

Narrowing the Drone Zone: The Constitutionality of Idaho Code § 21-213

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Drones are beginning to occupy the skies across the United States by both citizens and federal, state, and local governments. The concept of drone law is even more novel than the technology itself.

While we have all heard about the United States using drones as part of its foreign policy, attention over the past few years has started to focus on the use of drones by citizens and governmental entities alike. Drones are not only becoming increasingly affordable, but are becoming highly popularized both domestically and abroad. While the potential beneficial uses of drones are numerous, their technological capabilities — including the ease and clarity by which they can produce audio and visual recordings — have increasingly given rise to public concern regarding their unfettered use by both governments and private citizens.

State legislatures are now being confronted with how to adequately protect the privacy rights of citizens in an age where virtually anyone with little more than \$300 and a smart phone can purchase a drone that can, with stealth-like ability, observe and record unsuspecting people as they go about their daily routine. Additionally, there is growing concern over the interplay between the Fourth Amendment's prohibition against unlawful searches by the government and its ability to use drones to get up close and personal when it comes to observing and recording people and their property. This concern is amplified by a lack of interpretive case law regarding small-flying objects that can

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go places and record things in ways unimaginable to the Founding Fathers when they drafted the Fourth Amendment,¹ and only minimally analyzed by the U.S. Supreme Court when considering issues involving the government's use of helicopters and vision-amplifying equipment to search for contraband.

While much of the public debate involves the *government* using drones to invade the privacy of citizens, the Idaho Legislature recently addressed the ability of *citizens* to invade the privacy of others. This brings up tough questions about what role government should play in controlling the actions of its drone-owning citizens, and how much protection citizens (non-drone-owning or otherwise) and certain industries should be afforded from this evolving technology.

This article discusses some of the constitutional principles and potential pitfalls implicated by Idaho's new drone law, while analyzing the basis for potential constitutional challenges under First Amendment jurisprudence.

Idaho's new drone law

The Idaho state Legislature addressed privacy issues related to drones during the last legislative session when it approved passage of

SB 1134 which, after being signed by Governor Otter, amended Chapter 2, Title 21 of the Idaho Code, to include section 21-213, imposing restrictions on the use of drones. A review of the legislative history reveals that the law's stated purpose is to ensure the safety and privacy of Idaho citizens. However, a closer examination of the language and prohibitions contained therein reveals that its listed prohibitions are overbroad relative to its intended purpose.

Idaho Code § 21-213 states, in relevant part:

(2)(a) Absent a warrant . . . no person, entity or state agency shall use an unmanned aircraft system to intentionally conduct surveillance of, gather evidence or collect information about, or photographically or electronically record specifically targeted persons or specifically targeted private property including, but not limited to:

(i) An individual or a dwelling owned by an individual and such dwelling's curtilage, without such individual's written consent;

(ii) A farm, dairy, ranch or other agricultural industry without the written consent of the owner of such farm, dairy, ranch or other agricultural industry.

(b) No person, entity or state agency shall use an unmanned aircraft system to photograph or otherwise record an individual, without such individual's written consent, for the purpose of publishing or otherwise publicly disseminating such photograph or recording.

Further, Idaho Code § 21-213 imposes a civil penalty for using a drone to photograph, record, gather evidence or gather information about any person, private property, farm, dairy, ranch or other agricultural facility even when the individual controlling the drone is in a place where they are unquestionably permitted to be.

The imposition of civil penalties for using drones to record constitutionally-protected speech activities implicates First Amendment concerns, as much as a law imposing a civil penalty for engaging in the protected speech itself. Moreover, Idaho Code § 21-213 may be subject to constitutional challenge for being content-discriminatory, based on the specific prohibition it contains against using drones to record the "agricultural industry." Even if the law is found to be content-neutral, the scope of its prohibition is so broad that it is susceptible to a First Amendment challenge on that basis alone. Simply put, Idaho Code § 21-213 is poorly designed to achieve its stated purpose and implicates numerous core constitutional concerns that should render it invalid.

The First Amendment and drones

The First Amendment of the United States Constitution, being incorporated to the states by the Due Process clause of the Fourteenth Amendment, provides that neither Congress nor the states shall make any law "... abridging the freedom

of speech, or of the press" The First Amendment has never been interpreted as an absolute prohibition. The U.S. Supreme Court has permitted different types of speech regulations (including content-based regulations and content-neutral regulations affecting the time, place, and manner of protected speech), setting forth different standards depending on the type of speech being regulated.²

The U.S. Supreme Court has held that the First Amendment extends to conduct that is necessary for developing and communicating protected speech.³ This protection prohibits the passage of laws suppressing otherwise protected speech simply by discouraging the activities early in the speech process necessary to achieve the end result of the speech itself. For example, a state could not discourage political speech by passing a law prohibiting the use of cameras, video recorders, or phones to record a political demonstration; nor could a state discourage media coverage of a particular event or issue by passing a law prohibiting the use of printing presses for a period of time. The bottom line is a law prohibiting audiovisual capture of public speech is regulating a predicate of speech that is otherwise afforded constitutional protection. Arguably, this is precisely what Idaho Code § 21-213 does and it is just as problematic as

a law prohibiting protected speech itself — it prohibits the act of using a drone to create an audiovisual recording in a variety of contexts where such a recording might be made preparatory to constitutionally-protected speech.

