

# Drones, LPR's and Pole Cameras

1.5 Hour Webinar

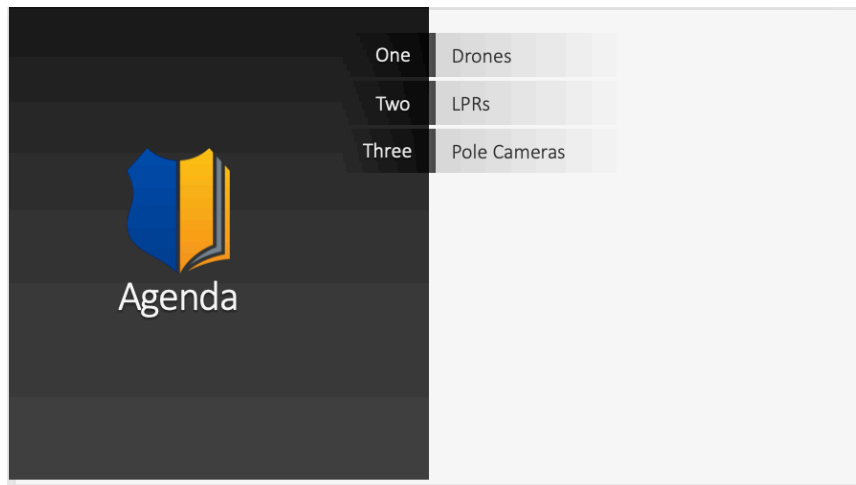
Course Outline

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Instructor introduction.

- 1) Explain the course objective.
- 2) Encourage attendees to ask questions and share feedback with other attendees.
- 3) Explain that certificates will be emailed after the class.
- 4) Go over the three disclaimers:
  - a) Laws and agency standard operating procedures may be more restrictive. Blue to Gold is teaching the federal standard unless otherwise stated. Therefore, students must know their state and local requirements in addition to the federal standard.
  - b) If students have any doubts about their actions, ask a supervisor or legal advisor.
  - c) The course is not legal advice, but legal education. Therefore, nothing we teach should be interpreted as legal advice. Check with your agency's legal advisor for legal



One	Drones
Two	LPRs
Three	Pole Cameras

**Module Two: Drones – 25 minutes**

- 1) **Legal Rule:** Generally, activity a person knowingly exposes to the public is not subject to Fourth Amendment protection and is not constitutionally protected from observation
- 2) **Case Sample:** Defendant sought review of a judgment of the United States Court of Appeals for the Ninth Circuit which, in affirming defendant's conviction for transmitting wagering information by telephone in violation of 18 U.S.C.S. § 1084, rejected the contention that the recordings had been obtained in violation of the Fourth Amendment because there was no physical entrance into the area occupied by defendant.  
**Synopsis:** Defendant was convicted of transmitting wagering information by telephone in violation of a federal statute. At the trial, the government was permitted, over defendant's objection, to introduce evidence of defendant's end of telephone conversations, which was overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth where he had placed his calls. A court of appeals, in affirming his conviction, rejected the contention that the recordings had been obtained in violation of U.S. Const. amend. IV because there was no physical entrance into the area occupied by defendant. The Supreme Court reversed, finding that a person in a telephone booth could rely upon the protection of U.S. Const. amend. IV. One who occupied a telephone booth, shut the door behind him, and paid the toll that permitted him to place a call was entitled to assume that the words he uttered into the mouthpiece would not be broadcast to the world. The Court determined that the government agents ignored the procedure of antecedent justification, which was a constitutional precondition of the kind of electronic surveillance involved in the case. **Outcome:** The court reversed defendant's conviction.  
Katz v. United States



