Droning On: The State and Federal Legal Response to the Deregulation of U.S. Airspace for Small Unmanned Aircraft Systems

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Abstract

With the 2012 congressional mandate that the Federal Aviation Administration promulgate rules allowing the use of small unmanned aircraft systems (commonly called drones) in U.S. airspace, many have expressed concerns about potential invasions of privacy by both private citizens and law enforcement agencies. This article provides a survey of the state and federal case law and legislative responses to such concerns through August of 2016, with a detailed focus on legislative enactments creating crimes related to civilian drone use and regulating the law enforcement use of drones to collect evidence in criminal investigations. The article also analyzes and attempts to make sense of the seemingly “hit-or-miss” state legislative responses to the advent of widespread drone use in the United States.

Keywords

legislation, drones, U.S. airspace, privacy, technology

I. Introduction

In February of 2012, the U.S. Congress enacted the FAA Modernization and Reform Act,¹ which mandated that the Federal Aviation Administration (FAA) implement regulations for the integration of small unmanned aircraft systems (sUAS), also commonly referred to as unmanned

¹ FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (2012).

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aerial or aircraft systems (UAS), unmanned aerial vehicles (UAVs), or drones, into U.S. airspace. Throughout this work, the terms *UAS* and *drone* are used interchangeably, generally to refer to small unmanned aircraft systems. However, when a specific legislative enactment regarding drones is referenced, the precise statutory language crafted within that statute to refer to UAS is used.

As the federal deregulation of U.S. airspace for drone use has progressed, the FAA has promulgated rules related to the registration and marking of sUAS, as well as their safe operation. Regarding the registration and marking issues, the FAA published its Interim Final Rule² on December 16, 2015. This Interim Final Rule addresses only the basic requirements for the registration and marking of UAS, as well as age restrictions on who can register a UAS.

On June 28, 2016, the FAA published "Operation and Certification of Small Unmanned Aircraft Systems, Final Rule."³ This rule addresses issues related to the commercial operation sUAS, including aircraft requirements, operator certification and responsibilities, and operational limitations; these include a prohibition against flying over persons not involved in an operation who are not under cover of a structure or a stationary vehicle. The rule also allows a certificate of waiver of the rule's provisions to the extent that an applicant can show that safe operation can still be accomplished.

The FAA website suggests that law enforcement agencies may apply to obtain a blanket public Certificate of Waiver or Authorization (COA) allowing "nationwide flights in class G airspace at or below 400 feet, self-certification of the UAS pilot, and the option to obtain emergency COAs (e-COAs) under special circumstances."⁴ Beyond this, the FAA has not made any specific attempt to regulate the use of drones by law enforcement or to address privacy issues related to drones, leaving such issues to state and federal legislators.

Since the 2012 federal mandate to integrate drones into the national airspace, private citizens and legislators alike have been in near-panic mode over its potential effect on privacy. News articles abound with headlines such as these: "Technology 2012: Smile! You're on Government Camera,"⁵ "Drones Over America. Are They Spying on You?"⁶ "Sen. Dianne Feinstein Says There's No Regulation of Commercial Drones,"⁷ and "Spies in the Sky Signal New Age of Surveillance."⁸ The Orwellian fear that Big Brother is watching, via drone, has become palpable.

² Registration and Marking Requirements for Small Unmanned Aircraft, Interim Final Rule, 80 FR 78593 (Dec. 16, 2015).

³ Operation and Certification of Small Unmanned Aircraft Systems, Final Rule, 81 FR 42063 (June 28, 2016).

⁴ Federal Aviation Administration, Unmanned Aircraft Systems, Beyond the Basics, Waivers to Certain Small UAS Operating Rules. (Modified February 10, 2017). Retrieved from https://www.faa.gov/uas/getting_started/fly_for_work_business/beyond_the_basics/#gov.

⁵ Technology 2012: Smile! You're on government camera. (2012, April 29, Sunday). *The Columbian* (Vancouver, WA), editorial, p. C6, 673 words, John Laird.

⁶ Drones over America. Are they spying on you? Thousands of drones could be routinely flying over the United States within the next ten years. They can help with law enforcement and border control, but they also raise questions about invasion of privacy. (2012, June 16, Saturday). *The Christian Science Monitor*, 852 words, Brad Knickerbocker, staff writer.

⁷ Sen. Dianne Feinstein says there's 'no regulation' of commercial drones. (2013, March 11, Monday). *Tampa Bay Times*, 1263 words, Becky Bowers.

⁸ Spies in the sky signal new age of surveillance. (2012, July 22, Sunday). *Star Tribune* (Minneapolis, MN), news, p. 1A, 1721 words, Mark Brunswick, staff writer.

II. Parameters of This Work

As outlined above, the FAA deregulation process that has played out over the last 4 years has been limited to issues regarding the registration and safe operation of UAS by hobbyists and commercial users. The FAA regulations do not address issues such as civil causes of action for drone use behaviors. Predictably, neither do the FAA guidelines address potential criminal justice issues related to drone use, such as the creation of drone crimes or the permissible uses of UAS by police in criminal investigations. Accordingly, a flurry of legislative action has begun to address this legal void.

The focus of this article is on the legal response to the newly authorized use of drones as it relates to the criminal justice process, defined in this work as the creation of drone crimes and/or the regulation of police use of drones, including civil causes of action for the improper use of drones. It addresses the minimal case law on drone issues and then outlines the general parameters of federal and state UAS legislative action related to drone use. The article then turns to an overview of the various crimes and civil causes of action created by state legislation. Next, it undertakes an in-depth discussion of state legislative responses to police use of drones, with a particular focus on the use of UAS in criminal investigations. Finally, the article makes observations about trends in the existing legislation and endeavors to identify some common themes in the disparate state legislative schemes, and then to identify considerations for future legislative action.

As the main focus of this article is the effect of U.S. airspace deregulation vis-à-vis drones on criminal justice practices and policies, a detailed review of the FAA registration and safety regulations is not undertaken.

III. Absence of State and Federal Case Law Addressing Law Enforcement Use of UAS

Although a wealth of general Fourth Amendment surveillance jurisprudence exists, there is a nearly total void of case law at the state and federal level specifically addressing the civilian or law enforcement use of drones. Perhaps this is not surprising, given the relatively short time that drone use has been allowed under the FAA deregulation, which began in 2012. Although a number of cases exist regarding privacy interests and the military use of unmanned aerial systems,⁹ a search of legal databases for the term *drone* related to Fourth Amendment issues yielded only a few cases. Most concerned circumstances in which *Drone* was a proper name,¹⁰ instances in which attorneys “droned on,”¹¹ or cases such as *Jacobus v. Heurta* (2013),¹² in which a *pro se* defendant attempted

⁹ See, e.g., *New York Times Co. v. U.S. Dept. of Justice*, 756 F.3d 100 (2d Cir. 2014), where newspaper sought government documents enumerating legal justifications for the targeted killings of U.S. citizens by drones, and *Al-Aulaqi v. Panetta*, 35 F. Supp.2d 56 (D.D.C. 2014), where relatives of U.S. citizens killed in drone strikes sued various U.S. government officials.

¹⁰ See, e.g., *U.S. v. Williams*, 616 F.3d 760 (8th Cir. 2010), where a man named Drones “was a mid-level heroin supplier in the St. Louis area,” and *United States v. Drones*, 218 F.3d 496, 504 (5th Cir. 2000), where “Drones” was pursuing habeas corpus relief based on ineffective assistance of counsel claims in his conviction for conspiracy to possess crack cocaine with intent to distribute and aiding and abetting possession of crack cocaine.

¹¹ See, e.g., *People v. Santiago*, 22 N.Y.3d 740, 986 N.Y.S.2d 375, 9 N.E.3d 870 (2014), where the court recognized the benefits of presentations using technology instead of a presentation where an attorney “drones” on and on.

¹² No. 12-CV-02032, 2013 WL 673233 (S.D. W. Va. Feb. 22, 2013).

to sue the FAA, claiming it was using drones to surveil him because he got into an argument with a pilot.

