
**BEFORE THE
WYOMING HOUSE & SENATE JUDICIARY COMMITTEES**

CASPER, WY

**DRAFT BILLS TO THE WYOMING STATUTES
23LSO-0110 v0.4 “PROHIBITING DRONES OVER PENAL INSTITUTIONS”
23LSO-23LSO-0112 v0.4 “TRESPASS BY SMALL UNMANNED AIRCRAFT”**

**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)
JOINED BY
WYOMING PRESS ASSOCIATION
and
WYOFILE**

**MICKY H. OSTERREICHER, GENERAL COUNSEL
ALICIA CALZADA, DEPUTY GENERAL COUNSEL
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**



**120 HOOPER STREET
ATHENS, GA 30602
716.983.7800
LAWYER@NPPA.ORG**

September 9, 2022

**Before the
Wyoming House & Senate Judiciary Committees**

Draft Bills to the Wyoming Statutes
23ISO-0110 v0.4 “Prohibiting Drones Over Penal Institutions”
23ISO-23ISO-0112 v0.4 “Trespass by Small Unmanned Aircraft”

**Comments of the
National Press Photographers Association (NPPA)
Joined by
Wyoming Press Association
and
WyoFile**

September 9, 2022

On behalf of the National Press Photographers Association (NPPA) and joined by the Wyoming Press Association and WyoFile, we thank the Senate and House Judiciary Committees and their respective Chairs, Sen. Tara Nethercott and Rep. Jared Olsen, for the opportunity to submit our comments on draft bills pertaining to trespass, scheduled to be considered during a September 13, 2022 meeting. The first is, item number: 13 – 05 related to Trespass and described as 23LSO-0110 v0.4 “Prohibiting drones over penal institutions” (hereafter “23LSO-0110”). The second is item number: 13 – 07 related to Trespass and described as: 23LSO-0112 v0.4 “Trespass by small unmanned aircraft” (hereafter “23LSO-0112”).

While there are other areas of concern to visual journalists, being able to properly cover, report on, broadcast, photograph and record matters of public concern in Wyoming and throughout the country using small uncrewed aircraft (UAS) more commonly referred to as “drones” is of paramount importance to our members and even more importantly to an informed citizenry.

Introduction

Founded in 1946, the National Press Photographers Association (NPPA) is a 501(c)(6) non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. NPPA vigorously promotes and defends freedom of expression and of the press in all forms. Its members include still and television photographers, editors, students and representatives of businesses serving the visual journalism industry. As the *Voice of Visual Journalists*, the NPPA advocates for the First Amendment rights of journalists and an informed public, especially as it relates to visual journalism.

As both staff photographers and independent visual journalists, members of the National Press Photographers Association (NPPA) have also covered, reported on, photographed and recorded, as well as broadcast stories on matters of public interest using drones in Wyoming and throughout the world.

Background

NPPA has been an active advocate for the responsible use of drones for newsgathering for more than a decade. We have worked with the Federal Aviation Administration (FAA), the Department of Homeland Security (DHS), the National Telecommunications and Information Agency (NTIA) and various other law enforcement associations such as the International Association of Chiefs of Police and agencies such as the New York City Fire Department (FDNY) and Los Angeles Fire Department (LAFD), and the Association for Uncrewed Vehicle Systems International (AUVSI) to help provide better working relationships between law enforcement, first-responders and journalists regarding the safe integration of drones into the national airspace, especially as that use relates to newsgathering. We have also trained hundreds of journalists on drone journalism, including on the importance of safety, ethics and legal issues.

NPPA also serves on the advisory board of DroneResponders,¹ is part of the News Media Coalition² which has participated in FAA rulemaking, was a stakeholder in the NTIA presidential mandate to establish “Voluntary Best Practices for UAS Privacy, Transparency, and Accountability,”³ and was an official observer participating in the Uniform Law Commission’s effort to draft a “Tort Law Relating to Drones Act.”⁴ For the past several years NPPA has held a day-long “Drone Journalism Leadership Summit”⁵ with participation by the FAA, DHS, police, fire, first-responders, media lawyers and journalists in order to discuss ways to safely, legally, and ethically improve the ability to use drones for newsgathering.

