

REGINALD C. GOVAN
Attorney at Law
3311 Ross Pl, NW
Washington, D.C. 20008
July 24, 2018

Ms. Anita Ramasastry
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

RE: Proposed Tort Law Relating to Drones Act

Dear Ms. Ramasastry:

I write in support of two concepts embodied in the above-captioned proposed Tort Law, which is under consideration by the Uniform Law Commission at its 2018 Louisville, Kentucky meeting. The concepts that I strongly support are:

- The lawful right of State governments through the exercise of their police powers to adjudicate and protect important privacy and private-property rights implicated by low-altitude drone operations; and
- The desirability of States acting in concert through the adoption of generally uniform statutes to prevent the enactment of the proverbial “patchwork” of disparate rights and responsibilities, especially on matters affecting the commercialization of new technologies.

My views are informed by my:

- Participation in one of the Committee’s two off-site drafting sessions in which many industry and trade association representatives also participated;
- Participation in at least one conference call in which the Committee’s proposal was discussed and refined;
- Review of comments filed as of this date by several industry and trade association representatives;
- Review of the comments filed by the General Counsel of the U.S. Department of Transportation and the Chief Counsel of the Federal Aviation Administration (FAA); and
- Prior service as the FAA’s Chief Counsel for the two and one-half years between September 2014 and February 2017.¹

¹ To be clear, I participated in the Drafting Committee’s off-site drafting session and subsequent conference calls in my private capacity and at no time spoke on behalf of the FAA. Nevertheless, sometime after terminating employment as the FAA’s Chief Counsel, I joined the Advisory Boards of two businesses in the drone sector - Vorpal, an Israeli manufacturer of advanced counter-UAS equipment, and

During my tenure as the FAA's Chief Counsel, I:

- Principally authored the December 17, 2015 "State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet;"
- Supervised the Office of the Chief Counsel's role in the Agency's promulgation of the Part 107 Regulation that authorized low-altitude, visual line of sight drone operations; and
- Supervised the issuance of several advisory letters to State and local governments in response to proposed legislation.

Several commentators mistakenly reference and rely on each of the above to contend State governments do not have lawful authority through the exercise of their police powers to adjudicate privacy and private-property rights affected by low-altitude drone operations. I disagree.

I. LANDOWNER'S CONTROL OF LOW-ALTITUDE AIRSPACE ABOVE PRIVATE PROPERTY

Ever since the 1946 decision in *United States v. Causby*, the law of the United States unambiguously gives private landowners "*exclusive control of the immediate reaches of the enveloping atmosphere.*" While the "immediate reaches" has not been defined either by statute or case law, *Causby* clearly establishes "a landowner owns at least as much of the space above the ground as he can occupy or use" even if he "does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense." As a result, it is beyond peradventure that a landowner controls an undefined amount of airspace that runs with each parcel of land. Simply put, *Causby* remains good law!

Given *Causby*, those who oppose the proposed statute have no choice but to contend that the FAA adjudicated and abrogated every private owner's right to control any of the "immediate reaches" of airspace above their land when it promulgated Part 107 confining line of sight drone operations to altitude below 400 feet. That contention is without merit for several very obvious reasons.

The FAA's eminently reasonable decision to confine line of sight drone operations to altitude below 400 feet is predicated on its safety authority, not its adjudication of the property rights of every private landowner in America. A myriad of variables informed the FAA's judgment that is unsafe to operate drones above 400 feet, including those pertaining to airframe design, weight, battery life, flight performance, control links, equipage and operator training, just to name a few.

AirMap, an airspace management company located in Santa Monica, California. The views herein are my own and not those of either company.

However, the FAA's determination that line of sight drone operations are safe below and unsafe above 400 feet surely cannot be conflated into the Federal government affirmatively authorizing every drone operator to repeatedly hover and/or crisscross at 5, 10, 35, 50 or 75 feet above my or your backyard, thereby stripping me and you of our rights as a landowner to control the "immediate reaches" of airspace above our property. To be clear, the FAA's determination that it is unsafe to operate small drones above 400 feet does not overrule or negate *Causby's* rule that private landowners control the "immediate reaches" of airspace above their land.

