EYES IN THE SKY

Two experts trade views on regulating drones.

It can seem sometimes like they’re everywhere.

Farmers use them to monitor crops. Investigators across the country rely on them to help reconstruct highway crash scenes. They’re vital to emergency response agencies in tracking wildfires and performing search-and-rescue operations.

There’s no denying that drones—aka unmanned aircraft systems, or UAS—have become critical to providing government services, and their commercial potential is untapped.

But there are downsides. Few people are unconcerned about the privacy issues associated with drone-mounted cameras hovering over our neighborhoods and public spaces. And many states have passed legislation to regulate or restrict their use. At least 19 of them require law enforcement agencies to get search warrants to use drones for surveillance or conducting a search.

But when it comes to such regulations, what is the proper role for the states? Should they yield to the U.S. government, which asserts authority to regulate all airspace? Or do they defer to the drone industry?

Opinions differ. We present two views here.

Reggie Govan, a former Federal Aviation Administration chief counsel, says state and local governments must play a role in regulating drone use. Doug Johnson, with the Consumer Technology Association, cautions that without industry input lawmakers could put the brakes on innovation.

Where do you stand?
Let Local Players Set the Rules

State, local and tribal authority is vital to realizing the full potential of the drone economy.

BY REGGIE GOVAN

To realize the full potential of drones for an ever-expanding range of commercial activity, it is necessary to recognize the important role of state and local governments to regulate aspects of drone operations.

Recreational, sport and commercial drone operations represent a fundamental paradigm shift. For the first time in commercial aviation, all the land in every neighborhood may be used for takeoff and landing, and all the airspace immediately above land may be used to fly commercial drones regardless of the landowner’s wishes. As a result, government now is required to adjudicate myriad interests unique to neighborhoods and communities across the country, and to decide whether, where and when to allow commercial drone operations in very low-altitude airspace.

Despite the drone industry’s protests to the contrary, continued reliance on federal agencies to provide regulatory solutions to issues uniquely within the purview of state and local governments is flawed as a matter of law, regulation and enlightened self-interest.

Ever since the 1946 U.S. Supreme Court decision in United States v. Causby, federal law unambiguously gives private landowners “exclusive control of the immediate reaches of the enveloping atmosphere.” While the term “immediate reaches” has not been defined in statute or case law, Causby clearly establishes

Local Players continues on 16

“Continued reliance on federal agencies to provide regulatory solutions to issues uniquely within the purview of state and local governments is flawed.”

Reggie Govan, adviser to drone technology companies AirMap and Vorpal

Don’t Allow Regulations to Impede Progress

New drone technology doesn’t have to mean new, complicated state laws.

BY DOUG JOHNSON

When any innovative product comes to market, early adopters get excited about the range of features, while others are skeptical. The excitement over drones includes safer and more efficient infrastructure inspections, quick delivery of supplies and high-quality filming. But the popularity of the technology—the Consumer Technology Association projects U.S. sales to reach 3.4 million units in 2019, a 4 percent increase over last year—is leading policymakers to react by proposing drone-specific laws, even though they may impede innovation.

Consider cameras on mobile phones. In the early 2000s, concerns about invasions of privacy resulted in the devices being banned from some public places. In 2019, this sounds archaic, but not long ago it was a major issue. In 2003, the Sports Club chain of workout facilities prohibited all mobile phone use—not just the camera feature—outside of the main lobby, according to the Los Angeles Times.

In 2009, U.S. Representative Peter King, a Republican from New York, introduced the Camera Phone Predator Alert Act to require mobile phones with cameras to make an alerting sound when a picture was taken. Fortunately, the bill received no cosponsors and died in committee.

The increasing use of drones is creating regulatory déjà vu, as many state and local regulators again feel the need to adopt technology-specific regulations. For example, many states are considering...
that “a landowner owns at least as much of the space above the ground as he can occupy or use,” even if he or she “does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense.”

Because *Causby* remains good law, we must turn to state and local governments, not to federal agencies, and certainly not to the FAA, to resolve how best to regulate the undefined airspace associated with each parcel of land.

Even during the golden age of manned aviation, state, local and tribal governments retained exclusive power to decide whether and where to site an airport for use by manned aircraft. Surely, that same authority extends to those governments to determine whether, where and when drones may take off, land and traverse the low-altitude airspace above their jurisdictions, provided the FAA has found such operation satisfies general aviation safety requirements.

A handful of states have enacted legislation that permits all drone flights that otherwise meet the FAA’s general safety standards. That approach mistakenly conflates the FAA’s role to determine drone safety requirements with a state’s historic power to adjudicate land-use, privacy and private-property rights. State legislatures should jealously guard their prerogatives and not defer to the FAA on matters plainly unrelated to the agency’s considerable safety expertise.

Fortunately, a committee of the Uniform Law Commission, an organization dedicated to promoting the enactment of uniform laws among states, is drafting legislation that may well clarify a property owner’s right to exclude drone operations below a specified altitude. The committee’s final proposal will merit serious consideration by every state legislature to make clear that landowners, not an industry relying on the FAA’s regulations, control the operation of drones in the “immediate reaches” above their property.

The autonomous vehicle industry is reaping the rewards of developing strong partnerships with state, local and tribal governments, thereby strengthening eventual public acceptance of self-driving vehicle technology and operations. The drone industry stands to benefit in a similar way by partnering with government at those levels.

