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FAA Reauthorization Bill Attempts National Drone Policy

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Poised to be one of the fastest growing industries, drone (i.e., unmanned aerial systems or UAS) technology has the potential to revolutionize commercial activity and the public's perspective of robotics and all manner of autonomous systems. As commercial uses of drone technology continue to evolve, its popularity continues to skyrocket. This technological advancement is on par with the evolution of the Internet in the early 1990s and smartphones over the last decade. However, numerous state and local laws regulating drones conflict with both the Federal Aviation Administration's contention that it controls the national airspace and the FAA's express desire to establish a single national policy for drones, thus creating a murky legal and regulatory framework.


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In 2012, Congress passed the FAA Modernization and Reform Act requiring the FAA to integrate drones into the national airspace. Primarily portrayed by the media as having military applications, public concerns about domestic drone use have increased. As a result, many states have enacted laws directly targeting drone operations.

Specifically, several states have enacted laws that regulate or prohibit the flight, weaponization and surveillance use of drones. In 2015, legislatures in 45 states considered 168 bills affecting drone operations. Of those bills, 20 states enacted 26 pieces of legislation regulating drone use. However, many of those laws may encroach on the sovereignty of the federal government. Whether federal law and regulation regarding drone operations will preempt state and local laws is an emerging issue.

The concept that federal law preempts state law is rooted in Article VI, clause 2 of the U.S. Constitution. When a court determines that federal law preempts state law, the state law is void. Congressional intent to preempt state law consists of two types: express and implied preemption.

Express preemption occurs when Congress explicitly states that federal law preempts state law or regulation. Within the aviation arena, only two instances of express preemption exist. First, Congress has expressly asserted "exclusive sovereignty of airspace of the United States," and has placed "exclusive authority for regulating the airspace above the United States with the [FAA]."[1] Second, under the Airline Deregulation Act of 1978, Congress prohibited states from enacting laws "related to a price, route, or service of an air carrier that may provide air transportation."[2]

Despite these instances of express preemption, the U.S. Supreme Court has held that there is no general express preemption in the field of aviation.[3] Instead, courts may infer intent either through a conflict between a federal law and a state law or by finding that Congress has occupied the "field."[4]

Under implied field preemption, intent to preempt a state law is typically determined on a case-by-case basis when the federal laws and regulations are "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[5] Although the breadth of laws and regulations in the aviation field are extensive, courts have consistently held that there is room for states to enact laws within aviation subfields. However, any attempt by states to regulate certain subfields within aviation, including airspace, noise control and safety, will be deemed preempted. Furthermore, the FAA considers any operational drone restrictions on flight altitude, flight paths, or navigable airspace by states to be an encroachment on its authority.

On the other hand, if the state law regulates a traditional state power generally not subject to or addressed by federal regulation, including land use, zoning, privacy or trespass, then the state law may survive.[6]

In an effort to clarify the responsibilities of federal, state and local governments with respect to the regulation of drones, the Federal Aviation Administration Reauthorization Act of 2016 ("FRA"), which was recently introduced in the U.S. Senate, specifically addresses federal preemption in the area of drone operations.

Section 2142(a) of the FRA would establish federal preemption for state and local laws relating to the design, manufacture, testing, licensing, registration, certification, operation, or maintenance of a drone, including airspace, altitude, flight paths, equipment or technology requirements, purpose of operations, and pilot, operator, and observer qualifications, training, and certification.

Under Section 2142(b), however, state or local laws (including common law causes of action) relating to nuisance, voyeurism, harassment, reckless endangerment, wrongful death, personal injury, property damage, or other illegal acts arising from the use of drones would not be preempted if they are not specifically related to the use of a drone.

The FRA is a bold and important proposal because only two other instances of express preemption exist regarding aviation. The FRA is Congress' attempt to establish a single national policy for drones by explicitly granting the FAA supremacy over all laws seeking to specifically regulate drone operations.

Granting the FAA this type of supremacy is not without its critics. The contrary view contends that Section 2142(a) "would also block local governments from adopting measures prohibiting encroachment on private property."[7] Whether it is better to have a single federal law or a variety of state and local laws is open to debate.