One of the only cases that even mention the law enforcement use of drones is the 2015 U.S. Federal District Court case of *Blanton v. Deloach* (2015),¹³ in which a citizen filed suit claiming he was unlawfully targeted for traffic citations by a sheriff's office; the targeting included the use of a drone to determine his location. While dismissing the complaint for failure to state a claim, the court noted as an aside that "[t]raditionally, watching or observing a person in a public place is not an intrusion upon one's privacy" (*Summers v. Bailey*, 1995). *Summers v. Bailey*, 55 F.3d 1564 (11th Cir. 1995). Additionally, courts in this Circuit have held that "[f]ollowing someone, without more, is not a violation of the Constitution or laws of the United States" (*Hunter v. Abi*, 2014). *Hunter v. Abi*, No. 2:13-CV-661-WKW, 2014 WL 495359, at *8 (M.D. Ala. Feb. 5, 2014).¹⁴

IV. Overview of the Proposed Federal Legislative Action on Privacy Issues Related to UAS Use

Fresh on the heels of the FAA's 2012 deregulation of airspace for drone use, members of Congress began sponsoring legislation regarding the potential new use of drones. Proposed legislation related to privacy issues in general included the Farmer's Privacy Act of 2012,¹⁵ restricting the Environmental Protection Agency's use of drones over agricultural lands. Members of the Senate also sought to use a Department of Transportation appropriations bill to prevent funding of the FAA deregulation efforts until the agency undertook a detailed report about the potential privacy effect of drones.¹⁶ The Drone Aircraft Privacy and Transparency Act of 2013¹⁷ also sought to require the FAA to study and identify drone privacy issues, but it attempted to do so with a proposed amendment to the FAA Modernization and Reform Act of 2012.

Examples of proposed legislation specifically related to the federal law enforcement use of drones include the Preserving American Privacy Act of 2013,¹⁸ which sought to ban the weaponization of drones as well as their warrantless use by governmental agencies, and the Preserving Freedom from Unwarranted Surveillance Act of 2013,¹⁹ seeking to prohibit U.S. agencies from gathering evidence for use in a criminal prosecution or a regulatory case without a warrant. (An identical bill was introduced in the U.S. Senate as S. 1016.²⁰) During the 114th session of Congress (2015-2016), bills were proposed in both the House and the Senate seeking, among other things, to require law enforcement and other governmental agencies to obtain warrants to collect investigative information via drones.²¹

None of the federal bills addressing these privacy issues related to the use of drones were enacted, and most never moved beyond assignment to committee.

¹³ *Blanton v. Deloach*, No. 2:15-CV-40, 2015 WL 6758230 (S.D. Ga. Nov. 5, 2015).

¹⁴ *Id.* at footnote 4, p. 6.

¹⁵ H.R. 5961, 112th Cong. (2nd Sess. 2012).

¹⁶ S. 1243, 113th Cong. (1st Sess. 2013).

¹⁷ H.R. 1262, 113th Cong. (1st Sess. 2013).

¹⁸ H.R. 637, 113th Cong. (1st Sess. 2013).

¹⁹ H.R. 972, 113th Cong. (1st Sess. 2013).

²⁰ Preserving Freedom from Unwarranted Surveillance Act of 2013, S. 1016, 113th Cong. (1st Sess. 2013).

²¹ Drone Aircraft Privacy and Transparency Act of 2015, H.R. 1229, 114th Cong. (1st Sess. 2015) and S. 635, 115th Cong. (1st Sess. 2015).

V. Overview of and General Trends in State Legislation Regarding the Use of UAS

In 2013, state legislatures began addressing a variety of issues regarding drones. That year, 130 bills and resolutions were considered by 43 states, and ultimately 13 states enacted 16 new laws. An additional 16 resolutions (many mandating study committees for drone privacy issues) were adopted in 2013 by 11 states.²² In 2014, overall state legislative action dropped significantly, with only 35 states considering legislation and 10 states enacting 12 new drone laws.²³ Drone-related legislative activity at the state level rebounded sharply in 2015, with 45 states considering 168 bills; 20 states eventually enacted 26 pieces of legislation, and another five states adopted resolutions, again related mostly to establishing study committees on various drone-related issues.²⁴ During 2015, 26 states enacted laws addressing a wide range of issues related to UAS use. With the 2016 state legislative sessions winding down, 38 states have considered additional drone laws, and 28 new laws have been passed by 15 states.

After 4 years of legislative action, 19 states (Alabama, California, Colorado, Connecticut, Delaware, Georgia, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, South Dakota, Washington, and Wyoming) have not yet enacted any drone-related laws. As is detailed below, of the 31 states that have enacted drone laws, four have enacted only administrative/funding laws, nine have enacted various drone-related crimes but have no regulation of law enforcement investigative use of drones, seven have regulated law enforcement investigative use of drones but created no drone crimes, and eleven have enacted legislation concerning both drone crimes and the law enforcement use of drones.

VI. States With Legislation Only on Funding or Administrative Positions Related to UAS

Although nearly all states have considered UAS legislation, only 32 states have passed laws related to some manner of drone use. The type and scope of the UAS-related state legislation vary widely. Four states – Hawaii, Maryland, Ohio, and Rhode Island – have passed only limited legislation addressing administrative and funding issues. These states have left unaddressed those issues related to privacy crimes or law enforcement investigation matters.

Legislation in Hawaii has provided the funding of staff positions to plan for degree and training programs for professional unmanned aircraft systems pilots²⁵ and has created a chief operating officer for the Hawaii unmanned aerial systems test site.²⁶ Likewise, Maryland's legislation has addressed only limited drone-related issues, such as the appropriation of funds for its UAS test

²² National Conference of State Legislatures. (July 2, 2015). 2013 state unmanned aircraft systems (UAS) legislation. Retrieved from <http://www.ncsl.org/research/transportation/2013-state-unmanned-aircraft-systems-uas-legislation.aspx>.

²³ National Conference of State Legislatures. (July 2, 2015). 2014 state unmanned aircraft systems (UAS) legislation. Retrieved from <http://www.ncsl.org/research/transportation/2014-state-unmanned-aircraft-systems-uas-legislation.aspx>.

²⁴ National Conference of State Legislatures. (Sept. 9, 2016). Current unmanned aircraft state law landscape. Retrieved from <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx#1>.

²⁵ 2013 Haw. Sess. Laws, Act 272, S.B. 1221.

²⁶ Haw. Rev. Stat. Ann. § 201-72.7 (West).

site²⁷ and the preemption of county or municipality ability to regulate drone operation.²⁸ In Ohio, the only drone-related legislative enactment creates an aerospace and aviation committee whose duties include the development of unmanned aerial vehicle technology.²⁹ Rhode Island has addressed the use of drones only to the extent of assigning all legal authority within the state to the Rhode Island Airport Corporation.³⁰

Thus, 27 states currently have enacted laws concerning the law enforcement use of drones and/or creating crimes related to drone use. Some of these 27 states have also passed laws concerning the administration and funding of drone research; however, this article focuses only on the criminal justice–related drone legislation of those states.

VII. State Legislation on UAS

Of the 27 states that have enacted legislation addressing criminal justice issues surrounding UAS use, nine states³¹ (Arizona, Arkansas, Kansas, Louisiana, Michigan, Mississippi, New Hampshire, Oklahoma, and West Virginia) have created crimes or civil causes of action related to drone use without addressing the law enforcement use of drones for criminal investigation. An additional eleven states³² (Florida, Idaho, Indiana, Nevada, North Carolina, Oregon, Tennessee, Texas, Utah, Vermont, and Wisconsin) have legislated both drone crimes and drone use by police in criminal investigations.

A. Citizen Use: Creation of Crimes and/or Private Causes of Action

An overview of drone crimes legislation that regulates citizen use is presented in Table 1. In 2016, Arizona amended its criminal code section “Miscellaneous Offenses” to make the operation of unmanned aircraft that interferes with the operations of law enforcement, firefighters, or emergency services a class 1 misdemeanor.³³ The legislation also made it a class 6 felony to use an unmanned aircraft or unmanned aircraft system “to intentionally photograph or loiter over or near a critical facility in the furtherance of a criminal offense.”³⁴ A second offense for drone use in furtherance of a criminal offense related to a critical facility is punishable as a class 5 felony.³⁵ It is also a crime in Arizona to operate a UAS in violation of federal law.³⁶

²⁷ 2013 Md. Sess. Laws, Ch. 423 §52(6), H.B. 100.

