

Fifth Circuit Reverses Ruling on Texas Drone Law, Restores Provisions Previously Held Unconstitutional

May 14, 2024 Michael Lambert

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In 2020, a Texas federal court ruled that certain provisions of the Texas drone law violated the First Amendment because they restricted the right to gather news. This freed Texas journalists from concerns that their conduct would be subject to civil and criminal penalties under unclear provisions of the state's drone law enacted in 2013 under Chapter 423 of the Texas Government Code. But in October 2023, the Fifth Circuit Court of Appeals reversed the trial court's ruling, restoring the vague language that caused the Texas Press Association, National Press Photographers Association (NPPA), and a freelance journalist to challenge the law in 2019. *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770 (5th Cir. 2024).

Journalists must now comply with all provisions of the Texas drone law, even the ones initially declared unconstitutional. The main provisions of the drone law at issue in the case are Sections 423.002, 423.003, 423.004, and 423.006 (the "Surveillance Provisions"), which makes it unlawful to "capture an image of an individual or privately owned real property in [Texas] with the intent to conduct surveillance on the individual or property contained in the image," and Sections 423.0045 and 423.0046 (the "No-Fly Provisions"), which outlaw flying drones over a "correctional facility, detention facility, or critical infrastructure facility" or "sports venue" at less than 400 feet.

In a disappointing decision, the Fifth Circuit held that the Surveillance and No-Fly Provisions were facially constitutional because they largely regulated conduct, not speech. Although the Court admitted that the Surveillance Provisions "no doubt have an incidental effect on speech, they more closely resemble conduct regulations," not "regulations of expression."

The Fifth Circuit justified its decision by focusing on the privacy interest at stake. On one hand, the drone law expressly allows the use of drones to capture images of "public real property or a person on that property" (§ 423.002(a)(15)), but it does not extend to capturing images of private individuals and property. According to the Court, citing *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972), "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."

The Fifth Circuit also relied on *City of Austin v. Reagan National Advertising of Austin, LLC.*, a U.S. Supreme Court case decided *after* the trial court initially struck down some provisions of the drone law as unconstitutional. In *City of Austin*, the Supreme Court narrowed the definition of content-based restrictions on speech. The Fifth Circuit held that the Surveillance Provisions passed constitutional muster under the new standards set in *City of Austin*.

Although the decision was a loss for journalism in Texas, the Fifth Circuit did not rule out the possibility that the drone law could be challenged if it is applied in an unconstitutional manner. But until then, Texas journalists must follow the Surveillance and No-Fly Provisions, the rest of the [Chapter 423](#), and the other generally applicable laws governing drones. In light of *McCraw*, journalists should be careful flying over private property and should not capture images of

individuals or private property. Journalists should also stay clear of critical infrastructure facilities, such as pipelines, refineries, and plants as well as sports venues.

Journalists must also follow national and local drone regulations before flying in Texas or elsewhere. The FAA requires that drone operators follow Part 107 of the Code of Federal Regulations, which requires (1) learning the Part 107 rules; (2) earning a remote pilot certificate; and (3) registering the drone with the FAA.

Part 107 prohibits flying:

- In restricted air spaces without permission. Airspace is restricted near airports, stadiums, military bases, national landmarks, and certain “critical infrastructure.”
- Over 400 feet
- At night without authorization
- Directly over people unless certain conditions are met
- From a moving vehicle or aircraft
- Beyond the operator’s visual line of sight
- In a careless or reckless manner

After learning the Part 107 rules, you should schedule a test with a FAA-approved testing center to earn a remote pilot certificate (here is a step-by-step guide to obtaining a pilot certificate). Training must be complete every two years. A FAA registration certificate must be in a pilot’s possession while flying.

Every drone must be registered with the FAA online or by mail. Drone registration is \$5 and valid for three years. Pilots must label their drone with their registration number and enable remote identification.

Drone journalists should be aware of other non-FAA flight restrictions as well. For example, drone flights are only allowed in Texas State Parks with a permit, except for designated areas of Martin Dies, Jr. or with a filming permit. Flying drones in Harris County parks are only allowed in specifically designated areas or with written authorization from a park superintendent.

Drone journalists should also remember to follow trespass, privacy, and other generally applicable laws. Photos and videos should not be taken of areas where there is a reasonable expectation of privacy, such as inside a home, hotel, or workplace.

Additional resources to review before taking flight include the Drone Journalism Lab Operations Manual by the University of Nebraska-Lincoln and resources provided by the Poynter Institute. For ethical considerations, you should consult the Society of Professional Journalists Code of Ethics and the NPPA Code of Ethics.