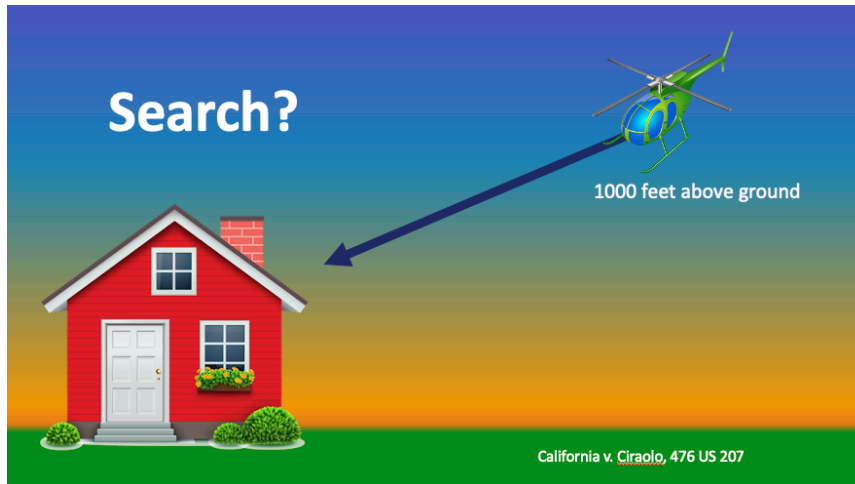
01. Did suspect expect privacy?
02. Would society consider it reasonable?
03. Both are required!

3)

- 4) **Pro Tip:** This is a difficult test to apply in the field! **Apply this test instead...**



The back yard of appellant's home was enclosed by a waist high picket fence and foliage growing at various locations along the fence. Planting marijuana plants in a back yard enclosed only by a picket fence and intermittent vegetation is not an action reasonably calculated to keep the plants from observation since it is certainly foreseeable that a reasonably curious neighbor, while working in his yard, might look over the picket fence into appellant's yard and see the plants, whether or not he knew what they were.

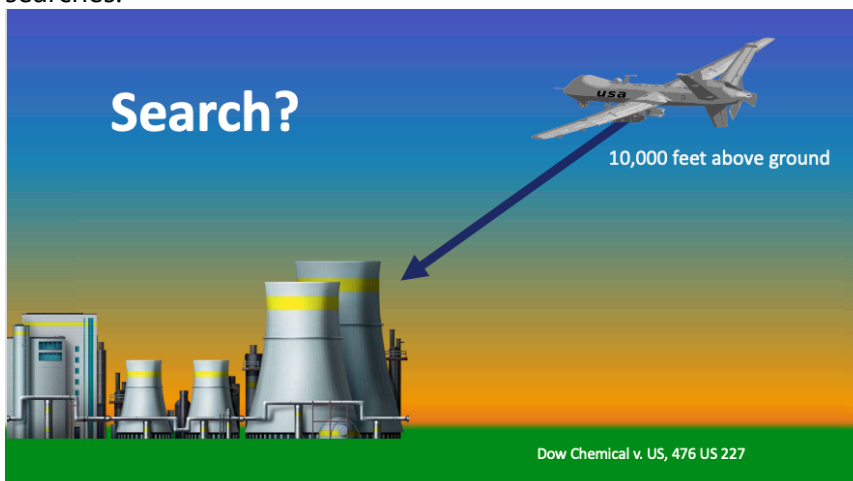


In the other case, by comparison, the court noted: Patrol by police helicopter has been a part of the protection afforded the citizens of the Los Angeles metropolitan area for some time. The observations made from the air in this case must be regarded as routine. An article as conspicuous and readily identifiable as an automobile hood in a residential yard hardly can be regarded as hidden from such a view. **Ruling:** The observations were made ... in a physically nonintrusive manner ... Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. The Defendant's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor. **Takeaway:** Naked eye observations from navigable airspace is not a search.



