You Can't Regulate This: State Regulation of the Private Use of Unmanned Aircraft

By Jol A. Silversmith

The FAA Modernization and Reform Act of 2012 requires the Federal Aviation Administration to adopt regulations for the use of unmanned aircraft systems (often referred to as unmanned aerial vehicles or UAVs) by September 2015.[1] Since the act was adopted, bills that would restrict the use of UAVs have been proposed in most state legislatures, and eight states actually have adopted UAV-restricting laws. In five (Florida, Illinois, Montana, Tennessee, and Virginia), the new requirements primarily restrict the use of UAVs for law enforcement purposes[2]— but in three (Idaho, Oregon, and Texas), the new requirements restrict the use of UAVs by private parties.[3]

The statutes that restrict the use of UAVs only by governmental entities seem to have attracted limited scrutiny—perhaps because they embody a voluntary decision by each of those states to not use UAVs themselves, and not an effort to regulate the conduct of private citizens.[4] But requirements of the kind imposed by the Idaho, Oregon, and Texas statutes implicate significant legal questions, such as whether restrictions on photography and other information collection by UAVs can be reconciled with the First Amendment to the U.S. Constitution.[5]

This article briefly addresses another legal question that bears upon the Idaho, Oregon, and Texas statutes (and any similar statutes adopted in the future)—namely, whether these statutes are preempted by the Federal Aviation Act of 1958. This issue may be less glamorous than a free-speech-based inquiry, but it is nevertheless an important question of federalism that to date has received only minimal attention and analysis.[6]

Federal Preemption of Aviation Regulation

The U.S. Constitution provides that federal laws are the "supreme law of the land."[7] In the context of aviation, the doctrine of field preemption—that state action is preempted because Congress intended to occupy the entire regulatory field—has been held by many courts to generally prohibit state regulation of aircraft safety and operations.[8] Underlying this position is that the U.S. government by statute "has exclusive sovereignty of airspace of the United States."[9] As the Supreme Court explained more than 40 years ago in an opinion invalidating a locally imposed curfew on aircraft noise, "a uniform and exclusive system of federal regulation" is required "if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."[10] Thus, in the context of aviation, federal preemption long has been understood to sweep with a wide broom.[11]

The Idaho, Oregon, and Texas UAV Statutes

The newly adopted Idaho, Oregon, and Texas statutes all specifically limit the purposes for which unmanned aerial vehicles can be operated by private citizens. Idaho prohibits citizens from using "an unmanned aircraft system to intentionally conduct surveillance of, gather evidence or collect information about, or photographically or electronically record specifically targeted persons or specifically targeted private property."[12] Oregon prohibits the "operat[ion] of a drone that is flown at a height of less than 400 feet" over private property if the UAV has been flown there before and the owner or lawful occupier of the property has objected.[13] Texas prohibits citizens from using "an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image."[14]

The Idaho statute provides two codified exceptions—for mapping and resource management and for the inspection of one's own facilities located on lands owned by another.[15] The Oregon statute exempts UAVs in the process of taking off or landing, or in an airport's flight path.[16] The Texas statute, meanwhile, incorporates 19 specific exceptions.[17] Some of the Texas exceptions are law enforcement-specific, but many permit specific classes of UAV surveillance activities to be conducted by private citizens—e.g., for scholarly research, by real estate brokers, or in connection with oil pipeline safety.[18]

Additionally, the legislative history of the Texas statute includes a summary of arguments made by its supporters and opponents—but with only a brief mention of preemption. For supporters: "The FAA is not a privacy protection agency and has no experience drafting laws that protect personal privacy rights. The Texas Legislature is a more appropriate body to draft laws and regulations that would protect the rights of Texans." For opponents: "The bill would conflict with the regulations the FAA currently is drafting for the use of unmanned vehicles. If each state passed its own drone laws, the law would become messy and confusing."[19]

Federal Preemption of State Restrictions on Private UAV Operations

Neither the FAA nor the courts have had specific

Published in *The Air & Space Lawyer*, Volume 26, Number 3, 2013.

occasion to address whether state and local laws regarding UAVs are preempted by the Federal Aviation Act of 1958. But there is considerable reason to doubt that the Idaho, Oregon, and Texas mandates (and any similar statutes adopted in the future elsewhere) are within the authority of a state legislature.

