be used in a variety of ways to collect information in preparation to speak that would clearly implicate the First Amendment. For instance, a reporter could use a drone to fly over a crime scene in order to describe something that is of public concern,³²

³¹ See, e.g., *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

³² Eugene Volokh, *No Drone Surveillance of Crime Scene (even from 150 feet above), Police Say*, WASH. POST (Mar. 30, 2015), available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/no-drone-surveillance-of-crime-scene-even-from-150-feet-above-police-say/>.

or a wedding photographer could use a drone to take pictures at a ceremony.³³ More radically, suppose that, when Amazon launched its currently experimental Prime Air service, it retained all high-resolution video data collected by its drones during flight for teleoperation purposes. While any attempt to predict the potential uses of such a database will undoubtedly look silly in the future, it is not difficult to project forward from today's paradigms: Amazon might build an alternative to Google's Street View, allowing users to navigate through cities in 3D, or a far more exciting alternative to Google Maps and with it, Amazon's own recommendation engine – perhaps in partnership with a company like Yelp. Visitors could experience flying down a street to select a business – or to look for real estate. Perhaps the information collected will help to monitor traffic patterns in new and unexpected ways, informing the way that self-driving cars operate in ways can only be perceived by seeing the flow of traffic data from above – perhaps even enabling the development of algorithms that can predict accidents or dangerous road conditions in very local areas in something like the way Google can predict flu outbreaks or unemployment geographically based on search engine queries. Or perhaps another company will use the same heat-mapping technology that has inspired so much concern when law enforcement uses it to identify marijuana growers to, instead, identify opportunities for improving building insulation – not merely based on the front of the building, as can be seen from the street, but by looking at the top of the building, too. The possibilities are endless.

Some of these scenarios may raise very serious privacy concerns. There may indeed be a role for government in addressing them – and, even more so, for multistakeholder processes to develop “best practices” for such uses of drones. But each of these examples, however silly or far-fetched they might seem, simply illustrates potential uses of UAS for collection of information in ways that we believe will at least trigger First Amendment review – even if that is not the end of the matter.

The First Amendment clearly applies to much data collection.³⁴ Thus, common law remedies (like those described below) are limited by the First Amendment in their application.³⁵ Courts have struck a delicate balance with privacy torts in respecting the customary expectations of privacy while not overly burdening speech, as discussed below. Government regulation of drones at every level could fail under First Amendment analysis

³³ Matt McFarland, *Drones: The Next Big Thing in Wedding Photography, or a Tacky Intrusion?* WASH. POST (Feb. 24, 2015), available at <http://www.washingtonpost.com/blogs/innovations/wp/2015/02/24/drones-the-next-big-thing-in-wedding-photography-or-a-tacky-intrusion/>.

³⁴ See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

³⁵ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (rejecting intrusion upon seclusion and intentional infliction of emotional distress claims because of conflict in this case with First Amendment).

if the regulations are found to be overbroad, chilling protected speech. Technology-specific regulation might be subject to heightened scrutiny.

How Current Privacy Laws Apply to Drones

Before bringing the power of the state to bear on the privacy problems raised by drones – whether through formal legislation or regulation or through informal processes and jawboning – we should consider whether the current legal framework could adequately address plausible harms and whether it could do so in a way that would better balance privacy protection with the benefits of UAS and the free speech interests at stake.

Again, any code of conduct produced by a multistakeholder process would be binding upon any company that promised to abide by it – as enforced by the Federal Trade Commission under its Section 5 Deception authority. While contract remedies would require privity and actual damages that may not always be present with drone technology, the FTC can step in under Section 5 and ameliorate harms where the common law fails to provide a remedy.

This is not to say, however, that the common law would not be up to the task of remedying privacy harms. The NTIA process should begin by surveying the potential application of current common law doctrine to specific scenarios created by drones. But to illustrate the point, we provide herein a brief introduction.