²⁸ Md. Code Ann., Com. Law § 14-301 (West).

²⁹ Ohio Rev. Code Ann. §122.98 (West).

³⁰ Rhode Island H.B. 7511, Unpiloted Aerial Vehicle Regulation (effective July 1, 2016 without governor’s signature).

³¹ Some sources count California among the states that have passed drone crime legislation. However, this article does not include California’s legislation amending its “physical or constructive invasion of privacy” statute, West’s Ann. Cal. Civ. Code § 1708.8, to include invasions of privacy via airspace as there is no specific mention of UAS or drones in the statute.

³² Some count Indiana’s Ind. Code Ann. § 35-46-8.5-1 (West), which makes it a drone-related crime to place electronic surveillance equipment on the property of another without consent; however, as it makes no specific mention of UAS or drone use, it is not counted here as UAS legislation.

³³ Ariz. Rev. Stat. Ann. § 13-3729.

³⁴ *Id.*

³⁵ Ariz. Rev. Stat. Ann. § 13-3729 (E).

³⁶ Ariz. Rev. Stat. Ann. § 13-3729 (A).

Table 1: State Statutes That Regulate Citizen Use of UAS

	Weapon- ization	Hunting and Fishing	Peeping or Privacy Crimes	Surveilling a Critical or Other Facility	Other Drone Crimes	Civil Cause of Action
Arizona				X	X	
Arkansas			X	X		
Florida						X
Idaho		X				
Illinois		X				
Indiana		X				
Kansas					X	
Louisiana			X	X	X	
Michigan		X				
Mississippi			X			
Nevada	X			X	X	X
N.H.		X				
N.C.	X	X	X		X	X
Oklahoma				X		X
Oregon	X	X	X	X	X	
Tennessee		X	X	X	X	
Texas			X		X	
Utah					X	
Vermont	X					
W.V.		X				
Wisconsin	X	X	X	X		

In 2015, Arkansas amended its existing crime of Video Voyeurism to include the use of an “unmanned vehicle or aircraft.”³⁷ Arkansas also created criminal³⁸ and civil penalties³⁹ for the unauthorized use of UAS to surveil a critical infrastructure. In the Arkansas statute, the phrase *critical infrastructure* relates to electric power generations systems and to petroleum, chemical, and rubber facilities.⁴⁰

In Florida, the Freedom from Unwarranted Surveillance Act was amended in 2015⁴¹ to create a civil cause of action for damages, including punitive damages, and injunctive relief for the unlawful surveillance of persons or property via drone. The state has not passed criminal laws related to drone use.

³⁷ An Act Concerning the Use of an Unmanned Vehicle or Aircraft to Commit the Offense of Voyeurism or Video Voyeurism; and for Other Purposes, Act 293, 2015 Ark. Acts 293, codified at Ark. Code Ann. §5-16-101 (West).

³⁸ Ark. Code Ann. § 5-60-103 (West).

³⁹ Ark. Code Ann. § 16-118-111 (West).

⁴⁰ *Id.*

⁴¹ Fla. Stat. Ann. § 934.50 (West).

Idaho added a drone crime related to hunting in 2016 when it amended its existing laws regulating methods of taking wildlife to include unmanned aircraft systems. It is a misdemeanor under the Idaho code to hunt game from, molest game with, or hunt game with the aid of any unmanned aircraft system.⁴²

In 2013, the Illinois legislature amended its criminal law on hunter or fisherman interference to include the use of a drone to interfere with the “lawful taking of wildlife or aquatic life.”⁴³

In 2016, Indiana similarly added a section, “Prohibition Against the Use of an Unmanned Aerial Vehicle to Aid in the taking of an Animal,” to its Fish and Wildlife code.⁴⁴ The law forbids the use of a UAV to “search for, scout, locate, or detect a wild animal to which the hunting season applies as an aid to take the wild animal.”⁴⁵ Violation of the prohibition is a class C infraction unless the violation is done in a knowingly and intentional manner, in which case it constitutes a class C misdemeanor.⁴⁶

Kansas, which had passed no drone legislation until 2016, took a small first step in regulating drone use by amending its existing Protection from Stalking Act to include certain uses of unmanned aerial systems.⁴⁷ Under Kansas stalking law, the definition of harassment was expanded to include “any course of conduct carried out through the use of an unmanned aerial system over or near any dwelling, occupied vehicle, or other place where one may reasonably expect to be safe from uninvited intrusion or surveillance.”⁴⁸

By legislative action in 2014, Louisiana created the crime of Unlawful Use of an Unmanned Aircraft System and punishes by a minimum \$500 fine and up to 6 months in jail the nongovernmental use of an unmanned aircraft system to surveil “a targeted facility.” Targeted facilities are defined to include petroleum and alumina refineries, chemical and rubber manufacturing facilities, and nuclear power electric generation facilities. Louisiana also passed a law in 2015 regulating the use of unmanned aerial systems in agriculture.

In 2016, the Louisiana State Legislature added substantially to its list of drone-related crimes. It amended its Resisting an Officer statute to include knowing interference with a “police cordon” and authorized police or fire personnel to disable the offending UAS if it endangers the safety of persons.⁴⁹ In 2016, Louisiana also added the intentional use of a UAS over correctional facilities to the existing crime of Unlawful Use of an Unmanned Aircraft System,⁵⁰ added schools to the existing list of “targeted facilities,”⁵¹ and added use of a UAS as a mechanism by which the existing crimes of Video Voyeurism,⁵² Peeping Tom,⁵³ and Criminal Trespass⁵⁴ could be committed.

⁴² Idaho Code Ann. § 36-1101 (West).

⁴³ 720 Ill. Comp. Stat. Ann. § 5/48-3 (West).

⁴⁴ IC 14-22-6-16.

⁴⁵ *Id.*

⁴⁶ IC 14-22-38-1.

⁴⁷ K.S.A. 60-31a02.

⁴⁸ *Id.*

⁴⁹ LSA-R.S. 14:108.

⁵⁰ LSA-R.S. 14:337.

⁵¹ *Id.*

⁵² LSA-R.S. 14:283.

⁵³ LSA-R.S. 14:284.

⁵⁴ LSA-R.S. 14: 63.

In 2015, Michigan passed two pieces of legislation, one criminalizing the use of UAS to interfere with a person who is lawfully hunting or fishing⁵⁵ and one making it illegal for anyone other than State Department of Natural Resources and Environmental Protection staff to take game or fish while using “an unmanned vehicle or unmanned device that uses aerodynamic forces to achieve flight or an unmanned vehicle or unmanned device that operates on the surface of water or under water.”⁵⁶ The sum total of Michigan’s criminal justice regulation related to drones consists of these two statutes.

In Mississippi, the only foray into criminal justice–related drone legislation came in 2015, when it amended its existing Voyeurism statute to include peeping by use of “drone” and other electronic devices.⁵⁷

In 2015, Nevada made it a class D felony to weaponize an unmanned aerial vehicle and a class C felony to discharge a weaponized UAV.⁵⁸ The state also created a number of other crimes related to UAV use. Unauthorized operation of a UAV within 500 feet of a critical facility or an airport is a misdemeanor in Nevada.⁵⁹ The Nevada legislation added unmanned aerial vehicle to the definition of aircraft in its Operation of Aircraft While Under the Influence statute⁶⁰ and includes operation of a UAV “with reckless disregard for the safety of other persons and with willful indifference to injuries that could result from such operation” in its definition of the misdemeanor crime of Dangerous Flying.⁶¹ Nevada also created a civil cause of action for trespass against anyone unlawfully flying a drone within 250 feet over property after having previously done the same and having been warned against it.⁶²

In New Hampshire, the enactment of criminal justice–related drone legislation has been limited to the 2015 passage of legislation prohibiting interference with the lawful taking of game or the surveillance of those lawfully taking game by use of an unmanned aerial vehicle other than by government agents in performance of their official duties.⁶³

Conversely, North Carolina has created more crimes related to unmanned aircraft system use than any other state. North Carolina, passing extensive drone legislation in 2014, made it a class 1 misdemeanor to operate a UAS for commercial purposes without authorization,⁶⁴ to unlawfully disseminate images recorded via UAS,⁶⁵ to hunt or fish while using a UAS,⁶⁶ and to commit a second offense of using a UAS to wrongfully interfere with the lawful taking of wildlife.⁶⁷

⁵⁵ Mich. Comp. Laws Ann. § 324.40112 (West).

