

SUBJECT: Regulating the capture of images by unmanned vehicles and aircraft

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Herrero, Carter, Burnam, Canales, Hughes, Toth
1 nay — Schaefer
2 absent — Leach, Moody

WITNESSES: For — Chris Howe; Clint Stutts; (*Registered, but did not testify:* Mary Anderson, Sam Brannon, and Heather Fazio, Texans for Accountable Government; Kristin Etter, Texas Criminal Defense Lawyers Association; Marida Favia del Core Borromeo, Exotic Wildlife Association; Maria Flint, Southwestern Jones County Taxpayers; and 14 individuals)

Against — Brent Byler and Buddy Garcia, DJI Innovations; Alicia Calzada and Mark Estabrook, National Press Photographers Association; John Downer, John Downer Productions; Preston Gregg; Mike Hull, Texans for Lawsuit Reform; Guy Reynolds, Dallas Morning News, National Press Photographers Association, Texas Press Association; Nicolia Wiles; Curtis Wilson; (*Registered, but did not testify:* Donnis Bagget, Texas Press Association; Amy Beard, The Boeing Company; Hugo Berlanga, Texans for Lawsuit Reform; Lon Craft, Texas Municipal Police Association; Parke Gregg; James Jones, San Antonio Police Department; Randy Kildow, Texas Association of Licensed Investigators; William Luther, National Press Photographers Association, Texas Press Association; Donald McKinney, Houston Police Department; Michael Schneider, Texas Association of Broadcasters; Frank Sturzi, City of Arlington; Gary Tittle, Dallas Police Department; Jon Weist, Arlington Chamber of Commerce)

On — James Arnott; Jeremy Blosser; Tim Tagliabue, City of Corpus Christi; (*Registered, but did not testify:* Luis Cifuentes and Flavius Killebrew, Texas A&M University Corpus-Christi; Shannon Edmonds, Texas District and County Attorneys Association; Steven C. McCraw, Department of Public Safety; J D Robertson, Texas Rangers Department of Public Safety)

DIGEST: CSHB 912 would create the Texas Privacy Act. It would define terms, specify exceptions to applicability, and provide for criminal penalties and civil action.

Definition. Under the bill, “image” would mean any capturing of sound waves, thermal, infrared, ultraviolet, visible light, or other electromagnetic waves, odor, or other conditions existing on or about real property or an individual located on that property.

Nonapplicability. The bill would not apply to images of real property or an individual on real property captured by an unmanned vehicle or unmanned aircraft for purposes of professional or scholarly research and development on behalf of an institution of higher education. This would include images taken by professors, employees, or students of the institution or people who were under contract with or otherwise acting under the direction or on behalf of the institution.

The bill would not apply to airspace designated as a test site or range authorized by the Federal Aviation Administration for the purpose of integrating unmanned aircraft systems into the national airspace, or to an operation, exercise, or mission of any branch of the U.S. Military.

Offense for use of unmanned vehicle to capture image. Under the bill, it would be a class C misdemeanor (maximum fine of \$500) to use or authorize the use of an unmanned vehicle or unmanned aircraft to capture an image of an individual or real property with the intent to monitor or conduct surveillance on the individual or real property captured in the image.

The offense would not apply if the image was captured:

- pursuant to a valid search or arrest warrant;
- by a law enforcement authority in immediate pursuit of a person law enforcement officers had probable cause to suspect had committed a felony;
- by law enforcement for the purpose of documenting a crime scene where a felony had been committed;
- by law enforcement for the purpose of investigating the scene of a human fatality or suspected human fatality;
- by law enforcement in connection with the search for a missing person;

- by law enforcement for the purpose of resolving a hostage situation;
- by state authorities for the purpose of surveying the scene of a catastrophe to determine whether a state of emergency should be declared;
- by state authorities for the purpose of preserving public safety, protecting property, or surveying damage or contamination during a lawfully declared state of emergency;
- at the scene of a spill or a suspected spill of hazardous materials;
- for the purpose of fire suppression;
- for the purpose of rescuing a person whose life or well-being was in imminent danger;
- by a Texas licensed real estate broker in connection with the marketing, sale, or financing of real property, provided that no individual was identifiable in the image;
- of real property or a person on real property within 25 miles of the United States border;
- from a height no more than eight feet above ground level in a public place, as long as the image was captured without using any means to amplify the image beyond normal human perception;
- of public real property or a person on that property; or
- with an optical resolution no greater than 40 inches per pixel.