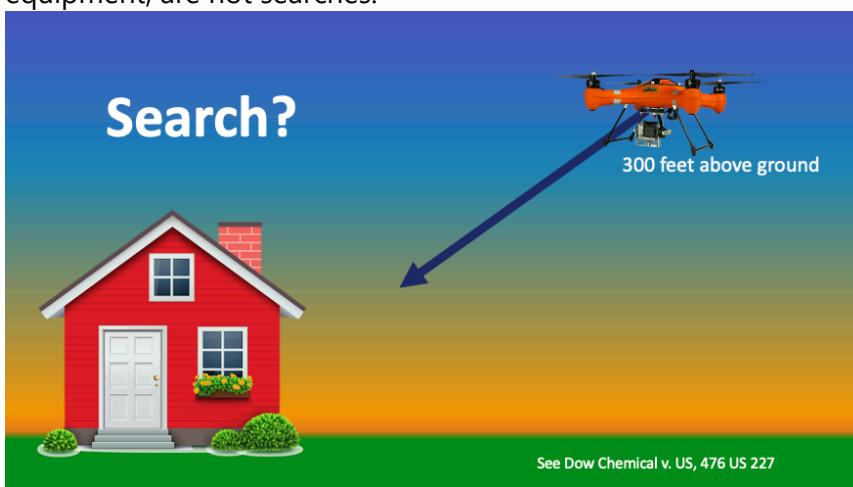
- 5) When considered from the perspective of the *Katz* test, the two decisions are not inconsistent. In *Sneed*, the court reasoned that while appellant certainly had no reasonable expectation of privacy from ... airplanes and helicopters flying at legal and reasonable heights, we have concluded that he did have a

reasonable expectation of privacy to be free from noisy police observation by helicopter from the air at 20 to 25 feet and that such an invasion was an unreasonable governmental intrusion into the serenity and privacy of his back yard. **Takeaway:** Highly intrusive naked eye observations are often considered searches.



6)

We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras. **Takeaway:** Highly intrusive searches of commercial property or open fields, even with hi-tech equipment, are not searches.



**Takeaway:** Do not use high-tech features such as thermal imaging or zoom lenses to view inside homes or curtilage.

- 7) **Pro Tip:** Under the Fourth Amendment, it is likely that deploying a drone in the same manner as the public, while abiding by all laws, would be considered plain view.
- 8) While the topic of aerial drones may be in vogue, the law on aerial surveillance has been well-established for decades. The Supreme Court held that the aerial inspection did not amount to a search protected by the Fourth Amendment, stressing the fact that the observation was within navigable airspace and that the observation was physically non-intrusive. US vs Cantu
- 9) **Video:** Covid 19 Drones
- 10) "The thought of government drones buzzing overhead, monitoring the activity of law-abiding citizens, runs contrary to the notion of what it means to live in a free society." Sen. Chuck Grassley
- 11) Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all--and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably 'where they had a right to be.' Would ... the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' ... not be infringed by such surveillance? Supreme Court Justice Brennan, 1989

12) **Drones versus Helicopters:**

- Drones are quiet and stealthy
- Drones are cheap compared to helicopters
- Highly trained pilots are not required
- If unchecked, millions of drones could be used by agencies around the country in just a few years.

13) **State Law Examples:**

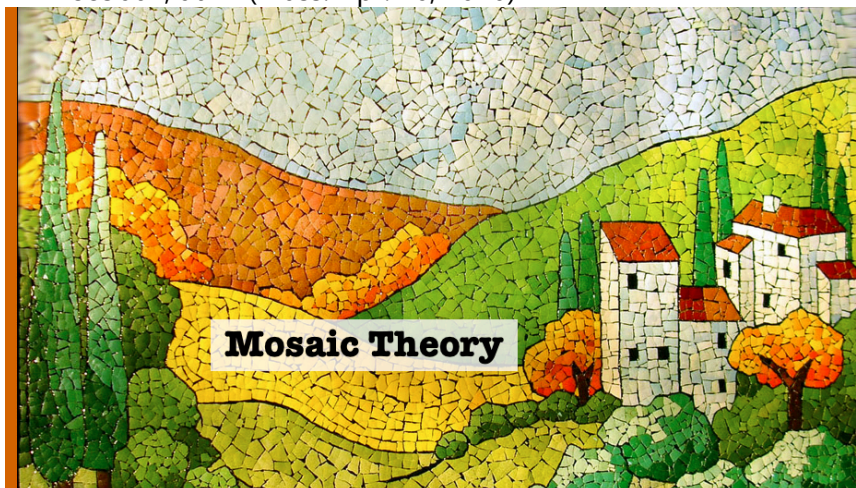
- MI: Prohibits harassing hunters with drones
- ND: Limits drone surveillance
- Utah: Can use drones to find missing persons