The FAA has well-established requirements for the use of *manned* aircraft for surveillance purposes.[20] It also has long-established standards for the operation of model aircraft.[21] The FAA recently warned that the operation of UAVs for commercial purposes is not encompassed by the model aircraft standards—but it set out procedures, pending the development of new regulations, by which special authority can be obtained to operate UAVs.[22] And the future regulations are expected to encompass the aerial photography industry.[23] Additionally, in response to a proposal in Deer Trail, Colorado, to issue hunting permits and bounties for UAVs, the FAA issued a media statement which emphasized that: "The FAA is responsible for all civil airspace."[24] Thus, even before the congressional mandates of the FAA Modernization and Reform Act of 2012, the FAA seems to have had no doubt of its exclusive jurisdiction to regulate UAVs, both as a general proposition and with specific reference to surveillance.[25]

Case law interpreting the Federal Aviation Act of 1958 typically emphasizes that local regulation of safety matters is preempted. But in its seminal decision, *Lockheed Air Terminal*, the Supreme Court made clear that local requirements that affect not just safety but aircraft operations generally are preempted—especially (but not necessarily only) if those matters are the subject of specific FAA regulations.[26] A subsequent decision of particular interest is *Banner Advertising, Inc. v. City of Boulder*,[27] in which the Colorado Supreme Court concluded that an ordinance that prohibited banner towing was preempted, noting that the FAA not only had "control over the general activities of aircraft in flight," but it also "exercises pervasive control over the specific act of banner towing."[28] Applying the same logic, it seems likely that a court also would find local regulation of activities conducted in-flight by UAVs to be impermissible, based on both the general scope of FAA authority and its current and mandated future oversight thereof.[29]

Other courts likewise have found the preemptive effects of the Federal Aviation Act of 1958 to have considerable breadth.[30] For example, a town's efforts to regulate parachute jump sites, insurance, and other elements of skydiving operations were invalidated by a federal district court based on the doctrine of implied preemption. The court specifically noted "that the FAA views its authority as pervasive in the realm of parachute jumping."[31] Similarly, a local ordinance that limited the frequency of commercial operations at the town's airport—specifically targeted at an operator of warbird rides—was ruled to be preempted by another federal district court.[32] Additionally, the U.S. Court of Appeals for the Tenth Circuit recently held that New Mexico could not require an airline to comply with the state's alcoholic beverage regulatory scheme in order to serve alcohol in-flight, based on the Federal Aviation Act of 1958.[33]

Conclusion

Given that (1) surveillance operations of the kind that Idaho, Oregon, and Texas purport to regulate are specifically regulated already by the FAA for manned aircraft, (2) courts have given an expansive interpretation to the FAA's authority under the doctrine of implied preemption, and (3) the FAA has been mandated to further regulate operations by UAVs and has issued guidance thereto, the newly adopted statutes would appear to be vulnerable to a challenge predicated on the Federal Aviation Act of 1958. In court, a challenge to state restrictions on the use of UAVs by private citizens likely would be premised on multiple grounds—e.g., also including a First Amendment-based challenge. But implied preemption perhaps could provide the simplest avenue by which a court could find such laws to be unenforceable.[34]

Endnotes

1. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332, 126 Stat. 11. A "roadmap" and a "comprehensive plan"—with a longer time horizon—were released by the FAA in November 2013. See http://www.faa.gov/about/initiatives/uas/.

2. *See* Fla. S.B. 92, effective July 1, 2013; Illinois S.B. 1587, effective January 1, 2014; Mont. S.B. 196, effective Oct. 1, 2013; Tenn. S.B. 796, effective July 1, 2013; Va. H.B. 2012, effective July 1, 2013.

