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ASSAULTS ON THE FAA'S DRONE POLICY MOUNT – BRENDAN SCHULMAN ON BEHALF OF TEXAS EQUUSEARCH FILES PETITION FOR REVIEW WITH THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I.

Backstory

Brendan Schulman, Esq., with the firm of Kramer, Levin, Naftalis and Frankel, LLP in New York, has embarked on a headlong assault on the FAA's policy restricting the operation of model aircraft and/or unmanned aircraft systems pursuant to a 2007 FAA Policy Statement published in the Federal Register. Schulman maintains the Policy Statement did not conform with Section 553 of the Administrative Procedure Act and was not part of the formal rule making process. Further, one can argue the Policy Statement is inconsistent with FAA Advisory Circular AC 91-57 (1981) which declares that the operation of model aircraft fall outside the regulatory authority of the Federal Aviation Administration provided they are not operated over populated areas, they are operated below 400 feet, that prior to operations near an airport, air traffic control facilities were notified, and model aircraft operators avoid flying in proximity to full scale aircraft.

Schulman's first victory came in the form of a Decisional Order rendered by Judge Geraghty on March 6, 2014, in *Michael P. Huerta, Administrator, Federal Aviation Administration, v. Raphael Pirker,* NTSB Docket No. CP-217. The claims in *Pirker* involved alleged operations of a model aircraft being flown over and about the campus of the University of Virginia in Charlottesville in furtherance of filming as part of a compensated business activity. The Administrator took exception to these operations because they were for compensation and sought to impose a $10,000.00 civil penalty against Mr. Pirker. Judge Geraghty overturned the Administrator's $10,000.00 order of civil penalty finding that there was no regulatory basis for the Administrator's position, since "Notice 07-01 does not, however, meet the criteria for valid legislative rulemaking…" *Id.* at 6. Schulman, having defeated the FAA's claims against Pirker in an administrative proceeding has now set his sights on a more high profile venue, the United States Court of Appeals for the District of Columbia. This background sets the stage for the proceedings discussed below.

II.

The FAA Order Challenged by Texas EquuSearch and RP Research Services

Before we address the specific order of the FAA which is in issue, we should momentarily address the background of two key individuals involved in this unfolding drama. The first person is Tim Miller. Mr. Miller's daughter, Laura, was tragically abducted and murdered in 1984. That resulted in Mr. Miller founding Texas EquuSearch Mounted Search and Recovery, a non-profit organization operating under Section 501(c)(3) of the Internal Revenue Code. Mr. Miller has been the recipient of the Point of Life Award by former President George W. Bush. He received the Jefferson Award from the City of Houston. He has been honored by countless other organizations including, among others, Crime Stoppers of Houston. He was invited by former President George H.W. Bush, Jr. to attend the first conference for the National Center for Missing and Exploited Children in Washington, D.C., and also the signing of the National Amber Alert System in Washington, D.C.

The second individual in this drama is Gene Robinson of RP Search Services, Inc., a Texas non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Service. While Mr. Robinson operates under the umbrella of a non-profit corporation, he is engaged in extensive operations relating to the operation of unmanned aircraft under the auspices of the National Institute of Standards and Technology which works under contract and pursuant to a Fire and Research Certificate of Authorization (COA). Mr. Robinson uses his company's Spectra RC Flying Wing for search and rescue. However, his work with a COA-authorized federal agency in another context does not negate the charitable nature of the search and rescue missions undertaken jointly by Texas EquuSearch and RP Search Services.

Searches undertaken by Texas EquuSearch employing model aircraft had been undertaken in the disappearance cases of Stacy Peterson (Illinois), Kayley Anthony (Florida), Natalie Holloway (Aruba), and Lauren Spierer (Indiana). To date, the Texas EquuSearch team model aircraft have pinpointed the locations of remains of eleven deceased missing people. A model aircraft can photograph one square mile in less than ten minutes, and the images can be used to identify items such as fresh tire tracks, shoes and items of clothing.

On February 21, 2014, at 1:45 p.m., Gene Robinson of RP Search Services dispatched an email to Alvin Brunner of the FAA advising he was still flying volunteer search and rescue missions with Texas EquuSearch using his company's model aircraft with cameras for still imaging. He further noted that he frequently receives requests from Mr. Miller on short notice making it difficult to wait on the FAA for individual permissions to engage in flight operations without jeopardizing the purpose of the mission. Mr. Robinson noted that the FAA has been slow in promulgating regulations dealing with the operations of unmanned aircraft and closed his email with the following:

> The new rules promised years ago have not materialized. The new promised dates are still years off while the demand for this activity remains high. Under the circumstances, I am just going to continue these operations unless you give me a legal reason not to.

