

# Lambert in Texas Press Association: How Journalists Should Operate Drones After Fifth Circuit Upholds 2013 Texas Law

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**PRACTICES** Intellectual Property Litigation, Anti-SLAPP and First Amendment Rights, Media and Entertainment Litigation

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Haynes Boone Associate [Michael Lambert](#) authored an article for the *Texas Press Association* with guidelines for how journalists should operate drones in Texas following the recent ruling in the Fifth Circuit Court of Appeals.

Read an excerpt below:

Journalists must now comply with all provisions of the Texas drone law as passed by the Legislature, 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 make 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.

The Fifth Circuit held that the Surveillance and No-Fly Provisions were constitutional because they largely regulate conduct, not speech.

The court said that although 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.

To read the full article in the *Texas Press Association*, click [here](#).