MEMORANDUM

TO: Uniform Law Commission, Drafting Committee, Tort Law Relating to Drones Act

FROM: Paul Kurtz, Chair and Robert Heverly, Associate Reporter

DATE: October 19, 2018

RE: Tort Law Relating to Drones, October 2018 Committee Meeting

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The Tort Law Relating to Drones Act was first read at the 2018 Annual Meeting. This memorandum supplements the memorandum that was distributed at that meeting (dated June 13, 2018; attached) by reiterating various issues raised in that memorandum and adding additional information and issues for discussion relating to the revised draft (dated October 19, 2018; attached). Familiarity with both the June 13, 2018 memorandum and the October 19, 2018 draft are presumed.

I. Drones, Trespass, and §301

a. The existing provision

Section 301 of the draft presented at the 2018 Annual Meeting was the most controversial aspect of the proposed Act. Implementing a *per se* trespass rule for any drone intrusion below a height of 200 foot above ground level, the provision engendered significant discussion immediately prior to and during the meeting. The existing §301 was based on an understanding of the interaction of the U.S. Supreme Court's opinion in *United States v. Causby*, 328 U.S. 256 (1946) with traditional concepts of trespass to land. *Causby* held that airplane flights in the national airspace did not trespass unless those flights caused substantial interference with the use and enjoyment of the land below. As commentators have since noted, the Supreme Court's formulation, developed in the context of a Takings Clause claim, appeared to merge the requirements of trespass law – which traditionally requires only a physical invasion of the land – with nuisance law – which requires a finding that the use of the land has been intruded upon in some way.

Following *Causby*, state courts and torts commentators expanded the Supreme Court's analysis into what became known as an "aerial trespass doctrine." Thus, the Restatement (Second) of Torts defines an aerial trespass as follows:

"Flight by an aircraft in the air space above the land of another is a trespass if, but only if,

(a) it enters into the immediate reaches of the air space next to the land, and

(b) it interferes substantially with the other's use and enjoyment of his land." (Restatement (Second) of Torts § 159(2)).

This mix of trespass concepts – the immediate reaches of the air space next to the land – and nuisance concepts – substantial interference with other's use and enjoyment of land – has continued to modern times but has caused relatively little difficulty in relation to manned flight because relatively few flights raise disputes in relation to its requirements. Drones, however, because they can easily fly in the airspace directly adjacent to property and can do so without significant disruption of property use, raise the trespass issue in a new context. They are small, can be operated relatively quietly, and do not pose the same significant danger to life and property as that posed by larger, manned aircraft.

Yet many landowners object to drones flying or hovering over their properties at altitudes much lower than those at which manned aircraft have traditionally been flown. Many drones flown at 50, 100, or even 150 or 200 feet can be seen and heard from the ground, and awareness of them makes landowners uneasy and, at times, angry. Drones raise old issues but, in doing so, bring new issues to the forefront of our legal and social analysis.

The 2018 Annual Meeting draft of §301 responded by establishing a 200-foot zone of trespass above land. Under the 2018 Meeting draft, a drone intentionally flown into that zone without permission is trespassing and its operator is liable for that trespass, as well as any damage caused by it. Section 301 also contained a variety of privileges and defenses to a trespass action, many of them based in common-law privileges and defenses.

Comments from observers just before and soon after the Annual Meeting indicated unease and dissatisfaction with the *per se* trespass concept and encouraged the development of alternatives to the initial approach.

b. The First Proposed Alternative

The first alternative to the 2018 Annual Meeting §301 text replaces the *per se* trespass rule for intrusions below 200 feet with a rebuttable presumption that operators who operate drones over land below the established ceiling are liable for trespass. Illustrative factors that can be used by state courts to determine whether the presumption has been rebutted are included, such as the length of time the drone is over the land, the height at which it was operated, the noise produced by the drone, whether the drone was making video recordings or taking photographs while traveling over the property, whether the landowner generally allows the operation of drones over the property, whether physical damage resulted from the operation of the drone, the time of day the intrusion occurred, and the purpose of the flight, with a clarification that commercial uses can still rebut the presumption of trespass created by the section.