Content-based vs. content-neutral regulation?

When the government overtly attempts to restrict speech based upon the content of the speech, the statute or regulation "must ... be subjected to 'the most exacting scrutiny'" ("strict scrutiny").⁴ Strict scrutiny also applies when a statute burdens speech because of its content, *even if* the statute appears to be content-neutral on its face.⁵ Consistent with the application of the strict scrutiny standard, a statute regulating speech based on content "must be narrowly tailored to promote a compelling Government interest."⁶ If there is a less restrictive alternative measure, the legislature must use it.⁷

However, where a statute does not attempt to restrict the content of speech, but rather restricts speech based upon the reasonable, time, place, or manner of the speech, the statute is subjected to a lower standard. In such cases, the statute must be "justified without reference to the content of the regulated speech, ... narrowly tailored

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to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information.”⁸ The Supreme Court focuses on the government’s justification for the statute to determine whether a statute is content-neutral.⁹

While, on its face, Idaho Code § 21-213 appears to regulate the manner and place of the speech, thus appearing to be content-neutral, one does not need to dig too deeply to determine that the Idaho Legislature afforded questionable,¹⁰ yet very similar protections for the agricultural industry via the enactment of Idaho Code § 18-7042 (“Interference With Agricultural Production,” ubiquitously referred to as the “Ag-Gag Law”) in February of 2014. Among other things, Idaho Code § 18-7042 criminalizes the act of making “audio or video recordings of the conduct of an agricultural production facility’s operations” without the facility owner’s consent.¹¹ As indicated above, Idaho Code § 21-213 imposes a comparable civil penalty for “gather[ing] evidence or collect[ing] information about, or photographically or electronically record[ing] specifically targeted persons or specifically targeted private property including, but not limited to . . . [a] farm, dairy, ranch or other agricultural industry without the written consent of the owner . . .”

The similarity of protections afforded to the agricultural industry in Idaho Code §§ 21-213 and 18-7042 creates a basis for the inference that the rationale for protections in both laws is the same. Both statutes impose a penalty to prevent the recording and/or publishing of activities that occur at agricultural facilities. Therefore, both laws are potentially subject to challenge for being content-discriminatory, to the

extent they treat speech containing agricultural content differently from speech *not* containing agricultural content.

The official legislative Statement of Purpose for the Idaho Code § 18-7042 is “to protect agricultural production facilities from interference by wrongful conduct by providing penalties for such conduct and restitution to an injured agricultural producer.”¹² Although Idaho Code § 21-213 appears to be content-neutral when considered in isolation, given its striking similarities to Idaho Code § 18-7042, it begins to ap-

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pear that its intent, at least in part, is targeted at preventing people or organizations from publishing recordings of animal abuse at Idaho’s agricultural facilities. That same prohibition is currently being challenged on First Amendment grounds in federal District Court for the District of Idaho.

If the Statement of Purpose of the Ag-Gag Law is used to defend special protections afforded the agricultural industry under Idaho Code § 21-213, it seems unlikely that courts would find that the state’s interest in “protecting agricultural production

facilities from wrongful conduct . . .” is compelling enough to restrict the First Amendment rights of people using drones to record animal abuse at agricultural facilities. Further, even if courts found the state’s intent behind Idaho Code § 21-213 compelling enough, it seems unlikely that the broad prohibitions against recording any specifically-targeted person or private property without the required consent is narrowly tailored enough to survive strict scrutiny.

Overbreadth of Idaho code § 21-213

An overbreadth challenge to the constitutionality of a statute “is an exception to the traditional rule that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.”¹³

The scope of the prohibition contained in Idaho Code § 21-213 is vast, to the extent that it is susceptible to challenge for being unconstitutionally overbroad in violation of the First Amendment. Even though Idaho Code § 21-213 may have some constitutional applications, its broad sweep includes protected speech activities and has the effect of chilling speech.¹⁴ The law imposes a civil penalty for using a drone to photograph, record, gather evidence or gather information about any person, any privately-owned property, or any farm, dairy, ranch or other agricultural facility absent consent, even when the drone or the individual controlling the drone is otherwise lawfully permitted to be there. By virtue of its scope, the law prohibits the audiovisual capture of a significant amount of what could be constitutionally-protected speech activity, such as protests, speeches, or rallies, just to name a few.

