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PERSPECTIVE

Legal framework lacking in the Age of Drones

By Scott Hall

The Age of Drones is here, but the legal and regulatory framework necessary to fully realize the anticipated benefits of drones continues to lag behind advances in technology. The potential applications for drones, including aerial photography, precision agriculture, emergency response and package delivery — to name just a few — are well known. Less clear are the laws governing drone use, as well as the basic question of who possesses, or should possess, the authority to make laws aimed at drones. While the majority of states have passed or are considering drone-related laws, currently proposed federal legislation, such as the FAA Reauthorization Bill (S.2658), passed by the Senate on April 19, would prohibit states and local governments from enacting or enforcing any law or regulation “relating to the design, manufacture, testing, licensing, registration, certification, operation, or maintenance” of drones.

This preemption of all drone-focused legislation, if passed, would significantly restrict the ability of states and local governments to deal with problems in their localities arising from the increasingly popular and widespread use of drones. Those in favor of broad federal preemption argue that strict uniformity is necessary so that drone manufacturers and operators are not confronted with a patchwork of differing state and local laws. But while uniformity is important, the sluggishness with which federal laws and regulations have been, and continue to be, developed may be hindering the advancement of the fledgling drone industry at a critical time for its growth.

Federal authority over drones traces its roots back to the advent of air travel and the need for exclusive federal sovereignty over U.S. airspace to create a uniform framework for commercial airplane flights between states and across the country. The Federal Aviation Administration possesses authority to issue regulations governing any aircraft in U.S. airspace, including drones. The need for exclusive federal jurisdiction over airspace above 500 feet for the purpose of regulating nationwide air traffic is obvious. Less intuitive is why the federal government should have sole jurisdiction over the operation of small drones that may fly only 50-100 feet off the ground and travel no more than a few hundred yards, or even a few miles. Perhaps more problematic is the slow pace at which federal drone regulations have de-



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veloped at the same time that drone sales and usage are skyrocketing.

The FAA’s proposed rules for small drones have been pending since February 2015. Until those and other proposed regulations take effect, many have commented that the current state of drone law is akin to the “wild west,” where drone operators are encouraged to get away with as much as they can before a comprehensive legal framework is established.

At this crucial juncture, where drone technology is rapidly advancing, but clear federal regulations are lacking, states cannot be blamed for stepping in to enact legislation to deal with increasingly problematic issues posed by drones in their jurisdictions. The National Conference of State Legislatures reports that during 2015, 45 states considered 168 bills related to drones, and many more state laws have been proposed in 2016. These laws address various topics affected by drones, including privacy, hunting, agriculture, law enforcement use and surveillance, among others.

The proposed federal legislation, however, would prohibit or nullify all such state laws irrespective of whether there is any federal law addressing the same issue. Moreover, although the federal legislation would purportedly permit state laws relating to issues such as nuisance, privacy, property damages, or other illegal acts to be applied to drones — as long as such laws are not specifically aimed at drones — clarifying the applicability of current laws to drones has been the very purpose of many recently enacted state laws, including California’s own Assembly Bill 856, passed late last year.

AB 856 amended the Civil Code’s definition of a “physical invasion of privacy” to specifically include drone incursions into the airspace above private property for the purpose of capturing private images or other information. Although

such drone invasions likely already constitute a constructive invasion of privacy under California law, AB 856 was viewed as necessary to curb the increasing practice by paparazzi and others to invade privacy through the use of drones. Under the proposed federal legislation, states will be prevented from seeking specific legislative solutions to reckless or harmful drone operation, while being left to deal with many of its consequences.

An alternative to the broad preemption language in the currently proposed federal legislation would be to give exclusive federal jurisdiction to aspects of drone regulation such as design, manufacture, and certification, while allowing states to regulate other drone attributes which don’t conflict with federal law. This type of narrowed preemption was considered, but not incorporated, in the FAA Reauthorization Bill passed by the Senate.

The idea of some kind of dual federal/state responsibility over drones, however, warrants further consideration. Such a compromise would allow for federal uniformity of law where necessary, and would also provide needed flexibility for state and local governments to resolve problematic effects of drone operation which no federal law addresses.

In sum, while a comprehensive federal scheme may be necessary, for example, to establish uniform altitude restrictions, or for safety requirements in the design and manufacture of drones, uniformity in drone regulation should not come at the cost of the ability of state and local governments to timely and uniquely address drone issues specifically affecting their jurisdictions.

Moreover, it is unlikely the federal government has the resources to effectively enact and enforce all necessary drone laws and regulations without the help of state and local governments. Given the FAA’s own estimate that 2.5 million new drones will be sold and enter the nation’s skies this year,



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federal and state governments working in combination may provide the best solution to both regulate and facilitate the further growth of this exciting new technology.

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