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What Can Municipalities Do About Drones?

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What Can Municipalities Do About Drones? Restrictions on Municipal Regulation of the Private Operation of Unmanned Aerial Vehicles

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Small drones,[1] typically with high definition cameras, are being mass produced and can be purchased at affordable prices. Their price, size, and maneuverability make it inevitable that drones will be used in a manner inconsistent with community standards. A recent incident on a beach in San Diego County is illustrative.[2] A drone flew "dangerously low" to a group of beachgoers on a summer evening; one member of the group, concerned about the group's privacy and safety tossed a t-shirt at the drone, the damage from which caused it to fall to earth. The incident led to the beachgoer's arrest for vandalism, although the charges were promptly dropped. Similar incidents have been reported above private property.

When communities deal with the negative impacts of technological change, municipal lawyers are asked "What can we do about this?" With drone use expanding, we have reached that point. So, what can a municipality do when its citizenry desires to do something about the negative effects of drone use by private parties?

Federal Preemption

We all know that:

. . . the laws of the United States . . . shall be the supreme law of the land.[3]

Many commentators have offered opinions on the extent of federal preemption of state and local drone regulation. Some suggest that room exists for state and local regulation.[4] Others offer the view that the permissible scope of state and local regulations is very narrow.[5] None of these commentators, though, has done the kind of preemption analysis necessary to offer a useful opinion to those in the trenches. In the meantime, the states at least have proceeded to plow new ground.[6]

Arizona v. U.S., 132 S. Ct. 2492, 2500-01 (2012) provides a helpful summary of the rules governing preemption analysis. First, *Arizona* puts the Supremacy Clause in the federalism context, noting that "both the National and State Governments have elements of sovereignty the other is bound to respect" but that ultimately the Supremacy Clause gives Congress the power to preempt state law.[7] Congress's intent to preempt state law can take the form of a statute *expressly preempting* state power, or it can be implied. Implied preemption can be found in two ways. The first is *field preemption*, where Congress's "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[8] The second is *conflict preemption*. Conflict preemption includes "those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[9] Most importantly, here, the Court reminds us that "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"[10]

Express Preemption

Express preemption seems unlikely to be a fruitful avenue for challenging state and local regulations aimed at drone usage. The Federal Aviation Act does contain an express preemption clause, but it pertains only to laws "related to a price, route, or service of an air carrier. . . ."[11] One federal court held that the preemption clause's application to routes does not restrict a local agency from determining the siting of air fields.[12] We did not find anything in the FAA Modernization and Reform Act of 2012's UAS provisions expressly preempting local legislation. In fact, we found quite the opposite. In its *Small UAS Notice of Proposed Rulemaking*,

the FAA stated that privacy concerns associated with UAS use are beyond the scope of the proceeding and specifically noted that "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."[13]

Field Preemption

The focus of attacks on local drone regulation will be on field preemption. The federal courts have found that federal law impliedly preempts various aspects of aircraft operations. In *City of Burbank v. Lockheed Air Terminal*,[14] the Court struck down a local ordinance that prohibited flights departing Burbank Airport between 11 pm and 7 am the next day. The Court noted the fact that the Federal Aviation Act declares that the United States has "'complete and exclusive national sovereignty in the airspace of the United States.'"[15] It also noted that the FAA Administrator has been given broad powers to regulate the use of the national airspace.[16] The Court then went on to find that the "pervasive nature of the scheme of federal regulation of aircraft noise" left no room for local curfew ordinances.[17] The Court was particularly concerned about the fact that curfews could limit the FAA's ability to control traffic flow.[18]

The *Burbank* Court suggested that the Federal Aviation Act did not preempt state and local control entirely. In particular, the Court focused on the pervasiveness of noise regulation and the federal control over all aspects of carriers' operations.[19] Noting this, subsequent cases have made it clear that states and localities retain control over the siting of airfields.[20] Those federal courts have noted the specific nature of the FAA Administrator's authority to regulate, which is focused on developing rules on "the use of the *navigable airspace*" as "necessary to ensure the safety of aircraft and the efficient use of airspace."[21] In addition, the Administrator must adopt regulations "on the *flight of aircraft*" so as to protect aircraft and people and property on the ground, use the "navigable airspace efficiently," and prevent collisions.[22] Thus, one court found "the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight . . . distinguishable from the regulation of the designation of plane landing sites, which involves local control of land . . . use."[23]

Clearly, the ability to dictate the permissible locations of drone takeoffs and landings is a broad power. Similarly, criminal enforcement of FAA standards also offers the ability to deal with rogue drone usage. These two requirements will be adequate to deal with many drone operations that impact communities.