If, however, the opponents of the proposed statute are correct and the FAA's promulgation of Part 107 negates my *Causby* right to control and limit others from hovering or flying drones 5, 10, 35, 50 or 75 feet in the airspace above my backyard, then Part 107 accomplished a nationwide "taking" of private property without just compensation that surely raises significant questions about the scope of the Federal Government's authority under the Commerce Clause of the U.S. Constitution.

II. FAA'S REGULATORY COMMENTS GERMANE TO THE COMMITTEE'S PROPOSED STATUTE

Opponents of the Committee's proposed statute are advised to read the FAA's official comments accompanying the promulgation of Part 107 regulations about its scope and affect on private property and privacy rights at the time it promulgated the Regulation. These comments are reflected in the Federal Register notice accompanying the final rule.² The FAA wrote:

Regarding Trespass and Property Rights:

- "Adjudicating private property rights is beyond the scope of this rule. However, the provisions of this rule are not the only set of laws that may apply to the operation of a small UAS, the FAA will address preemption issues on a case-by-case basis rather than doing so in a rule of general applicability"
- "This rule does not address preemption issues because those issues necessitate a case specific analysis that is not appropriate in a rule of general applicability. The FAA notes, however, that state governments have historically been able to regulate the takeoffs and landings of aircraft within their state boundaries."
- "Property rights are beyond the scope of this rule. However, the FAA notes that, depending on the specific nature of the small UAS operation, the remote pilot in command may need to comply with State and local trespassing laws."

² Operation and Certification of Small Unmanned Aircraft Systems (RIN 2120-AJ60) Federal Aviation Administration. Retrieved from http://www.faa.gov/uas/media/RIN_2120-AJ60_Clean_Signed.pdf

- “The FAA also notes that hobbyists or other third parties who do not have the facility owner’s permission to operate UAS near or over the perimeter or interior of amusement parks and attractions may be violating State or local trespassing laws.”

Regarding Preemption

- “The FAA is not persuaded that including a preemption provision in the final rule is warranted at this time. Preemption issues involving small UAS necessitate a case specific analysis that is not appropriate in a rule of general applicability. Additionally, certain legal aspects concerning small UAS use may be best addressed at the State or local level. For example, State law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person’s use of a UAS.”

Regarding Privacy

- “Recognizing the importance of addressing privacy concerns in the proper forum, the FAA has partnered with other Federal agencies with the mandate and expertise to identify, develop, and implement appropriate mitigation strategies to address privacy concerns.”
- “State law and other legal protections may already provide recourse for a person whose individual privacy, data privacy, private property rights, or intellectual property rights may be impacted by a remote pilot’s civil or public use of a UAS, in light of the FAA’s long-standing mission and authority as a safety agency, it would be overreaching for the FAA to enact regulations concerning privacy rights.”

Regarding the First Amendment

- “Under intermediate scrutiny, a restriction on speech must advance a “significant,” “substantial,” or “important,” (but not necessarily “compelling”) government interest, and the restriction must be narrowly tailored to achieve that interest. This rule fulfills several legitimate needs, the most important of which is providing the safest, most efficient aerospace system in the world.

The provisions at issue all align with that principle. As such, this rule (which does not discriminate based on the time, place or manner of any expressive conduct) is narrowly tailored to achieve a significant, substantial, and important government interest.

The flight of a small UAS is not speech—it is conduct other than speech which may incidentally restrict speech (e.g., news reporting, commercial speech, or aerial photography). However, for the reasons discussed below, even if this rule

were to be analyzed using the more stringent time, place, manner framework, the provisions of this rule would still be consistent with the First Amendment.

