

The Texas Privacy Act: Tall Enough Fences to Keep out Nosy Drones?

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The age of unmanned aircraft whizzing through the air above our heads is here. By 2020, the Federal Aviation Administration estimates that almost 30,000 unmanned aircraft, more commonly known as “drones,” will be regularly flying through the national airspace.¹ While many will welcome the days of aerial burrito or pizza delivery, drone use raises significant privacy concerns. In 2013, the Texas Legislature responded to those concerns by enacting the Texas Privacy Act, Chapter 423 of the Government Code, to protect the privacy expectations of Texans while establishing guidelines for the legitimate use of drones in this state (see Figure A on pg. 3).² In passing the Act, the Texas Legislature has provided Texans security in their homes against unwanted and unreasonable invasions of privacy by drones leading up to more expansive federal regulation of drone use coming in 2015 by way of the “FAA Air Transportation Modernization and Safety Improvement Act.”³ Until that time when drones will be integrated into the public airspace for commercial uses, only recreational use of drones will be allowed. Texas has taken a first step to define the contours of a particular recreational use of drones: image capturing.

I. Legal Background

The first half of the 4th Amendment to the U.S. Constitution guarantees people a right to be secure in their “persons, houses, papers, and effects” against unreasonable searches and seizures. Beyond privacy considerations, this guarantee protects people from unreasonable searches conducted by law enforcement without warrants. The Exclusionary Rule, grounded in the 4th Amendment, also protects criminal defendants from the admission of evidence collected as a result of illegal searches by law enforcement.⁴ The U.S. Supreme Court defined the baseline for modern jurisprudence on privacy considerations in *Katz v. United States*, a case that supplied the modern rule that a warrantless search violates the 4th Amendment when the search violates a person’s actual, subjective expectation of privacy and that expectation is one that society is prepared to recognize as reasonable.⁵ While individual and societal expectations of privacy grounded the *Katz* decision, traditional 4th Amendment jurisprudence focused on preventing information-seeking trespasses into constitutionally protected areas—persons, places, papers, and effects.⁶ The U.S. Supreme Court recently reaffirmed the validity of this traditional notion of 4th Amendment property protection in *United States v. Jones*, holding that *Katz*’s protection of individuals’ privacy rights supplemented the 4th Amendment’s original protection of physical areas.⁷ In many respects, the Texas Exclusionary Rule mirrors the federal one but unlike the 4th Amendment, the Texas Rule applies to certain actions by private individuals as well as those by government officers.⁸

Modern surveillance technology, such as drones, butts up against the tension between privacy and more efficient, safer police work. The appeal of using drones is precisely that operators do not need to trespass onto private property, nor alert persons located on the property, to conduct surveillance. Certain smaller drones, modeled after tiny buzzing hummingbirds, can perform incredibly invasive surveillance in an incredibly inconspicuous manner.⁹ Case law relevant to modern aerial surveillance has struggled to deal with technological advancements that skirt around the bright-line rules the U.S. Supreme Court has sought to establish.¹⁰ While the U.S. Supreme Court has not directly addressed the potential trespassory aspect of aerial surveillance, the Supreme Court has affirmed the legitimacy of aerial surveillance conducted from within navigable airspace. In *Florida v. Riley*, the U.S. Supreme Court cited *Katz* to hold a person had no reasonable expectation of privacy from overhead observation from a police helicopter flying at 400 feet, where any aircraft could potentially fly.¹¹ In *Riley* the court went on to suggest in dicta that 400 feet, near the height standard regulated by the FAA, may be a minimal height for non-violating aerial surveillance.¹² Certainly, a benefit of drones is the ability to fly below this threshold, undetected, to get a closer look at the subject of surveillance.

On the use of advanced surveillance technologies, the U.S. Supreme Court has invalidated law enforcement's use of thermal scanners and GPS trackers to collect information about the "intimate details" of a home or the whereabouts of a suspect's car, respectively.¹³ While the aerial surveillance cases upheld the legitimacy of aerial surveillance because the subject of surveillance had no reasonable expectation of privacy, the technology cases directly addressed and invalidated invasive searches into constitutionally protected areas—houses and effects.

Considering the aerial surveillance and technology cases together may provide a rough estimation of the legitimacy of drone surveillance, in advance of the Supreme Court directly addressing the issue. *Kyllo v. United States* provides that a search violates the 4th Amendment when "sense-enhancing" technology that is not in general public use collects information that is unobtainable without physical intrusion into a protected area such as a home. What technology is in "general public use" has not been clarified by subsequent case law. *Kyllo* concerned a thermal scanner that measured external heat emissions from non-specific areas of a building.¹⁴ Today, thermal scanners are available for less than \$50, but that does not mean a homeowner reasonably expects her neighbors will conduct random heat scans of her home.¹⁵ Yet, law enforcement use of a sophisticated, \$20,000 mapping camera to photograph an industrial complex was held to not invade an expectation of privacy in *Dow Chemical Co. v. United States*.¹⁶ Considering that the camera used in *Dow Chemical* did not allow law enforcement to collect information that was otherwise unknowable without intrusion into a constitutionally-protected area, understanding these cases together suggests that it is primarily the object of the surveillance rather than the sophistication of the technology itself that will determine whether a 4th Amendment-violating search has occurred.