⁵⁶ Mich. Comp. Laws Ann. § 324.40111c (West).

⁵⁷ Miss. Laws 2015, Ch. 489 (S.B. No. 2022), § 1, eff. July 1, 2015. Interestingly, this amendment to address peeping by use of technology also addresses issues related to the practice of “up-skirting.”

⁵⁸ Nev. Rev. Stat. Ann. AB 239 § 18 (West).

⁵⁹ Nev. Rev. Stat. Ann. AB 239 § 18.5 (West).

⁶⁰ Nev. Rev. Stat. Ann. § 493.130 (West).

⁶¹ Nev. Rev. Stat. Ann. § 493-100 (West).

⁶² Nev. Rev. Stat. Ann. AB 239 § 19 (West).

⁶³ N.H. Rev. Stat. Ann. § 207:57.

⁶⁴ N.C. Gen. Stat. Ann. § 63-96 (West).

⁶⁵ N.C. Gen. Stat. Ann. § 14-401.25 (West).

⁶⁶ N.C. Gen. Stat. Ann. § 14-401.24 (West).

⁶⁷ N.C. Gen. Stat. Ann. § 14-401.24 (West). The first offense of wrongful interference with the lawful taking of wildlife is a class 2 misdemeanor.

Felony crimes in North Carolina regarding UAS use include possessing a weaponized UAS (a class E felony)⁶⁸ and disrupting the operation of or damaging a manned aircraft while in motion by using a UAS (a class H felony).⁶⁹ North Carolina also provides for civil relief from unwarranted surveillance via unmanned aircraft system and provides for injunctive relief, actual damages, or \$5,000 per wrongful photograph or video published, plus attorneys' fees and costs.⁷⁰

Oklahoma, making a first, limited venture into drone regulation in 2016, created a civil cause of action for designated wrongful operations of unmanned aircraft over an enumerated list of "critical infrastructure" facilities.⁷¹ The law, which took effect on November 1, 2016, excludes government entities and their representatives from liability in addition to owner operators of the critical infrastructure facilities and their designees.⁷²

In 2013, Oregon enacted legislation creating a number of drone crimes. It prohibited a public body from operating a drone that is weaponized or capable of directing a laser.⁷³ Oregon made it a class A felony to possess or control a drone and to intentionally cause or attempt to cause the drone to interfere with aircraft in a number of different ways (fire a projectile at, direct a laser at, or crash into the aircraft) while in the air.⁷⁴ The 2013 Oregon legislation makes it a class C felony to interfere with or gain unauthorized control over an unmanned aircraft system licensed by the FAA or operated by the U.S. Armed Forces.⁷⁵ Oregon law also creates a cause of action for damages for certain unauthorized low-flying operations of unmanned aircraft systems over private property.⁷⁶

In 2016, Oregon expanded its 2013 prohibition against operation by a public body of a drone capable of being weaponized to include such operations by any persons.⁷⁷ Through legislation in 2016, Oregon also created a class A violation for operating a UAS over or allowing it to come in contact with specifically enumerated critical infrastructures, including power, transportation, telecommunication, and correctional facilities.⁷⁸

Tennessee passed drone crimes legislation in 2014, 2015, and 2016. The 2014 Tennessee legislature set out a number of circumstances under which it is lawful to capture images while using an unmanned aircraft,⁷⁹ including public safety and commercial uses, and then made it a class C misdemeanor to capture an image of an individual or privately owned property except as specifically allowed by law.⁸⁰ In 2015, Tennessee criminalized the use of a drone over fireworks discharge sites, large open-air venues, and correctional facilities.⁸¹

⁶⁸ N.C. Gen. Stat. Ann. § 14-401.24 (West).

⁶⁹ N.C. Gen. Stat. Ann. § 14-208.3 (West).

⁷⁰ N.C. Gen. Stat. Ann. § 15A-300.1 (West).

⁷¹ 2016 Ok. ENR. H. B. No. 2299.

⁷² *Id.*

⁷³ Or. Rev. Stat. Ann. § 837.365 (West) 2013.

⁷⁴ Or. Rev. Stat. Ann. § 837.995 (West).

⁷⁵ *Id.*

⁷⁶ Or. Rev. Stat. Ann. § 837.380 (West).

⁷⁷ Or. Rev. Stat. Ann. § 837.365 (West).

⁷⁸ Or. Laws 2016 Ch. 72, § 13 (West).

⁷⁹ Tenn. Code Ann. § 70-4-302 (West).

⁸⁰ Tenn. Code Ann. § 39-13-903 (West).

⁸¹ *Id.*

In 2016, the Tennessee legislature added prohibitions against using drones within 250 feet of other critical infrastructure, including electrical, chemical, and petroleum facilities.⁸² The nonconsensual video surveillance by drone of persons lawfully hunting or fishing is also a class C misdemeanor in Tennessee.⁸³

In 2013, Texas passed extensive criminal justice-related drone legislation. Texas, like Tennessee, enumerates lawful uses of an unmanned aircraft to capture images⁸⁴ and then makes it a class C misdemeanor to use unmanned aircraft to capture, possess, or distribute an image of a person or individual other than as allowed by law.⁸⁵ It is a defense to the illegal use of unmanned aircraft to capture an image if the image has not been disclosed and is destroyed when the accused realizes the image violates the statute.⁸⁶ Other Texas laws make it a class B misdemeanor⁸⁷ to use unmanned aircraft in the state capitol complex in violation of rules promulgated by the complex director⁸⁸ or to operate an unmanned aircraft lower than 400 feet above land containing enumerated critical infrastructure facilities.⁸⁹ It is a class A misdemeanor in Texas to commit a second offense of unlawfully flying an unmanned aircraft over a critical infrastructure facility.⁹⁰

In 2016, Utah added drone crimes related to operation near wildfires to its already existing drone laws. Utah has made it a class A misdemeanor to operate a drone causing an aircraft fighting a wildfire to err in dropping its payload, a third-degree felony to crash into such an aircraft, and a second-degree felony to cause such an aircraft to crash.⁹¹ A second piece of legislation in 2016 amended the same statute to make it a class B misdemeanor to fly over an area designated as a wildfire scene and authorizes certain law enforcement officers to neutralize unmanned aircraft flying in violation of the law.⁹²

In 2016, Vermont enacted its first drone legislation concerning citizen use. It prohibited the weaponization of drones. In Vermont, it is a crime punishable by up to 1 year in jail and up to a \$1,000 fine to “[e]quip a drone with a dangerous or deadly weapon or fire a projectile from a drone.”⁹³

In 2015, the West Virginia legislature created crimes related to the use of drones to take game. It amended its existing statute, Unlawful methods of hunting and fishing and other unlawful acts, to make it a misdemeanor to hunt by firing from a drone or by using a drone to herd animals.⁹⁴

In 2014, Wisconsin created two drone crimes that relate to citizen use. The legislature made it a felony to possess a weaponized drone, exempting armed forces members acting in their official capacity,⁹⁵ and also made it a class A misdemeanor in Wisconsin to use a drone to observe or

⁸² Tenn. Code Ann. § 39-13-903 (West) 2016.

⁸³ Tenn. Code Ann. §39-13-902 (West).

⁸⁴ Tex. Govt. Code Ann. § 423.002 (West).

⁸⁵ Tex. Govt. Code Ann. § 423.003 (West).

⁸⁶ Tex. Govt. Code Ann. § 423.003 (c) (West).

⁸⁷ Tex. Govt. Code Ann. § 411.065 (West).

⁸⁸ Tex. Govt. Code Ann. § 411.062 (West).

⁸⁹ Tex. Govt. Code Ann. § 423.0045 (West).

⁹⁰ *Id.*

⁹¹ Utah Code Ann. § 65A-3-2.5 (West).

⁹² Laws of Utah 2016, 3rd Sp. Sess., c. 3, § 1, eff. July 17, 2016.

⁹³ Vt. Stat. Ann. Tit. 13 § 4018 (West).

⁹⁴ W. Va. Code Ann. § 20-2-5 (West).