Other courts have found room for states and municipalities to regulate conduct that federal law already prohibits. For example, a Maryland court held that a state statute that made it a crime to operate an aircraft in a reckless manner was not preempted because the FAA proscribed the same conduct and because Congress intended to leave criminal sanctions to the states.[24] It is unclear the extent to which such a justification would survive scrutiny, in light of the decision of *Arizona v. U.S.*, where the court struck down an Arizona law that imposed stricter penalties for violating federal law's requirements regarding alien registration than the federal government did.[25] The focus in the case was on the fact that the state might bring criminal charges in circumstances when the federal officials believe prosecution would "frustrate federal policies."[26] Given the FAA's implicit admission that it lacks the resources to deal with enforcement of its own regulations applicable to drones,[27] it will be difficult to establish that the same level of "frustration" could exist with respect to drone regulation as the Court found exists in alien registration.

Clearly, the ability to dictate the permissible locations of drone takeoffs and landings is a broad power. Similarly, criminal enforcement of FAA standards also offers the ability to deal with rogue drone usage. These two requirements will be adequate to deal with many drone operations that impact communities. However, the regulation of the siting of takeoffs and landings would not allow a community to deal with drones that are launched outside of the jurisdiction. In addition, the restrictions might be perhaps too blunt an instrument to properly serve a community's interest in allowing appropriate drone usage, while prohibiting less desirous usage.

So, the key question remains whether there is any ability to regulate drones in flight. There is a strong chance that states and municipalities retain substantial police power authority to regulate drones in flight. For several reasons, commentators' implicit suggestion that "the framework of [UAS] regulation" is "so pervasive . . . that Congress left no room for the States to supplement it" is hard to swallow.

First, Congress, although it has declared "exclusive sovereignty of airspace of the United States," has only given FAA the authority to make policy governing "the use of the navigable airspace" and to regulate the flight of aircraft for the purpose of protecting the public and "using the navigable airspace efficiently."[28] The navigable airspace is defined as "the airspace above the minimum altitudes of flight prescribed by" FAA regulations "including airspace needed to ensure safety in the takeoff and landing of aircraft."[29] Over cities, the minimum altitude for aircraft other than helicopters is at least 1000 feet;[30]; helicopters are allowed at less than the minimums provided that they comply with any routes or altitudes prescribed by the Administrator.[31] Much if not all of the municipal regulatory action with respect to drones will be unrelated to safety, being focused instead on the

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privacy issues associated with drone flights above or adjacent to private property, and the regulations can be appropriately designed to impact only operations within airspace *other than* "the navigable airspace." This view of the local realm is consistent with the United State Supreme Court's takings jurisprudence, which gives property owners the "exclusive control of the immediate reaches of the enveloping atmosphere."[32] It also ensures that the scope of the Aviation Act is consistent with the Commerce Clause.[33]

In addition, the "public right of transit" that might support the view that drones can go where they want is limited to the "navigable airspace."[34] Congress and the FAA have both suggested that UAS operations will be limited to the non-navigable airspace.[35]

Second, Congress has not made a policy statement of any kind suggesting that drones can operate in the non-navigable airspace without interference. At this point in time, Congress has merely directed the FAA to incorporate UAS into the national airspace.[36] Congress's focus to date has been on encouraging the FAA to make the effort necessary to allow UAS to share the skies with traditional aircraft. This is unlike federal policy with respect to commercial aviation at issue in *Burbank* where there is a clear federal interest in ensuring the flow of travel.[37]

Third, Congress exempted model aircraft entirely from federal regulation, severely blunting field preemption arguments with respect to model aircraft. Section 336 of the FAA Modernization and Reform Act of 2012 prohibits the FAA from promulgating any rule or regulation regarding model aircraft, provided that they meet certain criteria including a weight of less than 55 pounds and use strictly for non-commercial purposes.[38] This provision reflects Congress's view that model aircraft operated in accordance with the criteria will not interfere with the national airspace system. The utter lack of federal regulation gives states and municipalities even wider berth to regulate model aircraft.

Finally, the FAA itself has made clear that it has no present intention to regulate the privacy issues raised by commercial UAS operations.[39] It also notes that state and other laws may provide recourse to those harmed by another's drone use. It is strange to suggest that states and locals are preempted from regulating issues that the FAA has indicated are (a) a problem, (b) not a subject of its present regulatory activities, and (c) subject to state regulations.

Much if not all of the municipal regulatory action with respect to drones will be unrelated to safety, being focused instead on the privacy issues associated with drone flights above or adjacent to private property, and the regulations can be appropriately designed to impact only operations within airspace *other than* "the navigable airspace."

In simple terms, federal regulation of drones at present is far from pervasive. In fact, it is very limited, focusing entirely on avoiding conflict with the existing national airspace system. We therefore think that the suggestion that there exists broad field preemption on municipalities' ability to address drone privacy issues is wrong.

Conflict preemption

Conflict preemption, for the same reasons, is unlikely to serve as a viable basis for displacing local regulation of drones. Under conflict preemption, "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."[40] Since as was noted in the previous section, Congress has not given any suggestion that drone operations within the non-navigable airspace is to remain free from regulation we think that substantial room exists for local regulation of drones.