The FAA contends that attempts by state and local governments to regulate the operation or flight of aircraft raises substantial air safety issues.[8] If a significant number of municipalities enact laws regulating drone operations, fractionalized control of the navigable airspace could result.[9] The FAA argues that this patchwork of differing restrictions could severely limit its flexibility in controlling airspace and flight patterns, and ensuring safety and an efficient air traffic flow.[10] From the FAA's perspective, a navigable airspace free from inconsistent state and local restrictions is necessary to the maintenance of a safe air transportation system.[11]

Brian Wynne, president and CEO of the Association for Unmanned Vehicle Systems International, echoes the FAA's concern. Wynne argues that state and local laws regulating drone operations "may conflict with federal jurisdiction resulting in a complicated patchwork of laws and ordinances."[12] This, according to Wynne, would not only cause "confusion about where commercial UAS operators could fly," but "may erode, rather than enhance, safety."[13]

Proponents also argue that the patchwork of laws whereby federal, state and local governments all seek to regulate drone operations inhibits the growth of the drone industry. Furthermore, many contend that it is simply unnecessary for state or local governments to enact drone specific legislation because existing state or local laws already cover the areas delineated in Section 2142(b) of the FRA.

Opponents argue that a patchwork of laws is not necessarily a bad thing. Jay Stanley, senior policy analyst for the American Civil Liberties Union, compared drone policies to "other quality-of-life issues about noise and safety and privacy, dealt with through local legislation" such as "for leaf-blowers or handguns."[14] More critical is Troy Rule, a professor of law at Arizona State University, who believes the FRA is "one of the largest property-rights grabs by Congress in history."[15]

While certain laws enacted by various states are susceptible to preemption, until challenged and litigated in court (or repealed by the legislature), there will continue to be legal ambiguity. With the FAA planning to issue final regulations for commercial drone use as early as June 2016, it is clear that the breadth and pervasiveness of these forthcoming regulations will greatly influence the degree and scope of preemption.

While the FRA attempts to remedy the lack of regulatory guidance at the federal level, states are also contemplating how to address the confusing regulatory environment. For example, Arizona Senate Bill 1449 would, among other things, prohibit local governments from enacting drone regulations — in essence state preemption of local attempts to regulate drone operations. The Arizona bill aims to "strike a balance between safety and privacy concerns and commercial and enthusiast interests" by taking "into account the concern of business to have a uniform, reasonable policy, and the concerns of cities and towns to protect against voyeurism."[16]

Section 13-3729(d) of the Arizona Bill addresses the concern that "individual towns and cities will pass separate laws creating a mish-mosh of … drone ordinances."[17] In particular, it would prevent local governments from enacting more restrictive drone regulations.[18]

The surge in drone technology has tremendous economic development potential for states that have a favorable regulatory environment for this burgeoning new industry. State lawmakers must exercise caution to avoid enacting reactionary, burdensome, and restrictive laws specifically directed toward drone operations. Those laws have the potential to alienate the drone industry and impede economic development.

Instead, state lawmakers should strike a balance that allows the use of drones for commercial and recreational use while addressing citizen concerns. Those concerns should be addressed through a cautious and thoughtful approach before enacting laws that affect drone operations, as courts will examine the text of the statutes involved, as well as the purposes and concerns addressed by the statute.

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[1] 49 U.S.C. §40103(a); see also Riggs v. Burson, 941 S.W.2d 44, 49 (Tenn. 1997).

[2] 49 U.S.C. § 41713(b); see also Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 232 (1995).

[3] Braniff Airways, Inc. v. Neb. State Bd. Of Equalization & Assessment, 347 U.S. 590, 760 (1954); see also Nw. Airlines v. Minnesota, 322 U.S. 292, 303 (1944).

[4] Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999).

[5] City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 632-33 (1973) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[6] For example, state laws which prohibit the use of drones for voyeurism or address trespass by drones.

[7] Bart Jansen, State drone laws could clash with federal drone policy, USA Today available at http://www.usatoday.com/story/news/2016/03/13/state-drone-laws-could-clash-federal-drone-policy/81604344/ (last visited April 13, 2016).

[8] State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Federal Aviation Administration Office of the Chief Counsel December 17, 2015) available at https://www.faa.gov/uas/regulations_policies/media/UAS_Fact_Sheet_Final.pdf.

[9] Id.

[10] Id.

[11] Id.

[12] AUVSI Statement on FAA's Fact Sheet on State and Local Regulations of UAS, AUVSI (Dec. 17, 2015), available at http://www.auvsi.org/browse/blogs/blogviewer?BlogKey=a9331175-36ce-4899-b5b0-b46b8e579128.

[13] Jansen, supra note 7.

[14] Id.

[15] Id.

[16] Buzz off: Arizona Legislature mulling bill to control drone use, KTAR News (February 16, 2016), available at http://ktar.com/story/911604/buzz-off-arizona-legislature-mulling-bill-to-control-drone-

use/.

[17] Id.

[18] S.B. 1449, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016) ("Except as authorized by law, a political subdivision…may not…adopt any ordinance, policy or rule that relates to the ownership or operation of [a drone] or otherwise engage in the regulation of the ownership or operation of [a drone] if the ordinance, policy or rule is more prohibitive than or has a penalty that is greater than any state law penalty, whether…adopted before or after the effective date of this section.").