It would be a defense to prosecution against this offense that the person destroyed the image as soon as he or she had knowledge that it was captured in violation of the bill, and without disclosing, displaying, or distributing it to a third party.

Offense for actions related to images captured. It would be an offense to possess, display, disclose, distribute, or otherwise use an image captured in violation of this section. Each image in violation of this offense would be a separate offense.

An offense for possession would be a class C misdemeanor (maximum fine of \$500). It would be a defense to prosecution for possession if the person destroyed the image as soon as he or she had knowledge that it was captured in violation of the bill.

An offense for disclosure, display, distribution, or other use would be a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000). It would be a defense to disclosure, display, distribution, or other

use if the person stopped disclosing, displaying, distributing, or otherwise using the image as soon as they had knowledge that it was captured in violation of the bill.

Disclosure. Images captured in violation of the bill, or an image captured by an unmanned vehicle or unmanned aircraft that was incidental to the lawful capturing of an image:

- could not be used as evidence in any criminal or juvenile proceeding, civil action, or administrative proceeding;
- would not be subject to disclosure, inspection, or copying under the Public Information Act; and
- would not be subject to discovery, subpoena, or other legal compulsion for its release.

These images could be disclosed and used as evidence to prove a violation of the bill and would be subject to discovery, subpoena, or other legal compulsion for that purpose.

Civil action. An individual who was the subject of an image — or who owned or legally occupied real property that was the subject of an image — captured, possessed, disclosed, displayed, distributed, or otherwise used in violation of the bill could bring a civil action to:

- enjoin a violation or imminent violation of the bill; and
- recover a civil penalty.

A person who violated the bill would be liable for a civil penalty totaling not more than \$3,000 for each still image or \$300 for each second of a moving image.

A single plaintiff would not be able to recover more than \$1,000 for each still image or more than \$100 for each second of a moving image of the plaintiff or real property owned or legally occupied by the plaintiff, and could not recover more than a total of \$50,000 for all still images and moving images captured in a single occurrence.

Courts would be required to award court costs and reasonable attorney's fees to the prevailing party. Venue would be governed by the Civil Practice and Remedies Code. The statute of limitations would be two years from the date the image was captured or two years from the date the

image was first possessed, displayed, distributed, or otherwise used in violation of the bill.

Effective date. The bill would take effect September 1, 2013, and would apply only to the capture, possession, disclosure, display, distribution, or other use of an image that occurred on or after that date.

**SUPPORTERS
SAY:**

CSHB 912 would update the law to ensure the protection of privacy as technology improves and the cost of surveillance goes down. The use of unmanned aerial vehicles, or “drones,” is on the rise in the United States. According to the Federal Aviation Administration (FAA), there will be more than 30,000 drones in U.S. airspace by 2020. These vehicles are designed to be small, quiet, and clandestine and are able to take high-resolution photographs and video, as well as record sound or detect infrared or ultraviolet light. The bill would ensure that rules were established for the use of these vehicles now before they became more prevalent and privacy violations became commonplace.

The bill is intended to address only photography by drones. The difference between helicopters and drones is significant. Drones can fly low, are quiet, and can be nearly impossible to see unless a person was looking for them. Helicopters and airplanes are noisy and difficult to miss, so a person over whom a helicopter flies would hear it and would be on notice that there could be someone surveilling or photographing them.

Speech, press, and legitimate business use. This bill would uphold the Bill of Rights. It would ensure the protection of the innocent civilian populations against illegal surveillance and would protect 4th Amendment rights against illegal searches and the amendment’s implied right to privacy. The bill would allow for a defense if a person who realized that the photographs taken were illegal immediately destroyed them or stopped illegally using them. By establishing prohibitions against the use of these vehicles for surveillance and monitoring, the bill would strike a balance between the right to privacy and the rights to free speech and a free press.

Journalists, filmmakers, photographers, those who use satellites, and others would be criminally or civilly liable under this law only if they were taking photographs for the purpose of surveillance and monitoring. Any other use would continue to be legal and their businesses would be unaffected.

FAA regulations. The FAA's regulations will be intended to regulate airspace and the type of activity that can occur within that airspace. The FAA is not a privacy protection agency and has no experience drafting laws that protect personal privacy rights. The Texas Legislature is a more appropriate body to draft laws and regulations that would protect the rights of Texans.

