

Drones and Privacy

By Wes Bearden

Drones fly overhead like high-tech bees. You can now buy them online or from most local electronics stores. Heck, they've even replaced the remote controlled helicopters as an adolescent boy's favorite Christmas gift. They are those newfangled drones and they seem to be utilized in every facet of our daily lives. From the precise military strikes in the Middle East to the proposed daily delivery of consumer items by Amazon, they seemingly are here to stay.

Beyond the foreign military application, we have begun to see more and more commercial uses for this type of technology. Some have even begun using such drone technology in commercial surveillance and security applications. How these drones will be used in such surveillance operations has not yet been decided. Unfortunately, the regulatory framework in the use and operation of drones has lagged behind and now is in a state of flux. Within the last few years, efforts have been made to implement drones in the national airspace and to protect overall privacy interests.

In 2012, Congress finally passed the FAA Modernization and Reform Act (FMRA) the purpose of which was to integrate over a five-year plan unmanned aircraft systems

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(UAS) into the national airspace system. As part of the FMRA, Congress provided basic criteria for the establishment of drone regulations by the Federal Aviation Administration (FAA) and also provided a safe harbor for drones under 55 pounds and are model aircraft. Drones that exist in this size have exploded in recent years. Now, many of them are equipped with high power and high definition recording devices. Last year, the FAA under its rulemaking authority granted by Congress, began issuing rules for those drones under the 55-pound threshold. It has delineated these rules for those drones used in commercial applications and those exempted by the FMRA as model aircraft.

The FAA has further required that operators maintain unaided visual contact with the drone at all times. The FAA has also restricted operation to daylight hours, a maximum speed of 100 miles per hour and a maximum altitude of 500 feet above ground level. In addition, the FAA has and will continue to place more substantial registration and regulation requirements on those drones used for commercial purposes. Many of these regulations narrow the practical use of such devices in surveillance operations.

Privacy concerns are also taking root at the federal level. Recently, the National Telecommunications & Information Administration located within the U.S. Department of Commerce, has begun suggesting voluntary recommendations. In particular, they have stated that, "In the absence of a compelling need to do otherwise, or consent of the data subjects, UAS

operators should avoid using UAS for the specific purpose of intentionally collecting covered data where the operator knows the data subject has a reasonable expectation of privacy." Although voluntary, those guidelines in addition with the expected input by other interested stakeholders will likely allow the drafting of considerations of privacy protections. It is believed that the framework of the FAA law and the exemptions granted by Congress will pave the way for local law to deal with nuisance, trespass and privacy issues more common under surveillance.

Texas has recently passed legislation under the Texas Privacy Act in an attempt to provide privacy protections for citizens of the state. This act, in the face of remarkable opposition, prohibits the use of drones to capture images of an individual on privately owned property with the intent to conduct surveillance. The act also protects criminal and civil defendants by barring the admission of images captured in violation of the act into evidence in a criminal or civil trial. Although some exceptions of drone use are spelled out within the statute, they quickly narrow the use for either law enforcement or the private sector in any surveillance operation. Short of a court order or warrant, these devices and tactics will be taken off the table.

It appears that as of today in Texas, the use of drones in any type of investigation is one of flux. More often than not, these devices will create issues more than they will produce useable and admissible evidence. Maybe it's best to keep the snooping on the ground.