- CA: Can't use drones to film private activities without permission
- IL: Basically, no use of drone for criminal purposes

14) **Final Takeaway:** If you're doing exactly what the public can do, abiding by all state and local laws, not being overly intrusive, and not using image enhancements, it's likely constitutional.

### Module Three: License Plate Readers – 25 minutes

- 1) **Legal Rule:** Running plates with LPRs is not a search because there is no privacy interest. The issue instead is whether the data falls under the mosaic theory
- 2) **Case Sample:** Permeating police presence. As the Supreme Court made clear in *Carpenter*, courts analyzing the constitutional implications of new surveillance technologies also should be guided by the founders' intention "to place obstacles in the way of a too permeating police surveillance." *Carpenter*, 138 S. Ct. at 2214, quoting *United States v. Di Re*, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948). Specifically, both this court and the Supreme Court have recognized how advancing technology undercuts traditional checks on an overly pervasive police presence because it (1) is not limited by the same practical constraints that heretofore effectively have limited long-running surveillance, (2) proceeds surreptitiously, and (3) gives police access to categories of information previously unknowable. *Commonwealth v. McCarthy*, No. SJC-12750, 2020 WL 1889007, at \*4 (Mass. Apr. 16, 2020)



- 3) The mosaic theory calls for a cumulative understanding of data collection by law enforcement and analyzes searches "as a collective sequence of steps rather than individual steps."



4) **Factors to consider when using intrusive technology:**

- How long will the surveillance be conducted? (e.g. three days or three months?)
- Is the surveillance done in secret? Or does the suspect notice? (e.g. police cameras in Times Sq.)
- Does the technology give police access to information previously unknowable? (e.g. public facial recognition)

5) **Video:** License Plate Readers"



6)

7) **Factors to consider when using LPRs:**

- How many LPRs are there?
- How long will the information be retained?
- Are LPRs placed near constitutionally "sensitive" areas, like homes and churches?
- Are they only used for emergencies" (e.g. Amber alert)

8) As this court and the United States Supreme Court interpret society's reasonable expectations of privacy over time, the courts' overarching goal is to "assure [the] preservation of that degree of privacy against government that existed when the Fourth Amendment [and art. 14 were] adopted." Massachusetts Supreme Court

9) While acknowledging the usefulness of these tools for crime detection, "both this court and the United States Supreme Court

have been careful to guard against the 'power of technology to shrink the realm of guaranteed privacy' by emphasizing that privacy rights 'cannot be left at the mercy of advancing technology but rather must be preserved and protected as new technologies are adopted and applied by law enforcement.'" Massachusetts Supreme Court

- 10) **Pro Tip:** An LPR hit that the driver is wanted or has no driving privilege usually provides RS to stop vehicle barring contrary evidence.
  
