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A Look At Federal Preemption Of State Drone Laws

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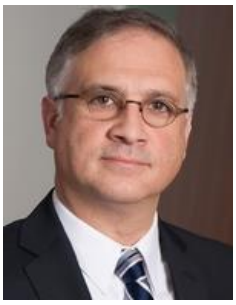

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The Federal Aviation Administration's final rule governing the commercial use of small, unmanned aircraft, Part 107, took effect at the end of August 2016.[1] In the wake of Part 107, it remains to be seen whether and to what extent state legislatures and localities will continue to propose laws and regulations that infringe upon the FAA's statutory mandate to regulate unmanned aircraft and their operation. California's Legislature is perhaps the most notable example of late, sending six separate bills to Gov. Jerry Brown in early September 2016 involving drones.

On Sept. 29, 2016, Gov. Brown vetoed four of those bills (AB 1662, AB 2148, AB 2320, and AB 2724) and signed two others into law (SB 807 and AB 1680). Of the two he signed, SB 807 limits the exposure of emergency responders who damage a drone that interferes with the provision of emergency services, and AB 1680 makes it a misdemeanor for drone operators to stop and interfere with emergency personnel in the performance of their duties.

Noteworthy among the four bills that the governor vetoed is AB 2724, which would have required drone hobbyists to maintain adequate liability insurance and drone manufacturers to provide "a copy of the FAA safety regulations applicable to unmanned aircraft" and a notification to drone purchasers of the FAA's registration requirements. AB 2724 also would have required manufacturers to equip drones having GPS mapping capabilities with "geofencing technological capabilities that prohibit the unmanned aircraft from flying within any area prohibited by local, state, or federal law."[2] As the governor explained in his veto message, AB 2724 would have created "significant regulatory confusion by creating a patchwork of federal, state, and local restrictions on airspace" and would likely have led to a legal challenge that the geofencing mandate was preempted by federal law — in the governor's words, "[p]iecemeal is not the way to go."[3]

The governor's message echoes the guidance provided by the FAA's Office of the Chief Counsel issued in December 2015, which admonishes states and localities about enacting "patchwork" laws and regulations that could limit the FAA's flexibility in controlling airspace, flight patterns, and ensuring safety and efficient air traffic flow.[4] While the governor's veto of AB 2724 was no doubt motivated by the significant presence and growth of the drone industry in California, the result was the correct one at least insofar as the FAA is concerned. When it comes to regulating aircraft and aircraft operations in the national airspace and aviation safety, generally, most courts have ruled that state law and regulation is preempted.[5]

Federal preemption of state laws and regulations is rooted in the Supremacy Clause of the U.S.

Constitution, Art. VI, cl. 2. Under this authority, Congress may withdraw specified powers from the states by enacting a statute containing an express preemption provision.[6] Absent express preemption, courts may infer "field" preemption 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."[7] Preemption also may be inferred if state law conflicts with federal law or regulations.[8]

The field of aviation safety is expansive and one in which courts have consistently ruled that the Federal Aviation Act and the pervasiveness of Federal Aviation Regulations issued under the act sufficiently demonstrate congressional intent to occupy the entire field of aviation safety.[9] The regulation of aircraft (manned and unmanned) and airspace fall squarely into the field of aviation safety, and state laws that encroach upon this area of federal regulation are susceptible to being preempted, whether or not those state laws are in conflict with federal regulation.[10]

While there are scant, if any, reported opinions on the federal preemption of state laws concerning unmanned aircraft, it is simply a question of when, not if, such cases will appear. AB 2724's "geofencing" requirement was an obvious case of a state attempting to legislate or regulate within the field of aviation safety; the FAA specified "geofencing" requirements as an example of preempted legislation in its December 2015 fact sheet.[11] Arguably, AB 2724's requirement that drone manufacturers provide purchasers with "a copy of the FAA safety regulations applicable to unmanned aircraft" and notify purchasers of the FAA's registration requirements also would have been subject to preemption. These requirements not only impose an undue burden on manufacturers to determine what regulations to provide based upon the purchaser's ultimate use of the drone (i.e., hobbyist or commercial), but also conflict with the FAA's decision to place responsibility on drone operators — not manufacturers — to determine what regulations are applicable to the operation of drones. Of course, even assuming AB 2724's notification requirements were intended to complement the FAA's regulations, they still may have been preempted under prevailing law.[12]

That does not mean, however, that all state or local action to regulate certain aspects of drone operations are subject to federal preemption. States and localities retain their "historic police powers" unless clearly preempted by Congress, and this is manifest in myriad state laws, regulations and municipal ordinances that impact law enforcement and emergency response operations, and those that touch upon land use and zoning, privacy, and trespass.[13] The FAA, in fact, recognized the role of states and localities in regulating these typically local aspects of aircraft operations by omitting a blanket preemption provision from Part 107. Both SB 807 and AB 1680 easily fall within the state's "police powers" as they concern emergency response personnel and operations. Other states have passed similar legislation prohibiting operation of unmanned aircraft that interferes with first responders.[14] Some states have enacted laws prohibiting the flight of drones over or near certain areas designated as critical infrastructure, prisons, schools, or over events with concentrated attendance.[15]

