INTO THE SUNSET:
Southwest 737-800 on initial approach to MDW

Photo by the Editor

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The federal drone privacy law enacted as part of the FAA Reauthorization Act of 2018, which was signed by President Donald Trump on October 5, 2018, has significant implications for commercial drone operators in numerous sectors. Given lawyer-pilots’ unique firsthand experience with federal aviation regulations (FARs) and FAA enforcement procedures and policies, lawyer-pilots may be the ‘go-to’ advisors for clients seeking to establish effective compliance practices and procedures for the new law.

In recent years, businesses in a diverse array of sectors have begun to employ drones for a broad spectrum of purposes. Commercial and residential real estate brokers now use drones to take aerial photos and videos of listed properties and insurance companies use drones to survey property damage. Construction companies have deployed drones to monitor progress and inspect critical infrastructure and equipment. Mining companies have used drones to survey mining sites and farms have utilized drones for crop monitoring. The coming months and years will likely witness an expansion of commercial drone use as drone package and food delivery and autonomous construction technology continues to develop.

The new federal drone privacy law requires all commercial drone operators not using drones for First Amendment-protected activity such as news reporting to develop and implement publically available privacy policies governing the collection of any data regarding any person using a drone. The law provides that any violation of such required privacy policies constitutes an unfair and deceptive trade practice for the purpose of the Federal Trade Commission Act that is subject to Federal Trade Commission enforcement.

The law also provides that the required privacy policies must protect individuals' privacy consistent with state and local laws. Therefore, lawyer-pilots advising commercial drone operators must assist commercial drone operators in complying with the emerging patchwork of state laws governing the privacy and security of personally identifiable information that could be obtained by a drone photographing or filming human subjects despite the fact that multiple courts, including the California Appellate Court in the 2016 case of People ex. rel. Harris v. Delta Airlines, Inc. have held that state data privacy statutes are preempted as applied to airlines.

California is a proactive state in the area of privacy regulations. The California Consumer Privacy Act of 2018, which took effect on January 1, 2020, applies to any entity that “does business in California” (A) has annual gross revenues in excess of $25 M; (B) alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more customers, households, or devices; or (C) derives 50% or more of its annual revenues from selling customers' personal information.

The California act requires covered entities to disclose to any California resident upon request the categories and specific pieces of information it collected from them and the categories of third parties with whom such information is shared and gives all California residents the right to opt out of any sale of their personal information. It also requires covered entities to delete any personal information collected from a customer upon request.

The California act imposes a duty on all covered entities to “implement and maintain reasonable security procedures and practices appropriate to the nature of the information” they possess and creates a private right of action for California residents harmed by breaches of this duty. Plaintiffs in such suits are entitled to the greater of actual damages or statutory damages of $100-$750 per incident. All other provisions of the statute are enforceable by the California Attorney General.

Numerous other states including New York, Texas, Pennsylvania, Massachusetts, Washington, and Florida, have enacted statutes requiring entities that possess the personally identifiable information of state residents to implement reasonable proactive security practices to protect the personally identifiable information of state residents. Further, Illinois, Texas, and Washington have implemented statutes prohibiting the collection of biometric data regarding state residents without their consent and requiring companies that possess biometric data of state residents to use reasonable security measures to protect such information. There is also currently pending legislation in numerous other states that would impose significant data privacy and security requirements on entities that collect or process the personally identifiable information of state residents.

Given that state data privacy and security statutes’ definitions of personally identifiable information may vary, lawyers representing commercial drone operators would be well advised to evaluate each commercial drone operator’s operations and the ways in which their drones monitor, photograph, film, or otherwise collect...
with a dynamic maneuvering endorsement and show evidence of a practice performance within 45 days prior to the airshow event. In accordance with this new Order, the performance must have been in a practice setting. The performers cannot re-obtain their currency by flying a dynamic maneuvering routine during a “practice day” at the airshow. Fortunately, airshow performances like Prowlers of the Pacific are grandfathered and will not be required to demonstrate participation in 30 practice sessions before going to an Aerobatic Competency Evaluator. However, even grandfathered airshow performances involving dynamic maneuvering will have to go before an Aerobatic Competency Evaluator and be evaluated.