- 11) **Case Sample:** LPR alerted that registered owner was wanted.  
**Synopsis:** In a prosecution stemming from a traffic stop initiated after a police officer received an alert from a license plate reader system in his patrol car that a person linked to the vehicle was wanted for failure to appear in court, the driver failed to convince the court that the license plate reader system failed to meet foundational requirements for admissibility. An officer had been patrolling in a car equipped with an LPR system when he received an alert indicating that the wanted person was a male being sought for failure to appear in court. The officer conducted a traffic stop. In his subsequent prosecution, the defendant contended that trial court erred in denying his motion to suppress because the LPR system arguably failed to meet foundational requirements for admissibility, as have been established for radar detectors. The court disagreed. It explained that the patrol cars were equipped with license plate reader systems, consisting of mounted cameras that read license plates of passing vehicles to transmit the information to a database of wanted persons. The database was updated daily and included information about wanted persons and their related vehicles. The information was provided by the Georgia Bureau of Investigation and the Department of Motor Vehicles. When the LPR recognized a license plate linked to a wanted person, the system would make an audible alert, notifying the officer of a "wanted person" and providing the officer with an opportunity to view the information the system retrieved, including the person's name and date of birth, the reason the person was sought, and a color photograph of the vehicle and its license plate. The court acknowledged that for data collected by a radar device to be admissible into evidence, the state had to establish that (1) the device was marketed under a particular name or was similar and approved by the Department of Public Safety for the measurement of speed, (2) the law-enforcement

agency had a particular license, (3) the device had been certified for compliance by a special technician, and (4) the device had passed tests for accuracy. Although the defendant suggested that, in order to be admissible, the LPR system at issue was required to meet similar requirements, the court disagreed, reasoning that a radar detector is used to prove commission of the offense at issue, whereas the use of the LPR merely provides an officer with reasonable, articulable suspicion to justify an investigatory stop. Accordingly, the court approved admission of evidence derived from the LPR. **Held:** LPR provided reasonable suspicion. *Hernandez-Lopez v. State*

- 12) **Pro Tip:** Visually confirm plate before making the stop.
- 13) **Case Sample:** Officer stopped stolen vehicle based on LPR hit. The officer did not visually confirm the plate and made a felony stop. **Synopsis:** An appellate court determined that summary judgment could not be granted in favor of police officers where a civil rights litigant had been subjected to a traffic stop on the basis of an ALPR match, but where the officers failed to take additional steps to confirm that the driver's license plate actually matched that of an arguably stolen vehicle. The driver, a 47-year-old African-American woman with no criminal record, had been subjected to a vehicular stop after the police department's Automatic License Plate Reader mistakenly identified her Lexus as a stolen vehicle. It was late and dark outside, which rendered the ALPR photograph blurry and illegible. As a result, the officers could not read the ALPR photograph, nor could they get a direct visual of the plaintiff's license plate. Without visually confirming the license plate, the arresting officer made a "high-risk" stop during which the plaintiff was held at gunpoint by multiple officers, handcuffed, forced to her knees, and detained for 20 minutes. She was released only after officers eventually ran her plate and discovered the ALPR mistake and that her vehicle was not stolen. After she filed her civil rights suit, the defendants moved for summary judgment, arguing, inter alia, that the initial officer had reasonable suspicion to stop the plaintiff's vehicle. While the district court granted the defendants' motion, the appellate court reversed, finding that a rational jury could find that the defendants violated the motorist's Fourth Amendment rights and that the initial officer was not entitled to qualified immunity. In court, the arresting officer admitted that if he had read the full plate, he would not have had the reasonable suspicion to effect the stop. The court noted that was

undisputed that the ALPR occasionally made false "hits" by misreading license plate numbers and mismatching passing license plate numbers with those listed as wanted in the database. Because of the known flaws in the system, the city's officers were trained that an ALPR hit did not automatically justify a vehicle stop, and the police department directed its officers to verify the validity of the identified hit before executing a stop. Patrol officers were instructed to take two steps to verify a hit before acting on an ALPR read. First, they were to visually confirm the license plate (to ensure that the vehicle actually bore the license plate number identified by the camera); second, they were to confirm with the system that the identified plate number had actually been reported as stolen or wanted. However, the parties disputed whose responsibility it was to perform these two steps; the defendants stated it was the responsibility of the officer in the camera car, while the plaintiff argued that it was reasonable to expect the officer actually making the stop to perform these steps. The court determined that an unconfirmed hit on the ALPR did not, alone, form the reasonable suspicion necessary to support an investigatory detention. As a result, it could not be established as a matter of law whether or not reasonable suspicion existed to justify the investigatory detention, and the defendants' motion for summary judgment on this ground was improperly granted. Held: Civil rights lawsuit can move forward against officer. *Green v City of Francisco*