As our Founding Fathers intended, state and local governments play a critical role in adjudicating uniquely local property, privacy and land-use interests. Because drones clearly represent a paradigm shift in aviation, state and local governments must lead the way in addressing the inherently local concerns that must be resolved to ensure social acceptance of ubiquitous low-altitude drone operations.

It’s time for America’s drone industry to end its “FAA-only” mantra and begin developing real partnerships with state and local governments. Only then will we realize the full potential of the drone economy.

Reggie Govan, former FAA chief counsel during the Obama administration, helped shape the regulatory framework for commercial drone operations and for performance-based rulemaking in aviation. He serves on the advisory boards of AirMap Inc., a global airspace management platform for drones, and Vorpal Ltd., a provider of technology to identify, track and mitigate rouge drone operations.

Almost every state has a law or regulation pertaining to the operation of unmanned aircraft systems, or drones, as most people know them. But lawmakers are still examining the implications of their use.

The Federal Aviation Administration has jurisdiction of federal airspace, but state lawmakers are addressing drones in areas generally understood to be under their jurisdiction. Since 2013, at least 41 states have enacted drone-related laws or regulations, or both. Using guidelines such as the FAA’s 2015 fact sheet on state and local government regulation, states have addressed privacy issues and criminal penalties for drone misuse, commercial and government drone operations, and recreational drone use.

Twenty-seven states have enacted privacy-related measures, including warrant requirements for drone use by law enforcement agencies. Nineteen states require officials to obtain warrants to use drones for video surveillance or to conduct searches.

States have also addressed potential privacy violations committed by nongovernmental operators, including peeping Toms. Fourteen states offer privacy protections from other citizens, but lawmakers continue to grapple with the criminal penalties associated with these and other violations, such as flying near an airport. As of this year, at least 21 states have criminalized certain uses of drones. Laws in at least 10 states prohibit drone operations over or near critical infrastructure, including petroleum refineries and chemical manufacturing facilities.

Additionally, six states prohibit using drones for hunting and fishing, and seven states prohibit using them to interfere with others who are lawfully engaged in those activities.

In 2017, the FAA created the UAS Integration Pilot Program to gather input from various levels of government and from other UAS stakeholders to guide, or integrate, drone use in low-altitude airspace. The FAA chose nine state and local lead participants for the program in 2018 to examine a variety of functions, including flights beyond the pilot’s line of sight and government infrastructure inspections.

Currently, 12 states pre-empt local governments from acting on drone matters.

—Ann Kitch
Regulations, from 15

legislation to prohibit photography that may invade someone’s privacy if a drone takes a photograph. The measures are well-intended, but CTA cautions against specifically targeting legislation at drones. The better approach is to adopt laws addressing certain conduct, regardless of the technology used to engage. CTA tracks states’ drone policies in its U.S. Innovation Scorecard report, a biennial index that helps determine where tech innovation and entrepreneurs are supported by their state governments.

In addition to actions by state legislators, the Uniform Law Commission is considering draft legislation that would create drone-specific trespass and invasion of privacy torts. In fact, some ULC members continue to feel specific laws are necessary to allow landowners to prohibit drone operations below 200 feet over their property without prior consent.

This premise is flawed, however. First, drone-specific legislation is not warranted—and rarely is. Existing state nuisance and aerial trespass laws already provide mechanisms to address particularly intrusive drone activity. Second, the Federal Aviation Administration has sole jurisdiction to determine where drones are permitted to operate, pre-empting state and local efforts to draw “lines in the sky,” below which drones cannot operate.

For America to remain a leader in aviation and drone technology, government at all levels and private sector stakeholders must work together on rules that uphold safety and enable the economic potential of drones. With the FAA’s Unmanned Aerial Vehicle Integration Pilot Program now underway with state, local and tribal governments, the agency’s private sector partners will inform future policy development. But state efforts to enact conflicting rules—such as the ULC’s drone-specific trespass tort—threaten the growth of America’s drone industry. Before considering new legislation, state lawmakers should determine whether such action is pre-empted, already addressed by existing laws or warranted by a technology-specific approach.

Doug Johnson is vice president of technology policy with the Consumer Technology Association, which annually hosts CES, the world’s largest and most influential technology event. Legislators interested in drones or drone-related legislation are encouraged to contact the organization at publicpolicy@cta.tech.

Snapshot: Federal Landscape

The Federal Aviation Administration’s rules on drone operations continue to evolve.

The agency asserted, in a 2015 fact sheet, that the federal government is the sole regulator of drone design, construction and operation. States and localities, the FAA said, may regulate within their police powers, which govern privacy and trespass. They may also regulate where drones, which the FAA considers aircraft, can take off and land. Many states have challenged this assertion, however, by enacting laws that restrict operations in particular circumstances.

The agency laid out operational rules for commercial drones in 2016, under its Small UAS Rule (Part 107). These rules required operators to pass a knowledge test and register the drone, and they set limits on where (not over people or beyond visual line of sight) and when (daytime only) drones could be operated, without a waiver.

Drones flown for recreational purposes faced fewer requirements, due to language in the 2012 FAA reauthorization. Following passage of the 2018 reauthorization, however, the FAA was given new authority to create rules for recreational operators, though the agency has yet to finalize requirements.

Earlier this year, the FAA released a proposed rule that would allow commercial operators to fly drones over people and at night. The drone industry has eagerly awaited this authority, but the agency was clear that it would not finalize this rule until it had settled on a separate set of requirements for tracking drones by radar, commonly known as “remote ID.” Those tracking requirements have yet to be released.

—Ben Husch