Prosecution and law enforcement. The bill would not unduly prevent law enforcement from carrying out its duties. The law enforcement exceptions are narrowly carved out in order to allow for legitimate law enforcement purposes while protecting the civil rights of the general public.

OPPONENTS
SAY:

CSHB 912 could violate the Bill of Rights and impact free speech, free press, law enforcement, prosecutors, and many legitimate businesses.

The bill would criminalize only a method of photography. The kinds of photographs outlawed by this bill still could be taken, more expensively, in a helicopter or aircraft or from the top of a building. There is no way to tell the difference between a photograph taken by an unmanned aircraft and one taken from a manned aircraft, so the bill needlessly would outlaw a cost-effective tool for taking aerial photographs.

Speech and press. The bill would hinder free speech and a free press. Drones are becoming an increasingly practical and inexpensive way to take aerial photographs for news gathering purposes. CSHB 912 would make it illegal for newspapers and media websites to collect these photos and to post or disseminate them. When taking aerial photographs from a helicopter currently, press photographers take hundreds of photos on each helicopter pass. The bill would make each of those images if captured by an unmanned vehicle an individual offense, creating enormous criminal penalties for protected press activities.

Additionally, public photography is a protected speech exercise. Not only would this bill restrict photography, it could effectively criminalize certain photographs based on their content, depending on whether they contained images of certain property or people. Content-based restrictions are constitutional only under the highest level of scrutiny, and this bill would not meet that standard. The bill would infringe on an important First Amendment right.

Legitimate business uses. CSHB 72 would hurt businesses. Several industries use unmanned vehicles for legitimate photography purposes that would be outlawed by this bill. Filmmakers, documentarians, and others use unmanned vehicles to take aerial video of a city's skyline or of the crowds at a festival such as South By Southwest. Manufacturers of unmanned vehicles need to be able to research new developments in technology and test their vehicles.

At the least, CSHB 912 would have a chilling effect on these activities and discourage businesses, such as the film industry, from operating in Texas. At worst, the bill could criminalize innocent businesspeople using the most efficient means to conduct their business.

Technology and satellites. The bill would not define the term unmanned vehicle, which could be used to apply to satellite images. This would mean that companies taking satellite images for the purpose of reporting weather, mapping streets, or other legitimate reasons could be criminally or civilly liable under the bill. Many Texans access and benefit from satellite images, and these kinds of images and photography should not be penalized.

FAA regulations. The bill could conflict with regulations the FAA currently is drafting for the use of unmanned vehicles. If each state passed its own drone laws, the law would become messy and confusing. Texas should not enact any law at least until it is possible to determine how it would interact or conflict with federal regulations.

Prosecution and law enforcement. The bill would be difficult to enforce the way it is drafted. It provides for 17 exceptions to the application of the offense of capturing images. Prosecutors attempting to enforce this law would be forced to file a charging instrument that proved every one of these exceptions did not apply in order for the case to go forward. This would discourage prosecutors from filing charges and make the bill less likely to be efficiently enforced.

The bill would force law enforcement to unnecessarily endanger themselves and spend more taxpayer money. In certain circumstances law enforcement would have to send up manned aircraft in order to take the same pictures they now may take using an unmanned vehicle. This would be more costly and could place peace officers in harm's way when an unmanned vehicle could perform the same job and capture the same

images more efficiently and cost-effectively.

OTHER
OPPONENTS
SAY:

The bill's law enforcement exceptions are not broad enough and could result in prosecutors having to prosecute themselves or peace officers for violations of the bill. The law enforcement exception should be broadened to prevent this.

CSHB 912 should provide for only civil liability for improper use of unmanned vehicles. Criminal penalties are too extreme and civil liability would provide sufficient relief to those who had been wronged.

NOTES:

The author intends to offer a floor amendment under which an owner or tenant of privately owned real property could bring an action to enjoin a violation or imminent violation of the bill or recover a civil penalty of:

- \$5,000 for all images captured in a single episode; or
- \$10,000 for disclosure, display, distribution, or other use of any images captured in a single episode; or
- recover actual damages if the disclosure, display, or distribution of the image was done with malice.

For the purposes of bringing an action under the floor amendment, all owners of a parcel of real property would be considered to be a single owner and all tenants of a parcel of real property would be considered to be a single tenant.