- 14) **Final Takeaways:** If LPRs can replicate GPS data, then they are likely searches under the 4<sup>th</sup> Amendment  
Unused LPR data should be purged after some time, probably annually.  
LPR data about sex offenders, parolees, and suspects likely do not need purged.

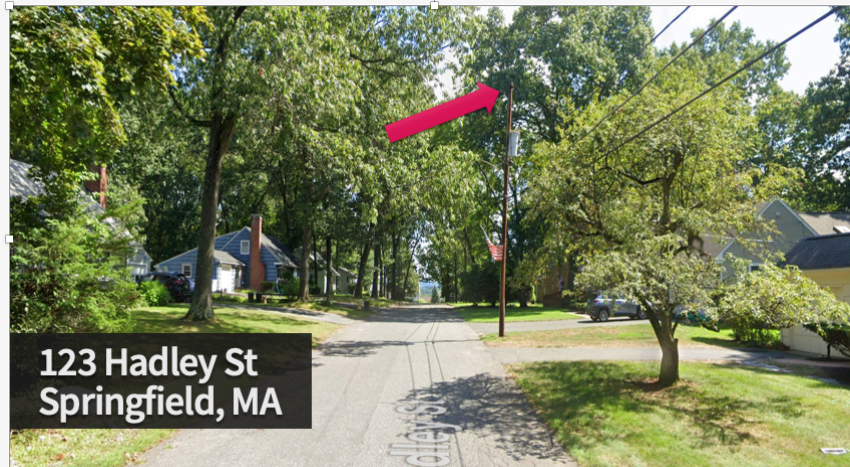
#### **Module Four: Pole Cameras – 25 minutes**

- 1) **Legal Rule:** Activity knowingly exposed to the public is usually not protected. Instead, the issue is whether it render privacy futile or the mosaic theory.
- 2) Activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection, and thus, is not constitutionally protected from observation." *Id.* at 1281 (citing

*Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Pointing to two facts—(1) the pole cameras could not see inside the houses and (2) the pole cameras could only see what a passerby could observe—we found the subject of the surveillance “had no reasonable expectation of privacy that was intruded upon by the video cameras.” *Id.* The surveillance therefore did not violate the Fourth Amendment, and the police officers did not need to obtain a warrant to install or use the pole camera.

- 3) According to the US Supreme Court: Facts to consider when using intrusive technology:
  - How long will the surveillance be conducted?
  - Is the surveillance done in secret?
  - Does the technology give police access to information previously unknowable?
- 4) **Video:** “Pole Cameras”
- 5) **Pro Tip:** However, this test is not necessarily compatible with **pervasive, continuous and automated police surveillance**
- 6) **Case Sample:** United States v. Nia Moore-Bush. USDC Mass. Decided June 4, 2019.