⁹⁵ Wis. Stat. Ann. § 941.292 (West).

record a person in a location where the person has a reasonable expectation of privacy.⁹⁶ In 2016, Wisconsin added two new drone prohibitions, the first by amending its Interference with Hunting, Fishing, or Trapping statute to include interference by use of a drone⁹⁷ and the second setting a \$5,000 penalty for the unlawful operation of a drone over the grounds of any correctional institution.⁹⁸

B. Law Enforcement Use: Regulating Investigation Power

As of August of 2016, 18 states have enacted legislation regulating the use of drones by police in criminal investigations: Alaska, Florida, Idaho, Illinois, Indiana, Iowa, Maine, Montana, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin.

Although Alaska has created no drone crimes, it has regulated police use of UAS. The Alaska 2014 legislation expressly prohibits law enforcement use of unmanned aircraft systems except as otherwise provided in Alaska law.⁹⁹ The law also requires police agencies that utilize UAS to adopt procedures for their use following detailed requirements set out in the statute.¹⁰⁰ The Alaska provisions for police use of UAS are short and simple. Police may use drones to collect evidence in a criminal investigation pursuant to a search warrant or as otherwise allowed by judicially recognized exception to the search warrant requirement.¹⁰¹ Police may also make use of UAS in a situation not designed to obtain evidence for use in a criminal investigation.¹⁰²

Alaska law forbids the retention of an image obtained through police use of UAS unless the image is necessary to an investigation/prosecution, necessary for training purposes, or required to be kept by statute.¹⁰³ Nonretainable images are specifically deemed confidential and not public record.¹⁰⁴

Florida was among the earliest states to regulate police use of drones. In 2013, it expressly prohibited law enforcement from using drones to gather evidence except in specifically enumerated circumstances.¹⁰⁵ Exceptions include the following: countering the high risk of a terrorist attack,¹⁰⁶ with a warrant,¹⁰⁷ other exigent circumstances including but not limited to protection of life, prevention of serious property damage, to prevent escape or destruction of evidence, or to search for missing persons.¹⁰⁸ Florida allows other lawful drone uses not related to commerce and other agency business.¹⁰⁹ Remedies for a law enforcement violation of Florida

⁹⁶ Wis. Stat. Ann. § 942.10 (West).

⁹⁷ Wis. Stat. Ann. § 29.083 (West).

⁹⁸ Wis. Stat. Ann. § 114.045 (West).

⁹⁹ Alaska Stat. § 18.65.900.

¹⁰⁰ Alaska Stat. § 18.65.901.

¹⁰¹ Alaska Stat. § 18.65.902(1).

¹⁰² Alaska Stat. § 18.65.902(2).

¹⁰³ Alaska Stat. § 18.65.903(a).

¹⁰⁴ Alaska Stat. § 18.65.903(b).

¹⁰⁵ Fla. Stat. Ann. § 934-50 (West).

¹⁰⁶ Fla. Stat. Ann. § 934-50 (4)(a) (West).

¹⁰⁷ Fla. Stat. Ann. § 934-50 (4)(b) (West).

¹⁰⁸ Fla. Stat. Ann. § 934-50 (4)(c) (West).

¹⁰⁹ Fla. Stat. Ann. § 934-50 (4)(d) *et seq.* (West).

drone statutes include a civil cause of action against the agency¹¹⁰ and a prohibition against use of any evidence obtained in violation of drone laws in a criminal prosecution.¹¹¹

Table 2: State Statutes That Regulate Law Enforcement Use of UAS

	Warrant Requirem.	Enumer. Warrant Exception	Exception Per Existing Jurisprud.	Evidence Excluded	Civil Cause of Action	Use Report Required
Alaska	X		X			
Florida	X	X		X	X	
Idaho	X	X			X	
Illinois	X	X	X			X
Indiana	X	X	X	X		
Iowa	X		X			
Maine	X		X			X
Montana	X		X			
Nevada	X	X	X	X		
N.C.	X	X		X	X	
N.D.	X	X	X	X		
Oregon	X	X		X		X
Tennessee	X	X		X		
Texas	X	X				X
Utah	X	X				X
Vermont	X	X	X	X		X
Virginia	X	X				
Wisconsin	X	X	X			

In 2013, the Idaho legislature regulated unmanned aircraft use by police via one fairly brief statute.¹¹² Related to law enforcement, use of an unmanned aircraft system is prohibited “[a]bsent a warrant, and except for emergency response for safety, search and rescue or controlled substance investigations.”¹¹³ Idaho law allows consensual UAS surveillance of a dwelling and its curtilage¹¹⁴ or of a person.¹¹⁵ Remedy for violation of the Idaho UAS law is a civil cause of action for damages against the violating person or agency in the sum of actual damages or \$1,000, plus attorneys’ fees and costs.¹¹⁶ The Idaho statute also provides for some private use of UAS.¹¹⁷

¹¹⁰ Fla. Stat. Ann. § 934-50 (5)(a) (West).

¹¹¹ Fla. Stat. Ann. § 934-50 (6) (West).

¹¹² Idaho Code Ann. § 21-213 (West).

¹¹³ Idaho Code Ann. § 21-213 (2)(a) (West).

¹¹⁴ Idaho Code Ann. § 21-213 (2)(a)(i) (West).

¹¹⁵ Idaho Code Ann. § 21-213 (2)(b) (West).

¹¹⁶ Idaho Code Ann. § 21-213 (3) (West).

¹¹⁷ Idaho Code Ann. § 21-213 (West).

Illinois enacted an extensive drone regulation scheme in 2013. It prohibits law enforcement agencies from gathering information by drone except in specific enumerated circumstances.¹¹⁸ Allowable law enforcement uses for drones in Illinois include countering high risk of terrorist attack,¹¹⁹ pursuant to search warrant with certain time limitations,¹²⁰ in exigent circumstances under specific time restrictions to prevent harm to life or escape of a suspect or destruction of evidence,¹²¹ to attempt location of a missing person not associated with a criminal investigation,¹²² and for crime and crash scene photography.¹²³

Under Illinois law, evidence obtained by police in violation of Illinois statute is presumptively inadmissible in court unless the state can show it meets a judicially recognized exception to the exclusionary rule.¹²⁴ Police agencies in Illinois owning drones must report the number of drones owned to the Illinois Criminal Justice Information Authority, and an annual list detailing police agency drone ownership is made publicly available.¹²⁵

Illinois is one of the few states that specifically regulate the retention and disclosure of information collected by drone. Information obtained via drone by a law enforcement agency must be destroyed within 30 days unless it contains evidence of a crime or is relevant to an ongoing trial or investigation.¹²⁶ Additionally, a law enforcement agency is forbidden to share information gathered by drone except with a supervisor of another agency where it has met a threshold of reasonable suspicion of criminal activity or relates to an ongoing criminal investigation.¹²⁷

In 2014, Illinois added to its existing laws regulating law enforcement use of drones. The existing Freedom from Drone Surveillance Act was amended to authorize police to use drones during a disaster or public health emergency¹²⁸ and added a section that prohibits law enforcement from obtaining evidence through use of a drone owned by a private citizen, but it allows a private citizen to voluntarily provide evidence to police that the private citizen acquired independently of police involvement.¹²⁹ The 2014 legislation also specifically states that any information acquired from the independent action of private citizens is subject to the same retention and disclosure requirements as information obtained by the police via drone.¹³⁰

As a part of a broad piece of surveillance and privacy legislation, Indiana enacted a requirement that law enforcement officers obtain a search warrant before use of an unmanned aerial vehicle except with regard to specific enumerated exceptions.¹³¹ The exceptions include exigent circumstances requiring a warrantless search (presumably as otherwise set out in existing

¹¹⁸ 725 Ill. Comp. Stat. Ann. § 167/10 (West).

¹¹⁹ 725 Ill. Comp. Stat. Ann. § 167/15-1 (West).

¹²⁰ 725 Ill. Comp. Stat. Ann. § 167/15-2 (West).

¹²¹ 725 Ill. Comp. Stat. Ann. § 167/15-3 (West).

¹²² 725 Ill. Comp. Stat. Ann. § 167/15-4 (West).

¹²³ 725 Ill. Comp. Stat. Ann. § 167/15-5 (West).

¹²⁴ 725 Ill. Comp. Stat. Ann. § 167/30 (West).

¹²⁵ 725 Ill. Comp. Stat. Ann. § 167/35 (West).