Therefore, the constitutional status of drone surveillance may likely depend on the particular use of a drone in specific circumstances. When the skies become a public highway for commercial drone use in 2015, a person may frequently invite drones to her doorstep for food or package deliveries.¹⁷ As a result, a reasonable expectation against visual observations may no longer exist. Yet, a further feature of drone surveillance is that operators can equip the drone with more advance technology than simple visual cameras. Infrared cameras, thermal scanners, and super-sensitive parabolic microphones, for example, could all be attached to a drone flying over a private residence. If that technology gave the drone operator information about what was going on inside the home, then the 4th Amendment should invalidate such searches. The *Kyllo* "general public use" exception may permit visual observations of a house exterior, while still invalidating more hi-tech observations. The key for the U.S. Supreme Court will be to shore up questions concerning the trespassory aspects of drone use to make sure the *Kyllo* exception doesn't sell off privacy as cheaply as Amazon sells hi-tech equipment.

II. Exploring the Legislation

The crystal clear lesson from the case law history is that the only definite answer to modern privacy problems is, "it depends." In the face of this murkiness comes the Texas Privacy Act—legislation aimed at guaranteeing privacy and fostering valuable drone technology advancements. The Texas Legislature recognized the broad applications of drones for capturing images, which new Section 423.001 of the Government Code defines as "any capturing of sound waves, thermal, infrared, ultraviolet, visible light, or other electromagnetic waves, odor, or other conditions existing on or about real property in this state or an individual located on that property." The rest of new Chapter 423 sets out two offenses, lawful instances of image capturing remedies for violations, evidentiary provisions, and directives for regulation on law enforcement uses of drones in Texas. The Texas Privacy Act solidifies privacy protections for private real property throughout this state, and the individuals living upon that real property. New Section 423.003 prohibits the use of drones to capture images of an individual or privately owned real property with the intent to conduct surveillance on that person or property. Additionally, new Section 423.004 prohibits the possession, disclosure, display, distribution, or use of an image captured in violation of Section 423.003. While destruction of the captured image provides a defense to prosecution, each individual image captured constitutes a separate misdemeanor offense. To capture images using drones or possess the images is a Class C misdemeanor, while the disclosure, display, or distribution of the images is a Class B misdemeanor. Under new Section 423.006, violators also face potential civil penalties up to \$10,000 for each image captured.

The Act also protects criminal and civil defendants by barring the admission of images captured illegally or even incidentally to lawful image capturing into evidence in a criminal or civil trial. However, images may always be admitted into evidence to prove violations of Section 423.003 or 423.004, respectively. The evidentiary provisions of the Act, contained in new Section 423.005, go further to prevent the disclosure of captured images for the purposes of

the Texas Open Records Act, Chapter 552 of the Government Code, or legal compulsion for the release of capture images for any other purpose.

Despite the broad privacy protections of the new statutes, the Texas Legislature created wide latitude for legitimate uses of drones to capture images by providing roughly 25 specific types of lawful image capturing in new Section 423.002 (see, Figure B). Law enforcement authorities, or agents thereof, may use drones to capture images when in immediate pursuit of an individual the authorities have reasonable belief or probable cause to suspect has committed a felony offense. While law enforcement authorities must generally have a search or arrest warrant to enter private real property, this exception allows authorities an opportunity to use drones for image capturing in the exigent circumstance of an immediate pursuit. More broadly, anyone may use drones to capture images of persons or private real property within 25 miles of the U.S.-Mexico border.

The Act also allows for other law enforcement-centric uses of drones to capture images in high-risk tactical operations, felony crime scene investigations, missing person searches, and scenes of human fatalities.

In addition to 4th Amendment concerns, opposition to the Texas Privacy Act focused on 1st Amendment freedom of speech issues. Many opponents to the Act voiced these concerns at Senate and House Committee meetings last spring, often representing various free press interests.¹⁸ The Texas Legislature attempted to respond to these interests by specifying numerous acceptable non-law enforcement uses of drones to capture images, with which law enforcement legal advisors and prosecutors should familiarize themselves. Important lawful means of drone use include capturing images: with the consent of the private real property owner, of public property or an individual on public real property, of real property within 25 miles of the U.S.-Mexico border, or while the drone remains on public property at a height of no more than eight feet above ground and the image was captured without means to amplify the image beyond normal human perception. Additionally, the Act allows for legitimate drone image capturing for certain academic and commercial purposes such as utilities operation maintenance, mapping, real estate development, and academic research.