First amendment issues

Mass market drones have cameras affixed to them. Because they can be used for communications purposes, some have suggested that there might be First Amendment restrictions on the regulation of drones. The First Amendment applies to the written and spoken word and when one engages in "expressive conduct."[41] Several cases have recognized that photography can involve expressive conduct that is subject to the First Amendment.[42] The federal courts have begun to develop a nascent right to make recordings under the First Amendment.[43] In *ACLU v. Alvarez*, which struck down an Illinois statute that prohibited all forms of audio and video records of oral communications without the parties' consent, the court stated stated as follows:

> The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected, as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.[44]

Ultimately, the *Alvarez* court's concerns were with the statute's interference "with the gathering and dissemination of information about government officials performing their

duties *in public*."[45] The other cases also focused on public officials and on activities taking place on public property.[46] It seems unlikely that the principle will extend beyond that narrow context to provide a general right to record activities from the air, but those crafting municipal drone regulations should review how the "right to record" develops.

Notes

1. The industry refers to drones as unmanned aerial vehicles or UAVs, while Congress and the FAA place them in the broader category of unmanned aerial systems or UAS. The FAA anticipates lightly regulating UAS of less than 55 pounds and refers to them as small UAS or sUAS. *See* Federal Aviation Administration, Notice of Proposed Rulemaking, Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (Feb. 23, 2015).
2. Kristina Davis, *Drowning drone at beach leads to jail*, San Diego Union-Tribune (August 20, 2015), http://www.sandiegouniontribune.com/news/2015/aug/19/man-jailed-beach-drone-confrontation/
3. U.S. Const., art. VI, cl. 2.
4. John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 Harvard Journal of Law & Public Policy 457, 514 (2013) (suggesting space for state and local regulations related to privacy abuses); Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry,* The Circuit, Paper 8, http://scholarship.law.berkeley.edu/clrcircuit/8; Henry H. Perri Jr., *One centimeter over my back yard: where does federal preemption of state drone regulation start?*, (2015). Available at: http://scholarship.kentlaw.iit.edu/fac_schol/845.
5. Jol A. Silversmith, *You Can't Regulate This: State Regulation of the Private Use of Unmanned Aircraft*, 26 The Air and Space Lawyer (2013), http://www.americanbar.org/content/dam/aba/publications/air_space_lawyer/2013_december/ASL_V26N3_WINTER13_Silversmith.authcheckdam.pdf (suggesting that "local regulation of activities conducted in-flight by UAVs to be impermissible" as impliedly preempted by authority given FAA by Congress); Peter Sach, Esq., Current U.S. Drone Law (Revised March 26, 2015), www.dronelawjournal.com (asserting that local agencies may only regulate locations on the ground from which drones may be launched, landed, and operated)
6. See, e.g., Cal. Civ. Code § 1708.8 [applying paparazzi statute to drone usage]; Fla. Stat. § 934.50 [creating a private right of action for surveillance of person or private property by drone].
7. *Id.* at 2501.
8. *Id*. citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)
9. *Id*. citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
10. *Id*. citing *Rice, supra* at 230.
11. See 49 U.S.C. § 41713.
12. See Hoagland v. Town of Clear Lake, 415 F.3d 693, 697; accord Condor Corp. v. City of St. Paul, 912 F.2d 215, 219 (8th Cir. 1990); Gustafson v. City of Lake Angelus, 76 F.3d 778, 783 (6th Cir. 1996).
13. Federal Aviation Administration, Notice of Proposed Rulemaking, Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544, 9552 (Feb. 23, 2015) ("sUAS NPRM").
14. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).
15. *Id.* at 627, citing former 49 U.S.C. § 1508(a), now 49 U.S.C. § 40103(a).
16. *Id*. citing former 49 U.S.C. 1348, now 49 U.S.C. § 40103(b).
17. *Id*. p. 633.
18. *Id*. p. 639. The Court cited its earlier aviation preemption case, Northwest Airlines v. State of Minnesota, 322 U.S. 292, 303 (1944), where the court noted the pervasive nature of federal control over air commerce:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. State of Minnesota, 322 U.S. 292, 303 (U.S. 1944). As is discussed *infra*, current federal statutory and administrative regulation of drones, particularly as to model aircraft, is a far cry from the level of intensity perceived in *Northwest Airlines*.
19. See footnote 14.
20. Gustafson v. City of Lake Angelus (6th Cir. 1996) 76 F.3d 778; Hoagland v. Town of Clear Lake, 415 F.3d 693, 697;(7th Cir. 2005) Condor Corp. v. City of St. Paul, 912 F.2d 215, 219 (8th Cir. 1990).
21. 49 U.S.C. § 40103(b)(1), (emphasis added).
22. 49 U.S.C. § 40103(b)(2), (emphasis added).

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