¹²⁶ 725 Ill. Comp. Stat. Ann. § 167/20 (West).

¹²⁷ 725 Ill. Comp. Stat. Ann. § 167/25 (West).

¹²⁸ 725 Ill. Comp. Stat. Ann. § 167/15(6) (West).

¹²⁹ 725 Ill. Comp. Stat. Ann. § 167/40 (West).

¹³⁰ 725 Ill. Comp. Stat. Ann. § 167/40 (West). See 725 Ill. Comp. Stat. Ann. § 167/20 (West) for information on retention requirements and 725 Ill. Comp. Stat. Ann. § 167/25 (West) for disclosure prohibitions.

¹³¹ Ind. Code Ann. § 35-33-5-9(a) (West).

jurisprudence), high risk of a terrorist attack, for search-and-rescue or recovery operations, in conjunction with a natural disaster or to perform a survey for noncriminal justice purposes, or with property owner consent.¹³² Indiana specifically excludes information, including derivative information, unlawfully obtained via UAV from being used in any administrative or judicial proceeding.¹³³ Indiana also added UAVs to its definition of a tracking device.¹³⁴

In 2014, Iowa passed a brief item of legislation addressing three points about police use of an unmanned aerial vehicle. First, Iowa prohibited use of a UAV for purposes of traffic enforcement.¹³⁵ It also prohibited the use of evidence obtained by UAV in any civil or criminal proceeding absent a search warrant or other authorization under state and federal law.¹³⁶ Lastly, Iowa mandated the department of public safety, in consultation with various law enforcement agencies, to report on whether a modification of the criminal code was advisable to regulate UAV use and to develop suggested guidelines for the use of UAVs in Iowa.¹³⁷

In 2015, Maine dealt with police drone use in a single code section, "Regulation of unmanned aerial vehicles."¹³⁸ Maine's law requires that police agencies receive permission from their governing body before acquiring a UAV.¹³⁹ The law also mandates that the Maine Criminal Justice Academy, with advice from the state attorney general, create policies and protocols for law enforcement use of UAVs¹⁴⁰ and requires that police agencies be in compliance with those policies and protocols before using a UAV.¹⁴¹ Data collection and reporting concerning each use of UAV by law enforcement are also required.¹⁴²

Maine law requires that police officers either have a warrant for UAV use for criminal investigations or that the use fall within a recognized warrant exception,¹⁴³ and it prohibits police from weaponizing UAVs.¹⁴⁴ The law specifically authorizes police use of UAVs for search-and-rescue operations necessary to protect persons, for related training, and for noncriminal investigative functions like assessment of accidents, fires, floods, or storm damage.¹⁴⁵ Maine law also approves emergency use of UAVs by law enforcement when authorized by the head of the agency or the governor.¹⁴⁶

In Montana, the sole item of legislation related to unmanned aerial vehicle use is a brief statute passed in 2013 addressing only law enforcement use. The Montana law prohibits the use at trial of evidence obtained by unmanned aerial vehicle without a warrant or pursuant to a judicially

¹³² Ind. Code Ann. § 35-33-5-9(b) (West).

¹³³ Ind. Code Ann. § 35-33-5-10 (West).

¹³⁴ Ind. Code Ann. § 35-31.5-2-227.5 (West).

¹³⁵ Iowa Code Ann. § 321.492B (West).

¹³⁶ Iowa Code Ann. § 808.15 (West).

¹³⁷ Iowa Acts 2014, Chap. 1111.

¹³⁸ Me. Rev. Stat. Ann. tit. 25, § 4501.

¹³⁹ Me. Rev. Stat. Ann. tit. 25, § 4501(3).

¹⁴⁰ Me. Rev. Stat. Ann. tit. 25, § 4501(5).

¹⁴¹ Me. Rev. Stat. Ann. tit. 25, § 4501(4).

¹⁴² Me. Rev. Stat. Ann. tit. 25, § 4501(6).

¹⁴³ Me. Rev. Stat. Ann. tit. 25, § 4501(4).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

recognized search warrant exception.¹⁴⁷ The Montana law does allow information obtained from the warrantless monitoring of public lands or international borders to be used in an affidavit of probable cause to support a search warrant.¹⁴⁸

In 2015, Nevada legislation regulated the use of unmanned aerial vehicles by law enforcement.¹⁴⁹ Nevada's statute permits law enforcement use of UAVs except as expressly prohibited.¹⁵⁰ These prohibitions include a location where a person has a reasonable expectation of privacy except by warrant issued for a limited period of time not to exceed 10 days.¹⁵¹ The Nevada statute then goes on to list specifically authorized warrantless police uses of a UAV to include exigent circumstances surrounding a crime that is occurring or about to occur, by property owner consent, for purpose of certain search-and-rescue operations, declared state of emergency, and to combat terrorism, with reporting requirements attached.¹⁵²

Nevada law also specifically prohibits the use of information unlawfully obtained by UAV from being used in any administrative, adjudicatory, or judicial proceeding or to establish reasonable suspicion or probable cause.¹⁵³ A Nevada public agency (agency, office, bureau, board, commission, department or division of the state, or a political subdivision of the state other than a law enforcement agency¹⁵⁴) may not use a UAV to assist police in conducting a criminal investigation, and any information collected by a public agency by UAV may likewise not be used in any administrative, adjudicatory, or judicial proceeding or to establish reasonable suspicion or probable cause.¹⁵⁵

In 2014, North Carolina enacted one of the more comprehensive drone legislative schemes. In addition to creating numerous drone-related crimes (discussed previously), North Carolina enumerates specific circumstances under which police use of an unmanned aircraft system is allowed, including pursuant to a warrant, to counter a terrorist attack under certain specific parameters, of an area in plain view, or under exigent circumstances to protect life, prevent serious damage to property, prevent escape, or conduct pursuit of a suspect, prevent the destruction of evidence, or to search for a missing person.¹⁵⁶ North Carolina also permits law enforcement to use UAVs to undertake photography of gatherings, whether on public or private land, to which the public is invited.¹⁵⁷

Under North Carolina law, unlawfully obtained UAV evidence is excluded from use in a criminal prosecution but allows a good faith exception.¹⁵⁸ The law also creates a civil cause of action against a state agency, as well as a private citizen or other entity, that conducts unwarranted surveillance via UAV.¹⁵⁹ Damages may be either actual or \$5,000 per wrongfully published photograph or video

¹⁴⁷ Mont. Code Ann. § 46-5-109 (West).

¹⁴⁸ Mont. Code Ann. § 46-5-109(2) (West).

¹⁴⁹ Nev. Rev. Stat. Ann. AB 239 § 20 (West).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Nev. Rev. Stat. Ann. § 493.020 (West).

¹⁵⁵ Nev. Rev. Stat. Ann. AB 239 § 21 (West).

¹⁵⁶ N.C. Gen. Stat. Ann. § 15A-300.1(c) (West).

¹⁵⁷ *Id.*

¹⁵⁸ N.C. Gen. Stat. Ann. § 15A-300.1(f) (West).

¹⁵⁹ N.C. Gen. Stat. Ann. § 15A-300.1(e) (West).

and may include attorneys' fees.¹⁶⁰ North Carolina law also provides injunctive relief from unwarranted UAV surveillance.¹⁶¹

North Dakota's drone law, passed in 2015, simply prohibits information obtained by an unmanned aerial vehicle system from being used in any prosecution, proceeding, or affidavit of probable cause in support of a search warrant unless obtained via warrant or exception to the search warrant requirement.¹⁶² North Dakota uniquely requires UAV warrants to include a data collection statement concerning details about the UAV flight, maximum flight period, and how information will be collected, used, retained, or destroyed.¹⁶³

The North Dakota statute also enumerates exceptions, allowing the use of UAVs to patrol borders, by police to prevent bodily harm or imminent danger to life, in a catastrophe that is environmental or weather-related, or for certain research, education, training, testing, or development-related applications.¹⁶⁴ North Dakota expressly prohibits law enforcement weaponization of UAVs and forbids police to authorize the use of a UAV by one private person to surveil another private person without consent.¹⁶⁵ The statute also bans UAV "[s]urveillance of the lawful exercise of constitutional rights unless the surveillance is otherwise allowed."¹⁶⁶

In 2013, Oregon, which also has fairly extensive drone crimes legislation, enacted a broad piece of legislation regulating police use of drones. The state prohibits law enforcement use of an unmanned aircraft system to acquire information except in specific circumstances enumerated by statute¹⁶⁷ and mandates that evidence obtained in violation of the Oregon UAS laws is not admissible at any judicial, administrative, or other adjudicative proceeding or in arbitration.¹⁶⁸ Likewise, such illegally obtained evidence may not be used to establish reasonable suspicion or probable cause that a crime has occurred.¹⁶⁹

Specific circumstances under which Oregon authorizes police UAS use include surveillance pursuant to a warrant¹⁷⁰ or where law enforcement has probable cause to believe a crime has been, is being, or is about to be committed and there is not time to obtain a warrant.¹⁷¹ UAV search warrants under Oregon law may not be issued for more than 30 days and are renewable.¹⁷²

UAVs may also be used by police with written consent of the individual or the property owner surveilled,¹⁷³ for search-and-rescue activities, and in states of emergency¹⁷⁴ subject to certain reporting requirements. Oregon also allows police limited use of UAS to reconstruct or physically

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² N.D. Cent. Code Ann. § 29-29.4-02 (West).

