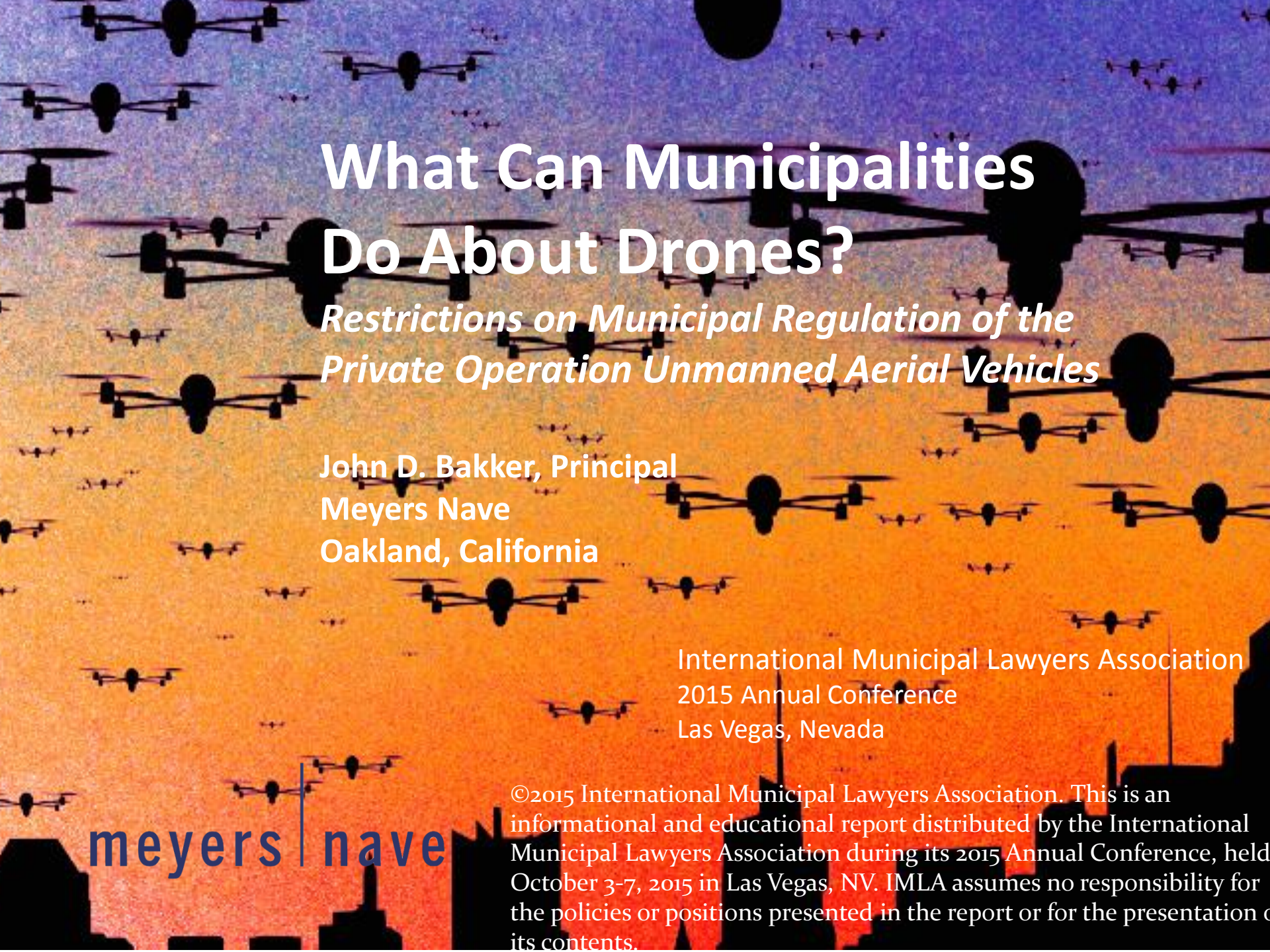

What Can Municipalities Do About Drones?

Restrictions on Municipal Regulation of the Private Operation Unmanned Aerial Vehicles

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What kind of drones are we talking about?