- Similarly, this rule is directed at aviation safety and does not directly regulate reporting or other expressive activity. Anyone seeking to use a small UAS for photography or videography in a manner not permitted under this rule is free to utilize another method of photography or videography by, for example, using a manned aircraft, filming from a tall structure or landmark, filming from the ground, or using specialized equipment.

Thus, the provisions of this rule meet the Constitutional standard for an incidental restriction on speech, and enforcement would not implicate the First Amendment.”

III. EXCLUSION ZONE OF 200 FEET

I agree with Messrs. Bradbury’s and Trippe’s view, as set forth in their July 11, 2018 letter to the Drafting Committee, that there is nothing in the FAA Chief Counsel’s December 17, 2015 Fact Sheet or any official agency statement (of which they or I am aware) that would support the adoption of a private property owner’s right as a matter of law to exclude drone operations up to 200 feet altitude. Indeed, were I providing advice to the Committee, which I am not, I would counsel against adopting an exclusion zone of 200 feet and counsel in favor of adopting a significantly more modest definition of the “immediate reaches” of airspace above private property.

IV. PRIVACY

With respect to privacy, neither Congress nor any other agency of the Federal government has acted to establish and/or adjudicate privacy-related rights and responsibilities arising from or related to low-altitude drone operations. That is not to say that Congress or an appropriate Federal agency are precluded from acting to clarify and establish privacy rights and responsibilities arising from low-altitude drone operations in the same manner that Congress has acted to establish privacy rights pertaining to educational records, health records, video rental records and records pertaining to a range of other business and recreational activities.

In the absence of Congressional or lawful agency action intended to establish a uniform national privacy regime arising from low-altitude drone operation, I believe a State’s police power provides a lawful basis to protect privacy through trespassory tort doctrines.

Opponents of the proposed statute contend any new aerial trespass cause of action in response to low-altitude drone operations ought to mimic the current aerial trespass doctrine applicable to high-altitude manned aviation operations by conditioning relief on a showing of “substantial harm.” I disagree.

As I understand trespass over land, a child who stands in his backyard and throws a baseball through the airspace of my backyard commits trespass absent any showing of harm whatsoever, let alone having to show substantial harm. The same should be true if an operator flies a drone through the “immediate reaches” of the airspace above my backyard. Tying liability to the mere presence of the drone in the “immediate reaches” of the airspace above my backyard – encourages operators to respect private property rights and the property owner should not have to also establish that the drone is noisy, has toxic emissions or appears to be out of the operator’s control.

VI. COMMITTEE’S MAKE-UP AND DELIBERATIONS

I understand some opponents of the proposed statute contend the Committee lacks the necessary expertise to propose a new tort to strengthen privacy and private-property rights in response to the new phenomenon of low altitude drone operations simply because none of the Committee’s members are drone experts or drone operators. That objection is specious and taken to its logical conclusion means that many state legislators also would be disqualified from enacting drone legislation.

I urge the Commission to reject the view that representatives of private business interests, both foreign and domestic, are ideally or uniquely suited to draft State legislation to protect the privacy and private-property rights, or that their views are entitled to deference. State Legislatures appoint Commission members to ensure the development of State legislation and law is informed by a broad cross-section of professional experiences and judgments. Indeed, the strength of the Committee mirrors the strength of our State Legislatures in that members with varied personal and professional experiences come together to craft laws in response to new circumstances and phenomenon.

I understand some opponents of the above-captioned proposal also contend that the Committee’s deliberations did not provide private industry and trade association Observers a meaningful opportunity to make their views known. At least during the meetings in which I participated, the Committee repeatedly solicited, patiently listened and faithfully responded to the views and the voices of all Observers over and over and over again. While some industry and trade association Observers chose not to participate during the Committee’s deliberations, other Observers actively expressed views and engaged Committee members in robust discussion.

Thank you in advance for your consideration of my views.

Sincerely,

/s/

Reginald C. Govan