The rationale for this first alternative is that while it provides less certainty than the *per se* trespass rule, it also provides more flexibility for drone operators across a host of circumstances. This approach thus has the potential to allow more use of the airspace above land, while still protecting landowner rights from interference. It would, however, permit potentially innovative uses that do not affect the use and enjoyment of the land below.

c. The Second Proposed Alternative

The second alternative leaves it to each state to set a specific flight ceiling and allows flight ceilings to vary by location within the state. Importantly, it requires states which adopt the uniform law to explicitly set those ceilings for airspace throughout the state. The uniform aspect of this approach arises not from a ceiling that is maintained throughout the nation, but in the requirement that the state explicitly articulate the height under which an operator flying a drone will be liable for trespass. With this information in hand, the drone community can develop appropriate maps and technologies to allow for drone operation within the boundaries established by each state.

This second alternative begins from a different position than do the first and second alternatives. By interpreting trespass law involving aerial intrusions consistently with modern Supreme Court Takings jurisprudence, the uncertainty of the *Causby* approach is narrowed and the inconsistency borne of the apparent integration of trespass and nuisance law falls away. As takings law itself has developed since the 1940s when *Causby* was decided, this approach accurately brings the law regarding airspace intrusions into the modern age.

The analysis begins by recognizing that the law of trespass to land is inherently tied to notions of property law. A person is liable for trespass to land when that person enters the land of another without permission. The question that arises is thus: how far above the land do a landowner's rights extend? *Causby* answered this question by rejecting the ancient *ad colem* doctrine (that the landowner owns down to the center of the earth and up to the heavens), while acknowledging that at some point an airspace intrusion would justify a finding of trespass (and a concomitant payment under the takings clause).

How far, then, do the landowner's rights extend following *Causby* and its progeny, when considered in light of the Supreme Court's modern takings jurisprudence? The starting point for this analysis is with state property law and the recognition that states determine the extent of property law based on common law property law doctrines. This is not a controversial position. The U.S. Supreme Court recognized in a number of cases that property law is state-based. This does not mean that states can do anything they want to do in relation to property rights. Property rights are based, according to the Supreme Court's decisions, on common law conceptions and well-established state law principles and practices.

Thus, the question of how far above the land a landowner's rights extend is not a question of determining desired heights, useful flight levels, or any other extrinsic matter. It is a question of how high state law is justified in recognizing the property law claims of landowners. This may be lower for some areas than others. Developed cities may have higher expectations, while for rural areas the height may be lower. A state may set that height at some reasonable level above the highest natural trees, towers or buildings, or it may set a general height if the state's common law history supports such a determination. Thus, the height to be set in each state would be a function of that state's understanding of its common law property rights.

Within this understanding, a state risks a finding that a taking has occurred if it sets the limit too low, while it risks having the state recognized height abrogated by federal use if it sets

the limit too high. It is important to recognize, however, that the federal government would likewise be bound by a well-founded and defended state determination of landowner rights. If the United States granted rights to drone operators to operate within the airspace that a state has recognized as belonging to the landowner, such a grant would be a taking of property under the Fifth Amendment. Thus, the federal government could, in effect, preempt the state determination, but in doing so would authorize a physical intrusion that would violate the Fifth Amendment and that would thus trigger the duty to pay for that intrusion.

This notion – that it is within the states' authority to independently set the height to which a landowner's rights extend, is buttressed by the Supreme Court's takings jurisprudence since *Causby*. For example, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Supreme Court found that Grand Central terminal's owners did not suffer a taking when their right to build above the terminal was restricted by New York City's building and historical preservation regulations. The Court ruled that the takings clause does not allow for the separate consideration of the airspace from the land and existing development. When considered together, the regulations did not sufficiently diminish the value of the property to constitute a taking. Of particular note is that the Court did not hold that airspace has no value, that airspace is not part of the estate in land held by a landowner, or that airspace can be restricted or invaded without Constitutional implications. The NYC scheme even allowed for transfer of development rights where restrictions otherwise forbid development, though because the Court did not find a taking, it did not reach the question of whether such transferable development rights were sufficient for purposes of the Fifth Amendment's just compensation requirement.

Critical to our understanding of how the doctrine applies today, *Penn Central* stands for the proposition that property rights include airspace rights, and that airspace rights are a part of the rights that landowners hold in their land. We should not, and indeed cannot under Supreme Court precedent, separate out the different estates in land for Constitutional purposes.