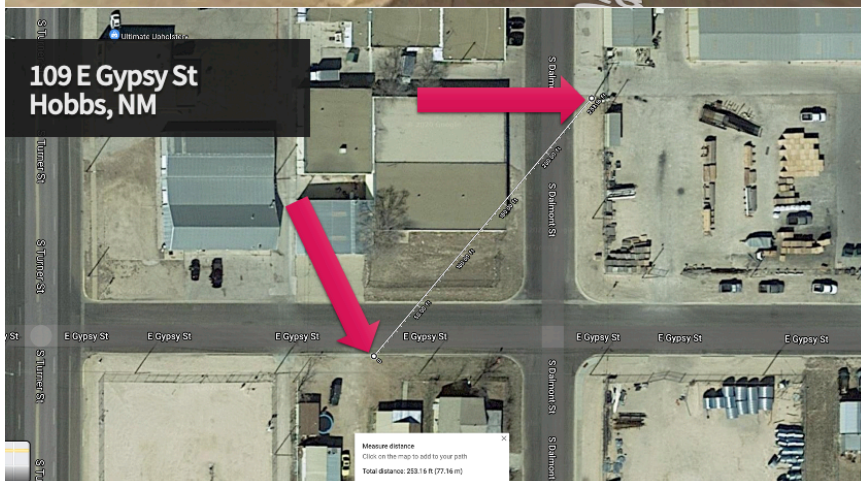


**Question:** Was pole camera's 8-month recording of suspect's house a search under the Fourth Amendment?

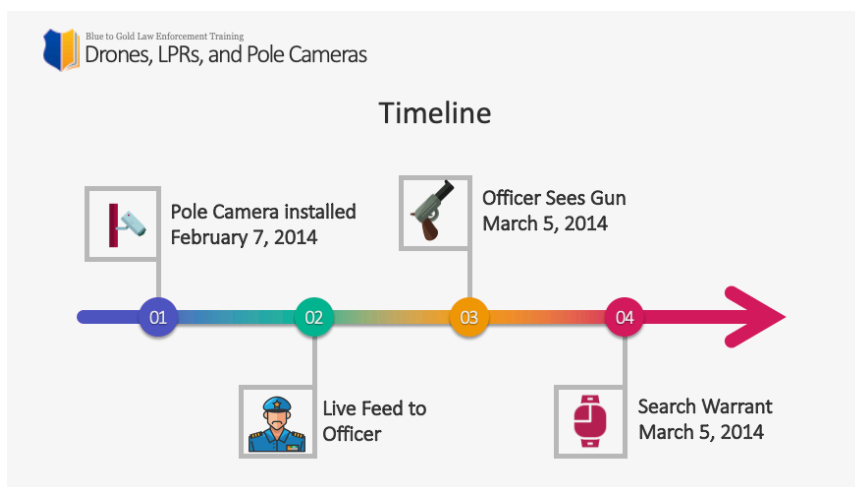
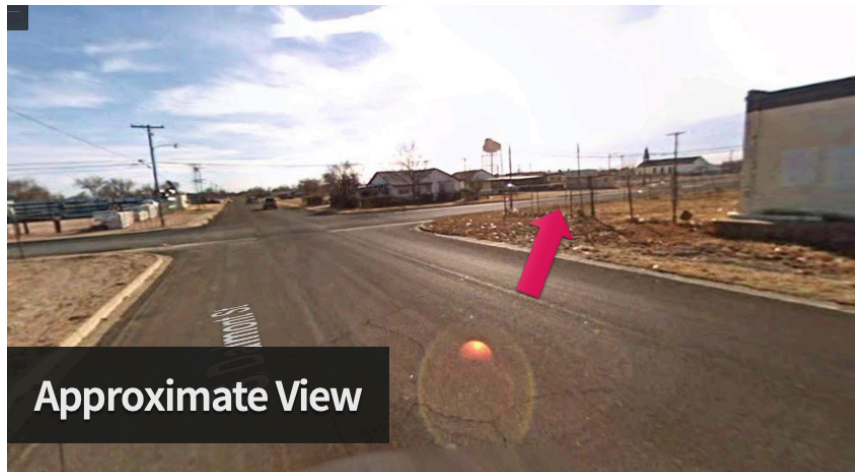
- 7) The Supreme Court recognized that **long-term** tracking of a person's movements "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'
- 8) Nor does the Government have any business tracking a homeowners' hobbies or regular trips for appointments. Perhaps people would hesitate to have supporters of opposition political parties visit if they knew that the Government might be monitoring their driveway. The continuous video taken by the Pole Camera thus threatens to chill these religious, political, and associational activities.  
Mass D. Court
- 9) However, the First Circuit reversed the District Court because the Supreme Court has not directly held that the Mosaic Theory applies to pole cameras.  
First Circuit
- 10) And for another twist! The First Circuit will rehear this case again en banc on March 23, 2021 First Circuit, 982 F.3d 50 (Mem) (2020)
- 11) **Case Sample:** People v. Tajoya. Colorado Ct. of Appeals Decided November 27, 2019
- 12) **Question:** Was pole camera's 3-month recording of suspect's house a search under the Fourth Amendment?