¹⁶³ N.D. Cent. Code Ann. § 29-29.4-03 (West).

¹⁶⁴ N.D. Cent. Code Ann. § 29-29.4-04 (West).

¹⁶⁵ N.D. Cent. Code Ann. § 29-29.4-05 (West).

¹⁶⁶ *Id.*

¹⁶⁷ Or. Rev. Stat. Ann. § 837.310 (West).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Or. Rev. Stat. Ann. § 837.320 (West).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Or. Rev. Stat. Ann. § 837.330 (West).

¹⁷⁴ *Id.*

assess a crime scene¹⁷⁵ and for law enforcement training purposes; however, no information acquired during training may be used in court or as a basis for reasonable suspicion or probable cause that a crime has been committed.¹⁷⁶ Law enforcement agencies in Oregon must report drone ownership to the Oregon Department of Aviation, as well as certain details about drone use.¹⁷⁷

In 2016, Oregon added to its earlier police regulation of drones by requiring that all public bodies operating unmanned aircraft systems establish detailed policies and procedures that include rules about use, storage, retention, and sharing of recorded data and to make such rules available to the public.¹⁷⁸

Tennessee was one of the first states to deal with police use of drones, passing legislation in early 2013. Tennessee law prohibits the use of drones by law enforcement except under specific enumerated circumstances.¹⁷⁹ Conditions under which police in Tennessee are allowed to use drones to gather evidence or other information include pursuant to a warrant, to counter a high risk of a terrorist attack, in exigent circumstances to save life, for continuous aerial surveillance of a fugitive, escapee, or hostage situation, or to search for a missing person.¹⁸⁰ Tennessee law forbids dissemination and requires prompt destruction of information collected that is collateral to actual targets.¹⁸¹

Additionally, Tennessee drone law specifically identifies police use of a drone as a search under Fourth Amendment jurisprudence and requires that all drone searches adhere to search-and-seizure requirements of the federal and state constitutions.¹⁸² Tennessee law expressly prohibits evidence collected in violation of the statute to be used in any criminal prosecution in the state.¹⁸³

In its extensive 2013 drone legislation, Texas not only established a number of drone crimes, discussed above, but also regulated police use of drones. Texas law enumerates 21 permissive uses of an unmanned aircraft to capture an image,¹⁸⁴ and one such use is “pursuant to a valid search or arrest warrant.”¹⁸⁵ Other statutory permissive uses of an unmanned aircraft to capture an image that relate to law enforcement include immediate pursuit of a felon,¹⁸⁶ documentation of a felony crime scene,¹⁸⁷ investigation of the scene of a human fatality or a motor vehicle accident resulting in death or serious bodily injury or occurring on a state or federal highway,¹⁸⁸ searching for a missing person,¹⁸⁹ tactical operations that risk threat to human life,¹⁹⁰ and certain private property

¹⁷⁵ Or. Rev. Stat. Ann. § 837.340 (West).

¹⁷⁶ Or. Rev. Stat. Ann. § 837.345 (West).

¹⁷⁷ Or. Rev. Stat. Ann. § 837.360 (West).

¹⁷⁸ Or. Laws 2016, c. 72, § 8, eff. March 29, 2016, operative Jan. 1, 2017.

¹⁷⁹ Tenn. Code Ann. § 39-13-609 (West).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Tenn. Code Ann. § 39-13-609(g)(1) (West).

¹⁸³ Tenn. Code Ann. § 39-13-609(g)(2) (West).

¹⁸⁴ Tex. Govt. Code Ann. § 423.002 (West).

¹⁸⁵ Tex. Govt. Code Ann. § 423.002 (a)(7) (West).

¹⁸⁶ Tex. Govt. Code Ann. § 423.002 (a)(8)(A) (West).

¹⁸⁷ Tex. Govt. Code Ann. § 423.002 (a)(8)(B) (West).

¹⁸⁸ Tex. Govt. Code Ann. § 423.002 (a)(8)(C) (West).

¹⁸⁹ Tex. Govt. Code Ann. § 423.002 (a)(8)(D) (West).

¹⁹⁰ Tex. Govt. Code Ann. § 423.002 (a)(8)(E) (West).

with owner permission.¹⁹¹ State or local law enforcement may additionally capture UAS images to assist in certain state of emergency responsibilities,¹⁹² and to lawfully collect air quality data.¹⁹³

Other permissible uses of drones in Texas, not specific to law enforcement but that might come within law enforcement duties, include surveillance at the scene of a hazardous waste spill,¹⁹⁴ to aid in fire suppression,¹⁹⁵ to rescue a person who is in danger,¹⁹⁶ surveillance of real property within 25 miles of the U.S. border,¹⁹⁷ public property and persons on public property,¹⁹⁸ for protection of oil pipeline and rig safety,¹⁹⁹ and for port authority security.²⁰⁰ Use of unmanned aircraft to capture an image in Texas, other than those authorized by statute, whether by public or by government agents, is a crime, as outlined previously. Texas has also mandated the Department of Public Safety to create rules for the use of unmanned aircraft in the state²⁰¹ and requires specific, detailed biennial reports to the governor, lieutenant governor, and members of the legislature on law enforcement uses of unmanned aircraft.²⁰²

Utah passed legislation in 2014 providing oversight in police use of drones. Utah's law regulating police use of UAVs prohibits police from obtaining, receiving, or using unmanned aircraft system data unless under specific enumerated conditions.²⁰³ Police may of course obtain UAV data under the terms of a search warrant but also pursuant to judicially established search warrant exceptions or to search for a missing person in an area where there is no expectation of privacy.²⁰⁴

Under Utah statute, a law enforcement agency may obtain UAS surveillance data collected by a nongovernmental actor if it appears to relate to the commission of a crime and the nongovernmental actor in good faith believes disclosure is necessary to protect life or remedy an emergency.²⁰⁵ Police in Utah may also operate UAS at a testing site but must destroy the data collected within a reasonable amount of time after use.²⁰⁶ Data collected during a search for a lost or missing person must also be destroyed within a reasonable amount of time.²⁰⁷ Utah has additional provisions regulating the retention and disclosure of data pertaining to persons who are not the target of an investigation.²⁰⁸ The state has extensive requirements for police agencies to

¹⁹¹ Tex. Govt. Code Ann. § 423.002 (a)(8)(F) (West).

¹⁹² Tex. Govt. Code Ann. § 423.002 (a)(9)(A) & (B) (West).

¹⁹³ Tex. Govt. Code Ann. § 423.002 (a)(9)(C) (West).

¹⁹⁴ Tex. Govt. Code Ann. § 423.002 (a)(10) (West).

¹⁹⁵ Tex. Govt. Code Ann. § 423.002 (a)(11) (West).

¹⁹⁶ Tex. Govt. Code Ann. § 423.002 (a)(12) (West).

¹⁹⁷ Tex. Govt. Code Ann. § 423.002 (a)(14) (West).

¹⁹⁸ Tex. Govt. Code Ann. § 423.002 (a)(16) (West).

¹⁹⁹ Tex. Govt. Code Ann. § 423.002 (a)(18) (West).