- Typically quadcopters with high resolution cameras with gyroscopes for steady shots
- Easy to maneuver into nearly any space
- Ridiculously cheap
- Capable of being annoying and invasive
  - Please be nice to animals: http://goo.gl/Dtf7K4

What *can* municipalities do?

- Addressing the negative effects of drone use by private parties
  - Primary issue: preemption under Federal Aviation Act
    - Some commentators suggest that states and locals are only authorized to regulate the locations on the ground where drones launch and land
      - Takeoff and landing power is broad, but limits ability to deal with invasive operations begun outside jurisdiction
        - » May be too inflexible
  - Secondary issue: First Amendment "right to record"

Federal Preemption

- Focus on states where cities have broad police power
- Supremacy Clause gives Congress right to preempt
  - Express
  - Implied
    - Field preemption
    - Conflict preemption
  - Courts should respect historic police powers unless "clear and manifest purpose of Congress."

Illustrative regulation

- Ordinance prohibiting operation of unmanned aircraft equipped with photography equipment
  - within the airspace above the jurisdiction from the ground to 500 feet above the ground
  - Exempts operations above property for which consent has been obtained from property owner.
    - No capture of imagery of other property without consent of property owner.



Federal Aviation Act Framework

- Declaration of "exclusive sovereignty of airspace"
- A "public right of transit through the navigable airspace."
- FAA responsibility:
  - For "the use of the navigable airspace" and
  - to regulate the flight of aircraft for the purpose of protecting the public and "using the navigable airspace efficiently."
- "Navigable airspace"
  - FAA-defined minimum altitudes and
  - Airspace for safe takeoffs and landings

Case law on Aviation Preemption

- *City of Burbank v. Lockheed Air Terminal*
  - Strikes down local ordinance curtailing takeoffs and landings between 11 pm and 7 am.
  - Notes Aviation Act declaration of sovereignty over all airspace and FAA administrator power to regulate use of national airspace
  - Focuses on "pervasive" nature of noise regulation and regulation of air carrier operations
    - Local curfew could limit FAA ability to control traffic flow

Case law on Aviation Preemption

- Subsequent case law has found room for local regulation of takeoff and landing sites
  - Does not encroach on FAA administrator's authority to regulate *navigable airspace*
- Other cases uphold punishing same conduct that FAA prohibits

Express preemption?

- Express preemption of laws "related to a price, route, or service of an air carrier. . . ."
- No expression in FAA Modernization Act
  - Directs FAA to integrate drones "into national airspace system"
  - FAA proposed regulations *expressly* avoid privacy issues and indicate that state law might provide remedies

Field preemption?

- Is there a "pervasive" regulatory framework or "dominant" federal interest that would preempt the regulation?
  - The declaration of "exclusive sovereignty of airspace of the United States" by itself is not preemptive
    - Regulatory authority given FAA is focused on "navigable airspace"
      - Allows for regulation outside of navigable airspace
    - Public "right of transit" is only within navigable airspace
      - Proposed regulations allow drone use only in non-navigable airspace

Field preemption?

- Is there a “pervasive” regulatory framework or “dominant” federal interest?
  - No federal policy suggesting that drones can operate in the non-navigable airspace without interference
    - Focus is solely on allowing drones within national airspace system
  - FAA has no intention of regulating privacy issues and specifically acknowledges possible state law remedies

Conflict preemption?

- Would regulation "frustrate" Congressional purposes?
  - No suggestion in FAA Modernization Act or FAA actions that drone operations would remain free from regulation
    - Rather, FAA, being focused on impacts of drones on national airspace system, has indicated it has no intention of regulating privacy

First Amendment right to record?

- First Amendment applies to the written and spoken word and when one engages in "expressive conduct."
  - Because drones have cameras, some have suggested that First Amendment restrictions might apply
- A First Amendment right to make recordings has developed recently
  - Focus on public places, public officials, and the media
  - Unlikely that the right would apply broadly outside of that context to recording from drones

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Work Session VIII: Drones - Legal and Regulatory Challenges over Use, Privacy and Public Safety Take Flight

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