Penn Central was a *regulatory takings* case, that is, a claim that a regulation prevented the beneficial use of property. Drone intrusions into the airspace appurtenant to land, however, would be physical invasions of the airspace, and as such fall into the only category of intrusions that are automatically takings. Where state rules required apartment owners to allow the installation of cable television wires in their buildings, the Court found a taking, even though the intrusion was minimal, in no way affected the use and enjoyment of the land, and was for the benefit of the tenants of the land. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Likewise, where a regulation required that a landowner provide a public footpath in exchange for development approval, the Court held that the regulation authorized a physical invasion (and would be a taking unless it was sufficiently related to the impacts of the project, a requirement not likely to be relevant in the drones and trespass setting). *Dolan v. City of Tigard*, 512 U.S. 74 (1994). It is within the takings context that the Supreme Court has recognized that state law determines the boundaries of property rights. *See, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Putting these pieces together leads to a number of conclusions relevant to drone operation over privately-owned land. First, landowners are not limited to bringing claims within the

structure of the *aerial trespass* doctrine that developed out of the Supreme Court's *Causby* line of cases. While it is well established that landowners cannot bring claims for airspace intrusions within the national airspace, below that landowners have a right to bring trespass claims based on non-possessory airspace intrusions. As an illustration, there is little doubt that a drone that crossed a landowner's yard at six inches above the ground would violate state trespass laws. The question is not whether such intrusions are trespasses, but to what height they remain trespasses. That question must be answered by the states themselves.

The existence of this right thus threatens the development and deployment of a variety of drone uses. Without a clear understanding within each state of the limits of a landowner's rights in the airspace over their lands, drone owners will be potentially subject to numerous lawsuits to establish that limit through the judicial process. These lawsuits, even within a single state, may yield conflicting and inconsistent results, leading to chaos in the airspace appurtenant to the land. Any federal attempts to preempt the lower limit, even though they may fall within the federal government's Commerce Clause power, would violate the Takings Clause, requiring payment to landowners of just compensation.

The second alternative is built on this analysis and provides a framework for resolution. If states adopt the uniform law, they would also set a clearly articulated and constitutionally defensible height limit for landowner rights. As when states modernize their property laws to more clearly delineate lateral property rights, this alternative would clarify, not alter, existing claims to property in airspace near the ground. While the height limit might change from location to location within a state, it will be clearly articulated in the law and drone operators will be able to adjust their operations to match its requirements. Thus, this alternative is comprised primarily of a framework for making those determinations and for making clear that they are made within each state's common law tort and property framework.

II. Questions Relating to §302

a. Inclusion of Voyeurism Without Recording

The current draft of §302 provides a cause of action for the acquisition of images using drones in certain circumstances. Raised at the Annual Meeting was the question of whether the section should be limited to acquisition of recorded imagery, or whether the use of a camera without recording should be included within the right. The Committee must resolve this question.

b. To whom do §302 rights apply?

A second question raised at the Annual Meeting was whether non-landowners may bring actions under the provision where they are legally on land owned by another. The current draft does not clearly provide for such a right. The Committee must resolve this question.

III. The Need for §§303-305

Commenters on the draft have questioned whether §§303-305, relating to nuisance law, intentional torts, and trespass to chattels, are necessary. The sections themselves simply clarify

that drones may be instrumentalities of torts in addition to trespass but make no substantive changes or alterations to the law in this regard. The Committee must resolve this question.

IV. Additional Issues

a. Intentional Nature of the Torts

A number of comments at the annual meeting raised questions regarding accidental or unintended intrusions into airspace. The tort of trespass requires intent to enter where one has entered. It does not require knowledge that the land belongs to another, nor is mistake as to who owns land a defense to trespass, but accidental entries are not trespasses. The Committee must decide whether to make this point more explicit in the Act.

b. Defense of Property

The draft Act does not explicitly address matters relating to the authority of landowners to actively defend their land against drone intrusions. As raised at the Annual Meeting, the question was whether landowners have the right or privilege to use force to counter intrusions by drones in the airspace over their land. As the law makes clear that common law principles apply to drone intrusions, and the privilege of defense of property is well developed, the addition of provisions on defense of property may be extraneous. Such provisions may, however, clarify the law within the drone context, and as such may be desirable. The Committee must decide how to deal with this.