Additionally, NPPA was one of the plaintiffs in *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017), successfully striking down as unconstitutional a Wyoming Data Trespass law. NPPA also was a plaintiff in *Nat’l Press Photographers Ass’n v. McCraw*, No. 1:19-CV-946-RP, 2022 U.S. Dist. LEXIS 56475, (W.D. Tex. 2022), in which certain provisions of the Texas drone law were found to be unconstitutional. That ruling is now being appealed to the U.S. Court of Appeals for the Fifth Circuit.

¹ See: Board of Advisors | DRONERESPONDERS <https://www.droneresponders.org/board-of-advisors>

² News Media Coalition consisting of the following news media organizations with significant interest in the development of drone law and policy in the United States: Advance Publications, Inc., American Broadcasting Companies, Inc., American Society of Media Photographers, The Associated Press, Capitol Broadcasting Co., Fusion Media Network, LLC, Gannett Co., Inc., Getty Images (US), Inc., Gray Television, Inc., Media Law Resource Center, National Press Photographers Association, NBCUniversal Media, LLC, News Media Alliance, Nexstar Media Group, Inc., The New York Times Company, Radio Television Digital News Association, Reporters Committee for Freedom of the Press, The E.W. Scripps Company, Sinclair Broadcast Group, Inc., Society of Professional Journalists, TEGNA, Inc., WP Company LLC

³ NTIA Best Practices Release 05-19-16 https://www.ntia.doc.gov/files/ntia/publications/nppa_best_practices_release_05-19-16.pdf

⁴ ULC Drone Tort Letter 02-27-19

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5d042806-16ce-81eb-9d7b-c73e7dc56b45>

⁵ See: NPPA (Virtual) Drone Journalism Leadership Summit <https://www.droneresponders.org/post/today-nppa-virtual-drone-journalism-leadership-summit>

Draft Bill 23LSO-0110

Draft bill 23LSO-0110 in pertinent part would create W.S. 6-5-214(b)(i) under which, “[e]xcept as authorized by a person in charge of the penal institution or correctional facility, no person shall intentionally: Photograph, surveil, broadcast or otherwise record a penal institution or correctional facility through the use of an unmanned aircraft system.” A person in violation of this section of the law “is guilty of misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than two thousand dollars (\$2,000.00), or both.”

Draft Bill 23LSO-0112

Draft bill 23LSO-0112 in pertinent part would create W.S. 6-3-308, under which “[a] person is guilty of trespass by small unmanned aircraft if the person causes a small unmanned aircraft to enter into the immediate reaches of the airspace over the private property of a landowner and the entry substantially interferes with the landowner’s or his authorized occupant’s use and enjoyment of the land.” Additionally, “[a]ny person convicted of violating subsection (a) of this section shall be punished by a fine not to exceed seven hundred fifty dollars (\$750.00), by imprisonment not to exceed six (6) months, or both.”

Analysis

Both of these draft bills violate the First Amendment. As the Tenth Circuit explained in the recent case of *Irizarry v. Yehia*, affirming its holding five years ago in *Western Watersheds Project v. Michael*, “If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by “simply proceed[ing] upstream and dam[ming] the source” of speech.” *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017). As a result, the Supreme Court has repeatedly applied the First Amendment

to the creation of speech, and as is demonstrated by the aforementioned cases, those rights extend to photography and videography—including using a drone.

As the U.S. Supreme Court noted when regarding First Amendment protection for newsgathering, “without some protection for seeking out the news, freedom of the press could be eviscerated.”⁶

The Correctional Facility Provision

Because the crime that would be created under W.S. 6-5-214(b)(i) is expressly based on what is in the image, it is a content-based restriction, on First Amendment protected activity, and such restrictions are presumptively invalid. *United States v. Alvarez*, 567 U.S. 709, 717(2012); *W. Watersheds Project v. Michael*, at 1186.

