Written by **Joe Wolverton, II, J.D.** on October 25, 2013

What States Are the Drones Watching?

State legislatures are beginning to understand their critical role in protecting citizens from exposure to the never-blinking eye of government.

From coast to coast, lawmakers are proposing bills and resolutions restricting the use of drones over states' sovereign airspace.

In a report published this week, the National Conference of State Legislatures (NCSL) tallied the number of states where drone-regulating bills are pending or passed.

In 2013, 43 states introduced 118 bills and resolutions concerning UAS (unmanned aircraft system) issues. So far, 16 bills have been enacted in 13 states and 14 resolutions have been adopted in 10 states. Common issues addressed in the legislation include defining what a UAS or drone is, their use by law enforcement or other state agencies, their use by the general public, the formation of study committees and Federal Aviation Administration (FAA) test site application process.

The list of states whose legislatures have enacted some form of drone restricting law begins with Virginia. The NCSL reports that

> On April 3, 2013, Virginia enacted the first state drone laws in the country with the passage of HB 2012 and SB 1331. The new laws prohibit drone use by any state agencies "having jurisdiction over criminal law enforcement or regulatory violations" or units of local law enforcement until July 1, 2015. Numerous exceptions to the ban are enumerated including enabling officials to deploy drones for Amber Alerts, Blue Alerts, use by the National Guard, by higher education institutions and search and rescue operations. The enacted bills also require the Virginia Department of Criminal Justice Services and other state agencies to research and develop model protocols for drone use by law enforcement in the state. They are required to report their findings to the General Assembly and governor by Nov. 1, 2013.

Other state laws fall along the spectrum from nearly outright prohibition on the use of drones to conduct unwarranted surveillance to milder, more liberal restrictions. Much attention was paid to the law signed this summer in the Lone Star State.

Texas Governor Rick Perry signed a bill into law June 14 that curtails the power of law enforcement and government to use drones to conduct surveillance on citizens of his state.

HB 912 — the Texas Privacy Act — charges with a Class C misdemeanor any private or public entity that "uses an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image."

The bill was passed by an impressive majority of state legislators. On May 10, the state House of Representatives approved the measure 119-11. The state Senate followed suit a week later, passing the bill by a vote of 29-1.

While the bill is a laudable attempt to shore up the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" as protected by the Fourth Amendment to the Constitution, there are numerous exceptions to the drone prohibitions.

Law enforcement, for example, may deploy drones in the "immediate pursuit of a person" whom officers have "reasonable suspicion or probable cause to suspect has committed an offense."

Other exceptions protect images captured by drone "by or for an electric or natural gas utility"; "for purposes of professional or scholarly research"; and as permitted by the lawful owner of the property under surveillance.

While those exceptions are arguably reasonable, there are others that seem to leave a very large loophole in the law that military and spy drones can fly through to the detriment of Texans' privacy.

Section 423.002 exempts from the law all drone flights and surveillance conducted by the Federal Aviation Administration "for the purpose of integrating unmanned aircraft systems into the national airspace"; as well, any drone deployment that is "part of an operation, exercise, or mission of any branch of the United States military."

Given the federal government's rapid acceleration of the growth of the surveillance state and the transformation of citizens into suspects, it seems that the Texas bill, while commendable, fails to sufficiently nullify the frequent unconstitutional federal assaults on the fundamental liberties protected by the Constitution.

With Governor Perry's signature on HB 912, Texas now joins Idaho, Virginia, Florida, Montana, and Tennessee on the list of states that have enacted laws regulating the use of drones in their sovereign skies.

As *The New American* has reported, the Idaho law reinforces "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by amending the Idaho code. Specifically, the law imposes new restrictions on the use of drones by government or law enforcement, particularly when it comes to the gathering of evidence and surveillance of private property.

Should police in Idaho try to submit in court evidence illegally obtained by drone, they would find themselves running headlong into Section 5, which directs that "no information obtained or collected in violation of the provisions of this act may be admissible as evidence in a criminal proceeding in any court of law in the state or in an administrative hearing."

In April, Governor Rick Scott of Florida signed into law the Freedom From Unwarranted Surveillance Act. The law in the Sunshine State forbids federal agents "from using a drone to gather evidence or other information" on citizens of Florida. Should a state citizen be the target of an unlawful search and seizure in violation of this bill, he or she would be authorized "to initiate a civil action in order to prevent or remedy" that violation.

As *The New American* reported earlier, the language of the Florida law is not perfect. Section 4(a) of the bill carves out a dangerous exception to its otherwise commendable constitutional protections.

Section 4(a) authorizes the Secretary of the Department of Homeland Security to launch a drone over Florida "to counter a high risk of a terrorist attack by a specific individual or organization." As is the case with the Texas anti-drone bill, Section 4(a) of the Florida bill leaves an enormous loophole in the law, one just large enough for a Hellfire missile.

Such an occurrence is not unthinkable in this era when the United States has been declared a battleground and Congress has given the president the power to indefinitely detain any American he believes to be aiding enemies of the state. Ostensibly, drones would be the perfect tool to accomplish such a round-up of potential prisoners. (See, for example, the comments made by Senator Lindsey Graham [R-S.C.] regarding the search for the suspected Boston marathon bomber.)

The NCSL reports that Alaska's state legislature created a task force to review federal drone policy to determine if the privacy of Alaskans would be threatened by the use of the unmanned aerial vehicles.

If freedom is to be protected and if the fundamental liberties protected by the Constitution are to be preserved, Alaska and all her sister states must quickly recognize that they "have the right, and are in duty bound, to interpose for arresting the progress of the evil" resulting from the federal government's habitual disregard for the constitutional limits on its power. The states' duty to thwart the federal government's attempts to break the constitutional chains on its power is called nullification.

Nullification is a concept of constitutional law that recognizes the right of each state to nullify, or invalidate, any federal measure that exceeds the few and defined powers allowed the federal government as enumerated in the Constitution.

Nullification is founded on the assertion that the sovereign states formed the union, and as creators of the compact, they hold ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof.

In *Federalist*, No. 33, Alexander Hamilton declared that any act of the federal government exceeding the limited powers granted it by the Constitution is not a law at all:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.… But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]

Hamilton is not alone. The undeniable truth is that not a single one of our Founding Fathers, not even the most ardent advocate of a powerful central government, would have remained even one day at the Philadelphia Convention if he had believed that the government they were creating would become the instrument of tyranny that it has become.

All state legislatures have an obligation to liberty and to their citizens to follow the example of Virginia, Texas, Idaho, Florida, Montana, and others to stop all unconstitutional acts of the federal government at the state borders. They can accomplish this by enacting state statutes nullifying those acts, based on the 10th Amendment's protection of states' power to legislate in all but a few narrowly defined areas of federal authority.

On the other hand, should these states fail to fearlessly oppose federal overreach, the day may rapidly come when the Constitution and individual liberty will be nothing more than remarkable relics of a once-free republic.

Photo of U.S. Customs and Border Protection drone: AP Images

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He is the host of* The New American Review *radio show that is simulcast on YouTube every Monday. Follow him on Twitter @TNAJoeWolverton and he can be reached at jwolverton@thenewamerican.com*