III. Analysis and Implications

The myriad of lawful uses for drones listed in Section 423.002 reflect the Legislature's recognition of the increasing usefulness of drones in many applications. Yet, the balancing act between this recognition and the privacy protections attempted in the Act poses serious problems for criminal and civil enforcement of drone image capturing offenses. Most notably, prosecutors must prove that a defendant captured the image with the intent to conduct surveillance. Section 423.003 pegs the meaning of "intent" to the definition within Section 6.03 of the Penal Code.¹⁹ But nothing in the Texas Privacy Acts defines what it means to "conduct surveillance," leaving prosecutors and judges to guess as to how to deal with the defendant who claims he or she meant not to conduct surveillance but to photograph landscapes, for example. Additionally, because Sections 423.003 and 423.004 provide a defense if a defendant destroys the images upon knowledge that the capture of images violated 423.003, liability can only be imposed if the defendant retained, used, or distributed the images. Therefore, the Act may not offer much help to prosecutors to stop the act of image capturing, itself, rather than to penalize drone-captured image retention, use, or distribution.

Civil litigants, comparatively, are limited in most cases to recovering a maximum of \$10,000 and they, too, must carefully navigate the list of legitimate uses. The sponsor of the enacting legislation, Senator Craig Estes, remarked that even early editions of the Act had so many exemptions it was "like Swiss cheese."²⁰ Clearly, the Texas Legislature acted to get out in front of 2015 federal regulations that will open the national airspace to commercial drone use. But the difficulties of proving images were captured in violation of 423.003, coupled with limitations on civil recoveries, raises questions whether the Texas Privacy Act will have any significant precedential effect on privacy law in Texas courts.

Where the Act truly shows its value, however, is in its evidentiary provisions. The only legal use at trial of images captured in violation of Sections 423.003 or 423.004 is to prove violations of those sections. Otherwise, illegally captured images as well as images captured incidentally to lawful image capture cannot be used as evidence in any judicial proceeding. Nor are these images subject to disclosure under the Open Records Act of Chapter 552 of the Government Code, or any other means of legal compulsion for the release of the images. For criminal defendants, these evidentiary provisions resemble Article 38.23 of the Code of Criminal Procedure, and protect against the use of illegally captured images as trial evidence of guilt of other offenses, no matter whether a government official or a private citizen captured the image. Arguably, however, such provisions are overbroad in scope and could undermine civil liberty protections. It is

hard to reconcile provisions of the Act prohibiting governmental disclosure of exculpatory images or prohibiting criminal defendants from using such evidence in a judicial proceeding in light of the passage of the Michael Morton Act.²¹

An important dilemma facing Texas magistrates is whether illegally or incidentally captured images can be used to support the issuance of a valid search or arrest warrant. Texas courts have strictly held that a search cannot be lawfully performed under a search warrant supported by information illegally obtained by law enforcement.²² Of course, this potentially leaves open the door for drone images illegally captured by private citizens to be turned over to law enforcement and subsequently be used to support a search warrant. While neither Section 423.003 of the Government Code nor Article 38.23 of the Code of Criminal Procedure specifically bars the admission of evidence procured under a search warrant supported by information obtained illegally by an independent third party, Texas case law states that suppression of such evidence is generally required.²³ Texas courts have refused to allow private citizens to deliver illegally obtained evidence on a “silver platter” to authorities for use in criminal trials.²⁴ Therefore, magistrates should keep in mind that the Texas Exclusionary Rule applies to certain actions by private individuals as well as those by government actors.²⁵ In short, the complexities of determining at warrant issuance or suppression stages the validity of evidence searches that are linked to information obtained through the use of drones ensures that Texas courts will need to show off their skills handling the challenges of the new legislation. Fear not, judges will not be the only ones tasked with new duties: the Texas Privacy Act directs the Texas Department of Public Safety to adopt regulations on appropriate drone use within the state.

IV. Conclusion

Though you likely will not be able to hear them, increasing numbers of drones will fly in Texas skies in the near future. With Texas A&M-Corpus Christi recently selected as an FAA national test site and other interested parties advocating increased security applications of drones near the national border, the limitations and effectiveness of the Texas Privacy Act will be put to the test.²⁶ The procedural and practical complexities of the legislation surely suggests that this balancing act of legitimate technology use and privacy will begin to topple, but let’s hope that constitutional privacy guarantees are not the end of the scale that comes crashing to the ground.