While courts no longer follow the old common law rule that our property reaches from the center of the Earth to the heavens, property owners have not lost the right to exclude in the airways above their property. For example:

Common sense would suggest that a homeowner has the right to prevent a UAS from being flown around his or her backyard at eye level. And indeed, in some states, trespassing statutes are worded in a manner that would encompass trespassory use of a UAS. In Arizona, for example, “entry” in association with criminal trespass is defined as “the intrusion of any part of any instrument or any part of a person’s body inside the external boundaries of a structure or unit of real property.” Unless an argument could be made that a UAS is not an “instrument,” this statute would cover intrusion by a UAS at extremely low altitudes (for example, at eye level) that are under the control of a property owner.

In Oregon, by contrast, “enter” as defined in association with criminal trespass is, among other things, “[t]o enter or remain in or upon premises . . . when the entrant is not otherwise licensed or privileged to do so.” While this somewhat circular definition is clearly intended to criminalize unauthorized entry by a person, it leaves open the question of whether entry by a very

low-flying UAS would be covered. California’s trespassing laws prohibit driving a vehicle on another person’s property without consent, but define vehicle in a manner that excludes UAS.³⁶

The law would probably allow property owners to use reasonable force to eject drones that are trespassing upon their property – and rightly so.

The common law might also limit the use of drones as nuisances even at altitudes too high to be considered trespassory – if their operation does affect the use and enjoyment of the property owner below (or across or above, as the case may be).³⁷ Similarly, the torts of intrusion upon seclusion and public disclosure of private facts could, together with that of intentional infliction of emotion distress and anti-stalking laws, limit other uses of drones.³⁸ States have enacted a variety of other laws governing “Peeping Toms,” voyeurism and paparazzi, and several are considering UAS-specific laws.

These laws may or may not be consistent with the First Amendment. Some respond to very real problems and would almost certainly be upheld upon challenge, if they have not already. Others, especially new laws that target drones specifically, may fail to balance the government’s interest with free speech interests burdened by regulation. But at least having clear laws on the books as laws allows the courts to consider whether the government has satisfied its First Amendment burden – something that may never happen if the same results are implemented through nominally voluntary codes that are, in fact, the result of the exercise of state power.

Conclusion

We urge the NTIA to tread with extreme caution in all aspects of this process that directly restrict the use of UAS to collect information – and to remember that other restrictions upon the use or design of UAS may in fact be smokescreens for the real goal: restricting the collection of information. Rules that simply curtail the development or use of UAS may do as much damage to UAS as tools of free expression as would rules that constrain what information can be collected through UAS. And, as discussed above, a nominally voluntary “multistakeholder” process can do as much damage as formal regulation – and possibly

³⁶ John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 HAR. J. OF LAW & PUB. POL. 458, 499-500 (2013), available at

http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36_2_457_Villasenor.pdf.

³⁷ See, e.g., Jeffrey Kosseff, *Drones: Aren't the Laws Already on the Books?* THE PRIVACY ADVISOR (Feb. 25, 2014), available at <https://privacyassociation.org/news/a/drones-arent-the-laws-already-on-the-books/>.

³⁸ Villasenor, 36 HAR. J. OF LAW & PUB. POL. 501–08.

even more, in that it will not easily be subject to legal challenge and that it lacks any of the basic legal safeguards of typical rulemakings.

In the end, for all the concerns they raise, we consider “drones” to be just another part of the trends towards increasingly ubiquitous data collection identified by science fiction novelist David Brin in his 1999 classic non-fiction study of the topic:

it is already far too late to prevent the invasion of cameras and databases. The genie cannot be crammed back into its bottle. No matter how many laws are passed, it will prove quite impossible to legislate away the new surveillance tools and databases. They are here to stay. Light is going to shine into nearly every corner of our lives. The real issue facing citizens of a new century will be how mature adults choose to live – how they can compete, cooperate, and thrive – in such a world. A transparent society.³⁹

³⁹ DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 8-9 (1999).