3. *See* Idaho S.B. 1134, effective July 1, 2013; Oregon H.B. 2710, effective July 29, 2013; Tex. H.B. 912, effective Sept. 1, 2013.

4. Indeed, numerous articles already have discussed whether the unrestricted use of UAVs for law enforcement purposes would violate the Fourth Amendment to the U.S. Constitution. *See, e.g.*, Philip J. Hiltner, *The Drones Are Coming: Use of Unmanned Aerial Vehicles for Police Surveillance and Its Fourth Amendment Implications*, 3 Wake Forest J. & Pol'y 397 (2013); Chris Schlag, *The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights*, 13 U. Pitt. J. Tech. L. & Pol'y 1 (2013).

5. *See, e.g.*, John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 Harv. J. L. & Pub. Pol'y 457 (2013); Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 Cal. L. Rev. Circuit 57, 61 (2013); Alissa M. Dolan & Richard M. Thompson II, Cong. Research Serv., Integration of Drones into

Jol Silversmith (jasilversmith@zsrlaw.com) is a partner at Zuckert, Scoutt & Rasenberger, LLP, in Washington, D.C. The views expressed herein are solely those of the author. The author thanks Alexander T. Simpson for his assistance.

Domestic Airspace: Selected Legal Issues 17–19 (Apr. 4, 2013).

6. The Villasenor and Kaminski articles each provides only an abbreviated discussion of preemption; *see* Villasenor, *supra* note 5, at 513–14; Kaminski, *supra* note 5, at 63–64. *See also* Timothy T. Takahashi, *Drones in the National Airspace*, 77 J. Air L. & Com. 489, 501 (2012) (discussing preemption but citing *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), for proposition that the Federal Aviation Act of 1958 has no general preemptive effect—apparently unaware that *Cleveland* had been explicitly abrogated by *US Airways v. Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010)).

7. *See* U.S. Const. art. VI, cl. 2.

8. *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999) ("the FAA and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation and . . . these standards are not subject to supplementation by, or variation among, jurisdictions"). Additionally, to the extent that the FAA already has adopted requirements for unmanned aerial vehicles—and now is required to adopt new standards by 2015—the doctrine of conflict preemption also may be applicable.

9. 49 U.S.C. § 40103(a)(1).

10. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973). *See also id.* at 627 (quoting statute subsequently recodified at 49 U.S.C. § 40103(b) (the FAA "has been given broad authority to regulate the use of the navigable airspace 'in order to insure the safety of aircraft and the efficient utilization of such airspace . . .' and 'for the protection of persons and property on the ground . . .'")).

11. Additionally, 49 U.S.C. § 41713—originally adopted as part of the Airline Deregulation Act—expressly preempts states and municipalities from regulating a "price, route, or service" of an air carrier. But, based on the definition of "air carrier" and related terms in 49 U.S.C. § 40102, UAVs used for surveillance do not appear to invoke this statute.

12. *See* Idaho Code Ann. § 21-213(2)(a) (2013). The statute specifies that the prohibition includes "[a] farm, dairy, ranch or other agricultural industry." *See id.* § 21-213(2)(a)(ii). The statute creates a civil cause of action, with damages in the amount of $1,000 or actual and general damages, whichever is greater, plus reasonable attorney's fees and other court costs. *See id.* § 21-213(3).

13. *See* 2013 Oregon Laws Ch. 686 § 15(1). The statute creates a civil cause of action, with treble damages for any injury to person or property, plus attorney's fees if the amount pleaded is $10,000 or less. *See id.* § 15(3)–(4). The Oregon attorney general is also empowered to bring an action alleging nuisance or trespass. *See id.* § 15(5).