Less than two hours later, Mr. Brunner, on behalf of the FAA, responded to Mr. Robinson's email noting:

> SAR operations outside the COA air space that meet the emergency COA (ECOA) criteria, can be requested and approved in short order, even on the weekend & holidays. I have not heard of you requesting and (sic) ECOA, or anyone having trouble getting an ECOA within a day or so. Have you had troubles applying for and getting one? If so, I can help fix that. On the other side of the fence, if you are operating outside of the COA provisions, **stop immediately**. This is **an illegal operation** regardless of if it is below 400 ft., AGL VLOS or doing volunteer SAR (emphasis added).

In the wake of the exchange between Mr. Robinson and Mr. Brunner, Schulman dispatched a letter to Mark L. Warren, Acting Chief Counsel of the Office of Chief Counsel of the Federal Aviation Administration on March 17, 2014 advising of his representation of the interest of Texas EquuSearch and RP Search Services. Schulman related that Mr. Brunner declared in his email of February 21, 2014 to Mr. Robinson that the search and rescue operations employing model aircraft were "illegal." Schulman advised that there was no administrative process to review that order and made the following request of the FAA:

> We hope that you will do the right thing now. We urge you to overturn the FAA's February 21st order or direct that the Administrator expressly rescind it within thirty days of the date hereof. Otherwise, we intend to pursue all available legal remedies. In order to stop further harassment by telephone, we ask your office to confirm in a written Legal Interpretation that model aircraft operations for volunteer search and rescue services are not currently prohibited by any Federal Aviation Regulation.

When there was no response from the FAA to Mr. Schulman's letter, the Petition for Review was filed with the United States Court of Appeals for the District of Columbia on April 21, 2014, in the matter styled *Texas EquuSearch Mounted Search and Recovery Team, Research Services, Inc., and Eugene Robinson v. Federal Aviation Administration,* Case No. 14-1061.

III.

The Petition for Review

The Petition for Review filed by Texas EquuSearch, et al. contains a mere five pages of substantive text (exclusive of exhibits) and takes the position that the email from Alvin Brunner of February 21, 2014 is an FAA order subject to review. In the second paragraph of the Petition for Review, this cogent summary appears:

> The FAA's order commands Petitioners to cease all use of radio-controlled model aircraft in connection with their volunteer, unpaid search-and-rescue efforts on behalf of families of missing persons. The order declares in no uncertain terms that such operations are "illegal" and demands that Petitioners "stop immediately."

Id. at 1. The Petitioners asserted in their Petition for Review that FAA Advisory Circular AC 91-57 (June 1, 1981) makes no distinction between model aircraft flown for hobby purposes and model aircraft flown for any other purpose and further argued that there are no pilot certification or airworthiness requirements applicable to radio-controlled model aircraft. *Id.* at 4. Addressing the 2007 Policy Memorandum published by the Administrator in 72 Fed.Reg. 29 at 6689 (February 13, 2007) [the FAA Policy Memorandum], the Petitioner's asserted that even if the Policy Memorandum were binding, still, their operations fall outside the restrictions articulated in that Policy Memorandum since they are not business operations but non-profit operations in the furtherance of a charity. *Id.*

The closing comments in the Petition for Review indicate that the Petitioner's position is that the FAA order of February 21, 2014 should be set aside because it is unlawful, arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law. *Id.* at 5. [See 5 U.S.C. §706(2)(A) authorizing a United States Court of Appeals to review Agency action in the circumstances.]

IV.

Conclusion

Without question, Brendan Schulman has mounted an assault on the citadel. The ruling of Judge Geraghty in *Administrator v. Pirker* is presently on appeal to the National Transportation Safety Board. In time, one can reasonably anticipate that the Board's decision in *Pirker* will find its way to the United States Court of Appeals for the District of Columbia. Mr. Schulman, anticipating this eventuality, has wisely taken the strategic action of filing a Petition for Review on behalf of sympathetic Petitioners such as Texas EquuSearch and RP Research Services. While the circumstances of the two matters are not identical, it appears to be desirable to have both matters pending before the United States Court of Appeals for the District of Columbia at roughly the same time or, alternately, there is always the possibility that a decision may be rendered in the Texas EquuSearch matter before the *Pirker* matter finds its way to the same appellate tribunal. In any event, the facts unfolding as relates to the FAA's policy on unmanned aircraft suggest that we may have a decision from a United States Court of Appeals in fairly short order about the validity and enforceability of an FAA "policy" dealing with unmanned aircraft and model aircraft operations in the United States.

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