

Want to be a drone vigilante? Better check your state's drone laws first

As the popularity of drones continues to rise, so too does the desire for regulation. However, drone regulation is a difficult problem to solve.

As a society, we have little experience dealing with small, airborne, data-harvesting machines. And, there is an endless list of complaints about drones ranging from safety concerns to potential abuses by law enforcement. In an effort to deal with those concerns, state and local governments have fashioned a variety of drone laws. Frankly, many of those laws are experimental and some may be unconstitutional.

One law that could be deemed “experimental” is in North Dakota, where law enforcement agencies are empowered to use drones equipped with non-lethal weapons, which would potentially include pepper spray, bean bag guns, tasers and sound-based weapons. Weaponized drones are extremely controversial. It probably will take one test case to determine if North Dakota's law will stand public scrutiny.

Similarly, North Carolina's law prohibits operation of a drone for commercial purposes unless the operator has a license issued by the North Carolina Division of Aviation. To get a license, North Carolina requires the operator to be 17 years of age, to pass a knowledge test and to have a valid driver's license. Pilot training and qualification is traditionally a field of action reserved for the Federal Aviation Administration. Such state action may violate Article 6 of the Constitution, which establishes that “This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Eventually we will see how society, drones and the law mix. We will learn whether current drone laws achieve our goals and/or whether they violate long-standing legal principles. A recent case in Oklahoma provides an opportunity to consider that question.

Prosecutors in Oklahoma filed charges against an alleged prostitute and her client based, in part, on drone video supplied by a local witness. According to affidavit testimony, a witness identified as Brian Bates (also known as the “Original Video Vigilante” and the creator of a website called “johntv.com”) was “monitoring prostitution activity” when he saw a white truck stop and pick up a female who was allegedly a “known prostitute.” The witness followed the truck and saw it park behind “an old tire company.” Suspicious that the pair was engaging in illegal activity, the witness launched a drone and aimed its camera at the windshield. The drone video allegedly confirmed the witness' suspicions. However, once they saw the drone, the pair allegedly ceased its activities and left the area. The witness ultimately posted the video to his YouTube channel, which is devoted to uncovering the “graphic realities of street prostitution.” He also supplied the video to the Oklahoma City police. The video was used as part of the evidence to support charges filed against the alleged prostitute and her client. The pair has pled not guilty.

The Oklahoma case raises some interesting issues regarding the use of drones for surveillance. There are likely many who celebrate the work of the video vigilante. And, his drone video apparently helped law enforcement officials make their case. But despite the apparent good intentions behind such activism, some states, including Texas, impose significant restrictions on the use of drones for surveillance.

With some exceptions, the Texas drone statute (contained in Chapter 423 of the Texas Government Code) imposes criminal penalties for the use of drones to conduct “surveillance” of persons or property without consent:

Sec. 423.003. OFFENSE: ILLEGAL USE OF UNMANNED AIRCRAFT TO CAPTURE IMAGE. (a) A person commits an offense if the person uses an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image.

(b) An offense under this section is a Class C misdemeanor.

It is important to note that the law focuses on intentional “surveillance.” Surveillance, however, is not defined by the statute and it is difficult to know precisely what acts would violate the law. Additionally, a person commits a Class B misdemeanor under the Texas drone law if the person “possesses, discloses, displays, distributes or otherwise uses” images captured in violation of the law. Thus, posting illegally obtained video on YouTube would be a violation. As it relates to law enforcement, images captured in violation of the Texas drone law “may not be used as evidence in any criminal or juvenile proceeding, civil action or administrative proceeding.” (However, such images may be used as evidence to establish a violation of the Texas drone law.)

The Texas drone law also provides a list of legal drone operations. In addition to a range of research, commercial and governmental uses, the law allows drone photography of public property or persons on public property and it allows photography of private property with the owner’s consent. It also contains a unique exception that allows drone photography “from a height no more than eight feet above ground level in a public place, if the image was captured without using any electronic, mechanical or other means to amplify the image beyond normal human perception.” It seems as if this exception fails the safety test — the airspace from 0-to-8 feet is generally inhabited by people. And, it is difficult to imagine any modern camera that does not amplify an image beyond normal human perception.

It is difficult to criticize the balance struck by the Texas drone law. Although drones may be useful for many things, including busting potential criminals, there is always a tradeoff. The Texas drone law generally protects individual privacy and most people would probably agree with that goal. However, as drones become more prevalent, it may be necessary to re-evaluate the Texas drone law (and other state and local drone laws) to determine if it still meets the goals of our society and whether there are other ways to preserve privacy and obtain the benefits of drone technology.

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