²⁰⁰ Tex. Govt. Code Ann. § 423.002 (a)(19) (West).

²⁰¹ Tex. Govt. Code Ann. § 423.007 (West).

²⁰² Tex. Govt. Code Ann. § 423.008 (West).

²⁰³ Utah Code Ann. § 63G-18-103(1) (West).

²⁰⁴ *Id.*

²⁰⁵ Utah Code Ann. § 63G-18-103(2) (West).

²⁰⁶ Utah Code Ann. § 63G-18-103(3) (West).

²⁰⁷ *Id.*

²⁰⁸ Utah Code Ann. § 63G-18-104 (West).

report details of UAS use. The report is made to the Department of Public Safety and is publicized on the department's websites.²⁰⁹

In 2016, Vermont passed a law related to the law enforcement use of drones. Vermont's regulation of police use of drones, which became effective on October 1, 2016, requires that police officers using drones for "the investigation, detection, or prosecution of a crime" must obtain a warrant or have a judicially recognized exception to the warrant requirement.²¹⁰ Uniquely, if police use a drone in exigent circumstances, without a warrant pursuant to a judicially recognized warrant exception, Vermont requires that they obtain a search warrant within 48 hours after the start of drone use, and if the court fails to grant the warrant, the drone use must end and the information gathered be destroyed.²¹¹ Use of a drone for investigatory purposes pursuant to a warrant or a judicially recognized exception must be conducted in a way intended to limit the data collected to the target of the surveillance and to avoid collecting data regarding nontargeted persons or places.²¹²

Vermont law expressly forbids police drone use to "gather or retain data on private citizens peacefully exercising their constitutional rights of free speech and assembly"²¹³ unless it is done pursuant to a warrant or for observational, public safety purposes where data is not gathered or retained.²¹⁴ Also unique to the Vermont statutes is an express prohibition against the use of "facial recognition or any other biometric matching technology" on data collected by drones related to any person or place not a target of surveillance.²¹⁵ Vermont law expressly allows the warrantless use of a drone for noninvestigative purposes such as search and rescue and the assessment of accidents, fires, floods, and storm damage.²¹⁶ Evidence gathered in violation of Vermont's Law Enforcement Use of Drone statute is not admissible in any judicial or administrative matter.²¹⁷

On April 3, 2013, Virginia was the first state to enact drone legislation when it prohibited drone use for state law enforcement purposes, excepting a few public safety uses, until July 1, 2015, to allow time to investigate and develop laws regulating investigatory law enforcement drone use.²¹⁸ Then, in April of 2015, Virginia legislators passed a law, Use of Unmanned Aircraft Systems by Public Bodies,²¹⁹ requiring that any investigative use of UAS by a state agency be done pursuant to a search warrant or an administrative/inspection warrant. Exceptions to the search warrant requirement were enumerated and relate to amber and blue alerts, immediate danger to persons, and consensual use, but no law enforcement purposes such as traffic, flood and wildfire assessment, or certain military training uses.²²⁰ Virginia has not yet created any drone crimes.

In addition to the drone-related crimes discussed earlier, Wisconsin has a brief, simple statute regulating law enforcement use of drones. Under Wisconsin law, police must obtain a warrant to

²⁰⁹ Utah Code Ann. § 63G-18-105 (West).

²¹⁰ 20 Vt. Stat. Ann. tit. 20 § 4622 (c) (2) (West).

²¹¹ 20 Vt. Stat. Ann. tit. 20 § 4622 (d) (3) (West).

²¹² 20 Vt. Stat. Ann. tit. 20 § 4622 (d) (1) (West).

²¹³ 20 Vt. Stat. Ann. tit. 20 § 4622 (b) (1) (West).

²¹⁴ 20 Vt. Stat. Ann. tit. 20 § 4622 (b) (2) (West).

²¹⁵ 20 Vt. Stat. Ann. tit. 20 § 4622 (d) (2) (West).

²¹⁶ 20 Vt. Stat. Ann. tit. 20 § 4622 (c) (1) (West).

²¹⁷ 20 Vt. Stat. Ann. tit. 20 § 4622 (e) (West).

²¹⁸ 2013 Va. Acts. Ch. 755 (H.B. 2012).

²¹⁹ Va. Code Ann. § 19.2-60.1 (West).

²²⁰ *Id.*

use a drone to collect information relative to a criminal investigation if they are surveilling a place where a person has a reasonable expectation of privacy.²²¹ Wisconsin law provides specific exceptions to the search warrant requirement for the use of drones to prevent danger to an individual, prevent imminent destruction of evidence, to surveil a location to assist in serving an arrest warrant, to locate an escaped prisoner, or to assist in a search-and-rescue operation.²²²

VIII. Observations on Legislative Actions to Date

In the 4 years since the federal government declared its intent to integrate drones into the national airspace, there has been a flurry of legislative action surrounding the permissible use of drones, primarily at the state level. The federal government, although it has considered some bills, including proposals to regulate police use of drones and ban weaponization of drones, has yet to act on criminal justice–related drone use issues. However, as already detailed in this article, a wide variety of state legislation has been enacted creating drone crimes and regulating police use of drones.

When one surveys the existing state legislative actions to date, the first and most obvious impression is that there is little uniformity from state to state concerning criminal justice drone legislation. Nearly half of the states, 23 to be precise, have not enacted any criminal justice–related drone legislation at all. The states that have enacted such legislation range from West Virginia, which has passed only one law creating hunting and fishing drone-related crimes, to Oregon and Tennessee, which have created a number of drone crimes and also extensively legislated police use of drones, and there is a wide variety of legislative enactment in between. Even when states have enacted drone laws on the same subjects, the specific content of the laws varies widely.

The only universal provision in the legislation examined in this article is found within statutes dealing with law enforcement use of drones; all use some mechanism to require generally that police drone use must be pursuant to a warrant, and all regulating states provide some mechanism for exceptions to the warrant requirement. Some specifically delineate exceptions to the warrant requirement, some list lawful uses and require a warrant for remaining uses, and some tie the warrant requirement to the existing search warrant jurisprudence. However, other provisions surrounding the regulation of police use of drones vary among the 18 states that have passed such legislation.

IX. Anticipated Future Legal Developments

Because federal deregulation of the national airspace for drone use is relatively new and the legislative provisions on drone use are even newer, virtually no case law discussing police use of drones exists, and there is currently no case law at all interpreting recently legislated drone crimes. It will likely take many years for the first drone cases to make their way through the trial and appellate court systems at the state and federal level, and not until then will we have any real guidance as to how such jurisprudence will develop.

One obvious question regarding future legal development in criminal justice–related drone law is whether or not the federal government will eventually pass some legislation. Potential federal legislation could come in two related areas, acting either to preempt some state authority

²²¹ Wis. Stat. Ann. § 175.55 (2) (West).

²²² *Id.*

to regulate criminal justice–related drone issues or to create criminal justice–related drone laws that relate only to the federal government — for example, federal drone crimes and regulation of the federal law enforcement use of drones for investigative purposes.

The notion that the federal government will act to preempt state authority to create state drone crimes or to regulate the state law enforcement use of drones seems unlikely. If such preemption were to occur, it makes sense that it would have been done soon after the 2012 deregulation process had begun instead of 4 years later, when 27 states had already enacted a large number of laws only to be subsequently preempted. Also, the fact that Congress has not even been able to move such laws out of committee in previous attempts makes it doubtful that such laws will be forthcoming.

It is, however, not unlikely that the federal government will eventually create federal drone crimes or regulate drone use by federal law enforcement because such legislation is exclusively within its jurisdiction and would not affect the state drone legislation that has accumulated during 4 years. Although the federal law enforcement use of drones could be regulated via existing Fourth Amendment search and seizure jurisprudence, any federal drone crimes would of course have to come from legislative enactment.

The future course of state legislative actions seems impossible to predict. It is probably safe to say that there will be additional criminal justice–related drone legislation in the years to come, but exactly what kind and how much is uncertain. Much will likely depend upon whether the prophesied flood of privacy-invading drone use feared by some legislators actually comes to pass, or perhaps on whether one high-profile drone case motivates additional state legislation. In the absence of a visible, intrusive surge in drone use by police or private citizens, it seems likely that interest in drone legislation will dwindle as time passes.

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