¹ “FAA chief says drones will force change at agency,” *Washington Times*, <http://www.washingtontimes.com/news/2012/aug/7/faa-chief-says-drones-will-force-change-at-agency/> (accessed 2/3/14).

² Acts, 2013, 83rd Regular Legislature, Chapter 1390 (H.B. 912).

³ “FAA Modernization and Reform Act 2012,” <https://www.govtrack.us/congress/bills/112/hr658> (accessed 2/2/14).

⁴ The Exclusionary Rule was applied to federal courts in *Weeks v. United States*, 232 U.S. 383 (1914), and to state courts through selective incorporation of the 14th Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵ Judge Harlan’s concurrence in *Katz v. United States*, 389 U.S. 347 (1967), which became the rule of law in later cases, stated a two-fold requirement for affording an individual privacy right: one, that the individual has an actual, subjective expectation of privacy; and two, that the expectation be one society is prepared to recognize as reasonable.

⁶ *United States v. Jones*, 132 S. Ct. 945 (2012); *Olmstead v. United States*, 277 U.S. 438 (1928); *Boyd v. United States*, 116 U.S. 616 (1886).

⁷ *United States v. Jones*, 132 S. Ct. 945 (2012).

⁸ *Miles v. State*, 241 S.W.3d 28, 32 (Tex. Crim. App. 2007).

⁹ The AeroVironment Nano Hummingbird is a tiny spy drone, modeled after a hummingbird. The Defense Advanced Research Projects Agency (DARPA), a Department of Defense agency, provided the specifications and \$4 million to fund the drone’s development, <http://www.avinc.com/nano> (accessed 2/2/14).

¹⁰ In *California v. Ciraolo*, 476 U.S. 207 (1986), police flew over a suspect’s house at 1,000 feet and took pictures in which they could identify marijuana plants.

¹¹ In *Florida v. Riley*, 488 U.S. 445 (1989), the Supreme Court held that warrantless police observation via a helicopter flying at 400 feet above ground of a suspect’s marijuana growing operation on his property was not a 4th Amendment search.

¹² *Id.* at 451.

¹³ In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court invalidated the warrantless use of thermal scanners to measure heat emissions from a suspect’s home. Police believed that the suspect was using heat lamps to grow marijuana (he was), and the thermal scanner registered “hot spots” from the roof areas, which the police used as probable cause to support a subsequent search warrant. In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court held that a GPS tracking device attached to a suspect’s car constituted a search because the device physically intruded onto the suspect’s “effect.”

¹⁴ *Id.*

¹⁵ While the thermal scanner used in *Kyllo*, the Agema Thermovision 210, was an advanced model, basic thermal scanners that provide similar information can be found on Amazon.com for around \$50.

¹⁶ *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

¹⁷ Amazon is currently working on using drones to deliver packages. See, <http://www.amazon.com/b?node=8037720011> (accessed 3/24/14). And, maybe more importantly, the Burrito Bomber is a planned use of drones to deliver burritos by drone. See, <http://www.darwinaerospace.com/burritobomber> (accessed 3/24/14).

¹⁸ Commenters representing the National Press Association, broadcasters associations, journalists, and television production groups spoke out against the legislation at the House Committee on Criminal Jurisprudence (March 26, 2013), and the Senate Committee on Agriculture, Rural Affairs, and Homeland Security (May 13, 2013).

¹⁹ Section 6.03 of the Penal Code states, “a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.”

²⁰ “Adding Exemptions, Texas Senate Approves Drone Bill,” *Texas Tribune*, <http://www.texastribune.org/2013/05/17/senate-panel-passes-drone-bill/> (accessed 1/30/14).

²¹ See, generally, Sara Kincaid, “The Michael Morton Act and Texas Municipal Courts” *The Recorder* (January 2014).

²² *Brown v. State*, 605 S.W.2d 572 (Tex. Crim. App. 1980), *overruled on other grounds by Hedicke v. State*, 779 S.W.2d 837 (Tex.Crim.App.1989); *State v. Aguirre*, 5 S.W.3d 911 (Tex.App.—Houston [14th Dist.] 1999, no pet.) (“the evidence obtained from executing the warrant [supported by illegally obtained information] was the fruit of an illegal search and was properly suppressed.”).

²³ *State v. Johnson*, 896 S.W.2d 277 (Tex.App.—Houston [1st Dist.] 1995), *aff’d* 939 S.W.2d 586 (Tex.Crim.App. 1996).

²⁴ *Id.*

²⁵ *Supra*, note 8.

²⁶ “Border Reps Split on Using Drones for Security,” *Texas Tribune*, <http://www.texastribune.org/2014/01/22/border-reps-split-using-drones-border-security/> (accessed 2/1/14).