A federal court recently found that the “use of drones to document the news by journalists is protected expression” and that a statute that restricts that use implicates the First Amendment.” *Nat’l Press Photographers Ass’n v. McCraw*.⁷ The word “surveillance” was not defined in the statute at issue in *McCraw*, just like the word “surveil” in the draft bill is not defined. This leaves the draft bill open to “multiple possible broad dictionary definitions one of which could be newsgathering and therefore is unconstitutionally vague.”⁸ As the *McCraw* court noted, “without knowing what constitutes surveillance it is impossible to know whether one’s intention constitutes that prohibited activity”⁹ such “that the uncertainty surrounding the term ‘surveillance’ dissuades journalists from engaging in UAV photography, chilling their speech.”¹⁰

⁶ *Branzburg v. Hayes*, 408 U.S. 665, 681(1972)

⁷ *Id.* at *27

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The *McCraw* court also found that a more stringent vagueness test applies where a law “interferes with the right of free speech.”¹¹ Additionally, the court found that “[s]uch laws may be constitutionally infirm where they ‘encourage arbitrary and discriminatory enforcement,’¹² or have the capacity ‘to chill constitutionally protected conduct, especially conduct protected by the First Amendment.’”¹³ “A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement.”¹⁴

Additionally, as it relates to draft bill 23LSO-0110, the FAA has promulgated rules related to “Critical Infrastructure and Public Venues,” prohibiting drones “from flying over designated national security sensitive facilities.”¹⁵ As the FAA notes, they are “continuing to consider additional requests by eligible federal security agencies for UAS specific flight restrictions as they are received;”¹⁶ but Wyoming penal institutions and correctional facilities are not *eligible federal security agencies* and while restricting flights over *designated national security sensitive facilities* may be a reasonable time, place and manner restriction under the First Amendment, restricting activities such as photography, broadcasting and recording may not survive the required strict scrutiny review if challenged.

A similar Texas drone provisions imposed criminal penalties by making it unlawful to fly drones over a “Correctional Facility, Detention Facility, or Critical Infrastructure Facility . . . at less than 400 feet.”¹⁷ The draft bill 23LSO-0110, makes it illegal for a person to “[p]hotograph, surveil, broadcast or

¹¹ *McCraw*, citing *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982).

¹² *Id.*, citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)

¹³ *Id.*, citing *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (quoting *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir.1988)).

¹⁴ *Id.*, citing *Women’s Med. Ctr. of Nw. Haus. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001).

¹⁵ See: https://www.faa.gov/uas/critical_infrastructure

¹⁶ *Id.*

¹⁷ See: Tex. Gov’t Code § 423.0045, § 423.0046

otherwise record a penal institution or correctional facility through the use of an unmanned aircraft system.” While those Texas provision prohibiting drone flight were struck down as unconstitutional, draft bill 23LSO-0110 prohibiting certain First Amendment protected rights—namely, the act of taking pictures itself—is even more chilling.

The “Immediate Reaches” Trespass Draft

Turning to the language in draft bill 23LSO-0112, we are once again extremely concerned about the vagueness of the terms included to provide criminal and civil penalties for the use of a drone, particularly as it pertains to newsgathering. With reference to a person causing “a small unmanned aircraft to enter into the *immediate reaches* of the airspace over the private property of a landowner and the entry *substantially interferes* with the landowner’s or his authorized occupant’s use and enjoyment of the land” (W.S. 6-3-308 (emphasis added) those “immediate reaches” have yet to be clearly established. In the landmark case of *United States v. Causby*, 328 U.S. 256 (1946), regarding ownership of airspace above private property, the U.S. Supreme Court held that local regulation of flight was not consistent with either federal law or common sense by noting,

[t]he air is a public highway, as Congress has declared. Were that not true, transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.¹⁸

Seventy-six years later there has been little caselaw to clarify at what height/altitude the “immediate reaches” of someone’s property begins and ends.¹⁹ What has changed is that the national airspace is no longer just occupied by large, crewed aircraft but also by drones, the operation of which

¹⁸ *United States v. Causby*, 328 U.S. 256, 261(1946)