Idaho Code § 21-213 is broad to the extent that its practical effect could be to burden otherwise protected speech activities in a variety of circumstances. A ban on audiovisual recordings using drones is not substantially different than the use of any other mediums that can be used to create audio or visual recordings such as cameras, microphones, smart phones, or even a pencil and paper for hand-drawn sketches. As stated above, the legislature has articulated some legitimate interests in regulating drone-based speech activity when it comes to protecting the privacy of the citizens of Idaho, and the widespread use of this technology does have significant implications for individual privacy, i.e. preventing people from flying drones outside, say, a tenth floor hotel room window, or preventing potential burglars from using drones to determine the daily routine of a homeowner.

However, Idaho Code § 21-213, as drafted, is inadequately tailored to those legitimate concerns and it unjustifiably engulfs a significant amount of speech-related activity that is otherwise protected by the First Amendment.¹⁵ The current language of Idaho Code § 21-213 chills the ability of people to use drones to record or observe “specifically targeted” persons or property in public spaces by anyone. This includes members of the media who may fly their drones to record the next big groundbreaking story rather than risk running into traffic delays. It also includes anyone else who may use his or her drone to publish videos of various events or activities that they intend to publish via various social media outlets or otherwise.

As stated above, in what appears to be an interesting extension of the legislative protections for the agricultural industry, Idaho Code § 21-213 also prohibits an individual or

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a state entity from using a drone to observe agricultural facilities and/or activities occurring on private property from a public space. This law goes well beyond protecting individual privacy by prohibiting recordings by law enforcement without a warrant. It extends the prohibition to all individual persons (absent express permission of the individual, private property owner, or agricultural facility being recorded) in a manner that needlessly and impermissibly burdens constitutionally-protected speech activities.

Conclusion

The timing of the Idaho Code § 21-213’s passage, combined with the singling out of the agricultural industry for additional protection, suggests that the legislature had a content-based objective when passing this law and contradicts the notion that the primary legislative objective is the protection of individual privacy and safety. As stated above, even assuming this law produces merely incidental, content-neutral burdens on expressive conduct, the government will bear the burden of establishing that the law “furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression, and . . . [imposes a burden] no greater than is essential to the furtherance of that interest.”¹⁶ The stated rationale of

promoting privacy and safety of Idaho’s citizens is simply not consistent with the list of entities afforded protection under this law. It is possible to envision a much narrower, revised version of this law, better designed to achieve the stated legislative purpose and less likely to run afoul of constitutional protections. However, as written, Idaho Code § 21-213 represents a poor attempt at doing so.

Endnotes

1. It should be noted that while the First and Fourth Amendments of the United States Constitution were safeguards for citizens from the federal government, the U.S Supreme Court has concluded that “...certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment...” Grosjean v. Am. Press Co., 297 U.S. 233, 243-44, 56 S. Ct. 444, 446, 80 L. Ed. 660 (1936)
2. See Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm’n of New York, 447 U.S. 530, 535, 100 S. Ct. 2326, 2332, 65 L. Ed. 2d 319 (1980); See also Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 50 L.Ed.2d 155 (1977); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976).
3. See, United States v. Eichman, 496 U.S. 310 (1990).
4. United States v. Eichman, 496 U.S. 310, 311, 110 S. Ct. 2404, 2406, 110 L. Ed. 2d 287 (1990); See also Boos v. Barry, 485

U.S. 321, 108 S.Ct. 1157, 1164 (1988).

5. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011)

6. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000)

7. Id.

8. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221 (1984); *See also* Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 535, 100 S. Ct. 2326, 2332, 65 L. Ed. 2d 319 (1980).

9. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 814, 120 S. Ct. 1878, 1886-87, 146 L. Ed. 2d 865 (2000). "So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral." Boos v. Barry, 485 U.S. 312, 320, 108 S. Ct. 1157, 1163, 99 L. Ed. 2d 333 (1988)

10. See http://www.huffingtonpost.com/2014/02/28/idaho-ag-gag-law_n_4877042.html

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11. This industry has been a hot political topic in light of the disturbing animal abuse videos recorded at Idaho agricultural facilities that have been circulating throughout the national media and the subsequent "Ag-Gag" legislation criminalizing such video recordings.

12. <http://www.legislature.idaho.gov/legislation/2014/S1337SOP.pdf>

13. Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 485, 145 L. Ed. 2d 451 (1999)(internal quotations omitted)

14. Id.

15. Virginia v. Hicks, 539 U.S. 113, 124 (2003).

16. United States v. O'Brien, 391 U.S. 267, 377 (1968).

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