Privacy continues to be a major concern of state legislatures, particularly over the use of drones by public and private entities to collect data from persons having a reasonable expectation of privacy. Several states have passed legislation in 2016 requiring that law enforcement obtain warrants before using drones for surveillance, as well as prohibiting drone flights for "peeping tom" activities.[16] Despite a congressional directive in the 2012 FAA Modernization and Reform Act to develop regulations governing privacy and the security of sensitive data collected by unmanned aircraft, the FAA punted that effort to the National Telecommunications and Information Agency.[17] As a result of a multistakeholder engagement process, the NTIA developed a set of "best practices" for users of unmanned aircraft concerning privacy, transparency, and accountability in the collection and storage of

"covered data."[18]

Recognizing the importance of maintaining uniformity in the regulation of unmanned aircraft at least within each state, states have also enacted laws preempting localities at the county and municipal levels from regulating drones activities.[19] This has not stopped major urban centers like Chicago, Los Angeles and Miami from regulating or attempting to regulate unmanned aircraft operations within city limits.[20] The city of Chicago was one of the first to do so, passing an ordinance in November 2015 that somewhat resembles Part 107's operational rules but imposes a duplicative and comparatively onerous registration and identification tag requirement (see the FAA's rule promulgated in December 2015)[21] that may be subject to federal preemption.[22]

As the number of licensed small commercial drone operators skyrockets,[23] and as larger companies further integrate drones into their primary business operations, it is more likely that we will see litigation over the preemption of state and local laws. This may only be months away. Industries including utilities, real estate, engineering firms, retail delivery and entertainment/media — which have the resources to pursue litigation — are likely to be among the first to challenge restrictive state and local laws that encroach upon the FAA's regulatory mandate. At some point, Congress may have to step in to clarify the boundaries of federal preemption of unmanned aircraft.

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[1] FAA Advisory Circular 107-2 (Small Unmanned Aircraft Systems): http://www.faa.gov/uas/media/ac_107-2_afs-1_signed.pdf

[2] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2724

[3] https://www.gov.ca.gov/docs/AB_2724_Veto_Message.pdf

[4] http://www.faa.gov/uas/resources/uas_regulations_policy/media/uas_fact_sheet_final.pdf

[5] See Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206, 210 (2d Cir. 2011); US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010); Montalvo v. Spirit Airlines, 508 F.3d 464 (9th Cir. 2007); Greene v. B.F. Goodrich Avionics Systems, Inc., 409 F.3d 784 (6th Cir. 2005); Abdullah v. American Airlines, Inc., 181 F.3d 363, 367-68 (3d Cir. 1999); French v. Pan Am Exp., Inc., 869 F.2d 1, 6 (1st Cir. 1989). While the majority of courts find field preemption in the area of aviation safety, it is not so expansive as to preempt all state law-based personal injury claims, which must be evaluated given the particular area of regulation at issue. See, e.g., Martin V. Midwest Exp. Holdings, Inc., 555 F.3d 806 (9th Cir. 2009) (FAA did not preempt state law claim for personal injury due to defective airplane stair design).

[6] Arizona v. U.S., 567 U.S. ___, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012) (citation omitted).

[7] Id. (citations omitted).

[8] Id. (citation omitted).

[9] See, e.g., Montalvo, 508 F.3d at 470-73; Abdullah, 181 F.3d at 367-68.

[10] Arizona v. U.S., 132 S.Ct. at 2502 ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.") (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)).

[11] http://www.faa.gov/uas/resources/uas_regulations_policy/media/uas_fact_sheet_final.pdf

[12] Arizona v. U.S., 132 S.Ct. at 2502 ("Where Congress occupies an entire field ... even complementary state regulation is impermissible.").

[13] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

[14] These states include Arizona (SB 1449), Delaware (HB 195) and Louisiana (SB 73).

[15] Arizona (SB 1449), Oklahoma (HB 2599), Oregon (HB 4066), and Tennessee (SB 2106).

[16] Kansas (SB 319) expanded the definition of harassment in the Protection from Stalking Act to include certain uses of drones, and Louisiana (HB 635) has criminalized the use of drones for voyeurism purposes.

[17] See FAA Advisory Circular 107-2, § 1.13: http://www.faa.gov/uas/media/ac_107-2_afs-1_signed.pdf

[18] https://www.ntia.doc.gov/files/ntia/publications/voluntary_best_practices_for_uas_privacy_transparency_and_accountability_0.pdf

[19] States enacting laws in 2016 restricting localities from regulating drones include Arizona (SB 1449), Delaware (HB 195), and Rhode Island (HB 7511/SB 3099).

[20] http://www.nytimes.com/2015/12/28/technology/faa-drone-laws-start-to-clash-with-stricter-local-rules.html?_r=0

[21] https://registermyuas.faa.gov/

[22] Chicago Municipal Code, § 9-121-020 and -050.

[23] The FAA estimates there will be 15,000 licensed small commercial drone pilots by the end of 2016, and more than 1.3 million by 2020. http://www.chicagotribune.com/news/nationworld/ct-faa-drones-20160916-story.html

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