- 13) We acknowledge that, by its own terms, the Court's decision in *Carpenter* "is a narrow one" and does not "call into question conventional surveillance techniques and tools, such as security cameras." The reality is that society has come to accept a significant level of video surveillance. Security cameras are routinely installed in public parks, restaurants, stores, government buildings, schools, banks, gas stations, elevators, and all manner of public spaces. Additionally, security cameras are increasingly being installed on public streets, highways, and utility poles. CO Court of Appeals
- 14) A pole camera, however, is not a security camera by any stretch of the imagination. ... Law enforcement officers did not install the pole camera here to 'guard against ... crime,' but to investigate suspects. Indeed, the prototypical security camera exists to monitor a heavily trafficked area or commercial establishment. Security camera operators often install their cameras in plain view or with warning signs to deter wrongdoers. The Government hid the pole camera out of sight of its targets and does not suggest that it did so to prevent criminal activity. CO Court of Appeals
- 15) Several federal court decisions upholding the warrantless use of pole cameras have distinguished [*Carpenter*] on the ground that GPS or CSLI tracking of a person's location is more invasive than video surveillance of a person's home. We wholeheartedly disagree. Visual video surveillance spying on what a person is doing in the curtilage of his home ... for months at a time is at least as intrusive as tracking a person's location — a dot on a map — if not more so. CO Court of Appeals
- 16) **Takeaway:** I believe targeted long-term recording of a person's house or curtilage is a search under the Fourth Amendment. However, your courts may have binding case law finding the opposite.
- 17) **Case Sample:** Defendant was convicted on conditional guilty plea in the United States District Court for the District of New Mexico of being a felon in possession of a firearm and ammunition. The District Court denied defendant's motion to suppress. Defendant appealed.  
**Holding:** The Court of Appeals, Timothy M. Tymkovich, Chief Judge, held that defendant did not have reasonable expectation

of privacy in outdoor common area between defendant's residence and his brother's residence next door. United States v. Cantu







The camera did not record sound, and it did not allow the agents to see inside either property. It provided a **continuous live feed** to a television screen at the Task Force office. Agents at the Task Force office could adjust the camera, zoom it in and out, and take still photographs.

Here, agents saw a man walk from a suspected drug trafficker's residence to a neighboring house carrying a large assault rifle. "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes."

18) **Takeaway:** A "live feed" camera viewing an area visible to the public is usually not a search.

19) Case Sample: United States v. Rafiq Brooks  
USDC Arizona Decided Nov 28, 2012

20) Question: Was pole camera's 24 day targeting of suspect's house a search under the Fourth Amendment?



21) **Held:** The evidence points to the fact that a person would not be required to be a complex resident to see the "comings and goings" at the Apartment, and any expectation of privacy by Defendant in the complex parking lot surveillance was unreasonable. Therefore, law enforcement's use of the pole camera did not violate the Fourth Amendment and, thus, there was no need for law enforcement to seek a warrant before using the camera.

22) **Takeaway:** A camera recording an area open to the public is rarely a search.

**Module Five: Major Takeaways – 5 minutes**

## Major Takeaways



Drones: Do exactly what the public can do



LPRs: They shouldn't replicate "GPS" type travel



Pole cameras: If it records homes, get a warrant

End of class.