14. *See* Tex. Gov't Code Ann. § 423.003(a) (West 2013). The statute creates a civil cause of action, with damages in the amount of $5,000 for the impermissible use of a UAV, $10,000 for the distribution of images collected by a UAV, and actual damages if the distribution was with malice, plus reasonable attorney's fees and other court costs. *See id.* § 423.006. Additionally, violations of the statute can be punished criminally, by up to a $500 fine for the impermissible use of a UAV, *see id.* § 423.003(b), and up to 180 days in prison and a $2,000 fine for the distribution of images collected by a UAV, *see id.* § 423.004.

15. *See* Idaho Code Ann. § 21-213(1)(b)(ii), (4). Additionally, the statute explicitly does not apply to model aircraft used for sport or recreational purposes. *See id.* § 21-213(1)(a).

16. *See* 2013 Oregon Laws Ch. 686 § 15(2).

17. *See* Tex. Gov't Code Ann. § 423.002.

18. *See id.* § 423.002(a)(1), (13), (18).

19. *See* House Research Org., Regarding the Capture of Images by Unmanned Vehicles and Aircraft 6–7 (May 7, 2013).

20. *See, e.g.*, 14 C.F.R. § 91.501(b)(2) (specifying that "[a]erial work operations such as aerial photography or survey" may be conducted for compensation under Part 91 of FAA regulations); *id.* § 119.1(e)(4) (stating that "[a]erial work operations," including aerial photography or survey and powerline or pipeline patrol, do not need to be conducted under Part 121, Part 125, or Part 135 of FAA regulations); *id.* § 375.41 (requiring DOT permit to conduct "pipeline patrol, mapping, surveying," and similar operations within the U.S. utilizing foreign civil aircraft); Restricted Category—Aerial Survey Special Purpose Operations, FAA Order 8110.40 (June 15, 1984) (clarifying conditions for issuing special type certificates to aircraft for aerial surveying pursuant to 14 C.F.R. § 21.25(b)(3)); Facility Operation & Admin., FAA Order JO 7210.3X, § 5-4-6 (Feb. 9, 2012) (stating procedures for handling flight requests for photogrammetric operations).

21. *See* FAA, Model Aircraft Operating Standards, Advisory Circular 91-57 (June 9, 1981). The FAA advises that model aircraft should operate at elevations below 400 feet, which indicates that the agency's jurisdiction extends to manned and unmanned aircraft no matter at what height they operate. *See also* Pub. L. 112-95, § 334(c)(2)(C)(ii) (directing the FAA to establish standards for the operation of public UAVs at elevations below 400 feet); 14 C.F.R. § 91.119(d) (providing that there is no minimum elevation for operations by helicopters and certain other categories of manned aircraft so long as the "operation is conducted without hazard to persons or property on the surface").

22. *See* Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007); Airworthiness Certification of Unmanned Aircraft Sys. & Optionally Piloted Aircraft, FAA Order 8130.34C (Aug. 2, 2013); Unmanned Operations in the Nat'l Airspace Sys. (NAS), FAA Notice JO 7210.846 (July 10, 2013).

23. *See* Small Unmanned Aircraft Sys. Rulemaking Comm., FAA Order 1110.150, § 4 (Apr. 10, 2008).

24. *See* FAA Says, Leave Those Drones Alone, http://www.avweb.com/avwebflash/news/FAA-Says-Leave-Those-Drones-Alone220182-1.html (July 22, 2013). However, the FAA's "comprehensive plan" for UAVs (*supra* note 1) in passing stated that: "Although there is no Federal law that specifically addresses privacy concerns with respect to civil UAS operations, many states have laws that protect individuals from invasions of privacy which could be applied."

25. As an aside, to the extent that Texas has suggested that the FAA lacks experience in protecting personal privacy rights,

that assertion is not only of questionable relevance to preemption but inaccurate. The FAA proposed and solicited comment upon a privacy policy for UAVs as part of its mandate to integrate them into the national airspace system. *See* Unmanned Aircraft System Test Site Program, 78 Fed. Reg. 68,360 (Nov. 14, 2013). Moreover, the FAA has extensive experience in maintaining confidential information in records of airmen and other regulated individuals. *See, e.g.*, Privacy Act of 1974: System of Records, 75 Fed. Reg. 68,849 (Nov. 9, 2010).

26. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633–34 (1973) (quoting Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Federal control is intensive and exclusive. Planes do not wander about 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 taxis onto a runway, it is caught up in an elaborate and detailed system of controls"). *See also* Airport Compliance Manual, FAA Order 5190.6B, § 13.2(a)(1) ("[t]he federal government has preempted the areas of airspace use and management, air traffic control, safety, and the regulation of aircraft noise at its source").

27. 868 P.2d 1077 (Colo. 1994).

28. *Id*. at 1082 (citing 14 C.F.R. § 91.311). *See also* Letter to Don Marcostica from Rebecca B. MacPherson, FAA Assistant Chief Counsel (July 9, 2010), *reprinted* at 8 Fed. Av. Decisions I-725 (opining that a locality could not deny a permit to conduct filming operations using manned helicopters, citing the FAA's "pervasive and exclusively federal regime over management and use of the navigable airspace, safety, noise, and aircraft operations. . . . Local jurisdictions do not have authority to regulate the use of navigable airspace or the safety of flight operations and local actions to do so would raise preemption questions").

29. The Ninth Circuit reached a conflicting conclusion in both *Skysign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002), and *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910 (9th Cir. 2006), but they appear to be distinguishable. Notably, the *Skysign* court framed the central issue as the regulation of *advertising* rather than *operations*, and on that basis ruled that the FAA had not exerted its authority to a degree that preempted local regulation; moreover, the court conceded that if the FAA were to adopt such regulations, they "would control over an actually contradictory municipal ordinance." *See Skysign*, 276 F.3d at 1116. In any case, the Ninth Circuit historically has applied an atypically narrow reading to federal preemption in the context of aviation, and thus has issued certain decisions that conflict with those of other courts. *See, e.g.*, Air Transp. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008) (finding Ninth Circuit's narrow reading of section 41713(b) preemption to be inconsistent with Supreme Court precedent); Jol A. Silversmith, *Federal Preemption over Air Carrier Prices, Routes, and Services: Recent Developments*, 24 Air & Space Lawyer, no. 3, 2012 at 4, 5.

30. *See also* Bart Elias, Cong. Research Serv., Pilotless Drones: Background and Considerations for Congress Regarding Unmanned Aircraft Operations in the National Airspace System 20 (Sept. 10, 2012) ("matters pertaining to the use of domestic airspace generally fall exclusively within its purview. . . . This may make it particularly difficult for state and local governments to restrict or regulate the use of drones.").

31. *See* Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 693 (N.D.N.Y. 1989) (citing 14 C.F.R. pt. 105).

32. *See* Price v. Charter Twp. of Fenton, 909 F. Supp. 498 (E.D. Mich. 1995).

33. *See* US Airways v. Donnell, 627 F.3d 1318, 1327 (10th Cir. 2010) (citing 14 C.F.R. § 121.575). The court did frame the issue as being one of safety; the regulation cited safety concerns in its legislative history, although not in its body. But the court also interpreted the concept expansively, joining other courts in finding that "the comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively." In any event, the FAA's existing guidance for model aircraft and UAVs specifically incorporates safety concerns. *See, e.g.*, Advisory Circular 91-57, *supra* note 19; Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689, 6689 (Feb. 13, 2007).

34. An alternative to a court challenge potentially could be a request to the FAA for a declaratory order pursuant to 49 U.S.C. §§ 40113(a) and 46101(a). It does not appear that such a procedure previously has been utilized for an implied preemption issue, but DOT recently issued a declaratory order citing these statutes while finding that an agricultural inspection fee imposed by Hawaii was preempted by both 49 U.S.C. § 41713 and the Anti-Head Tax Act, 49 U.S.C. § 40116. *See* Hawaii Inspection Fee Proceeding, DOT Order 2012-1-18 (Jan. 23, 2012).