THE SIX POSSIBLE CATEGORIES OF AIRSHOW PERFORMANCE

Table 3-6 of the new FAA Order makes it clear that there are now six possible categories of performances at airshows. They are as follows:

1. **Standard Maneuvering Solo** requires no credentials and the aircraft may be flown at a pitch angle equal to or less than 60° and a bank angle equal to or less than 75° and at an altitude of 100 feet above ground level at an airspeed of up to 300 knots.

2. The **Dynamic Maneuvering Solo** requires a Statement of Aerobatic Competency with a Dynamic Maneuvering Solo endorsement, and authorizes the performer to fly a pitch angle equal to or less than 60° and a bank angle equal to or less than 90° and to operate 100 feet above ground level, and with a SAC-DMS II card there are no limitations on airspeed other than not to go supersonic.

3. **Aerobatic Maneuvering Solo** requires a SAC card with an aerobatic solo endorsement, and authorizes the performer to operate at a pitch angle of greater than 60° and a bank angle of greater than 75°. If the airshow performer has a SAC-AS Level I Card, there is no limitation on his altitude. There is no limitation on the airspeed other than not to go supersonic.

4. A **Standard Maneuvering Formation Card** will authorize the performer to fly a pitch angle equal to or less than 45° and a bank angle equal to or less than 60° and to operate no lower than 250 feet above ground level and at an airspeed no greater than 250 knots indicated airspeed.

5. A **Dynamic Maneuvering Formation** card which is a SAC card with a DMF endorsement will authorize the performer to operate at a pitch angle equal to or less than 60° and a bank angle equal to or less than 75° and with a SAC DMF Level II card to operate at an altitude no lower than 250 feet above ground level and with no limitation on the airspeed other than not to go supersonic.

6. An **Aerobatic Maneuvering Formation** card which is a SAC card with an AF endorsement will authorize the performer to operate at a pitch angle of greater than 60° and a bank angle of greater than 75° and with a SAC – AF Level I card, at an altitude no lower than 250 feet above ground level, and with no limitations on the airspeed provided the aircraft does not go supersonic.

**CONCLUSION**

With a promulgation of the six categories of performers authorized to operate at airshows and the limitations that go with those operations, there will be no more head on passes as were featured in the Battle of Midway or in Prowlers of the Pacific unless the airshow performers are credentialed with the proper SAC cards, Statements of Aerobatic Competency. The performers will have to demonstrate that they successfully accomplished an evaluation by an ACE examiner. They will have to demonstrate that they have accomplished the performance of this particular airshow act within 45 days of the airshow appearance. Accordingly, one can anticipate in the warbird community that the flyby performances will be relatively tame. Since formation flight is considered to be the operation of an aircraft within 500 feet of another aircraft, unless all of the airshow performers possess Dynamic Maneuvering Formation cards, they will be restricted to standard maneuvering with a pitch angle equal to or less than 60° and a bank angle equal to or less than 75° and operations no lower than 100 feet above ground level, at airspeeds no greater than 300 knots indicated airspeed. The concern one has is that if an Inspector in Charge believes a pilot has exceeded the standard maneuvering limitations, the Inspector in Charge may argue that the pilot engaged in dynamic maneuvering without the appropriate credentials.

The Battle of Midway was an expensive performance and so was the Prowlers of the Pacific. It is unlikely that warbird operators will have the resources to practice an aerial performance every 45 days to demonstrate currency for purposes of appearing at an airshow. In other words, the days of dogfights at airshows may effectively be over, unless the performers possess the financial resources to comply with the requirements of the new FAA Order.