¹⁹ See: “Causby and effect: How the Uniform Law Commission’s misplaced reliance on a 1946 Supreme Court case threatens the drone industry” available at https://www.wiley.law/assets/htmldocuments/Causby_And_Effect.pdf

are regulated by the FAA and restricted to flight no higher than 400' above ground level (AGL)²⁰ or 400' feet above a structure if the UAS is within a 400' radius of that structure.²¹ Whether and how that airspace restriction will come into play in determining the immediate reaches of private property has caused much consternation between the UAS industry and real property advocates, so much so that a proposed draft by the Uniform Law Commission to set a bright-line altitude of "200 feet above any structure or the ground" as being the immediate reaches of that property,²² could not be agreed upon by the Commission and after more than two years of work, the ULC withdrew the proposal before it was called for a vote at the Commission's 2019 annual meeting.²³

The prohibitions in draft bill 23LSO-0112 contain a two-part requirement that a person cause a drone to enter into the "immediate reaches" of the airspace over the private property of a landowner and have that entry "substantially interfere" with the landowner's or his authorized occupant's use and enjoyment of the land before criminal liability and civil penalties attach. Neither of these elements of the crime are defined. As such, we express the same concerns that we did before the ULC that those vague, undefined, and subjective considerations will lead to arbitrary enforcement and protracted criminal proceedings, causing a further chilling effect on the use of drones for newsgathering and other First Amendment protected purposes. In an era of drones, as in other proposed legislation that has been rejected, courts attempting to apply the proposed statute would not be able to focus on "whether the

²⁰ 14 CFR § 107.51(b) "Operating limitations for small unmanned aircraft."

²¹ 14 CFR § 107.51(b)(1) and 14 CFR § 107.51(b)(2)

²² See: National Conference Of Commissioners On Uniform State Laws, "Tort Law Relating To Drones Act," Draft available at:

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=acc3dee9-7ab6-24e3-ee55-ad3e09a82c6a&forceDialog=0>

²³ See: The Air & Space Lawyer, "Clearing the Air: ULC Rightfully Rejects Property Rights Advocates' Line in the Sky," available at:

https://www.memphis.edu/law/documents/airandspacelawyer_gipson.pdf?_ga=2.16744950.130025342.1610400584-2066006062.1546615869

defendant truly and intentionally flew an aircraft within some well-defined column of airspace. Instead, they [would have to] engage in costly, ad hoc, fact-specific inquiries into what constitutes the ‘immediate reaches’ of the airspace above the [victim’s] parcel and whether the defendant’s flight ‘interfere[d]’substantially with the [victim’s] ‘use and enjoyment’ of its land.”²⁴ As was the case with the data trespass law that was voided, there is no indication that existing general privacy and trespass laws “would not accomplish the same goals without infringing on protected speech.” *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1191.

Conclusion

While we respect the concerns that Wyoming has related to the use of drones around its penal institutions and correctional facilities – namely the threat of dropping contraband into the facilities – we believe those concerns are adequately addressed by the other provisions of the draft correctional facility bill. Therefore, we urge you to delete W.S. 6-5-214(b)(i) while maintaining the portions of the bill that address the genuine security concerns.

We further respectfully request that draft bill 23LSO-0112, be removed from consideration for the above stated reasons.

Not all technological developments require the development of technology-specific legislative or even significant changes to common law doctrines. Because there are sufficient, already existing Wyoming laws that address the issues of trespass, privacy, public safety and security, we ask that any proposed legislation provide a clearly defined, uniform, commonsense and least burdensome response to the development and utilization of drones rather than knee-jerk legal impediments so as to avoid

²⁴ Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 184 (2015).

inhibiting the appropriate and beneficial development of unmanned aircraft systems for newsgathering and the variety of other uses to which such technologies are suited.

Finally, we offer the service and vast expertise of our members should the legislature wish any additional input and advice regarding the use of drones for newsgathering in Wyoming.

Respectfully submitted,

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

By

Mickey H. Osterreicher

Mickey H. Osterreicher, General Counsel

Alicia Calzada,

Alicia Calzada, Deputy General Counsel

National Press Photographers Association

129 Hooper Street

Athens, GA 30602

(716) 983-7800

lawyer@nppa.org

Joined by

Jen Sieve-Hicks

Jen Sieve-Hicks, President

Wyoming Press Association

Owner/Editor, Buffalo Bulletin

Angus Thuermer

Angus Thuermer

WyoFile

Jackson, Wyoming